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The approach to joint ventures under EC competition law after the reform package from 2004

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Contents

Summary

A joint venture is a business cooperation between undertakings embodied in a seperate legal body with elements more or less resulting in a structural change on the markets involved. It may serve many purposes, such as cost savings, entry into a new geographic market or the carry out of joint research.

For the purpose of EC competition law, there are three categories of joint ventures:

Full-function joint ventures

Where the cooperation is embodied in a separate legal entity, financially independent from its parents who confer all their activities in the market upon the JV, without the result of a potential coordination of competitive behaviour between the parents.

Full-function joint ventures with cooperative elements

As above, with the additional feature that the JV has the object or effect (whether wholly or partially) of co-ordinating the competitive behaviour of the parties who have established the joint venture, because two or more of the parents retain significant activities either in the same market as the joint venture, or in upstream, downstream or neighbouring markets.

Non full-function joint ventures

Where the cooperation between the parents are not embodied in a separate legal entity amounting to the Commission's definition of an autonomous economic entity. These joint ventures are assessed outside the merger regulation, under Articles 81 or under the competition rules of the Member States.

The full-function character depends on three principal criteria: 1) that at least two of the parents have a decisive influence over the business decisions related to the JV, such that a deadlock situation over strategy decisions may occur; 2) that the joint venture has sufficient staff, financial and material resources which enables it to is able to carry out the normal activities of other undertakings on the market without dependence on its parents; and 3) that the joint venture is intended to operate on a lasting basis.

A full-function joint venture of community dimension will be subject to the SIEC-test in Article 2(3) in the merger regulation. Potential spill-over effects of cooperative nature between the parents will be assessed in accordance with Article 81(1).

The SIEC-test in the merger regulation is new. It does no longer require the Commission to prove evidence of a dominant position after the operation has been executed. Basically, the new feature is that the Commission will be more concerned with the dynamics of economical reasoning, and may now base its conclusion on an assessment of the overall impact on the markets concerned, such that it would lead to a significant impediment of competition in a substantial part of the common market. Mainly this will be the case in highly concentrated markets with a risk for establishment of oligopolies.

If the concentration will not distort competition itself, the Commission will assess whether there are any cooperative restraints attached to the joint venture which are not regarded as necessary for the concentration. If so, the Commission will seek to establish whether there is any block exemption under which the cooperation will fall. Ultimately, the Commission has the ability to balance the potential beneficial and negative aspects of the agreement within the frame of an individual exemption under Article 81(3).

A novelty in Regulation 1/2003 is that non-full-function joint ventures will now have to assess for themselves whether their agreement is anticompetitive or not. The possibility of recieving a clearance from the Commission has been abolished. This makes the assessment harder for the parties and increases its costs for legal advice.

Preface

This thesis was written from late spring until early fall of 2005, a time when days were hot and nights were bright. This blazing heat came as a beacon light of bless to millions of our frozen countrymen, sadly crippled by the chains of a raw winter. However, this defrosting light of glee came as no savior to end the long night of my forced captivity.

The searing flames along my via dolorosa started with a sudden break down of my computer in mid June. A month later, I learned that two earlier student essays had treated the JV-test under the old (amended) merger regulation. Aghast, I dwindled into a shattered piece of flesh, left alone to rotten in a steamy cell of darkness. While people around covered their thirst with refreshing drinks on ambrosia, I was an agonized prisoner, choking in fumes of dispair. In an attempt to widen my perspective and ease the searing wounds, I filled my throat with draughts from the Pierian spring.

Upon completion of this project, the question whether these draughts of wisdom were shallow or hopefully deep enough, such that I may finally graduate and abide the monumental heights of Parnassos, remains to be answered.

Meanwhile, I shall carefully ascend the tracks of its winding walls: gleaning the lofty laurels along the path.

September 1, 2005 /Göteborg, Sweden

Björn Olof Bräutigam

Abbreviations

Buff.L.R	Buffalo Law Review
the Commission	the European Commission
EC	the European Community (the Community)
ECJ	the European Court of Justice
E.C.L.R.	European Competition Law Review
ECR	European Court Register
E.L.R.	European Law Review
JVs	Joint Ventures
M&As	Mergers and Acquisitions
Md.J.Int.L.T	Maryland Journal of International Law and Trade
NCAs	National Competition Authorities
New MR	the New Merger Regulation (Council Regulation (EC) No. 139/2004)
Nw.J.Int.L.B	Northwestern Journal of International Law & Business
Old MR	The Old Merger Regulation (Council Regulation (EEC) No. 4068/89)
R&D	Research and Development
the Treaty	The Treaty of Rome as amended by the Treaty of Amsterdam

1 Introduction

1.1 Purpose

Since the 1st of May in 2004, new regulations direct the application of EC competition law by virtue of the adoption of Regulation 1/2003[1] – replacing Regulation 17/62[2], which forms the framework for competition enforcement referring to Article 81 and 82 (EC Treaty) – and Regulation 139/2004[3] (the New MR) – replacing Regulation 4064/89 (the Old MR). In addition, the Commission has issued several new notices and guidelines accompanying the New MR and Regulation 1/2003.

The thesis aims to describe the "joint venture test" under EC competition law and to present a picture of the new legislation with relevance to this purpose. In particular, it attempts to highlight the prerequisites for full-function joint ventures under the merger regulation and to present a jurisprudence-based assessment of the interpretation of these. To this end, a brief presentation of the historic approach towards joint ventures and the merger regulation will be furthered.

As for comparative aspects of the joint venture tests (under the Old MR and after its amendments in 1998), this has already been treated in a master thesis written by Maria Jönsson at Lund university, in the year 2000.

1.2 Method and material

Regarding the purpose to present a compilation of the key elements in the Commission's assessment under the merger regulation and Article 81, I have used a traditional legal method. The material used in this sense has been the merger regulation along with Commission notices, guidelines and case law relevant to joint ventures. In order to find relevant case law and legislation I have used many articles found in the Westlaw Database (Journals and Law Reviews), literature, references within Commission notices and guidelines, and – last but not least – DG Competition's web page.[4]

In pursuing the goal to provide the reader with a historic picture of the earlier assessments of JVs and the features of the merger regulation, I have used a descriptive method. The material used in this sense has mainly been articles from the Westlaw Database.

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1 Council Regulation (EC) No 1/2003.
2 Council Regulation (EEC) No 17/62.
3 Council Regulation (EC) No 139/2004.
4 http://europa.eu.int/comm/competition/mergers/cases_old/ (last visited on September 9).

1.3 Delimitations

Aiming to present a picture of how joint ventures are assessed under current EC competition law; under the new legal framework together with the jurisprudence and assessments under the Old MR, still relevant after the changes; the approach gives rise to considerations relating to the application of the “Significant Impediment of Effective Competition-Test” (SIEC-test) in the New MR, in contrast to the “dominance test” in the Old MR. However, through my reading I have found no signs of a change which could substantially affect the assessment of JVs to a particular extent. This implies that my efforts have not led to any comprehensive analysis of this test. However, an overview of the elements in the SIEC-test will be presented.

Trying to bring forward an understanding of the subject up front, the thesis is, of natural causes, likely to touch on many aspects of the issue such as: the calculation of turnover in the merger regulation; the assessment of merger effects according to the SIEC-test; the assessment of market power; relevant factors for determination of the market structure; the overall balancing between all alleged effects of a merger; and, of course, the appraisal of potential benefits within the frame of all block and individual exemptions under Article 81(3).

Since the aim of the thesis is to present the legal assessment with regard to the joint venture test, and not mergers or cooperative agreements in general, many of these aspects are only covered to a swift extent and some have been excluded entirely.

1.4 Disposition

Chapter 2 presents an introduction to the assessment of joint ventures under EC competition law.

Chapter 3 describes the historical development of the merger regulation and its evolved approach towards joint ventures. It is divided in two parts: the period from 1957 to 1989 without a suitable tool for merger control, and the period from 1989 until 1998 when the Old MR was in force without amendments.

Chapter 4 is the main chore of the essay and displays a detailed picture of the assessment of joint ventures under the merger regulation and Article 81. It contains a jurisprudence-based assessment of the key elements in the joint venture test, such as the requirement for joint control and full-function characte. It contains a description of the new SIEC-test and conclusions to be drawn from it. Finally, it presents the assessment of cooperative elements under Article 81.

Chapter 5 contains some final remarks made in regard to the study.

2 Introduction to JVs under EC competition law

A joint venture is a form of commercial co-operation between undertakings with a common purpose. The form it takes depends on various factors, such as the overall business goal, to what extent the parents need control and the need for clearance under competition rules.

The pure definition of joint ventures under EC competition rules is found in the Full-Function Notice which reads:

"undertakings jointly controlled by two or more other undertakings".[5]

A formal categorisation is to look at the structure of the JV and distinguish between:

- *equity joint ventures:* where the parties contribute capital to a jointly-owned business which is identifiably separate from that of the co-venturers and conducted with some degree of independent management existence: and
- *non-equity joint ventures:* where the parties co-operate in a jointly conducted activity which falls short of a separate "equity" business and which, in economic terms, does not go beyond cost or risk-sharing.[6]

These categorisations do not serve any particular purpose for the concern of EC competition law. However, the full-function character of a joint venture, which is the form of JVs assessed under the merger regulation, depends on the existence of a separate legal entity. Hence, this kind of JVs are structural in character and belong to the category of equity joint ventures.

Joint ventures are somewhat a hybrid between, on the one hand, concentrations and, on the other hand, a more institutionalised form of cooperation. Essentially, a joint venture is a cooperation with elements more or less resulting in a structural change on the markets involved. The parents' joint, instead of sole, control over the JV is what distinguishes it from a merger, and the establishment of an autonomous economic entitity – leading to a structural change – is what distinguishes it from a mere cooperation. One of the largest challenges, both for the Commission and the undertakings interested in the setting up of a JV, has been to find an instrument suitable for the assessment of JVs under competition law.

The consistent fear of the Commission has been that joint ventures, where the parents conduct business on closely related markets, would lead to

[5] Commission Notice on the concept of full-function joint ventures (OJ 98/C 66/1), para. 3.
[6] Hewitt, Ian: *Joint Ventures*, Sweet & Maxwell [2003], p. 5.

coordination between the parents, which in turn would result in anti-competitive effects. The main problem for partners to a JV is to establish a cooperation which can facilitate from the benefits of the merger regulation, because of the “once-and-for-all-clearance”, without imposing any anti-competitive restraints assessed under Article 81.

Operations fulfilling the necessary pre-requisite of a full-function *JV* are assessed under the merger regulation solely,[7] whereas the setting up of a JV between parents remaining on the same, or a related, market as the JV – are assessed under the merger regulation in combination with Article 81 for the cooperative aspects of the agreement. There is also a possibility of assessments under Article 82, but to a lesser extent.[8]

2.1 The purpose and range of JVs

Joint ventures have many different objects and take different shapes depending on the nature of the proposed cooperation/actions and the nature or level of control needed.

Reasons for a joint venture may be many, but to mention only a few: cost savings, risk sharing, access to technology and entry into emerging economies; all these reasons seem to address the use of joint ventures mainly on a cross-border level. With an increasing competition due to globalisation in many industries and sectors, joint ventures serve the parents’ interest to assemble capital and/or to combine technology and expertise in order to develop new products and the entry into new markets. In this sense, the one-stop-shop for competition control, offered by the EU-legislation has facilitated the filing process for many businesses.[9]

The application of the merger regulation to full-function joint ventures was amended by the 1997 Amending Regulation of Regulation 4064/89[10] and its adherent notice on the concept of full-function JVs[11] whereby the merger regulation came to apply to all full-function JVs, regardless of any cooperative elements.

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[7] Council Regulation (EC) No 139/2004, Article 2(4) ‘e contrario’.
[8] Hewitt, Ian: *Joint Ventures*, Sweet & Maxwell Ltd [2003], p. 138.
[9] Hewitt, Ian: *Joint Ventures*, Sweet & Maxwell Ltd [2003], p. 1-2.
[10] Council Regulation (EEC) No 4064/89, Article 3(2) - now Article 3(4) of Council Regulation (EC) No 139/2004.
[11] Commission Notice on the concept of full-function joint ventures (OJ 98/C 66/1).

In short, the prerequisites of a full-function joint venture are found in paragraph 9 and 11 of the Notice, and they can be summarised to operations that involve:

- the acquisition of *joint control*[12];
- over an *undertaking*,
- performing, on a *lasting basis*,
- all the functions of an *autonomous economic entity*.

The overall range of the merger regulation's application to joint ventures is, hence; where there is a lasting structural change over the activities of the parents; and where the joint venture is independent to the extent that it has sufficient assets and staff to manage its activities on a day-to-day basis.

