



FACULTY OF LAW  
Lund University

Malin Larsson

Horizontal Co-operation –  
R&D Agreements in European Competition Law

Master thesis  
20 points

Reinhold Fahlbeck  
Marcus Glader

European competition law  
Spring 2001

# Contents

<b>PREFACE</b>	<b>1</b>
<b>SUMMARY</b>	<b>2</b>
<b>ABBREVIATIONS</b>	<b>4</b>
<b>1 INTRODUCTION</b>	<b>5</b>
1.1 Subject	5
1.2 Purpose and Method	5
<b>2 EUROPEAN COMPETITION LAW</b>	<b>8</b>
2.1 Introduction	8
2.2 Article 81 (1)	10
2.2.1 Prohibition	10
2.2.2 Effect on Trade between Member States	12
2.2.3 Restraints on competition	13
2.2.3.1 Restrictions by Object or Effect	13
2.2.3.2 The Ancillary and De Minimis Doctrine	16
2.3 Article 81 (3)	18
2.3.1 Individual exemptions and Block exemptions	18
2.3.2 The system of administrative authorisation	20
2.3.3 The administrative reform	22
<b>3 HORIZONTAL CO-OPERATION</b>	<b>25</b>
3.1 Introduction	25
3.2 Horizontal restraints	26
3.3 Horizontal arrangements in EC competition law	28
3.4 R&D agreements	31
3.4.1 Definition	31
3.4.2 Political objectives	33
3.4.3 Benefits	36
3.4.4 Effects on competition	37
3.4.4.1 Restrictions	37
3.4.4.2 Application of Article 81	38
3.4.4.3 Relevant markets	40
<b>4 THE BLOCK EXEMPTION ON R&amp;D AGREEMENTS</b>	<b>44</b>

<b>4.1</b>	<b>Introduction</b>	<b>44</b>
<b>4.2</b>	<b>Block exemption 418/85</b>	<b>44</b>
<b>4.3</b>	<b>An updated approach</b>	<b>48</b>
<b>4.4</b>	<b>Block exemption 2659/00</b>	<b>51</b>
<b>4.5</b>	<b>The Guidelines</b>	<b>53</b>
<b>4.6</b>	<b>Principal changes and improvements</b>	<b>56</b>
<b>5</b>	<b>ANALYSIS</b>	<b>58</b>
	<b>BIBLIOGRAPHY</b>	<b>62</b>
	<b>TABLE OF CASES</b>	<b>69</b>

# Preface

This thesis has been written over a period of one semester, during the last year of the Law programme at Lund University.

During this time I have received valuable assistance from my supervisors, Dr. Professor Reinhold Fahlbeck and LL.M. Doctoral Candidate Marcus Glader at the Faculty of Law in Lund. Thank you for your time and feedback, your help has been indispensable.

I would also like to thank the personnel at UB 1, Lund University Library for the help they provided in regards to my search for materials.

Lund, 31 May, 2001

Malin Larsson

# Summary

EC competition rules are in a phase of transition. The Commission has put forward some documents in order to modernise the EC competition rules, such as the proposal for a new Regulation amending Regulation 17/62. The Regulation presides over the enforcement of EC competition rules. The objectives of the proposed reform are to strengthen the enforcement of the competition rules, promote effective supervision and simplify the administrative procedure. The new rules would create a decentralised system of enforcement, where the authorities of the Member States would have increased power. With the aim of simplifying the administrative procedure, the compulsory system of notification would be abolished.

EC competition rules apply to horizontal co-operation agreements. These agreements initially restrict competition due to the fact that the agreements are concluded between competitors. Horizontal co-operation agreements are frequently concluded in the area of research and development (R&D). R&D and innovation are of greatest importance for the economy and competitiveness of Europe. These activities lead to increased social welfare and economic growth. Nevertheless, it is difficult to provide undertakings with the incentive to invest in R&D and innovation, because of the uncertainty and risk-taking it involves. Consequently, collaboration between undertakings must be allowed.

The Commission has recognised the necessity of having undertakings engaging in R&D and innovation. It has assumed a more economic approach towards co-operation in these matters. Correspondingly, it has adopted a new block exemption Regulation and complementary guidelines in the subject of co-operative R&D agreements. The new Regulation entered into force the first of January 2001 and introduces several important amendments. The guidelines refer not merely to R&D agreements, but cover also other forms of competitors' collaboration and present the general approach towards horizontal co-operation agreements. The new rules represent an important pillar in the overall modernisation of the EC competition rules. Their success is however dependent on whether they will be effectively applied.

EC competition rules and the administrative system are certainly in need of modernisation. The restriction and rigidity of the rules result in less R&D and

innovation. As follows, the European undertakings can not keep up with their world-wide competitors in high technology areas, which causes slow economic growth, increasing inequity and unemployment. This trend has to change. By adopting a more economic approach when modernising the EC competition framework - with emphasis on R&D and innovation - the Commission contributes to the alteration of this trend.

# Abbreviations

CFI	Court of First Instance
CMLR	Common Market Law Report
CMLRev	Common Market Law Review
ECLR	European Competition Law Review
ECJ	European Court of Justice
ELR	European Law Review
IIC	International Review of Industrial Property and Copyright Law
OJ	Official Journal
UNICE	Union of Industrial and Employers' Confederations of Europe
YBEL	Yearbook of European Law

# 1 Introduction

## 1.1 Subject

This thesis is concerned with horizontal co-operation agreements, in particular research and development (R&D) agreements. Horizontal agreements are agreements concluded between undertakings operating on the same level in the market. Competitors that are co-operating constitute initially a restriction on competition. Nevertheless, these types of agreements, especially when concluded for the purpose of R&D, produce several benefits.

R&D is a very important aspect of the future welfare and competitiveness of Europe. Innovation is generally established as the most important source of welfare improvements. It is, however, difficult to motivate undertakings to invest in R&D, because of the risks it involves. Consequently, it is necessary to allow undertakings to co-operate with each other. They can, in so doing, split the risks and investments involved in innovation. It is of uttermost importance that undertakings have the incentive to engage in R&D; rapid innovation in high technology industries is of significance in today's world economy.

It is a challenge for EC competition policy to balance the benefits of co-operative R&D agreements against the restrictions on competition. The EC competition rules have been reviewed in order to be able to offer an appropriate framework on the subject. An economic approach has been developed. The Commission has adopted a block exemption Regulation and complementary guidelines with reference to R&D agreements. The new rules form an essential part of the modernisation of the EC competition rules.

## 1.2 Purpose and Method

There are several reasons to focus on co-operative R&D agreements. The inspiration for this thesis has been the transition of the EC competition rules in general and the modernised block exemption on co-operative R&D agreements in particular. The main purpose of the thesis is to present the transition of the relevant rules and discuss the amendments it embraces.



However, the subject of horizontal co-operation agreements, with emphasis on R&D agreements, is very complex. It arises both legal and economic theoretical and analytical problems, which have to be considered. In order to understand the changes that the modernisation creates, it is necessary to have a general knowledge on these agreements and their importance. It is furthermore important to examine the benefits and restrictions on competition that they bring and how they are assessed under EC competition law. Accordingly, my intention is additionally to examine horizontal co-operation agreements, in particular R&D agreements, their assessment under EC competition law and why the rules on the subject have been amended.

In the first part of the presentation I will summarise EC competition law, with emphasis on the modernisation of the framework. The second part will be devoted to horizontal co-operation agreements and how they are assessed. The benefits and restrictions initiated by this type of co-operation will be examined. The policy on R&D related co-operation agreements will especially be considered.

The third part draws up the background of the transformation of the previous block exemption on R&D agreements. In this part I will further study the new rules on the subject; Regulation 2659/00 and the corresponding guidelines. I will try to establish the principal amendments and improvements provided by the new rules.

When writing this thesis I have used a traditional legal method. My study has been partly descriptive, partly analytical.

The debate relating to the subject has been animated for years. It has taken place in manuscripts of leading authors on the subject and it has taken place in European law journals. I have based my study on these sources. I have furthermore studied some case law in order to analyse the somewhat older methods of assessing horizontal agreements and recognise the modifications that have been completed with time. I have also consulted official documents and legislation generating from the authorities of the EC. The homepage of the Commission on the subject of competition has been valuable. The final parts of the thesis have significantly been based on the updated block exemption Regulation relating to R&D and the complementary guidelines.

It has been difficult to keep the thesis short, because of the many interesting aspects arisen by the subject. I have however tried to limit the scope of the thesis. The chapter on EC competition law is furthermore kept short. My initial intention when writing this thesis was to compare the European policy in regards to horizontal co-operation agreements, in particular R&D agreements, with the U.S. policy. Due to the limited scope this comparison has not been included in the thesis.

# 2 European competition law

## 2.1 Introduction

Ever since the creation of the European Communities, the objective of market integration has been one of the general principles governing the work of the EC. Through the establishment of a common market, unimpeded by national barriers, free movement of goods, services, workers and capital can be realised. The Community, with the exception of the sphere of agriculture, is based on a market economy and it is assumed that competition is the best measure of bringing about greater efficiency.<sup>1</sup> The application of a vigorous competition policy will lead to focus on innovation, reduction of costs and development of high-quality goods and services at the lowest prices possible.<sup>2</sup> This will result in a maximisation of consumer welfare and achievement of the optimal allocation of resources and, in the long term, the protection of employment.<sup>3</sup> To produce these and other desirable results, an effective competition structure is needed. Competition law must be able to remedy some of the shortcomings, which a free market system tends to produce.<sup>4</sup>

One of the aims of the Community is to create “*a system ensuring that competition in the internal market is not distorted*”. This is provided in Article 3 (g) of the Treaty of Amsterdam. However, the objectives of the Community competition policy are not clearly written down in the Treaty. The Treaty merely

---

<sup>1</sup> Bellamy, Christopher W. and Child, Graham; *Common market law of competition*, Fourth edition, Sweet & Maxwell, London, UK, 1993, p. 35.

<sup>2</sup> Twenty-first Report on Competition Policy 1991, point 3.

<sup>3</sup> Bellamy & Child, 1993, p. 35; Craig, Paul and de Búrca, Gráinne; *EU law. Text, cases, and materials*, Second edition, University Press, Oxford, UK, 1998, p. 891. The Chicago School has developed the objective of consumer welfare. Efficiency is identified as consumer welfare, which usually is determined by maximisation of allocative efficiency. This is most often achieved when allowing the market to regulate itself through the hidden hand of competition. The Chicago school has taken an economic approach towards competition policy and is well represented in the United States. In Europe, the completion of an internal market has taken precedence over the development of competition policy. But the European institutions have been influenced by the policy of the United States and a more economic approach has been visualised in Europe over the later years. Korah, Valentine; *EEC Competition Policy - Legal Form or Economic Efficiency*, Current Legal Problems, Vol. 39, 1986, p.85 and f, p. 91; Frazer, Tim; *Competition Policy after 1992: The Next Step*, The Modern Law Review, Vol. 53, 1990, p. 609, p. 617 and f.

<sup>4</sup> Furse, Mark; *Competition law of the UK & EC*, Second edition, Blackstone Press Limited, London, UK, 2000, p. 1.

gives guidance. According to the Treaty's Article 2, "a harmonious and balanced development of economic activities" is a primary aim. To clarify these aims the ECJ has provided certain guidelines.<sup>5</sup> However, the objectives of the Community in regard to competition are not necessarily fixed.<sup>6</sup>

The Community competition rules seem to fulfil three broad functions: the promotion of integration between the Member States, the promotion of effective and undistorted competition and the encouragement of efficiency, innovation and lower prices.<sup>7</sup> But the approach taken towards competition policy has partly changed. A globalised economy, a single currency and a single market, fifteen Member States and possible enlargements present a situation very different to the one existing in 1962. The Economic and Monetary Union will entail further economic integration and strengthen the effects of the internal market. The focus does no longer have to be on establishing rules on restrictive practices interfering directly with the goal of market integration. This creates a possibility to concentrate more on ensuring effective competition by detecting and stopping cross-border cartels and maintaining competitive market structures.<sup>8</sup>

The competition rules of the Community, especially Article 81 and its scope, have been eagerly discussed. The competition rules are in a state of transition. The idea is that the competition rules shall be more vigorously applied. Responsibility for the enforcement of competition rules shall increasingly rest with the Member States. This transition is of importance administratively and substantially. The relevant competition rules and procedures will be further considered below.