Bearing in mind that JVs are assessed under the merger regulation and/or Article 81, depending on the extent to which the JV is attributed with concentrative or cooperative elements, a JV can be distinguished to fall into one of the following three categories:

Full-function joint ventures

Where the cooperation is embodied in a separate legal entity under joint control by its parents. The undertaking is financially independent from its parents, who have transferred sufficient assets to the JV. The establishment of the joint venture, together with the parents' continued existence, does not result in a potential coordination of competitive behaviour between the parents.[13]

Full-function joint ventures with cooperative elements

As above, with the additional feature that the JV has the object or effect (whether wholly or partially) of co-ordinating the competitive behaviour of the parents, because two or more of the parents retain significant activities either in the same market as the joint venture, or in upstream, downstream or neighbouring markets.[14]

Non full-function joint ventures

Where the cooperation between the parents is not embodied in a separate legal entity amounting to the Commission's definition of an autonomous economic entity. These joint ventures are assessed under Articles 81 or under the competition rules of the Member States.

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[12] The principles for determining joint control are set out in detail in the Commission's Notice on the concept of a concentration, further discussed below in chapter 4.2.2.
[13] Council Regulation (EC) No 139/2004, Article 3(4); 2(4) 'e contrario'.
[14] Council Regulation (EC) No 139/2004, Article 2(4) and (5).

3 Legal assessment of JVs from the EC Treaty to the 1997 Amending Regulation

Before the adoption of the first MR in 1989, the situation for JVs was very much uncertain since they were almost always considered as falling under the prohibition laid down in Article 81.[15] Since the adoption of the first merger regulation in 1989, the assessment of JVs has gradually been developed to today's concept of full-function JVs and this chapter gives a brief overview of the development of a JV-test under EC merger control. It explains the historical definitions used to categorize JVs ('concentrative', 'cooperative' and 'full-function' JVs) until the adoption of the 1997 Amending Regulation[16].

3.1 JV-assessment before the adoption of the merger regulation in 1989

3.1.1 Merger control before 1989

Already at the time of the launching of the first European integration project in 1951, when the European Coal and Steel Community (ECSC) was founded, merger control became a feature of European competition law for the sectors in scope of that treaty.[17] Article 66 provided for *ex ante* control of concentrations and they should be granted authorization unless they gave the concerned undertakings the power:

- to determine prices, to control or restrict production or distribution or to hinder effective competition in a substantial part of the market for those products; or
- to evade the rules of competition instituted under the Treaty, in particular by establishing an artificially privileged position involving a substantial advantage in access to supplies or markets.[18]

As for the sectors covered by the following EC Treaty in 1957, the issue of merger control was for a long time uncertain. No regulation with provisions relating to concentrations had been enacted, and Article 81 and 82 of the EC Treaty were not designed for an appraisal of merger effects.

In 1966, the Commission published a memorandum[19] (the 1966 memorandum) which gave some recognition as to the positive aspects of

[15] *See:* Chapter 3.1.2.
[16] Council Regulation (EC) No 1310/97.
[17] The Treaty of Paris, Article 66(1) - (The treaty expired on July 23, 2002).
[18] The Treaty of Paris, Article 66(2).

concentrations by declaring Article 85(1) not applicable to concentrations – although maintaining the position that Article 82 was still an instrument for this purpose.[20]

In 1973, the Commission tried to apply Article 82 to a merger between a subsidiary of Continental Can (Europemballage) and a Dutch company (TDV) by linking the strengthening of a dominant position, resulting in the elimination of competition in a substantial part of the market in question, to an *abuse* by turning to the general spirit of the EC Treaty's aim in Article 3(f). The Commission sought, more specifically, to give the notion of *abuse* a wider interpretation to also incorporate the strengthening of a dominant position as a *result of mergers*.[21]

Although the Commission lost the case on the facts, the ECJ pronounced that the Commission's attempt to link the interpretation of Article 82 with the general objectives of securing a system of undistorted competition in Article 3(f), and of ensuring the harmonious development of economic activities set out in Article 2, was correct.[22]

However, the judgment's acknowledgment of the approach provided no effective instrument to control M&As as only acquisitions made by actors holding a dominant position *pre-merger* would be caught by Article 82 and since time lengthy assessments under Article 82 risked create devastating deadlock situations to planned mergers.[23]

Short after the judgment in *Continental Can*, the Commission made a first proposal to the Council of Ministers for a Regulation enabling it to control mergers *ex ante* in 1973, but the proposal had to be revised and, anew, delivered to the Council several times before the first merger regulation could be accepted in 1989.[24]

In the meantime, the ECJ decided in the case *British American Tobacco Ltd*[25] that Article 81 may be applicable to the acquisition of a minority holding by which a collusive behavior would occur. The operation would not lead to any merger, so ECJ had no reason to assess whether Article 81 was applicable to all concentrative operations. However, it held that an arrangement; whereby one undertaking acquires, or gets the option to

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[19] Memorandum on the problem of concentration in the common market, Competition Series, Study No. 3 [1966] Brussels.
[20] Fountoukakos, Kyriakos: *A new substantive test for EU merger control*, E.C.L.R. [2005], p. 278.
[21] Case 6/72, *Europemballage Corp. and Continental Can Co. v Commission*, [1973] ECR 215, para. 18.
[22] Ibid, para. 24.
[23] Lidgard, Hans Henrik: *Krävs både dominans och konkurrensskada för att stoppa företagskoncentrationer*, Forskningsrapport om företagskoncentrationer, p. 4. (Available at: www.kkv.se/ovr/nyhetsarkiv/nyhetsarkiv_december2003.shtm)
[24] Fountoukakos E.C.L.R. [2005], p. 278.
[25] Joined cases C-142 and 156/84, *British American Tobacco Company Ltd and RJR Reynolds Industries Inc v Commission*, [1987] ECR 4487.

acquire in the future, *control* over another undertaking's commercial policy, or creates a structure for commercial co-operation between the undertakings; may constitute a restriction of competition, within the meaning of Article 81.[26]

Until the adoption of the MR in 1989, no further attempts, apart from *Continental Can* and *British American Tobacco Ltd*, were made by the Commission to hinder or block mergers.[27]

3.1.2 Control of JVs before the adoption of the merger regulation

The Commission's initial experiences of joint ventures was based on a view that JVs were a form of cooperation with "inherent detrimental effects". The Commission therefore concluded that Article 81(1) was clearly applicable to joint arrangements. This raised, however, concern to the joint ventures of a concentrative nature since the Commission, in its 1966 memorandum, had expressed its attitude that Article 81 was not suitable to concentrations.[28]

As stated in the previous chapter, M&As fell in practice outside the scope of the Commission's scrutiny of operations in harm to competition. In order to overcome the detrimental effects occurring from an application of Article 85 to JVs of a *concentrative* nature, the Commission developed a "partial merger test" to JVs. However such merger-akin concentrations were only found in exceptional cases because of the test's severe conditions, and most JVs were deemed cooperative and assessed under Article 81.[29]

The requirements for a JV to pass the partial merger test were:

- A transfer from all parents involved of *all business* relating to the JV on a *lasting basis*;
- The JV must perform all the functions of an *autonomous economic entity* and be free to determine its business policy independently;
- Parents were to *permanently* withdraw from the market;
- The arrangement must not lead to *cooperation* between the parents in other areas. [30]

An operation falling short of the requirements in the partial merger test offered the undertakings no other option but to file a notice to the

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[26] Joined cases C-142 and 156/84, *British American Tobacco Company Ltd and RJR Reynolds Industries Inc v Commission*, [1987] ECR 4487, paras. 36-40.
[27] Lidgard, Hans Henrik: *Krävs både dominans och konkurrensskada för att stoppa företagskoncentrationer*, Forskningsrapport om företagskoncentrationer, p. 4.
[28] Supranote 19; Kirkbride & Xiong: *The European control of joint ventures: an historic opportunity or a mere continuation of existing practice*, E.L.R [1998], p. 38.
[29] Sibree, William: *EEC Merger Control and Joint Ventures*, E.L.R [1992], p. 93.
[30] Zonnekeyn, Geert: *The treatment of joint ventures under the amended E.C.Merger Regulation*, E.C.L.R [1998], p. 414.

Commission in order to secure an individual exemption under Article 81(3), or to make sure the agreement did not "affect trade between member states". This latter criterion could be regarded as fulfilled for three reasons:

1) The JV produced effects within one Member State only, or within territories outside the EC;
2) The JV was neutral to competition according to the 1968 Notice on co-operation between enterprises;[31] or
3) The parent companies were non-competitors and their joint venture did not significantly affect the market access of third parties.[32]

Under the principles of the 1968 Notice (in force until 2001)[33] the activities of a JV could be regarded as neutral with respect to competition if it "performed certain internal organizational tasks on behalf of their parent companies" such as joint market research and joint debt-collecting. The joint venture would not be deemed neutral with respect to competition if it affected the independent business decisions of the parent companies or restricted competition between them.[34]

Although embodied in a separate legal entity, most joint ventures were assessed under Article 81. The procedure was practically inappropriate for the involved parties: a time-limited and revocable exemption instead of a once and for all clearance. The partial merger test provided some relief to the problem of concentrative JVs, but it was limited and the Commission's inability to improve these conditions was heavily criticised.[35]

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[31] Commission Notice concerning agreements, decisions and concerted practices in the field of cooperation between enterprises, (corrected version OJ 1968 C 84/14) ("[C]ooperation among large enterprises can be economically beneficial without presenting difficulties from the angle of competition policy.")

[32] de Rosa, Paul J: *Cooperative Joint Ventures in EC Competition Law*, Buff.L.R. [1993], p. 1018.

[33] Together with Notice on cooperation agreements (OJ 1993 C 43/2), the 1968 Notice was later superceded by Guidelines on the applicability of Article 81 of the EC Treaty to horizontal co-operation agreements (OJ 2001 C 3/02).

[34] de Rosa, Buff.L.R. [1993], p. 1019.

[35] Kirkbride & Xiong, E.L.R [1998], p. 40.

3.2 Assessment under the unamended Council Regulation (EEC) No. 4064/89

When in 1989 the first merger regulation[36] was adopted it was the result of many compromises and subjected the proposed JV to a pre-notification to the Commission if it surpassed the turnover calculated thresholds in Article 1(2) meaning that:

(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than ECU 5000 million; and

(b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than ECU 250 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

These thresholds were relatively high and during the first 3 years after the enactment of the merger regulation, only an average of around 50 mergers were notified to the Commission. This is to be compared with the number of notified cases related to the year of 2000 when 345 mergers were notified.[37]

3.2.1 Distinction between concentrative and cooperative JVs

The definition of a concentration, with regard to joint ventures, in the Old MR was found in Article 3(2):

An operation, including the creation of a joint venture, which has as its object or effect the coordination of the competitive behaviour 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 amongst themselves or between them and the joint venture, shall constitute a concentration within the meaning of paragraph 1 (b).

The review of a JV proceeded along two quite different paths. The course a JV took in its review by the Commission depended on whether the JV was deemed *cooperative* in the first limb (a negative criterion) or *concentrative* in the second limb (a positive criterion). Concentrative JVs, or JVs with an effect on the *structure* of competition, were viewed as akin to mergers and thus reviewed under the MR. Cooperative JVs were entirely analyzed under Article 81 of the EC Treaty. The distinction had numerous implications for the involved parties. A joint venture qualifying as concentrative enjoyed the time frames offered by the merger regulation, as well as a possibility of structural remedies. In contrast, investigations of “cooperative” JVs under

[36] Council Regulation (EEC) No 4064/89.
[37] Community Merger Control - Green Paper on the Review of Council Regulation 4064/89 of 11 December 2001, COM (2001) 745/6 final., Annex I, p. 59.

Article 81 (and the procedure in Regulation 17/62) were subject to no time limits, and remedies could include numerous behavioral restrictions.[38]
The Commission issued the 1990 Notice[39] to ease the understanding for how the Old MR would be interpreted with regard to the distinction between concentrative and cooperative JVs. In essence, a concentrative joint venture should be able to operate on a market, performing the functions normally carried out by other undertakings operating on the same market. Therefore, the JV must have a management dedicated to its day-to-day operations and access to sufficient resources including finance, staff, and assets in order to conduct on a lasting basis its business activities.[40]

As most of the elements of the partial merger test were taken up by this notice, the notice did not interpret the critera for a concentrative joint venture in a less restrictive way. In contrast to the later 1994 Notice[41], it required the permanent withdrawal of both parents' activities on the market where the JV was to perform. It also put considerable weight with regard to the independence of the JV's management,[42] something which is rarely enjoyed in the light of the parents' joint control over the JV.[43]

The creation of a situation of coordination between the JV and *one* of its parents would automatically lead to the treatment as a cooperative joint venture.[44] However, the Commission soon adopted a more flexible approach towards certain aspects of the 1990 Notice. It made little reference to the significance of decision-making autonomy and suggested more that economic self-sufficiency, *i.e.* necessary assets to ensure its economic independence, was important to assess the JV's autonomy.[45]

In respect of the permanent withdrawal of the JV's parents, the Commission later stated in two cases *Thomson/Pilkington* [1991] and *Del Monte/Royal Food/Anglo American* [1992][46] that a marginal presence of one parent was not likely to give raise to any coordination concerns. For the appraisal of a marginal or insignificant presence, the Commission adopted the *de minimis* principle.[47]

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[38] Puckett, A. L: *Managing the "chameleon" of antitrust-technology joint ventures*, M.J.Int.L.T [1995], p. 60-63.
[39] Commission Notice regarding the concentrative and cooperative operations under Council Regulation (EEC) 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1990 C 203/10).
[40] Zonnekeyn, E.C.L.R. [1998], p. 415.
[41] Commission Notice on the distinction between concentrative and cooperative joint ventures (OJ 1994 C 385/1).
[42] The 1990 Notice. paras. 18-19.
[43] Kirkbride & Xiong, E.L.R. [1998], p. 42.
[44] Kirkbride & Xiong, E.L.R. [1998], p. 42-43.
[45] Kirkbride & Xiong, E.L.R. [1998], p.43.
[46] Case IV/M086, *Thomson/Pilkington*, Commission decision of October 23, 1991; Case IV/M.277, *Del Monte/Royal Food/Anglo American*, Commission decision of November 9, 1992.
[47] Kirkbride & Xiong, E.L.R [1998], p. 43.