---

<sup>5</sup> See Case 26/76 *Metro-SB-Grossmärkte GmbH & Co. KG v Commission and SABA* (1977) ECR 1875, (1978) 2 CLMR 1. The Commission has also participated in issuing guidelines regarding the objectives of the Community. See for example Commission First Report on Competition Policy (1972), p. 11 and ff.

<sup>6</sup> ".....there is no agreement as to what objectives should be pursued by the competition policy"; Korah, Valentine; *EEC Competition Policy - Legal Form or Economic Efficiency*, Current Legal Problems, Vol. 39, 1985, p. 85.

<sup>7</sup> Bellamy & Child, 1993, p. 33; Bishop, Simon and Walker, Mike; *Economics of E.C. Competition Law: Concepts, Application and Measurement*, Sweet & Maxwell, London, UK, 1999, p. 3.

<sup>8</sup> White Paper on Modernisation of the Rules Implementing Articles 85 and 86 [now Articles 81 and 82] of the EC Treaty – Commission programme No. 99/027 – approved on 28.04.99, paragraph 8 (summary), paragraphs 4 and 6.

## 2.2 Article 81 (1)

### 2.2.1 Prohibition

Article 81 (1) lists agreements which are incompatible with the common market and therefore prohibited.

*”The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:*

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;*
- (b) limit or control production, markets, technical development, or investment;*
- (c) share market or sources of supply;*
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;*
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.”<sup>9</sup>*

The wording of the Article and the interpretation by the ECJ gives Article 81 (1) a wide scope. It covers any aggregation of resources put together to carry out economic activities. It applies to any form of multilateral anti-competitive conduct. The Article covers agreements etc. made by undertakings. At least two undertakings must be parties to the arrangement for it to qualify under Article 81 (1).<sup>10</sup>

The concept of undertaking has been defined by the ECJ as *”any entity engaged in an economic activity, regardless of its legal status and the way in which it*

---

<sup>9</sup> Treaty of Amsterdam, Article 81 (1).

<sup>10</sup> Unilateral conduct does not fall within the scope of Article 81 (1) and its prohibition, if it in reality is unilateral. Furthermore, two or more legally separate entities can be treated as one single undertaking if their relationship justifies regarding them as a single economic unit.

*is financed*".<sup>11</sup> The mere engagement in commercial activity makes the entity an undertaking for the purpose of the competition rules. Even public bodies engaging in commercial activity will, in general, fall under the concept of undertaking within the meaning of Article 81 (1).<sup>12</sup> Even persons engaged in liberal professions may be considered as undertakings if their activities have a commercial character.<sup>13</sup>

Article 81 (1) further states that there must be an agreement, decision or concerted practice in order for the behaviour to be caught by the competition rules. These three kinds of understanding overlap. If parties co-operate to infringe the Treaty, the precise means adopted is of less importance.<sup>14</sup> For an agreement to exist it "is sufficient if the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way"<sup>15</sup> The form of the agreement is irrelevant. The competition rules are in fact designed to also cover less formal kinds of agreements. The rules are to be widely interpreted and will cover all agreements that set out a framework under which the parties involved will cease to operate independently.<sup>16</sup>

Article 81 (1) furthermore recognises decisions by associations of undertakings. Undertakings can work through a medium of an association representing them. The most common associations in this context are trade associations, but the Article is not restricted to those. In addition, the word "decision" has a wide meaning. If the activities of an association of undertakings produce anti-competitive results, the prohibition under Article 81 (1) can be applied.<sup>17</sup>

Article 81 (1) also includes concerted practice, which here covers a wide range of conduct. The purpose of Article 81 (1) in this respect is to bring informal anti-

---

Faull, Jonathan and Nikpay, Ali; *The EC law of competition*, University Press, Oxford, UK, 1999, p. 72 and f.

<sup>11</sup> Case C-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH* (1991) ECR I-1979, paragraph 21; Case C-244/94 *Fédération Française des Sociétés d'Assurances and Others v Ministère de l'Agriculture et de la Pêche* (1996) ECR I-4013, paragraph 14.

<sup>12</sup> Faull & Nikpay, Ali, 1999, p. 67 and f. See also the ECJ's case law on the matter, for example Case C-41/90 (1991) ECR I-1979; Case C-343/95 *Diego Cali & Figli Srl v Servizi ecologici porto di Genova SpA (SEPG)* (1997) ECR I-547.

<sup>13</sup> Case 2/74 *Reyners v Belgium* (1974) ECR 631, paragraphs 52-53.

<sup>14</sup> Bellamy & Child, 1993, p. 43.

<sup>15</sup> Case T-7/89 *SA Hercules Chemicals NV v Commission* (1991) ECR II-1711, paragraph 2. See also Joined Cases 41, 44 and 45/69 *ACF Chemiefarma NV v Commission* (1970) ECR 661, paragraph 112.

<sup>16</sup> Faull & Nikpay, 1999, p. 70. See also Commission Decision 86/398 *Polypropylene* (1986) OJ L230/1, (1988) CMLR 347.

<sup>17</sup> Faull & Nikpay, 1999, p.75 and f; Bellamy & Child, 1993, p. 51 and f.

competitive co-operation under the Treaty. Concerted practice is a form of co-operation between undertakings, where no formal agreement, decision or plan of action has been concluded.<sup>18</sup> Instead the parties may have relied on understandings or verbal exchange where one party has allowed the other party to understand the position he intends to take. Hereby both parties can regulate their conduct, knowing – or at least assuming - what the opposite party will do.

For concerted practice to take place, it is necessary that some sort of plan has been worked out between the parties.<sup>19</sup> The policy of the economic operator may not be dependent on the policy or practice conducted by one of its competitors. The independence of the undertakings concerned must be considered. If an undertaking adjusts its behaviour to be in line with wishes of another undertaking, concerted practice exist. However, merely parallel behaviour is not illegal.