In the *Thomson/Pilkington* case, the Commission developed an "industrial leadership" doctrine whereby a joint venture would be deemed concentrative even if one parent remained on the same market as the joint venture. This was an approach affected by realism towards the fact that if one parent enjoyed a leading role in the management of the JV, the joint venture was to be seen as part of the leading undertaking's economic group.[48]

In 1993, the Commission issued a Notice on cooperative joint ventures[49] which attempted to specify those categories of JVs that it percieves as being compatible with Article 81. It has now been replaced by the Guidelines on horizontal cooperation.[50] This notice will be further presented in Chapter 4.3.1.

In 1994 the Commission published the Form A/B, designed for "structural cooperative JVs", or more specifically a JV that "involves an important change in the structure and organisation of the business assets of the parties to the agreement."[51] (Since the adoption of Regulation 1/2003, abolishing the pre-notifation regime under Article 81, this form is no longer in use.) The same year, the 1990 Notice was revised[52] in order to further clarify the distinction between cooperative and concentrative joint ventures and with the intention of having more JVs being submitted under the merger regulation.[53]

The 1994 Notice included improvements of the 1990 Notice in regard to the concept of the JV's *autonomy* and the definition of cooperative elements for the purpose of a distinction between cooperative and concentrative JVs. Hereinafter, the JV's self-suffiency with regard to assets, IP-rights and staff was enough to establish the full-function character of the JV. As for the distinction between cooperative and concentrative JVs, the Commission anticipated that a strict withdrawal of the parents' activities in the market of the JV was important only insofar it was an instrument for producing or reinforcing coordination between the parents.[54]

In announcing its second review of the Merger Regulation the Commission acknowledged that the procedural reforms for "structural" cooperative joint ventures did not deal with all concerns and that a need was present to reduce as far as possible the analysis of substantive matters for jurisdictional purposes. As a result of the review, the Commission published a Green Paper in January 1996 where it recognised that an aspect of the Regulation requiring improvement was the assessment of concentrative and cooperative

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48 Kirkbride & Xiong, E.L.R. [1998], p. 43.
49 Commission Notice on the assessment of cooperative joint ventures, (OJ 1993 C 43/2).
50 Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements (OJ 2001 C 3/02).
51 Form A/B (OJ 1994 L 377/1), point D.
52 Commission Notice on the distinction between concentrative and cooperative joint ventures, (OJ 1993 C 385/1).
53 Zonnekeyn, E.C.L.R. [1998], p. 417.
54 Kirkbride & Xiong, E.L.R. [1998}, p. 50.

joint ventures. The Green Paper recommended that, if the effect of a joint venture was primarily structural, Article 81(1) would not apply to it, instead the substantive test as well as the procedures of the Merger Regulation should apply. But in so far as a joint venture leads to coordination of competitive behaviour of companies that remain independent, the Commission would still be able to apply the substantive test under Article 81(1) as to its compatibility with the common market. This proposed reform was later adopted in the 1997 Amending Regulation which significantly amended the Old MR. Under this regulation, all full-function joint ventures with a Community dimension qualified as a concentration. Potential coordination between the parents did no longer prevent the application of the merger regulation.[55]

[55] Zonnekeyn, [1998] E.C.L.R, p. 418.

4 JVs under current EC competition law

In previous chapters, a general description of EC merger control until 1998 has been presented. In this chapter joint ventures are assessed under the current legislation, not withstanding that much of the jurisprudence and legal opinions on JVs under the old legislation is still relevant. The New MR offers no particular novelties to the *JV-concept*, which was the case in 1998 when the Amending Regulation came into force whereby the distinction between concentrative and cooperative full-function joint ventures was abandoned. However, with the changes of the MR – together with Regulation 1/2003 and the framework regarded as a whole – some noticeable effects are apparent.

This chapter does not differentiate between the rules that are common to the New MR and the 1997 Amending Regulation. In addition, the prerequisites for *full-function joint ventures* under the merger regulation has not been changed since the adoption of the merger regulation in 1989. Hence, no particular reference will be given to the Articles in the amended merger regulation, and the case law under the Old MR will be treated as relating to the New MR.

4.1 Background

In 1998 the Commission changed its approach to the analysis of JVs. Under this new regime, all full-function JVs satisfying the thresholds of the MR are analyzed under the MR, whether or not they involve the coordination of competitive behavior. Where a JV involves coordination of the participants' competitive behavior, these aspects are analyzed under Article 81 while adhering to the procedural limits of the MR. JVs that fail to satisfy the thresholds of the MR in that they either are not full-function in nature or lack a community dimension, insofar they affect trade between Member States, are analyzed entirely under Article 81.

Since the 1st of May 2004, the European Union encompasses twenty-five Member States, thereby extending the applicability of the MR to twenty-eight countries. This fact, together with the modernization of Regulation 17/62[56], implementing the application of Article 81 and 82, required adaptations of the merger regulation. Moreover, in 2002 the CFI annulled four Commission prohibition decisions, largely due to shortcomings of proof in the Commission's assessments;[57] and in the case of *GE/Honeywell*[58]

[56] Council Regulation (EC) No 1/2003.
[57] Case T-342/99, *Airtours v. Commission*; Case T-310/01, Schneider *Electric v. Commission*; Case T-80/02, *Tetra Laval v. Commission*; Case T-251/00, *Lagardère and Canal+ v. Commission.*

the Commission and the US Federal Trade Commission reached diverging decisions. These facts all together led to the conclusion that also the MR had to be revised.[59]

Therefore, the Commission initiated a review of the merger control system. After the publication of a Green Paper[60] in December 2001 on this review, and a new regulation proposal from the Commission, the Council finally adopted the New MR on the 27th of November in 2003. Along with the New MR, the Commission issued a Notice regarding horizontal mergers, explaining the Commission's review criteria.

The Commission's White Paper in 1999 proposed the possibility that the Merger Regulation should be further extended to include *partial-function production joint ventures*, subjecting them to both the new SIEC-test and the Article 81 scrutiny by virtue of Article 2(4) of the MR. Ultimately, the Commission decided to leave Article 3(5), which addresses joint ventures, unchanged. Experience showed that the inclusion of full-function cooperative JVs under the merger regulation had reduced the cost and delays involved in achieving regulatory clearance for the companies involved in such transactions, and it was found that Article 2(4) allows all the competition aspects of such operations to be evaluated in a single administrative procedure.[61]

4.2 Assessment of JVs under the New MR

As previously explained in Chapter 2.1, the merger regulation applies to all joint ventures of a full-function character ever since the adoption of the 1997 Amending Regulation. A joint venture will be assessed under the Merger Regulation if it amounts to a *concentration* with a *Community dimension*, by surpassing the thresholds in Article 1(2) and (3).

As will be explained further down, a scrutiny under the merger regulation has many benefits compared to the assessment made under Article 81. Even if a joint venture is burdened with cooperative elements, assessed under Article 81, these considerations are made within the overall decision and procedure under the merger regulation. This implies that a full-function JV with cooperative aspects may benefit from the legal certainty offered by both the pre-notification procedure and the once-and-for-all-clearance nature of the Commission’s decision.[62]

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[58] Berg, Werner: *The new EC merger regulation: a first assessment of its practical impact*, Nw.J.Int.L.B. [2004], p. 683.
[59] Berg, Nw.J.Int.L.B [2004], p. 684.
[60] Community Merger Control - Green Paper on the Review of Council Regulation 4064/89 of 11 December 2001, COM (2001) 745/6 final.
[61] The Green Paper on the Review of Council Regulation (EEC) No 4064/89, p. 31, para. 116.
[62] Zonnekeyn, E.C.L.R. [1998], p. 418-19.

4.2.1 Community dimension

In the New MR the turnover thresholds have, in absolute figures, remained the same as in the Old MR. All the same, the jurisdictional reach of the New MR must be regarded as extended because of the adhesion of ten new member states. Their national markets are now subject to the overall calculation of a Community dimension.

According to Article 1(2) a concentration is within the scope of the merger regulation if:

(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5 000 million; and

(b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

Threshold (a) is intended to let NCAs investigate the effects of mergers between small and medium-sized firms and the first limb of threshold (b) is intended to exclude acquisitions with only a minor European dimension.[63] The second limb of threshold (b) ("the two-thirds rule") is intended to exclude cases from Commission scrutiny where it is more appropriate that the effects will be assessed by the NCAs.

An alternative community dimension arises in the Article 1(3) situation where:

(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than ECU 2 500 million;

(b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than ECU 100 million;

(c) in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than ECU 25 million; and

(d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than ECU 100 million;

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Communitywide turnover within one and the same Member State.[64]

Following the previous amendments to Old MR[65] the New MR has preserved the extended jurisdiction thresholds in Article 1(3). This extension of the jurisdiction was incorporated mainly in order to enable the

[63] Green paper on the Review of Council Regulation (EEC) No 4064/89, Annex I, p. 59.
[64] Green paper on the Review of Council Regulation (EEC) No 4064/89, p. 12, para. 23; Commission Notice on calculation of turnover, para. 3.
[65] Council Regulation (EC) No 1030/97 ('The Amending Regulation').

Commission to catch mergers with a clear impact on the EC market below the original thresholds. However, only a limited number of concentrations have been caught by the additional set of thresholds.[66]

4.2.1.1 Undertakings concerned

The calculation of turnover in the case of full-function joint ventures is a bit different from the situation of a normal M&A. The difference is that the calculation depends on the appraisal of which the undertakings concerned are.

The undertakings whose turnover must be included for the purpose of an establishment or acquisition of a JV are those parties who will be exercising joint control[67] over the company. The turnover of shareholders who do not exercise joint control is excluded from the assessment. Hence, the seller will not be concerned as long it post-operation does not exercise joint control with the acquirer.[68] In addition, where joint control is established over a pre-existing (as opposed to a newly created) company, this company will also count as one of the undertakings concerned unless the seller, initially exercising *sole control*, post-operation will share joint control. In the latter case, the turnover of the pre-existing joint venture will be taken into account from the calculation of the seller's turnover.[69]

If the acquirer of a target undertaking is a full-function joint venture, the undertakings concerned will normally be the target undertaking and the joint venture itself, *i.e.* its parents' turnover will not count. However, the Commission has stated that focus must lie on the economic reality of the transaction. It anticipates that the acquiring undertaking may be a mere vehicle for the parents to use as a "shell" to gain market distorting control in an area where the parents themselves, but not the joint venture, are active.[70]

[66] Broberg, M: *Muddying the clear waters: on the Commission's proposal for a new delimitation of jurisdiction in the field of merger control*, E.C.L.R [2002], p. 430.
[67] *See* Chapter 4.2.4.1.
[68] Commission Notice on the concept of undertakings concerned, (OJ 1998 C 66), paras. 8 and 22.
[69] Commission Notice on the concept of undertakings concerned, paras. 8 and 23.
[70] Commission Notice on the concept of undertakings concerned, paras. 26-28.

4.2.2 Definition of a concentration

Article 3(1) defines the emergence of a concentration as a “change of control on a lasting basis” resulting from:

(a) the merger of two or more previously independent undertakings or parts of undertakings; or

(b) the acquisition […] by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings.

A concentration may hence arise in two cases: by means of a *merger* between two independent undertakings, or by reason of an acquisition of shares leading to *sole* or *joint* control over a target undertaking.

Sole control exists when one undertaking alone can exercise *decisive influence* over the target undertaking. *Joint control* exists when two or more undertakings each can exercise decisive influence. For JV-parties striving to benefit from a legal assessment under the merger regulation this criterion is of vital importance. According to Article 3(4) the definition under 3(1b) shall apply to joint ventures if the operation involves the emergence of joint control by two or more independent undertakings.[71]

A concentration only arises when control is *obtained*. Thus, the merger regulation does not apply if control over the target undertaking is *lost* when the remaining owners continue to exercise joint control. For example, where four companies have joint control of a company, and one of the four companies surrenders its joint control, while the other three companies continue to have joint control, this will not amount to a concentration. Respectively, if the circle of parents with decisive control is *enlarged*, the additional parent will obtain control and the merger regulation applies.[72]

In practice, sole control is usually based on *positive* control, while joint control is based on *negative* control.[73] However, in theory, joint control could be positive if several undertakings could co-ordinate their minority interests, so that together they could decide the company's business strategy as one sole majority shareholder. Respectively, sole control could be negative if all shareholders are minority owners but one is empowered to block decisions by reason of, for instance, a veto right.[74]

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[71] Commission Notice on the concept of concentration (‘Concentration Notice’) (OJ 1998 C 66/5), Section III, para. 18-19.
[72] Broberg, Morten: *The concept of control in the merger control regulation,* E.C.L.R. [2004], p. 744.
[73] Concentration Notice, para. 19.
[74] Broberg, E.C.L.R. [2004], p. 742-46.

4.2.2.1 Change of control

In the light of the Commission's case-law and the Notice on undertakings concerned, change of control on a lasting basis related to JVs can appear in (at least) six situations:

1) The acquisition of joint control over a newly-created company;[75]
2) The acquisition of joint control over a pre-existing company;[76]
3) The change of joint control to sole control;[77]
4) An increase of the number of undertakings exercising joint control;[78]
5) The entry into force of a shareholders' agreement between minority shareholders who, after the operation, enjoy a joint position of majority;[79]
6) The replacement of one of several jointly controlling shareholders with another.[80]

Example 1:

In the case of *Nortel/Norweb* the parties allocated their combined knowledge of products for transmission of data to a new joint venture (NOR). The object was to enter a market where the parents had not previously been active.[81]

Example 2:

In the case *BS/BT* the buyer, BT, purchased 50 % of the shares in MegaRed which was transformed into BTSA. The new company would market, sell and service managed network services (MNS) to customers in Spain.[82]

Example 3:

In the case of *CNH/FHE*, the termination of a shareholders' agreement between the JV-parties (CNH and Hitachi) led to the consequence that CNH, being the majority shareholder, could exercise sole control over FHE.[83]

Example 4:

In the case of *Particitel International/Cableuropa*, GE and BA had joint control over Cableuropa when CDPQ also acquired joint control over the

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[75] Commission Notice on the concept of undertakings concerned, para. 21.
[76] Commission Notice on the concept of undertakings concerned, para. 40.
[77] Commission Notice on the concept of undertakings concerned, Section III-6.1.
[78] *E.g.* Case IV/M.1251, *Particitel International/Cableuropa*, Commission decision of July 30, 1998.
[79] *E.g.* Case IV/M.750, *IFIL/Worms/Saint Louis*, Commission decision of July 25, 1996.
[80] Commission Notice on the concept of undertakings concerned, para. 35.
[81] Case IV/M.1113, *Nortel/Norweb*, decision of March 18, 1998, paras. 7 and 25.
[82] Case IV/M.425, BS/BT, Commission decision of March 28, 1994.
[83] Case COMP/M.2369, *CNH/FHE*, Commission decision of June 26, 2001, para. 4.

company. The increase in the number of joint owners from two to three constituted a concentration.[84]

Example 5:

In the case *IFIL/Saint Louis/Worms*, Saint Louis was an undertaking with a spread ownership when IFIL and Worms, two minority shareholders, entered into a shareholders' agreement whereby they agreed to commonly excercise the combined majority of votes. The Commission assessed that the operation amounted to joint control and therefore was a notifiable concentration.[85]

Example 6:

In the case of *James River/Rayne* the joint venture company, JA/MONT was owned in equal shares by James River and Montedison. It was agreed between the parties that Montedison should sell its half of the venture to Rayne, so that JA/MONT would thereafter be under the joint control of James River and Rayne. This was a notifiable concentration.[86]

An interesting aspect, concerning the arisal of change of control with regard to shareholders agreements, was given in the case *Avesta (II)*. In 1992, a joint venture (ASAB) was set up between four parties. The shares were spread in a manner that two undertakings, none of which had own majority, had a bigger influence than the other two. The four undertakings entered into a shareholder agreement whereby all strategic decisions required the two major investors' consent together with one of the other small investors. In 1994, one of the small investors sold its shares in ASAB to a new investor – without the shareholders agreement being cancelled.
By reason of this, the small investor remaining in the agreement now had joint control together with the the other two. This was therefore a notifiable concentration.[87]

The Commission has indicated that a change of joint control to sole control will, in exceptional cases, require a closer investigation. According to the Simplified procedure Notice[88], competition issues may arise in circumstances where the former joint venture is integrated in the group or network of the remaining shareholder. This concern arises where the remaining shareholder is a direct competitor of the JV, which together will hold a substantial combined market position, because of the removal of a natural discipline resulting from the existence of potentially diverging

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[84] Case IV/M.1251, *Particitel International/Cableuropa*, Commission decision of July 30, 1998, para. 7.
[85] Case IV/M750, *IFIL/Worms/Saint Louis*, Commission decision of July 25, 1996, paras. 4-5.
[86] Case IV/M.162, *James/River/Rayne*, Commission decision of February 13, 1992, paras. 3-4.
[87] Case IV/M.452, *Avesta (II)*, Commission decision of June 9 1994, para. 5-8.
[88] Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004, (OJ 2005 C 56/32).

interests of different controlling shareholders. The removal of that disciplining constraint could in turn strengthen the strategic market position of the party acquiring sole control.[89]

4.2.3 Prenotification of a concentration

Under the merger regulation a full-function joint venture which has a Community dimension must be notified to the Commission prior to its implementation.

Under the old merger regulation, it was necessary to make a notification within one week of *conclusion* of the joint venture agreement.[90] However, the Commission recognised that the strict one-week deadline for notification was neither realistic nor necessary and has therefore abandoned this requirement under the current merger regulation.[91] It is now possible to notify any time prior to implementation of the joint venture agreement. Moreover, joint venture partners are able to notify a joint venture with a Community dimension in the absence of a definitive agreement. However, the joint venture partners need to demonstrate a good faith intention to conclude a binding agreement.[92]

Notifications must be made on Form CO[93]. As a general rule, for mergers and joint ventures the procedure of the pre-notification and the Commission's investigation are the same. However, under special circumstances a short-form notification procedure applies.

In the case of a joint venture with minimal activities within the EEA it is possible to make a short-form notification. Such a notification may be made where joint control is acquired by two or more undertakings, and:

- The turnover of the joint venture and/or of the activities of businesses contributed to the joint venture by the parents within the EEA is less than EUR 100 million; and
- The total value of the assets transferred to the joint venture within the EEA is less than EUR 100 million.[94]

The same procedure applies in case of acquisition of joint (or sole) control over an undertaking, if none of the parties are engaged in business activities in the same product and geographical market, or in a product market which

[89] Concentration Notice, para. 9 - with further reference to (*KLM/Martinair*).
[90] Council Regulation (EEC) No 4064/89, Article 4(1).
[91] The Commission's web page, 'Overview' (under 'Mergers') available at: http://europa.eu.int/comm/competition/index_en.html (last visited on September 9, 2005)
[92] Council Regulation (EEC) No 149/2004, Article 4(1).
[93] Annex to Commission Regulation (EC) No 802/2004, (OJ 2004 L 133/1).
[94] Simplified procedure Notice, para. 5(a).

is upstream or downstream of a product market in which any other party to the concentration is engaged.[95]

In contrast to the situation for full-function JVs of a cooperative nature under the first merger regulation, it appears as if the Commission has gained more flexiblity towards the assessment of horizontal joint ventures. A simplified procedure is even possible where two or more undertakings establish a joint venture and at least two of the undertakings concerned operate on the same geographical and/or product market. The combined market shares must, however, not surpass 15 % within the EEA.[96]

This simplified procedure applies, however, only insofar it does not give rise to substantive concerns.[97] The Commission has noted that competition issues may arise in the situation where companies A and B jointly control a joint venture C, which is a direct competitor of A, and A subsequently acquires sole control over C. This is because the change from joint to sole control in these circumstances removes the competitive constraint exercised by C prior to A's acquisition of sole control and affords the combined entity a significant market position. In such cases, the Commission will review the notified transaction under the full notification procedure. Equally, cases that raise potential coordination issues under Article 2(4) of the merger regulation may not be appropriate for treatment under the short-form notification procedure.[98]

One of the novelties to the New MR is the amended version of the so-called German clause in Article 9, which allows referral from the Commission to the Member States. The criteria for referring a case constitutes a significant obstacle for referrals in its new version. Article 9(2)(a) gives the Commission discretion as to whether and to what extent it would refer the case to one or more Member States and requires that the concentration threatens to create or strengthen a dominant position. The test under Article 9(2)(b) is even narrower and is only fulfilled if the concentration affects competition in a market which does not constitute a substantial part of the common market.

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[95] Simplified procedure Notice, para. 5(b).
[96] Simplified procedure Notic, para. 5(c).
[97] *Eg.* Case COMP/M.2908, *Deutsche Post/DHL (II)*, Decision of September 18, 2002.
[98] 29th report on Competition Policy 1999, (*KLM/Martinair*), para. 165-166.

4.2.4 Full-function character

As earlier mentioned, an application of the merger regulation to a joint venture requires it to be full-function. A description of the requirements for full-function JVs is found in the Full-Function Notice[99] and the Concentration Notice[100] of 1998.

A joint venture is declared to be full-function if it involves:

- *Joint control* over an undertaking,
- performing all the functions of an *autonomous economic entity*
- on a *lasting basis*.

The clearance of a joint venture under the merger regulation is dependent on the assessment of both structural elements – that the JV results in a lasting change of the undertakings' structure – and competitive aspects; that the JV does not significantly impede effective competition upon execution of the operation, and doesn't lead to cooperation between actual or potential parents. Hence, the success of a JV depends very much on whether it can fulfill the criterias of a full-function JV and be scrutinized under the merger regulation instead of under Article 81.

In this chapter, the requirements for the merger regulation to apply will be assessed in detail.

4.2.4.1 Joint control

Under the merger regulation, control is constituted by "rights, contracts or any other means which, either separately or in combination and having regard to considerations of fact or law involved, confer the possibility of exercising *decisive influence*" on the undertaking concerned.[101]
The Notice on the notion of concentration and jurisprudence from the Commission case-law outlines (at least) 6 ways by which decisive influence can be achieved:

1) equal rights, 2) veto rights, 3) common exercise of voting rights, 4) joint control for a limited period, 5) control by a single shareholder and 6) future rights.

Joint control means that no parent undertaking can exercise a decisive influence on its own, hence able to take major decisions, without reaching an agreement with the other shareholders. The essential feature of joint

[99] Commission Notice on the concept of full-function joint ventures, (OJ 1998 C 66/1).
[100] Commission Notice on the concept of concentration, (OJ 1998 C 66/1).
[101] Council Regulation (EC) No 139/2004, Article 3(3).

control is the possibility of a *deadlock* resulting from the power of two or more parent companies to veto proposed strategic decisions, which requires them to reach a common understanding in determining the commercial policy. It is not necessary to give concrete evidence that the possibility will be exploited, merely that it does in fact exist.[102]

Joint control is mainly *de jure* in character, but the Commission has also anticipated that it may be proved *de facto*.[103]

An example of *de facto* control was given in the case *TPS.* The French company TF1 was a partner to a joint venture together with three other undertakings. They each held 25 % of the votes each before TF1 acquired another 25 % from France Télévision Entreprises, a co-venturer. After this operation, the question was whether the JV was under joint control although one partner had a stronger position than the other two. The Commission reached the conclusion that *factual* joint control over the JV existed by evidence of a consistent pattern of identical votes exercised by the two remaining companies since five years back.[104]

The rights by which each party enjoys a decisive influence need not be identical. In principle, one undertaking could have decisive influence through a veto right over the adoption of the JV's financial plans, while another has decisive influence through the appointment of its management.[105]

4.2.4.1.1 Equal rights

A joint venture consisting of two participants with equal voting rights is an example of *legal control*, and the clearest form of joint control. Since the consent of both venturers is required for any decisions to be taken, this situation allows each participant to exercise decisive influence over the joint venture.[106]

Joint control may also arise in the case where decision-making is made by *majority voting*. This is the case when there are only two partners, where none of them enjoys own majority. This was demonstrated in the case *Alba/Beko/Grundig*. Alba and Beko owned equal shares of the capital in a JV, an undertaking formerly under Grundig's control. Decisions had to be taken by majority voting pursuant to the shareholders agreement. In practice, however, no decision could be taken without agreement between the board representatives of the joint venture's partners. In these circumstances, the Commission found that both parents had the possibility

[102] Concentration Notice, paras. 19 and 23.
[103] Concentration Notice, para. 18.
[104] Case COMP/JV.57, *TPS*, Commission decision of April 30, 2002, paras. 6-10.
[105] Concentraion Notice, paras. 21 and 25.
[106] Concentration Notice, para. 20.

to exercise decisive influence over the joint venture, and so had joint control.[107]

Joint control may also exist where the participants do not have equal rights in relation to the joint venture, either in terms of voting power or their representation on the decision-making bodies, or where there are more than two parent companies.[108]

A number of factors which are relevant in this situation are considered below.

4.2.4.1.2 Veto rights

A minority shareholder can enjoy decisive influence (and thereby creating joint control) if it has the right to veto strategic decisions relating to the business of the joint venture, such as decisions relating to the appointment of management, the budget, the business plan and investments. This is the far most common way by which parties to a joint venture establish joint control if they do not have equal rights.