### **2.2.2 Effect on Trade between Member States**

For Article 81 (1) to apply the agreement etc. must affect trade between the Member States. If not, the Community has no jurisdiction. The matter is instead an issue for the Member States. The concept of trade includes all economic activities relating to goods or services and it has been interpreted in a broad manner. In *Costen and Grundig v Commission* the ECJ held that an agreement could conceivably affect trade between Member States if it had had a direct or indirect, actual or potential, effect on the flow of trade between Member States.<sup>20</sup> Moreover, the requirement that trade between Member States has to be affected has been reduced by the ECJ case law.<sup>21</sup> In fact, it is not even necessary to

---

<sup>18</sup> Case 48/69 *ICI v Commission* (1972) ECR 619, paragraph 64.

<sup>19</sup> Case 48/69, (1972) ECR 619, paragraphs 64 – 124. See also Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 *Coöperatieve Vereniging “Suiker Unie” and others v Commission*, (1975) ECR 1663, paragraphs 173-174. The ECJ has further stated that the working out of an actual plan is not necessary. The parties activities can still be judged as concerted practice. Merely the existence of direct or indirect contact between competitors can be enough. See Joined Cases C-89, 104, 114, 116, 117 and 125 to 129/85 *Wood Pulp-A. Ahlström OY and others v Commission*, (1988) ECR 5193, paragraph 13 and ff. This concept of concerted practice has been limited by the ECJ case law.

<sup>20</sup> Cases 56 and 58/64 *Etablissements Costen SARL and Grundig-Verkaufs-GmbH v Commission*, (1966) ECR 299, p. 341. See also Case 42/84 *Remia and others v Commission*, (1985) ECR 2545, paragraph 22.

<sup>21</sup> The ECJ has established that Article 81 (1) can be infringed even if the specific provisions of the agreement do not restrict competition. The agreement as a whole can infringe Article 81 (1). Case 193/83 *Windsurfing International Inc. v Commission*, (1986) ECR 611, paragraphs 96-97. Furthermore, the ECJ has stated that trade is not restricted to the movement of goods or services, but reaches also to the right of establishment in other

ascertain that trade between Member States has actually been affected. It is sufficient to demonstrate that the restrictive practice in question is capable of having this effect.<sup>22</sup>

Even when an agreement takes place only in one Member State, can it have an effect on trade between Member States. “*An agreement extending over the whole of the territory of a member state by its very nature has the effect of reinforcing the compartmentalization of markets on a national basis, thereby holding up the economic interpretation which the treaty is designed to bring about and protecting domestic production.*”<sup>23</sup> The ECJ has, on several occasions, held that this stipulation is applicable to agreements between undertakings in the same state. In these cases, it might be necessary to investigate the agreement in the context of other similar agreements. This will ascertain whether the agreement, as a whole, is capable of affecting trade between Member States.<sup>24</sup>

The ECJ furthermore has jurisdiction over agreements that relate to trade outside the EC, if the agreement may have an impact on the pattern of trade within the Community.

## **2.2.3 Restraints on competition**

### **2.2.3.1 Restrictions by Object or Effect**

The central component of Article 81 (1) is the examination on whether an agreement’s object or effect is to prevent, restrict or distort competition. Here one encounters a problem, as most agreements have characteristics that both

---

Member States and the free movement of suppliers. Case 161/84 (1986) ECR 353, paragraph 26.

<sup>22</sup> Case C-219/95P *Ferriere Nord v Commission* (1997) ECR I-4411, paragraph 19.

<sup>23</sup> Case 8/83 *Vereeniging van Cementhandelaren v Commission*, (1985) ECR 391, paragraph 29. This judgement has been explained by the ECJ in several other cases. See Case 246/86 *SC Belasco v Commission*, (1989) ECR I-2117, paragraphs 33-35 and Joined Cases C-215 and C-216/96 *Carlo Bagnasco v Blanca Popolare di Novara and Cassa di Risparmio di Genova e Imperia* (1999) ECR I-135, paragraph 47 and ff.

<sup>24</sup> Case 23/67 *Brasserie de Haecht SA v Wilkin* (No 1), (1967) ECR 407, (1968) CMLR 26; Steiner, Josephine and Woods, Lorna; *Textbook on EC Law*, Seventh edition, Blackstone Press Limited, London, UK, 2000, p. 223.



enhance and restrict competition. In addition, almost all commercial agreements do, in a way, restrict competition.<sup>25</sup>

There are two possible approaches when illuminating the notion of restriction of competition. The competent authority of the EC regarding questions of competition - the Commission - has somewhat abandoned the strictly legal approach it used to apply. Article 81 (1) used to be given a wide interpretation. Restrictions on competition were permitted only via individual or block exemptions under Article 81(3).<sup>26</sup>

The second approach, mainly developed by the ECJ, has been eagerly discussed within the EC.<sup>27</sup> When looking at an agreement to examine whether its object or effect is to prevent, restrict or distort competition, an economic analysis is made. Instead of a broad application of Article 81 (1), and perhaps an exemption under Article 81 (3), it would be simpler and less burdensome for all involved if Article 81 (1) was not applied to the agreement in the first place. A restraint on commercial freedom of action is not necessarily a restraint on competition.<sup>28</sup>

In *Société Technique Minière*<sup>29</sup> the ECJ adopted, for the first time, an economic approach. It held that a market analysis was necessary to determine whether the agreement in question was restrictive to competition. The case concerned an agreement granting an exclusive right of sale. The ECJ found that this sort of

---

<sup>25</sup> Bellamy & Child, 1993, p. 65.

<sup>26</sup> Ibidem, p. 68.

<sup>27</sup> The Commission has regularly rejected the economic approach. This approach is named the “rule of reason” because of the influence of the United States’ competition policy. The “rule of reason” states that an analysis of the pro- and anti-competitive aspects of the agreement in question must be done in order to hold it as restrictive. The Commission argues that Article 81 and its structure does not comply with the exercise of “the rule of reason”. See White Paper on Modernisation of the Rules Implementing Articles 85 and 86 [now Articles 81 and 81] of the EC Treaty - Commission programme No. 99/027 - approved on 28.04.1999, paragraph 57. Certain authors do not agree with the American influence on EC competition law because of the differences of the two systems. A comparison of them may be misleading and lead to confusion instead of clarity. EC competition law must become more sophisticated in dealing with an economic approach. Instead of adopting a “rule of reason” there should be improvement within the EC system itself. To reduce the scope of Article 81 (1) might not be the solution. See R. Wish, and B. Surfin; *Article 85 and the Rule of Reason*, YBEL, Vol. 7, 1987, p. 36 and f. For an application of the “rule of reason” in Europe, see I. Forrester and C. Norall; *The Laicization of Community Law: Self-Help and The Rule of Reason: How Competition Law Is and Should Be Applied*, CMLRev, Vol.21, No.1, 1984, p. 11-51.