In the case *JCI/Bosch/VB Autobatteries JV* the minority shareholder, Bosh, retained its 20 % shareholding after an operation whereby JCI acquired the other 80 % from Varta. According to a specific agreement between Varta and Bosch, into which JCI would replace Varta, important business decisions could only be approved with the combined votes of both the majority and the minority shareholdings. The decisions related to the approval of detailed budget plans for the joint venture and the appointment and dismissal of members of the executive and supervisory boards. As a result, the new repartition of shareholdings did not change the decisive influence retained by Bosch prior to the operation.[109]

A right of veto which extends only to matters such as changes in the company's statutes, increases/reductions of the capital or liquidation, typically aimed at protecting the financial interests of minority shareholders in their role as investors, will not be sufficient for this purpose.[110]

This was the case in *Blackstone/CDPQ/Kabel Nordrhein-Westfalen* where two holding companies, CAI Lux (with a spread ownership) and KDG, wanted to perform an operation such that Pecunia 2 (the operative company) would be owned by KNW in which CAI Lux and KDG would hold 55 % and 45 % respectively. After an initial period of four years, any shareholder with more than 50 % of the votes in KNW would have the right to appoint a

[107] Case COMP/M.3381, *Alba/Beko/Grundig*, Commission decision of April 29, 2004, para. 6.
[108] Concentration Notice, para. 21.
[109] Case COMP/M.2939, *JCI/Bosch/VB Autobatteries JV* , Commission decision of October 18, 2002, para. III A.
[110] Concentration Notice, para. 22.

majority of the advisory board. Most decisions that determined the strategic commercial behaviour of KNW must be approved by *simple majority* vote of the advisory board.

KDG, the minority shareholder, would however have some veto rights related to decisions related to a possible merger, recapitalization or disposals/acquisition of any assets of significant value. The Commission assessed that these rights to veto specified levels of sales, acquisitions or other investments, was not enough to confer joint control since they didn't relate to the business plan, the appointment of management or budgetary control.[111]

Whether company law protection of minority shareholders was sufficient for the purpose of demonstrating a decisive influence, was answered in the case *Skanska Sverige/Posten/HOOC*. HOOC was a joint venture where none of the parties had sole control: Posten retained 45 %, Skanska 40 % and Mr. Dahlén the remaining 15 % of the votes. The JV-agreement stipulated that Skanska and Posten enjoyed decisive influence since they had the right to block strategic decisions relating to *major investments*. As for Mr. Dahlén, his rights were restricted to the power to block proposals concerning changes in the *strategy* and *direction* of the JV resulting from minority protection right. This was not found as decisive influence. However, since joint control only requires at least two undertakings with decisive influence, this fact had no bearing on the case.[112]

Although joint control was not found to exist between the two JV-parties in KNW in the case *Blackstone*/*CDPQ/KabelNordrhein-Westfalen*, the Commission reached the conclusion that joint control existed by virtue of the CAI Lux's sole control, the majority owner in KNW, which in turn was jointly controlled.

CAI Lux was a joint venture company with a number of investors, including Blackstone and CPDQ. The Commission found that Blackstone and CDPQ had joint control over CAI Lux, the majority shareholder in the JV. Since Blackstone and CDPQ were the two largest shareholders they were in a position to veto important decisions taken by CAI Lux's management board.

In finding that Blackstone and CDPQ exercised joint control over CAI Lux, the Commission considered an agreement between Blackstone and CPDQ, under which any board directors of KNW appointed by CAI Lux were required to vote together and to follow the instructions of CAI Lux's board of directors or those of its shareholders. Since CAI Lux exercised sole

[111] Case COMP/JV.46, *Blackstone/CDPQ/Kabel Nordrhein-Westfalen*, Commission decision of June 19, 2000, paras. 8-11 and 14-17.
[112] Case COMP/M2393, *Skanska Sverige/Posten/HOOC*, Commission decision of June 13, 2001, paras. 8-9.

control over KNW (retaining 55 % of the votes) Blackstone's and CDPQ's influence was seen as decisive.[113]

The right of veto does not necessarily need to affect all key strategic decisions: the Commission will assess the compilation of veto rights as a whole. It regards the ability to veto decisions relating to the budget and the appointment of management as the most important veto rights, because these give the minority shareholder a decisive influence on the overall commercial policy of the joint venture.[114]

A right of veto over the business plan may, alone, be sufficient to confer joint control if the business plan is sufficiently comprehensive to contain details of the aims of the joint venture and the measures to be taken with regard to their attainment.[115]

The significance of a veto over the investments that the joint venture is able to make depends on the size of investments which require the participants' approval. If it is very high this may be regarded merely as the normal protection of a minority shareholder and count against the existence of joint control. The extent to which investments are an essential feature of the market in which the joint venture is to participate is also relevant.[116]

It is noteworthy that even where one undertaking enjoys sole control over many decisions in the JV, joint control can still be established with regard to veto rights over investments, which was the case in *Deutsche Post/DHL (II)*.

Deutsche Post was to acquire the remaining shares in DHL from Lufthansa, *i.e* to acquire sole control. The Commission, however, presented a picture of how joint control over DHL had been exercised prior to this operation.

Deutsche Post's shareholding was already in excess of 50% in DHL. However, under DHL's shareholders' agreement, major strategic commercial decisions required a majority in the relevant decision-making body that could only be met by Deutsche Post and Lufthansa achieving consensus. This gave both parties a *de facto* veto right. Under another agreement signed by Deutsche Post and Lufthansa in 2000 ('the Aerologic Agreement'), Lufthansa agreed to confer to Deutsche Post the industrial leadership in DHL, and to vote in favour of Deutsche Post's proposals in a number of matters, including the appointment of the executive chairman of DHL's management company. Albeit, since Lufthansa kept its veto right for certain strategically important investment decisions and competitive strategy, DHL remained even under the 'Aerologic Agreement' jointly controlled by Deutsche Post and Lufthansa.[117]

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[113] Case COMP/JV.46, *Blackstone/CDPQ/Kabel Nordrhein-Westfalen,* Commission decision of June 19, 2000, paras. 12-17.
[114] Concentration Notice, para. 25.
[115] Concentration Notice, para. 26.
[116] Concentration Notice, para. 27.
[117] Case COMP/M.2908, *Deutsche Post/DHL (II),* Commission decision of October 21, 2002, para. 7.

A veto right which is of particular importance in regard to the market in which the joint venture operates may be enough to establish joint control. For example, a veto over the technology to be used by a joint venture where technology is a key to the joint venture's activities. As for a joint venture operating on an innovation market, veto rights with regard to decicions of which product lines to be developed by the JV may also be an important element in the assessment of joint control.[118]

4.2.4.1.3 Common exercise of voting rights

The fact that a minority shareholder does not have specific veto rights does not necessarily exclude the possibility of joint control. By acting together in the exercise of votes it is possible for two or more minority shareholders to have joint control. Such joint control may have a legal basis - the minority shareholders may, for example, have transferred their rights to a holding company[119] or they may have entered into a legally binding agreement to act in concert. Exceptionally, there may be *de facto* collective action if there are strong common interests between the minority shareholders so that one would not act against the interests of the other.[120]

Whether there are strong common interests will depend on the particular circumstances. As a general rule, where a joint venture agreement establishes a new joint venture entity, there is a higher probability that the Commission will find joint control. This is because it is more likely that the participants will be carrying out a deliberate common policy, and so have strong common interests, than in the case of a purchase of shares in an existing undertaking.[121]

The Commission has stated that the possibility of changing coalitions between minority shareholders will normailly exclude the assumption of joint control. Where there is no stable majority in the decision-making procedure and the majority can on each occasion be any of the various combinations possible amongst the minority shareholders, t can not be assumed that the minority shareholders will jointly control the undertaking.[122]

This was the case in *Eureko* which was set up as a full-function JV (on other grounds ultimately held to be "cooperative" and assessed under Article 81) between European insurance companies where each was to hold between 20% and 30% of the joint venture. It was anticipated that additional

[118] Concentration Notice, para. 28.
[119] *E.g* Case IV/M.102, *TNT/Canada Post, DBP Postdienst, La Poste, PTT Post and Sweden Post*, Commission decision of December 2, 1991 (as described in the Notice on the concept of undertakings concerned, para. 29).
[120] Concentration Notice, para. 30-32.
[121] Concentration Notice, para. 34.
[122] Concentration Notice, para. 35.

participants would subsequently acquire equal stakes in the joint venture so that, as the number of participants in the joint venture grew, the existing shareholders' stakes would be diluted. The Commission found that there might not be sufficient grounds to consider that Eureko was jointly controlled by the parties. The possibility of shifting alliances and the likelihood of further parties joining the venture meant that control was liable to change constantly.[123]

The chances of establishing strong common interests are further increased when each participant supplies or contributes something to the joint venture which is essential for its functioning. However, a great number of participants in the joint venture reduces the likelihood that there will be a co-ordinated approach indicating strong common interests, unless the parties can indicate a specific feature of the joint venture showing that the participants' interest are aligned.[124]

The latter point was highlighted in the case *Channel Five* which was formed as a company by four parties to operate a franchise for a TV-channel in the United Kingdom. In conjunction to the assessment that joint control could not be established *de jure* because of lack of veto rights, the Commission examined whether there was *de facto* joint control. The parties argued that there would be a strong common interest according to paragraph 32 of the Concentration Notice since there was a prior link between *two* of the investors. The Commission dismissed any further assessment of this criterion by concluding that there was no prior link between all *four* companies. There were no long-term supply agreements between the joint venture and its parents, and the parties admitted that only a modest proportion of the joint venture's television programmes would be purchased from its parents. The Commission therefore found that the parties did not have sufficiently strong common interests to establish *de facto* joint control.[125]

By contrast, in *Toray/Murata/Teijin* the Commission found that the parents did have joint control of the joint venture even though none of the parents had veto power with regard to decisions on the joint venture's business plan, budget and major investments taken at the level of the board of directors. It sufficed that unanimity was required for the adoption of decisions of a strategic nature at the level of the shareholders meeting. The broad powers afforded to shareholders' meetings sufficiently limited the scope of the board's powers. The Commission further noted that where a new joint venture is established with a limited number of parents, each making a vital contribution to the joint venture, there is a strong likelihood that the joint

[123] Case IV/M.207, *Eureko*, Commission decision of April 27, 1992, paras. 6-11.
[124] Concentration Notice, para. 34.
[125] Case IV/M.673, *Channel Five*, Commission decision of December 22, 1995, paras. 10-11.

venture will be operated with the parents' agreement on the most important strategic decisions, even if there is no express provision for veto rights.[126]

In relation to acquisitions of minority shareholdings in companies which are already in existence, prior links between the shareholders or concerted action in acquiring the shares may be factors indicating a common interest.[127]

For example, in *Skanska/Scancem* (a case which ultimately concerned an acquisition of sole control) Aker acquired 33,3 % of the votes in Scancem (renamed from Euroc) where Skanska already was a minority shareholder. Skanska responded by increasing its shareholding in Scancem such that it came to hold 33,3 % of the votes. The Commission considered, among other things, that Skanska's acquisitions had taken place by means of concerted action between Skanska and Aker, and that the evidence showed that these companies had in principle agreed on a comprehensive shareholders agreement, which included agreement on the business of the joint venture. Therefore, it made more sense for them to act together on a long-term basis, as opposed to trying to form shifting alliances with minor shareholders from case to case.[128]

4.2.4.1.4 Joint control for a limited period

If the joint venture is subject to joint control for a start-up period only, and subsequently will be controlled by only one of the participants, the "joint" venture will be considered as an acquisition of sole control.[129]

In the case *BS/BT* the two parent companies each held 50% of the shares, but the joint venture agreement provided that they were to have unequal voting rights. The parent with the lower voting strength was given protection in the form of veto rights for the first three years, but after this period the rights expired. This led the Commission to conclude that the joint venture was in fact under sole control.[130]

4.2.4.1.5 Future rights

For the purpose of an application of the merger regulation, control is directed at present means for control.[131] However, there is some case-law

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[126] Case COMP/M.2763, *Toray/Murata/Teijin*, Commission decision of December 6, 2002, paras. 12-13.
[127] Concentration Notice, para. 33.
[128] Case IV/M.1157, *Skanska/Scancem*, Commission decision of November 11, 1998, paras. 6-8.
[129] Concentration Notice, para. 38.
[130] Case IV/M.425, *BS/BT*, Commission decision of March 28, 1994, para. 16-21.
[131] Broberg, E.C.L.R [2003], p. 745.

evidence that rights enabling a *possibility* to acquire control, or forcing a shift of shares by dint of put options, may be taken into account.