<sup>28</sup> Faull & Nikpay, 1999, p. 81.

<sup>29</sup> Case 56/65 *Société La Technique Minière v Maschinenbau Ulm* (1966) ECR 235, (1966) CMLR 357.

agreements did not by "their very nature"<sup>30</sup> restrict competition within the meaning of Article 81 (1). The ECJ held that one must first consider the precise purpose of the agreement, in the economic context in which it is to be applied. Furthermore, it is necessary to consider the consequences of the agreement and to decide whether the restraint on competition was really necessary.<sup>31</sup> If the object of the agreement does not by its nature restrict competition, one must consider the effect of the agreement, taking the whole economic context in which the agreement operates into account.

An agreement that has as its object to restrain competition is prohibited and the ECJ has even stated that if this is the case, there is no need to take the concrete effect of the agreement into account.<sup>32</sup> Restrictions by object are identified by the terms of the agreement, the legal and economic context in which the specific agreement was concluded and by the conduct of the parties.<sup>33</sup> Agreements aiming at restrictions on competition can escape the prohibition under Article 81 (1) if they affect the market only insignificantly.<sup>34</sup>

An agreement, which is not designed to restrict competition, must be analysed with regard to its effects. It must be considered in its economic and legal context and when ascertaining whether the agreement restricts competition, several factors must be taken into consideration. In *Société Technique Minière* the ECJ held that the nature and quality of the products concerned by the agreement must be considered. If the parties in question have a great market share, they can do more damage on competition. Furthermore, the position and size of the parties

---

<sup>30</sup> Case 19/77 *Miller International Schallplatten GmbH v Commission* (1978) ECR 131, paragraph 7.

<sup>31</sup> Case 56/65 (1966) ECR 235, p. 247 and f.

<sup>32</sup> Case 56 and 58/64 (1966) ECR 299, p. 342.

<sup>33</sup> Joined Cases 96 to 102, 104, 105, 108 and 110/82 *NV IAZ International Belgium and others v Commission*, (1983) ECR 3369, paragraph 23 and ff.

<sup>34</sup> Case C-306/96 *Javico International v Yves Saint Laurent Parfumes*, (1998) ECR I-1983, paragraph 15. The above statement causes problems because it requires an idea about how to interpret "affects the market only insignificantly". In the case *Völk v Vervaecke* the ECJ held that in order to explain when an agreement has an "insignificant effect" on the market, one must take the impact of the agreement into account. The weak positions of the parties concerned must also be considered. *Völk v Vervaecke* concerned an exclusive distribution agreement between the two parties. The agreement in question guaranteed the distributor a strict territorial protection, but as the producer only held a very small part of the relevant market the agreement did not restrict competition. Case 5/69 *Völk v Etablissements Vervaecke Sprl* (1969) ECR 295, paragraphs 5-7. It should be noted that not all authors agree on appreciating the object of the agreement. They argue that once an agreement is caught by its object, appreciability can only apply to the effects of the agreement. Faull & Nikpay, 1999, p. 84.

involved, the isolated nature of the agreement or its position in a series and the severity of clauses must be regarded.<sup>35</sup>

The factors outlined shall be used to assess an agreement's potential to restrict competition within the common market. Furthermore the relevant market must be defined. The relevant market shall be defined in both its product and geographic dimension.<sup>36</sup> The definition includes an analysis of market shares and concentration, and shall draw attention to products and services that have a significant effect on competition. The market for substitutes shall also be considered when defining the relevant market.<sup>37</sup> To ascertain restriction of competition, one must balance the potential anti-competitive risks of the agreement against its possible pro-competitive benefits. The definition of the relevant market becomes an important tool when using the approach called "the rule of reason".

### 2.2.3.2 The Ancillary and De Minimis Doctrine

The Ancillary Restraint Doctrine says that agreements - clauses in agreements - may be lawful if they are necessary to make the main transaction viable. Clauses that restrict competition may fall outside Article 81 (1) if they are objectively needed to secure the achievement of a legitimate agreement. The ECJ has confirmed the Ancillary Doctrine in a number of cases. In *Nungesser v Commission* and *Coditel (II)* the ECJ held that an exclusive licence which gave absolute (*Coditel (II)*) territorial protection did not fall within the prohibition in Article 81 (1) because of its necessity.<sup>38</sup> But the Ancillary Doctrine does not apply automatically on restraints that may seem necessary. In *Pronuptia* the ECJ ruled that a franchising system does not in itself infringe competition, but the combination of two restrictive clauses, which result in an absolute territorial protection, constitutes a limitation on competition for the purpose of Article 81 (1).<sup>39</sup>

---

<sup>35</sup> Case 56/65 (1966) ECR 235, p. 249 and f.

<sup>36</sup> Notice on the Definition of Relevant Market for the Purposes of Community Competition Law, 9 December 1997, (1997) OJ C372/03, paragraph 2.

<sup>37</sup> Korah, Valentine; *An Introductory Guide to EC Competition Law and Practice*, Seventh Edition, Hart Publishing, Oxford, UK, 2000, p. 66; Bishop & Walker, 1999, p. 47

<sup>38</sup> Case 258/78 *LC Nungesser KG and Kurt Eisele v Commission* (1982) ECR 2015, (1983) 1 CMLR 278, paragraph 58; Case 262/81 *Coditel SA, Compagnie générale pour la diffusion de la télévision v Ciné-Vog Films* (1982) ECR 3381, paragraphs 15-19.

<sup>39</sup> Case 161/84 *Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgallis* (1986) ECR 353, (1986) 1 CMLR 414, paragraph 24; Korah, 2000, p. 63.

The main problem with the Ancillary Doctrine is that it is very hard to establish when a particular restraint in fact falls under it. When is the restraint in question objectively necessary for the implementation of the specific agreement? The fact that the ECJ and the Commission apply the Ancillary Doctrine demonstrates an eagerness to consider cases under Article 81 (1) with a more economic approach. Still, the ECJ, and the Commission, stress that an analysis of the necessity of the restraint must be done, even when the restraint may have beneficial effects on the competition. The possibility to escape the prohibition in Article 81 (1) is limited to what is necessary to ensure competition.<sup>40</sup>

If an agreement does not restrict competition or affect trade between the Member States to any appreciable extent it is likely that the agreement will fall outside of Article 81 (1). The *de minimis* principle was developed to regulate when an agreement restricts competition so little that it may be implemented despite of the infringement of competition. Guidelines for the *de minimis* principle was drawn up by the ECJ. In *Völk v Verwecke* the ECJ held that an exclusive distribution agreement that affected less than 1 % of the relevant market was to be considered insignificant.<sup>41</sup> Below 1 % of the market share is likely to be insignificant, whereas above 5 % of the market share in all probability constitutes an appreciable restriction on competition and calls for the prohibition in Article 81 (1). The area between 1 % and 5 % is best described as a grey area.<sup>42</sup>

The Commission has tried to reduce the uncertainty surrounding the *de minimis* principle. It has adopted a Notice on Agreements of Minor Importance in order to lay down a clear policy. The 1986 Notice established that an agreement which did not represent more than 5 % of the relevant market and which did not aggregate a turnover of more than 300 million ECUs would fall outside of the prohibition of Article 81 (1).<sup>43</sup>

The present 1997 Notice provides that an agreement will be identified as *de minimis* when the relevant market share of all business is not more than 5 % in the case of horizontal agreements or 10 % in the case of vertical agreements. The Notice also provides several exemptions from the general rules. Agreements

---

<sup>40</sup> Case C-250/92 *Gottrup-Klim v Dansk Landbrugs* (1994) ECR I-5641, paragraphs 32-34.

<sup>41</sup> Case 5/69 (1969) ECR 295, paragraph 3.

<sup>42</sup> Faull & Nikpay, 1999, p. 85.

<sup>43</sup> The Commission's Notice on Agreements of Minor Importance (1986), OJ C231/2, amended OJ C368/20, 1994. Before the amendment the limit regarding turnover was set at 200 million ECUs.

between small and medium-sized undertakings are not covered by Article 81 (1) even if they are over the market threshold. The Commission will not, in general, start proceedings against companies that fall under the Notice. Furthermore, if a company does not notify an agreement because it believes, in good faith, the agreement to be *de minimis*, the Commission shall not impose a fine.<sup>44</sup> Commission notices are not binding, but they shall certainly be taken into consideration when a breach of Article 81 (1) can be demonstrated.<sup>45</sup>

## 2.3 Article 81 (3)

### 2.3.1 Individual exemptions and Block exemptions

Not all agreements that restrict competition and affect trade between Member States are prohibited. Agreements can be granted an exemption if they have beneficial effects on competition. An exemption is a formal decision by the Commission, announcing Article 81 (1) to be inapplicable to the arrangement in question. This course of action differs from the American rule of reason because it does not keep out the express conduct from the scope of Article 81 (1), it merely admits an otherwise unlawful conduct to be exempted, provided that it has certain characteristics.<sup>46</sup>

An exemption under Article 81 (3) is granted either in the form of an individual exemption, on a case-by-case basis, or in the form of a block exemption, covering a category of agreements defined in a regulation. Exemptions are granted by the Commission. It has the exclusive power to grant individual exemptions. It has also been empowered by the Council to create block exemption regulations covering selected categories of agreements.

In order to grant an **individual exemption** the Commission must consider the criteria laid down in Article 81 (3), but it does enjoy a wide discretion. The agreement must be likely to have a beneficial effect in one or more of the four elements referred to in Article 81 (3). It must contribute (i) to an improvement in the production of goods or (ii) to an improvement in the distribution of goods or (iii) to technical progress or (iv) to economic progress. The agreement must, as a

---

<sup>44</sup> The Commission's Notice on Agreements of Minor Importance (1997), OJ C372/3, paragraphs 4, 5, 9, 19 and 20.

<sup>45</sup> Korah, 2000, p. 68.

whole, show beneficial effects. Different kinds of agreements will create different effects, but quite often the elements overlap. The Commission must objectively judge the benefit presented and determine whether it contributes to an improvement or a progress.<sup>47</sup> The burden of proof is placed upon the undertaking in question.<sup>48</sup>

The agreement must furthermore provide consumers with a fair share of the benefits resulting from the above elements. If competition is fierce in the relevant market it is probable that consumers will obtain benefits under the agreement, in the form of a better product or service, lower prices or greater availability of supplies. As a result, the parties' market share is a crucial factor.<sup>49</sup>

The agreement's restrictive clauses must be indispensable to the achievement of the benefits that the agreement will bring. It must not bring about any restrictions of competition, which are not absolutely necessary in order to realise the positive benefits under Article 81 (3). To determine whether a specific clause in an agreement is indispensable, the proportionality principle shall be applied. The Commission shall seek to determine if there are less restrictive methods available to the undertakings, which would allow the recognised benefits to be realised.<sup>50</sup>

The agreement etc. must not allow the undertakings the possibilities to eliminate competition in respect of a substantial part of the products in question. There must be sufficient competition from competing products on the market. An analysis of the relevant market must be done. The analysis is focused on the effect on the

---

<sup>46</sup> Furse, 2000, p. 139.

<sup>47</sup> See for example Decision *Re Bayer and Gist-Brocades NV* (1976) OJ L30/13, paragraph 57. See also Cases 56 & 58/64 (1966) ECR 299; Cases 209/78, etc. *Van Landewyck v Commission*, (1980) ECR 3125, (1981) 3 CMLR 134. To make this decision, the Commission must balance the relative advantages and disadvantages of the agreement, by drawing up a "bilan économique". Cases 43 & 63/82 *VBVB and VBBB v Commission* (1984) ECR 19, 88 (1985) 1 CMLR 27, Adv. Gen. Verloren van Themaat.