In the Ford/Hertz case, Ford was the largest single shareholder in Hertz with a shareholding of 49 % of the votes. It could already appoint four out of the totality of nine members of the board of directors. Together with a number of significant veto rights, Ford also had the *right* (by reason of a shareholders agreement) to convert its C-shares to B-shares and so become a single majority owner. The Commission made the overall assessement that Ford had sole control over Hertz.[132]

In the *BS/BT* case, the Commission considered the possible relevance of put options to the issue of joint control. The agreement stipulated that the minority shareholder (BS), under certain circumstances, could require the majority shareholder (BT) to buy out its shares in the joint venture. The question was whether the existence of this put option could have the effect of constraining the behaviour of BT to such an extent that there would be *de facto* joint control. The Commission stated that if the put option was sufficiently detrimental to BT, insofar the financial burden of a purchase was heavy enough that BT would feel obliged to take into account the requirements of BS in the management of the joint venture, it could lead to joint control. However, the Commission found that BT would have no problem to buy out BS from the joint venture.[133]

4.2.4.1.6 Sole control by a minority shareholder

If one single minority shareholder has the power to veto important strategic decisions (*e.g.* because his voting strength represents a blocking minority), that shareholder will normally be presumed to have sole control. The acquisition of such (negative) control will constitute a concentration within the meaning of the Merger Regulation, but it will be classified as a merger rather than a joint venture because there is no joint control.[134]

In *Ford/Mazda*, Ford increased its shareholding in Mazda from 24,5 % to 33,4 %. The Commission found that an amendment to a pre-existing shareholders agreement (whose content has been left out by the Commission) between Ford and other investors, whereby Ford would retain the right to nominate the president, meant that it acquired sole control over Mazda since it was the only party with decisive influence.[135]

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[132] Case IV/M.397, *Ford/Hertz*, Commission decision of March 7, 1994, paras. 5-9.
[133] Case IV/M.425, *BS/BT*, Commission decision of March 28, 1994, para. 19-21.
[134] Concentration Notice, para. 39.
[135] Case IV/M.741, *Ford/Mazda*, Commission decision of May 24, 1996, paras 4-6.

4.2.4.2 Autonomous economic entity

A full-function joint venture must perform the functions normally carried out by an undertaking operating on the market in which it operates.[136]

To achieve this, a joint venture must have: 1) sufficient assets, personnel and financial resources in order to operate its business activity independently; 2) the ability to conduct its own commercial policy; 3) an independent character in relation to its parents such as no significant purchase or supply agreements between it and its parents would undermine its independent character; and 4) be of a sufficiently long duration as to bring about a lasting change in the structure of the undertakings concerned.[137]

4.2.4.2.1 Transfer of assets enabling an independent management

A full-function joint venture must have sufficient assets, personnel and financial resources in order to perform its business independently of its parents and be a self-sufficient entity.[138]

An example of a case in which this requirement was found to be satisfied is *Hitachi/NEC-DRAM/JV*. In this case, the Commission considered that a joint venture, the functioning of which would be implemented over a period of at least two years, was full-function. At the end of this period the joint venture would have established an independent sales channel, and it would exclusively use its own brand and have access to the necessary IP-rights. It would also have all the necessary resources to operate as an autonomous economic entity, such as assets, staff and finances.[139]

On the other hand, in *RSB/TENEX/Fuel Logistic*, a joint venture for the forwarding of nuclear products was found not to be full-function. Although the parents indicated that the joint venture would at some time have its own equipment and staff, there were no concrete plans or a timetable for such a development. In addition, the joint venture's main task would be to supply one of its parents. Therefore, as the joint venture was largely dependent upon its parents for its continued existence, it was not a self-sufficient entity. Moreover, the joint venture lacked the necessary transportation equipment, specialised staff and appropriate premises to operate independently: it had no packaging equipment for the forwarding of nuclear

[136] Council Regulation (EC) No 139/2004, Article 3(4).
[137] Notice on the concept of full-function joint ventures ('The Full-Function Notice') (OJ 1998 C 66/1), paras. 11-12.
[138] Bergqvist, C: *The concept of an autonomous economic entity*, E.C.L.R [2003], p. 499.
[139] Case COMP/JV.44, *Hitachi/NEC-DRAM/JV*, Commission decision of May 3, 2000, paras. 9-12.

goods, and no own staff and it was to operate from the offices of one of its parents.[140]

A joint venture will not be full-function if it only takes over a specific aspect of a parent company's business, such as R&D or production, without own access to the market. The same applies if the joint venture's function is limited to the distribution of a parent's products.[141]

An example of R&D carried out by a full-function joint venture is the case *Thomson/Lucas*. Although the main purpose of the JV was to produce and sell the parents products, the Commission had a positive approach to the full-functionality of the joint venture. The JV would acquire the necessary IP-rights through an exclusive licence, and not by transfer, since this would be impracticable for the parents' need to use the IP-rights in other fields. However, any additional R&D work required for the adaptation of the product would be determined and supervised by the joint venture. The joint venture would also be free to choose with whom to undertake this R&D. The Commission concluded that since the JV would have sufficient assets, staff and capital in all other aspects, the joint venture was full-function despite the initial dependence on the parents' IP-rights.[142]

In *Toray/Murata/Teijin*, the full-functionality of the joint venture was not an issue even though the parent companies did not transfer all aspects of their operations related to the relevant business to the joint venture at the time of its creation. The marketing, sales and R&D activities of the parents were transferred at once, together with the relevant resources to carry on these activities. The parents further agreed to transfer their manufacturing activities to the joint venture company within one year of its incorporation. Dismissing the parent companies' arguments that the joint venture would attain full-functionality only at a future date when the manufacturing operations were transferred, the Commission found that it sufficed that the joint venture's parents had already agreed upon the principle of transferring the remaining assets required for a full-function joint venture.[143]

4.2.4.2.2 Commercial relationship with parents

A full-function joint venture must be free to determine its commercial policy in its own interests in such way that the joint venture does not simply represent the commercial needs of the parent companies.[144]

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[140] Case IV/M.904, *RSB/TENEX/Fuel Logistic*, Commission decision of April 2, 1997, paras. 7-17.
[141] The Full-Function Notice, para. 13.
[142] Case IV/M.1332, Thomson/Lucas, Commission decision of December 21, 1998, paras. 7-11 and 15.
[143] Case COMP/M.2763, *Toray/Murata/Teijin*, Commission decision of December 6, 2002, paras. 10 and 13.
[144] Bergqvist C, E.C.L.R [2003], p. 500-501.

The Commission takes into account the existence of any commercial relationship between a joint venture and its parents, who may be important trading partners of the proposed joint venture, either as suppliers or as customers. The Commission accepts that the joint venture may initially have to sell almost exclusively to its parents in order to establish itself on the market, and indicates that this will not normally undermine the full-function status of the joint venture as long as the trading period does not exceed three years.[145]

This three-year time limit is, however, not an absolute limit for the purpose of full-functionality. In *Siemens/Italtel* the Commission accepted that all the joint venture's sales would be to a subsidiary of one of its parents for the foreseeable future. The joint venture was regarded to be full-function because the parent's subsidiary was the joint venture's only potential customer, as it had a monopoly on the market for telecommunications infrastructure in Italy.[146]

Even after this start-up period, a joint venture may continue to sell products to its parents. In this respect, the full-function status will depend on the extent to which the joint venture is able to play an active role on the market as a whole. The assessment takes into account the proportion of sales made by the joint venture to its parents compared with its total production, and whether this trade is performed on normal commercial conditions.[147]

In one case, for example, the Commission found that a joint venture was full-function despite the fact that, under the first year, only 15 % of its sales was expected to be to third parties. However, by the third year this figure was expected to have grown to 65 %.[148]

The existence of a commercial relationship between a joint venture and its parents does not necessarily mean that it cannot be full-function. In *Cargill/Vandemoortele*, the fact that the joint venture was to use the sales force of one of its parents to distribute its products did not prevent it from being full-function, because the parent was to act solely as an agent with the joint venture itself being responsible for the organisation, marketing and pricing of the sales.[149]

If the parent companies operate upstream and are consequently suppliers of the joint venture, the Commission will take various factors into account in deciding whether the joint venture is full-function. If significant value is added by the joint venture to the products supplied by its parents, this is

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[145] The Full-Function Notice, para. 14.
[146] Case IV/M.468, *Siemens/Italtel*, Commission decision of February 17, 1995, para. 12.
[147] Faull & Nikpay: *The EC law of competition*, Oxford University Press, Oxford [1997], p. 365-366.
[148] Comp IV/M.1005, *Maersk Data/Den Danske Bank*, Commission decision of January 15, 1998, para. (B) 8.
[149] Case IV/M.1227, *Cargill/Vandemoortele*, Commission decision of July 20, 1998, paras. 10-11.

evidence that the joint venture is full-function. On the other hand, if little value is added, the joint venture may in reality be little more than a joint sales agency for the parent companies.[150]

4.2.4.3 Duration on a lasting basis

A joint venture must be intended to operate on a lasting basis in order to be full-function and bring about a lasting change of the parties involved. Many joint ventures are established for an indefinite period and, as such, will satisfy this requirement. However, the joint venture agreement may include the provision for termination upon occurrence of certain events, such as failure of the joint venture or fundamental disagreement between the parent companies, without affecting the full-function status of the joint venture.[151]

A joint venture established for a fixed period can also be on a lasting basis where the period is sufficiently long in order to bring about a lasting change in the structure of the undertakings concerned or where there are provisions for the continuation of the joint venture after the expiry. For example, in *Eastman Kodak/Sun Chemical*, the joint venture was initially established for a period of only ten years, but this was still found to be on a lasting basis as there were automatic options to renew the agreement for further periods of five years.[152]

A period of seven years was considered suffiecient in the case *GoAhead/Via/Thameslink*.[153] On the other hand, a joint venture is not set up on a lasting basis where it is established for a short finite period. A joint venture which was established as a temporary vehicle for the holding of shares, and which the joint venture partners intended to wind up after three years, was found not to have been established on a lasting basis.[154]

4.2.5 Compatibility with the EEA market

An operation of community dimension which confers joint control to two or more undertakings over an autonomous economic entity will be subject to the SIEC-test in Article 2(3) and potential spill-over effects of cooperative nature in Article 2(4).

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[150] Full-Function Notice, para. 14(3).
[151] Full-Function Notice, para. 15.
[152] Case IV/M.1042, *Eastman Kodak/Sun Chemical*, Commission decision of January 15, 1998, para. 10.
[153] Case IV/M.901, *Go-Ahead/Via/Thameslink*, Commission decision on April 24, 1997, para. 9.
[154] Case IV/M.722, *Teneo/Merrill Lynch/Bankers Trust*, Commission decision of April 15, 1996, para. 15.

Since the adoption of the New MR, a concentration which would "significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position" (the SIEC-test) must be declared incompatible with the common market.[155] Conversely, it must be cleared if this effect does not appear. This replaces the original substantive test in the Old MR whereby a merger that *created or strengthened a dominant position* as a result of which effective competition would be significantly impeded in the common market or a substantial part of it had to be declared incompatible with the common market (the dominance test).[156]

The rationale for the change was to clarify that "the substantive test contained in the regulation covers all types of harmful scenarios, whether dominance by a single firm or effects stemming from a situation of oligopoly that might harm the interests of European consumers".[157]

In assessing a concentration the Commission must determine whether it is compatible with the common market and for this purpose the Commission must take into account:

- The need to maintain and develop effective competition within the common market in view of, among other things, the structure of all the markets concerned and the actual or potential competition from undertakings located either within or outside the Community;
- The market position of the undertakings concerned and their economic and financial power;
- The alternatives available to suppliers and users;
- Any legal or other barriers to entry;
- Supply and demand trends for the relevant goods and services;
- The interests of the intermediate and ultimate customers; and
- The development of technical and economic progress, provided that it is to customers' advantage and does not form an obstacle to competition.[158]

The original dominance test had two limbs: 1) Whether the concentration creates or strengthens a dominant position; and 2) if so, whether the result is that effective competition would significantly be impeded.

The new test, however, has a single test: whether the merger significantly impedes effective competition. Dominance is one of the examples of when there may be such a significant impediment to effective competition, but is no longer a pre-requisite for the application of the test. Indeed, a significant impediment to effective competition will in most cases still arise from the creation or strengthening of a dominant position.[159] Accordingly, the

[155] Council Regulation (EC) No 139/2004, Article 2(3).
[156] Council Regulation (EC) No 4064/89, Article 2(3).
[157] Commission Press Release (IP/03/1261) (Available at the Commission's homepage).
[158] Council Regulation (EC) No 139/2004, Article 2(1a) and 2(1b).
[159] Council Regulation (EC) No 139/2004, Recital 26.

previous decisions of the Commission and the case law of the European Courts will continue to serve as precedent for the application of the new substantive test and the assessment of dominance.