<sup>48</sup> See for example Cases 56 & 58/64 (1966) ECR 299; Cases 43 & 63/82 (1984) ECR 19. For an analysis of the four elements see Faull & Nikpay, 1999, p.104 and ff; Steiner & Woods, 2000, p.236 and ff; Bellamy & Child, 1993, p.157 and ff.

<sup>49</sup> Faull & Nikpay, 1999, p.110; Steiner & Woods, 2000, p. 238. This criterion has been considered less than the other criteria of Article 81 (3). The condition is not clearly outlined. "Consumer" is a term widely defined, covering both private and commercial buyers. The benefit of the consumer has not been quantified and "a fair share" has not received a precise definition. But, if the first condition of Article 81 (3) is satisfied and there exists a sufficiently competitive market, it is assumed that the consumers will receive a fair share of the benefits. See Faull & Nikpay, 1999, p. 111 and f; Korah, 2000, p. 69 and f.

<sup>50</sup> Faull & Nikpay, 1999, p. 113.

competition between the undertakings concerned, as well as on the market as a whole.<sup>51</sup>

Individual exemptions produce an administrative burden for the Commission because they are examined one by one. To ease this burden categories of agreements may be exempted from Article 81 (3). When excluding a generic type of agreements, the need for separate and time-consuming individual analyses is prevented.<sup>52</sup> **Block exemption** regulations are made on the basis of the experience the Commission has gained by taking individual decisions. If a block exemption can be applied on the particular agreement, the individual notification of the practice is not necessary and Article 81 (1) is automatically excluded.<sup>53</sup>

Block exemptions normally define the type of agreements that can fall under them. Selected agreements are, in general, concluded within areas that on the whole are economically beneficial.<sup>54</sup> The block exemptions traditionally provide a white list, providing permissible clauses and a black list, listing provisions that prevent the application of the exemption. Today, the landscape of block exemptions is changing. Not only have several new block exemptions been adopted, but also the structure has been changed in order to make this type of legislation simpler, more flexible and better targeted.

### **2.3.2 The system of administrative authorisation**

The competition rules shall be used as tools, when integrating the common market and improving efficiency within the EC and therefore they must be strictly enforced. Through Regulation 17/62<sup>55</sup>, the Commission has obtained various powers from the Council to enforce the competition rules and also the exclusive power to grant individual exemptions under Article 81 (3). This centralisation should lead to a uniform interpretation and application, despite of the different national attitudes.<sup>56</sup>

---

<sup>51</sup> Bellamy & Child, 1993, p.167.

<sup>52</sup> Craig & de Búrca, 1998, p. 919.

<sup>53</sup> Furse, 2000, p. 150.

<sup>54</sup> Steiner & Woods, 2000, p. 240.

<sup>55</sup> Council Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty, OJ 013, 21/02/1962 p. 02014-0211. OJ Spec. Ed. 1959-1962, p. 87.

<sup>56</sup> Korah, 2000, p. 155.

When the issue of granting an individual exemption under Article 81 (3) arose, the Commission had the power to declare the prohibition of Article 81 (1) inapplicable. But there had to be a procedure before the Commission. The procedure could be set in motion by a complaint, be initiated by the Commission on its own because of information obtained from newspapers etc., a parliamentary question or from a notification. If an undertaking wanted to exempt a particular agreement, which did not fall under a block exemption, it had to notify the agreement to the Commission. The system of notification was established in Articles 4 and 5 of Regulation 17. Exemptions were rarely possible for the period before the notification.

The Commission early tried to simplify the procedure of notification. Instead of proceeding to a formal decision of exemption, a comfort letter could be issued by the Commission. The letter was informal and stated that the Commission did not see a reason for intervening.<sup>57</sup> However, the system was also complicated because of the distribution of enforcement powers between the Commission and the Member States. Once an agreement was notified, the Member State had no longer jurisdiction and the agreement could no longer be challenged in national courts.<sup>58</sup>

The system of notification has exposed the Commission's lack of resources and inability to cope with the exclusive power under Article 81 (3). The Commission has not been able to deal with the number of cases brought before it. Notwithstanding the increased number of block exemptions and notices to clarify the scope of Article (1), the administrative burden on the Commission has been too heavy. The notification and authorisation system has become an obstacle to effective enforcement.<sup>59</sup>

---

<sup>57</sup> There existed also a formal letter of comfort, where the Commission held that it was prepared to give an exemption or a negative clearance, but did not find it necessary to pursue a formal procedure. Bellamy & Child, 1993, p. 147.

<sup>58</sup> Regulation 17/62, Article 9 (3).

<sup>59</sup> Speech made by Commissioner Mario Monti at the CBI Conference on Competition Law Reform, London, June 12, 2000, paragraph 2. There has been a discrepancy between the Commission's claim to exclusively determine the course of competition policy and its capacity to actually control the enforcement of that policy. Ullrich, Hanns; *Harmonisation within the European Union*, ECLR, Vol. 17, 1996, p. 180.



### 2.3.3 The administrative reform

The Commission is responsible for the development of Community competition policy. It has proposed a reform designed to adjust the enforcement of competition rules to the climate governing competition policy today. The transition is presented in a White Paper on Modernisation of the Rules Implementing Articles 81 and 82 of the EC Treaty. The main objective of the transition of competition policy is to strengthen the enforcement of EC competition rules throughout the European Union. Effective supervision and a simplified administrative system are in the interest of the consumers.

The proposed reform includes the abolishment of the compulsory notification system. This would mean that the Commission could focus its resources on certain and serious issues that present a real threat to competition.<sup>60</sup> The procedure of notification produces a curb on the undertaking's commercial strategy and represents a considerable cost. It imposes not only a heavy workload on the Commission, but also creates a hindrance for the undertakings concerned. In an open market economy undertakings should be encouraged to enter into pro-competitive transactions, which promote competition and consumer welfare.

The reform sets in motion a decentralised application of competition rules. Through an allocation of responsibilities, national competition authorities and courts shall be given jurisdiction to consider the compatibility of restrictive practice coming before them, using Article 81 as a uniform norm. The whole Article would thus become a directly applicable provision which individuals could invoke in their national courts. This would lead to the creation of a joint competition policy and a common approach based on Community law. The option is to have the authorities and courts of the different Member States applying several different sets of rules.<sup>61</sup>

---

<sup>60</sup> Ibidem; The Commission can concentrate on the detection on particular serious restrictions, such as price and quota cartels, market allocation etc. Press release IP/00/1064 – 27-09-2000; White Paper on Modernisation, Commission Program No. 99/027, paragraph 45.