However, the new test also widens the scope of application of the merger regulation and marks a shift in the Commission's approach to the assessment of concentrations, including joint ventures. According to Recital 25 the SIEC-test will "beyond the concept of dominance, only extend to the anti-competitive effects of a concentration resulting from the non-coordinated behavior of undertakings which would not have a dominant position on the market concerned."[160]

This is intended to cover the alleged gap for mergers which resulted in unilateral effects in oligopolistic markets. The new test is effects-based and therefore requires a more rigorous analysis of the impact of the transaction on competition. The SIEC-test extends the scope of application to non-collusive oligopolies which significantly impede effective competition. In these cases the Commission will no longer have to prove lasting, tacit coordination as required by the CFI in *Airtours*[161] under the dominance test. In assessing the criteria laid down in Article 2(1) of the Merger Regulation, the Commission will consider, inter alia, the parties' ability to maintain prices above competitive levels or to maintain output, product quality or innovation below competitive levels.[162]

The Commission retained the reference to a dominance test for reasons of legal certainty. At the same time, with the new definition of dominant position, it wanted to make clear that the dominance test permits the prohibition of mergers in very specific oligopolistic situations in which the merging undertakings would be able to raise prices unilaterally and to exercise market power without coordinating their behavior (colluding) and without necessarily possessing the largest market share. Thus, the definition was meant to close the gap complained of in the market dominance test.[163]

4.2.5.1 The horizontal guidelines[164]

The Horizontal Guidelines were issued to facilitate an assessment of the detrimental effects under the SIEC-test when there is a concentration between actual or potential competitors. The guidelines elaborate on the evolved jurisprudence under the Old MR.[165]

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[160] Council Regulation (EC) No 139/2004, Recital 25.
[161] Case T-342/99, *Airtours v. Commission*, 2002 E.C.R. II 2585.
[162] Berg, W, Nw.J.Int.L.B. [2004], p. 687.
[163] Riesenkampff, A: *The New EC merger control test underArticle 2 of the merger control regulation*, Nw.J.Int.L.B [2004], p. 718.
[164] Guidelines on the assessment of horizontal mergers under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ 2004 C 31/03).
[165] The Horizontal Guidelines, para. 5-6.

Under the Old MR, a concentration was prohibited if it resulted in individual or collective market dominance. Individual market dominance, as defined by the Commission and case-law, is “a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.”[166]

The competitive forces which affect the undertakings involved in this test are assessed through a determination of the relevant product and geographic market.[167] The calculation of market share remains an important tool for the assessment under the SIEC-test.[168]

The relevant market is distinguished through the use of the concept of demand substitutability. Products which market opponents view as interchangeable belong to the same market. In a second step, the Commission must decide whether the undertaking has a dominant position in this market. First it looks at the undertaking’s market power, mainly by reference to market shares. Thereafter, the Commission looks at the influence of the opposite side of the market on the merging undertakings. In a third step, it determines the competitive pressure exerted by potential competitors. If such competitive pressure is no longer strong enough, then the undertaking has freedom to act autonomously within the meaning of Article 2 of the merger regulation.[169]

According to the Horizontal Guidelines, the effects of a concentration can be divided into *non-coordinated* or *coordinated* effects.

Non-coordinated effects are detrimental welfare effects from concentrations (either the reduction in product volume or the rise in prices) resulting in the elimination of competitive restraints between undertakings which act individually and independently from other competitors.
Coordinated effects are detrimental welfare effects which result from the concentration effects whereby the undertakings on an oligopoly are more likely to coordinate their behavior.[170]

The detrimental effects may result from the *creation on strengthening of a dominant position*, corresponding to the prior individual market dominance category. The Commission reviews whether an undertaking, by reason of its market position, can behave independently of its competitors. In evaluating the market position, the Commission looks primarily to the market share. It also considers the vertical integration of the undertaking and its economic

[166] Case 27/76, *United Brands Co. & United Brands Continental B.V. v. Commission*, [1978] ECR I-207, para. 65.
[167] Commission Notice on the definition of relevant market for the purposes of community competition law (OJ 1997 C 372/5), para. 2.
[168] The Horizontal Guidelines, para. 14.
[169] Craig & De Burca: *EU Law*, Third Edition, Oxford university press, Oxford [2003], p. 1000-1001, 1045.
[170] The Horizontal Guidelines, para. 22

power and financial strength. Thereafter, it looks at whether the opposite side of the market compensates for the growth of power resulting from the merger and whether competition is still preserved, despite the concentration, through new market entries by competitors in the future.[171]

If it is determined that a proposed transaction may result in the creation or strengthening of a dominant position, the Commission must take into account the following potentially mitigating factors in evaluating whether the concentration will significantly impede effective competition in the relevant market:

A concentration is less likely to significantly impede effective competition in situations where customers have the power to fend off price increases based on reductions in output by switching to alternative supply sources. For example, buyers may be able to purchase comparable goods through imports from outside the relevant market or may opt to meet their requirements through vertical integration. The absence of significant barriers to entry will also reduce the likelihood that a concentration will significantly impede effective competition. With respect to this factor, consideration will be given to whether new entrants are likely to be able to achieve sufficient profitability in the post-merger situation to make it likely that they will opt to enter the market. Efficiencies may also be taken into account provided that they benefit consumers, are merger-specific, timely, and can be readily verified. Efficiencies are most important in the case of non-collusive oligopolies and likely will not be persuasive if the merger creates a monopoly case. A concentration that creates or strengthens a dominant position may be allowed in situations where the target company is a “failing firm,” a situation that is likely to exist when: (1) the target would otherwise be forced to exit the marketing the near future; (2) there is no less anti-competitive alternative acquisition opportunity available to the target; and (3) the assets of the target would inevitably exit the market unless the transaction is allowed to go forward.[172]

Effects from a merger could also lead to *coordinated effects* by changing the competitive structure in an oligopolistic market such that *market participants post-merger are able to coordinate their market behavior* and therefore able to raise prices. Moreover, the concentration could supposedly facilitate the coordination of market behavior by market participants that have previously coordinated their behavior. This category therefore corresponds to collective market dominance.[173]

An interesting aspect with regard to collusion is in the existence of a joint venture between competitors on highly concentrated markets. The exercise of joint control over a joint venture (whether or not on the same market as its parents) may serve the purpose to retain tacit collusion. Tacit collusion is

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[171] Riesenkampff, A, Nw.J.Int.L.B [2004], p. 716.
[172] Bustin, G et al: *2003 Annual review of European Union legal developments,* International Lawyer [2003], p. 644-645.
[173] Riesenkampff, A, Nw.J.Int.L.B [2004], p. 722; (‘The Horizontal Guidelines’, para. 11).

often sustained if the market actors are able to retaliate any competitor's undercutting of collusion by cutting prices. If the joint venture is important to the competitors on a market, retaliation may be exercised through a refusal to cooperate on the JV's policies.[174]

Finally, a merger can supposedly *eliminate important competitive barriers for the market participants and enable them to raise prices*, something which could happen where the oligopolists do not coordinate their behavior.

This category is new. It is intended to close the gap thought to exist in the former test, which can be illustrated as a situation where there are four big participants in a given market: participant A and B each have a market share of roughly 15%. Participants C and D each have a market share of roughly 30%. Participants A and B merge. The market is not transparent, so that coordination among the remaining three participants cannot be proven. Despite the small number of market participants and symmetrical market share distribution, the merger cannot be prohibited on grounds of collective market dominance. None of the undertakings has individual market dominance since each undertaking still faces two strong competitors. But this merger is prima facie anticompetitive. The new category is specifically intended to cover such mergers.[175]

4.2.5.1.1 The possible significance of an SIEC-test to joint ventures

As a result of the dynamic economic assessment under the SIEC-test, the Commission's future analysis in regard to JVs on highly concentrated markets may possibly resemble the assessment in the cases *Sony/BMG*[176] which did not lead to any creation or strengthening of a dominant position but attracted a deep Commission investigation.[177]

The case covered an operation by which Bertelsmann and Sony would contribute the parties global recorded music businesses into a joint venture, which would lead to a reduce in number of competitors from five to four.

To assess whether a dominant position would be created, the Commission applied the test of collective dominance according to the Airtours case[178]. The test is compiled by four consecutive elements, *i.e* the existence of: 1) a

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[174] *The Economics of Unilateral Effects*, Report for DG Competition, European Commission, p. 19.
(Available at the Commission's web page
http://europa.eu.int/comm/competition/mergers/other)
[175] Riesenkampff, A, Nw.J.Int.L.B [2004, p. 723.
[176] Case COMP/M.3333, *BMG/Sony*, Commission decision of July 19, 2004, para. 12.
[177] Rabassa, V: *Joint ventures, as a mechanism that may favour co-ordination: An analysis of the aluminium and music mergers*, E.C.L.R [2004], p. 778.
[178] Case T-342/99, *Airtours v. Commission*, [2002] E.C.R. II 2585

common understanding about the terms of coordination; 2) an ability to monitor whether such terms are adhered to; (3) a deterrent mechanism in case of deviations; and (4) if actual and potential competitors or customers are able to effectively jeopardise the benefits expected from coordination.

In assessing whether there existed a collective dominant position in the markets for recorded music among the five music majors, the Commission analysed whether a coordinated price policy of the majors had existed during the last three to four years. After examining all factors, the Commission found evidence of a parallel behaviour on some markets, but it was considered that these evidence were not sufficient to establish any existing of collective dominant position.[179]

It is possible that the clearance of this joint venture depended on the lack of evidence rather than an assessment that the operation would lead to any significant impediment of competition.

4.2.5.2 Necessary restrictions

As part of the overall JV-operation, certain ancillary agreements or restrictions may be entered into by the full-function joint venture and its parents. These cover the fields of restrictive or non-compete obligations, purchase and supply arrangements or IP-licences.[180] To the extent that such restrictions are directly related and necessary to the implementation of the joint venture, they will be classified as ancillary restrictions and will not be challenged. Restrictions which are not ancillary will be assessed separately under Article 81.[181]

Guidance as to the meaning of restrictions which are directly related and necessary to the implementation of a joint venture is contained in the Notice on ancillary restraints (the 2004 Notice) which replaced the Commission’s previous notice published in 2001 (the 2001 Notice).[182] The new notice largely follows the form of the Commission’s notice published in 2001.[183] However, it has introduced a change in relation to joint ventures with regard to non-competition clauses. Non-competition obligations between the parent undertakings and a joint venture can be regarded as directly related and necessary to the implementation of a joint venture for the *lifetime* of the joint venture instead of the three to five year limitations in the earlier notice.[184]

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[179] Case COMP/M.3333, *BMG/Sony*, Commission decision of July 19, 2004, para. 12
[180] Commission Notice on restrictions directly related and necessary to concentrations (‘Notice on ancillary restraints’) (OJ 2005 C 56/03), Section IV A, B, C.
[181] Council Regulation No. (EC) 139/2004, para. 8(2), subpara. 3; Notice on ancillary restraints para. 7.
[182] Notice on ancillary restraints, para. 9.
[183] For an overview of these, see the Commission’s press release IP/01/908.
[184] Notice on ancillary restraints (2004), para. 36; Notice on ancillary restraints (2001) (OJ 2001 C 188/03), para 15.

As for the assessment of cooperative aspects under Article 81 (according to Article 2(4) of the merger regulations, the Horizontal cooperation guidelines apply.[185] These Guidelines replaced the earlier Notice on cooperative joint ventures.[186]

The amendment of the rules governing the assessment of restrictions ancillary to the implementation of a concentration (‘ancillary restraints’) in 2001 introduced a principle of self-assessment of such restrictions. This reflects the intention of the legislature not to oblige the Commission to assess and individually address ancillary restraints. Recital 21 of the New MR envisages that the Commission will exercise a residual function with regard to specific novel or unresolved issues giving rise to genuine uncertainty. It is in all other scenarios the task of the undertakings concerned to assess for themselves whether and to what extent their agreements can be regarded as ancillary to a transaction. Disputes as to whether restrictions are directly related and necessary to the implementation of the concentration, and thus automatically covered by the Commission's clearance decision, may be resolved before national courts.[187]

As a general condition, agreements must be necessary to the implementation of the concentration, such that in their absence the concentration could not be implemented more than under considerably greater difficulty. Agreements necessary to the implementation of a concentration are typically aimed at protecting the value transferred to the joint venture or enabling the start-up. In determining whether a restriction is necessary, the Commission will not only take account of its nature, but also to ensure that its duration, subject matter and geographical field of application are subject to the principle of proportionality: *i.e.* the aim must be legitimate and if equally effective alternatives are available for its pursuit, the undertakings must choose the one which is objectively the least restrictive of competition.[188]

To be treated as ancillary, restrictions must have a direct link to the establishment of the joint venture. A restriction is directly related to the main transaction if it is subordinate to the implementation of that transaction and is inseparably linked to it.[189] Clauses in joint venture agreements which serve to facilitate the joint acquisition of control are to be considered directly related and necessary to the implementation of the concentration. This provision will, however, apply only insofar the agreement concerns the implementation of the division of assets in order to divide the production facilities or distribution networks among themselves, together with the existing trademarks of the undertaking jointly acquired.[190]

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[185] Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements (OJ 2001 C 3/02).
[186] (OJ 1993 C 43/02).
[187] Notice on ancillary restraints, para. 2.
[188] Notice on ancillary restraints, para. 13.
[189] Guidelines on the application of 81(3) of the EC Treaty (OJ 2004 C 101/97), para. 29
[190] Notice on ancillary restraints, paras. 12 and 15.

The application of the ancillary restraint concept does not involve any weighing of pro-competitive and anticompetitive effects. Such balancing is reserved for Article 81(3).[191]

4.3 Assessment under Article 81

To the extent that a full-function joint venture has as its object or effect the co-ordination of the competitive behaviour of its parents, such co-ordination will also be examined in accordance with the criteria of Article 81(1) and (3) of the Treaty in order to establish whether the operation is compatible with the common market.[192]

A joint venture will fall outside the scope of Article 81(1) if it does not affect trade between member states, because its effects are limited to a single member state or to territories outside the EU.

Under Council Regulation (EC) No. 1/2003 it is no longer possible to notify an agreement for an individual exemption under Article 81(3). The parties will have to assess for themselves whether an individual exemption applies. The Commission retains, however, the power to decide that Article 81 does not apply to an agreement if there is a Community public interest in such a finding. In addition, the NCAs have power to apply Article 81(1) and Article 81(3) in full.[193]

Along with national compeition law, the NCAs will have to apply Article 81 and 82 as long as the cooperation affects trade between Member States.[194]

[191] Guidelines on the application of 81(3) of the EC Treaty, para. 30.
[192] Council Regulation (EC) No 139/2004, Article 2(4).
[193] *See* Commission Press Release on modernisation of EU Antitrust reform (IP/04/411).
[194] Council Regulation (EC) No 1/2003, Article 3(1).

4.3.1 Assessment with regard to Article 2(4) of the merger regulation

The possibility of coordination of the parties competitive behaviour arises if there are spillover effects between the parties, *i.e* if two or more of the parents participate, actively or potentially, in the same, similar or related product markets, and on the same or potentially the same geographic markets, as the joint venture. Article 81 applies where such co-ordination is the object or likely effect of the joint venture.
An assessment of the risk for the parent companies' coordination under Article 81, referred to in Article 2(4) of the MR, is dependent on the satisfation of four consecutive conditions:

- 1) two or more parent companies retain significant 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 this market, 2) so that it is likely that they will coordinate their behaviour on the market(s) concerned; and
- 3) the co-ordination which is the direct consequence of the creation of the joint venture affords the parties the possibility of eliminating competition in respect of 4) a substantial part of the products or services in question.[195]

Candidate markets for co-ordination are those on which the joint venture and at least two parent companies are active, or closely related neighbouring markets where at least two parent companies remain active.[196]

An example of this test is the case *BSkyB/Kirch Pay TV*. Two of the JV-parties operated on the market for pan-European sports events broadcasting rights, which was an upstream market to that of the joint venture's. Competitors claimed that the existence of a joint venture on that market would enable joint bidding for pan-European sports rights and sell them to eachother. The Commission concluded that the incentives to engage in such cooperative behaviour, may exist separately from the concentration for the purpose of reducing costs related to those acquisitions. The concentration itself did not facilitate this process. Hence, there was no need to consider the restriction under Article 2(4) of the Merger Regulation.[197]

Joint ventures falling into the abovementioned category are subject to a double test: first, whether the establishment of the joint venture itself would significantly impede effective competition, and, second, whether the likelihood of co-ordination between its parents is contrary to Article 81(1).

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[195] Council Regulation (EC) No. 139/2004, Article 2(5); Case IV/JV.1, *Telia/Telenor/Schibsted*, Commission decision of May 27, 1998, paras. 28-29.
[196] Case IV/JV.1, *Telia/Telenor/Schibsted*, Commission decision of May 27, 1998, paras. 28-29.
[197] Case COMP/JV.37, *BSkyB/Kirch Pay TV*, Commission decision of March 21, 2000, para. 91.

Restrictions that are not ancillary may fit into any of the existing block exemption regulations, under which the parties will have to assess for themselves whether the criteria for application of Article 81(3) are met.[198]

The Commission has stated that if a joint venture does not give rise to a structural restriction of competition, the restrictions that are necessary for the functioning of the parties' agreement are deemed to be ancillary to the main transaction and not caught by Article 81(1).[199]

Where it appears that the arrangement is not ancillary and falls within Article 81(1), the Commission must also assess whether the criteria for exemption under Article 81(3) is satisfied. Article 81(3) will be satisfied where the advantages of the joint venture outweigh the negative impact of such co-ordination, and provided the parties are not in a position to eliminate competition in respect of a substantial part of the products or services in question.[200]

4.3.2 JVs not amounting to a concentration with regard to the merger regulation

Article 81(1) prohibits, as incompatible with the common market, agreements or concerted practices between undertakings which may affect trade between member states and which have the object or effect of restricting competition within the common market. A joint venture which fails to fulfill the conditions of joint control or full-function character may, hence, be scrutinized under Article 81(1).

For this purpose, the Commission has issued the Horizontal cooperation guidelines which provide a comprehensive guide to the assessment under Article 81(3).
The categories dealt with are:

- R&D joint ventures
- Production joint ventures (including specialisation)
- Commercialisation joint ventures (for the selling, distribution or promotion of products)
- Purchasing joint ventures[201]

Article 81(3) can be applied either to individual agreements or to categories of agreements by way of a block exemption. The are a number of block exemption regulations, which lay down the conditions for application of Article 81(3) to certain categories of agreements.[202]

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[198] Guidelines on the application of 81(3) of the EC Treaty (OJ 2004 C 101/97).
[199] Guidelines on the application of 81(3) of the EC Treaty, para. 31.
[200] Horizontal cooperation guidelines, para. 4 and 79.
[201] Horizontal cooperation guidelines, Sections 2-5.
[202] *See* Commission Press Release on reform of competition rules (IP/00/1376).

Agreements that infringe upon Article 81(1) are void and unenforceable in respect of the provisions that restrict competition.[203] The parties may be subject to fines amounting to up to 10 % of the total turnover last business year, unless the agreement meets the conditions laid down in Article 81(3).[204]

Unless the parties involved have a significant market share, and the agreement is likely to cause foreclosure of third parties to the relevant market, the following JV-categories do not fall under Article 81(1):

- Joint ventures between parties who do not compete.
- Joint ventures between competitors who could not independently undertake the joint venture activity.
- Joint ventures that do not influence the relevant boundaries of competition.[205]

Joint ventures that have as their object the restriction of competition through means of price-fixing, output quotas or market or customer sharing will almost always fall under Article 81(1). Price fixing and output limitation directly lead to customers paying higher prices or not receiving the desired quantities. The sharing of markets or customers reduces the choice available to customers and therefore also leads to higher prices or reduced output.[206]

[203] Article 81(2) of the Treaty.
[204] Council Regulation (EC) No 1/2003, Article 23(2).
[205] Rabassa, V; E.C.L.R. [2004], p. 772.
[206] Horizontal cooperation guidelines, para. 25.

5 Final remarks

For reasons of legal certainty, a competitive scrutiny of joint ventures under the merger regulation is preferable to the alternative self-assessment of competitive restraints under Article 81. The assessment of cooperative aspects is not only different from the assessment of structural effects, but anticompetitive restraints on the parents laid down in the JV-agreement can also be regarded as *ancillary* if the operation amounts to a concentration. In order to qualify for an assessment under the merger regulation, a joint venture must be *full-function* and under *joint control*. In regard to the application of the merger regulation, the importance of joint control is confusing. Whether an undertaking is jointly controlled or not, *prima facie* appears to have little significance to the question of which effects (structural or cooperative) the operation would have on the markets concerned. On the other hand, if joint control is important – why is the full-function character necessary for an application of the merger regulation?

In my view, joint control over an independent undertaking could strengthen – rather than eliminate – the parents' incentives to cooperate to the detriment of competition. Most full-function joint ventures have parents with operations on markets related to eachother. As a result of the decisive influence enjoyed by each parent, the business activity of the joint venture – which is presumed to operate on a market neighbouring to the parents' – will never come to interfere with the interests of parents with decisive influence. Any decision going in a competitive direction against the interests of one parent will be blocked by the parent presumedly threatened in such situation. It is possible to draw the conclusion that the likely outcome of joint control is that no competition will occur between the parents on one side and the joint venture on the other. Indeed, the Commission has stated in the Notice on ancillary restraints that non-competition clauses with regard to the JV under certain conditions may apply for the lifetime of the joint venture. Evidently, this indicates that competitive concerns in regard to the parents' behaviour towards the joint venture is not so important. However, tacit collusion between the parents must be more likely to occur if joint control is acquired rather than sole or no control at all. The possibility of a deadlock between the parents could serve as an incentive for the parents to strive towards a "competitive harmony" with eachother, in order to facilitate a smooth management of the joint venture's business endeavours. If, on the other hand, no party has the possibility to block decisisions related to the joint venture's activities – a competitive atmosphere around the parents is in my view more likely to emerge/sustain.

Even if a joint venture is managed without joint control (for example because no party has a veto right related to decisions on the business strategy) it can still be full-function and, hence, create a new independent market actor. The establishment of a new full-function joint venture could be viewed as giving rise to a structural impact on the markets in issue, even if the parties do not have joint control. The full-function character requires it to be something more than just a cooperative vehicle for the parents. The joint venture must have sufficient assets to operate independently of its parents and – what is more important – the intention must be to operate on a *lasting basis*. The intention to operate on a lasting basis, and the parents' contribution of assets and staff, must be regarded as sufficient evidence of a structural change on the markets involved. It is not likely, even in absence of decisive influence, that parents who make a substantial contribution of assets to the joint venture would independently act to the detriment of the joint venture's business goals. The parents' decisive influence in regard to the JV rather seems to be a means for protection of the investment than something which should exclude the application of the merger regulation.

However, since the merger regulation only applies to concentrations bringing about a *lasting change* on the structure of a market, the requirement for the parents' decisive influence (joint control) may only be a prerequisite for its application. The issue of joint control may be tied to a view that only a decisive influence may give rise to a lasting change on the market – that absence of decisive influence would not lead to a permanent change of the market structure. The view may be based on a perception that a joint venture without joint control would merely be a vehicle for the parents' cooperation.

However, the compatibility with the EEA market of a full-function joint venture with cooperative elements is subject both to the SIEC-test and the assessment under Article 81. Even if the joint venture will not create single or collective dominance, the cooperative aspects will be assessed separately. This gives rise to the question why not all joint ventures, embodied in a separate legal body, could be subject to a pre-notification procedure and assessed under both the SIEC-test and Article 81.

Assuming that joint control is a reasonable prerequisite to attach to an application of the merger regulation, the question of full-functionality remains to be answered.

The existence of an independent character in regard to the JV seems to have little importance for the question whether the joint venture can be assessed under the merger regulation or not. The overall purpose of the merger regulation is to assess the *structural effects* appearing on the market, hence whether a change of control will facilitate undertakings to act independently of their competitors post-merger or give rise to coordinated effects. This issue is the mirror of the situation of where a non-full-function joint venture (for example by reason of lack of sufficient assets to operate independently) is under joint control. The fact that the parents have a decisive influence over the joint venture's business management will automatically lead to a close relationship between the JV and the parents. The independent character of the JV is only illusory in this respect. If joint control is a necessary element for a joint venture to be regarded as a concentration, one could reason that the impact on the market structure does not depend on whether the JV is independent from its parents. The effects of a "real" merger is that competition is eliminated between the previous competitors involved in the operation, and in the case of a joint venture, the parents will not cease to be but instead merge their activities in a specific market. Even if a joint venture is not independent, the effects will lead to a change of the market structure since the parents cease to compete on the market of the JV. Hence, one may wonder why a joint venture (not sufficiently independent from its parents) can not be assessed within the frame of the merger regulation's two tests instead of the more difficult self-assessment under Article 81.

However, once again one must remember that the merger regulation only deals with the concentrations leading to a change of control *on a lasting basis*. The concept of a full-function JV has been developed to cover such operations where the parents will transfer their activities in a specific market to a separate legal entity which will endure for a substantial part of the future. The potential impediment to competition resulting from the operation will be easier to assess if the parties merge their activities in a market, hence if the joint venture is created to function as a separate actor on the market. The effect of an agreement which does not establish an undertaking independent from its parents might perhaps give incentives to collusion. If the undertaking is independent from its parents, it might have an incentive to act competitively with a purpose to survive.

As for the material changes to the merger regulation, they do not amend much with particular regard to joint ventures. However, the new self-assessment under Regulation 1/2003 of whether Article 81 applies to a joint venture, and if so an individual exemption may apply, facilitates the speeding of a proposed joint venture since it will not have to await a Commission decision. However, as a result, the participants in a JV must carry out a market review early in their negotiations, to identify potential problems under Article 81(1). Together with the fact that the risk of cooperative effects, and their possible satisfaction of the criteria of an exemption under Article 81(3), may be hard to appraise at an initial stage, most certainly this will increase the costs for JV-partners and the risks for legal advisors. The new Guidelines on horizontal cooperation agreements however provide a comprehensive guide to potential parties to a joint venture with many examples of dynamic situations under which a joint venture would be cleared or not.

The merger regulation provides more legal certainty since the parties to a joint venture can now notify a concentration even where there is no formal agreement, so long they have a good faith intention to do so. This is even more important since the assessment under the SIEC-test now enables consideration of unilateral effects even where no situation of dominance is created. Until there is a substantial amount of case-law under the merger regulation, the assessment will perhaps be slightly more difficult since the overall feature of the reform package as a whole is signaling a dynamic and economic, rather than a formal, approach towards the potential effects of a joint ventures.

Under Regulation 1/2003, the NCAs of member states have the power to apply Article 81 in full. Under Article 3 of Regulation 1/2003, they have an obligation to apply the EC competition rules alongside national law and, hopefully, the costs related to legal advices in joint ventures can somewhat be compensated by the fact that the assessments are the same, whether the cooperative aspects of the JV produces effects on an EU level or within a few Member States only. One risk is however, perhaps small but existing, that there will be a slight divergence in the application by the different competition authorities interpreting the rules.

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