<sup>61</sup> Wessling, Rein; *The Commission White Paper on Modernisation of E.C. Antitrust Law: Unspoken Consequences and Incomplete Treatment of Alternative Options*, ECLR, Vol. 20, 1999, p. 420-433. The article discusses for instance the relationship between EC and national antitrust laws, p. 425 and ff.

Empowering national competition authorities and courts to apply Article 81 (3) does imply a certain risk of inconsistent application. This risk can be reduced by appropriate measures. The Commission would remain the centre of the competition network and would thereby continue to play a leading role. At focus is an intensified ex-post investigation. The Commission would have to initiate its own investigations to examine whether an agreement infringes competition. This is more difficult to do when the agreement in question has been implemented in the market. The Commission's power of enquiry must therefore be increased.<sup>62</sup>

The EC would also continue to work with block exemption regulations and the Commission would have the sole power of proposing legislative texts. The Commission would also issue guidelines in addition to the regulations, to inform and explain the competition policy and facilitate the application of the rules. The legal certainty is as well promoted by the direct applicability of Article 81 (3).

Furthermore, the preservation of a voluntary notification system has been discussed.<sup>63</sup> Notifications would remain important in relation to the imposing of fines. Undertakings are immune to fines from the day of the notification, which is why indistinct agreements should be notified.<sup>64</sup> The Commission could continue to impose fines if it was clearly established that a particular behaviour constituted an infringement. However, the benefits in terms of legal certainty of a voluntary notification system are not vital. The system would reinstate the present system and would risk to undermine the principal objective of the reform, namely effective enforcement.<sup>65</sup>

The Commission has presented a proposal for a new Regulation amending the Regulation 17/62. The proposal is based on the White paper on Modernisation and the preoccupations expressed in the consultation process following it.<sup>66</sup> The proposal sets out the principle of direct applicability of Article 81 (3) and empowers the competition authorities of the Member States to fully apply the

---

<sup>62</sup> White Paper on Modernisation, Commission Program No. 99/027, paragraph 109 and ff.

<sup>63</sup> White Paper on Reform of Regulation 17. Summary of the observations. Competition DG Document – 29.02.2000, paragraph 4.3; Speech made by Commissioner Mario Monti, June 12, 2000, paragraph 5.

<sup>64</sup> Regulation 17, Article 15 (5).

<sup>65</sup> Speech by Commissioner Mario Monti, June 12, 2000, paragraph 5.

<sup>66</sup> The Commission's Proposal for a Council Regulation on the implementation of the rules of competition laid down in Articles 81 and 82 of the Treaty and amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87, 29.09.2000, COM 2000 582 final, p. 3.

entire Article 81. It further emphasises the necessity of co-operation between the national courts and authorities and the Commission, and stresses the requirement of a uniform application of the competition rules. The Commission will continue to play a leading role, having the right to request information from the Member States and the power to inspect undertakings when necessary. The Commission will continuously have the right to impose penalties. The discussed voluntary notification system has not been included in the Commission's proposal.

# 3 Horizontal co-operation

## 3.1 Introduction

Article 81 of the Treaty applies to horizontal agreements, such as cartels, joint ventures and R&D arrangements affecting principally interbrand competition. Horizontal agreements can be defined as agreements between undertakings operating on the same level in the production or distribution chain in the market.

There exists a wide range of collaborative business arrangements, often generically referred to as “joint ventures”. They can raise antitrust problems because they distort competitive motivation among independent undertakings by making them co-owners or co-operators of a common profit foundation.<sup>67</sup> Collaborative business arrangements may take many different forms and have numerous different functions. Some restrict competition, but in many areas collaboration has several advantages, which may override the anti-competitive effects. However, there is always a risk that the undertakings will co-ordinate in an anti-competitive fashion.

Horizontal co-operation creates several advantages for firms engaging in innovation. Research and development form an element of the innovation process. Agreements are accorded in order to facilitate the R&D practice. These agreements lower the risks and reduce the costs of R&D for the undertakings involved.

---

<sup>67</sup> Brodley, Joseph F.; *Joint Ventures and Antitrust Policy*, Harvard Law Review, Vol. 95, 1982, p. 1524. Joint ventures can involve the creation of a separate legal entity that conducts specified business activities. These joint ventures are usually identified as “equity joint ventures”. The parties concerned own and manage this separate business entity. Quite often, when referring to “joint venture”, the classification is that of a “contractual joint venture”, which in contrast consists of one or more contractual agreements that oblige the parties to provide a range of operations or services which are needed to attain the objectives of the relationship. Gutterman, Alan S.; *Innovation and Competition Policy: A Comparative Study of the Regulation of Patent Licensing and Collaborative Research & Development in the United States and the European Community*, Kluwer Law International Ltd, London, UK, 1997, p. 148. When “joint ventures” are discussed in this thesis, the reference is to the “contractual joint ventures”.

## 3.2 Horizontal restraints

Horizontal restraints are commonly alleged to have a negative consequence on competition because they entail actual or potential competitors joining together in different arrangements. These kinds of restraint deprive the market of independent bases concerned with courses of action, which are necessary in order to sustain competition. However, provided that the undertakings in question operate in a market where there are numerous competitors, these arrangements will rarely become a problem to competition authorities. In a more concentrated market it is more likely that the undertakings successfully can agree to restrict competition. The problem for the competent authority develops into distinguishing conduct that is based on an agreement, whether formal or informal, from conduct that is the result of each firm responding rationally to the actions of the other.<sup>68</sup>

Horizontal co-operation can, moreover, produce pro-competitive benefits. This is the case when the collaboration occurs one or more steps away from the market of the final product – i.e. R&D/innovation agreements.<sup>69</sup> Collaboration reduces the individual risk for the undertakings and becomes for that reason important in facilitating innovation as well as penetration into new markets. It also strengthens the ability of small and medium-sized firms (SMEs) to compete against larger competitors and in bigger markets.<sup>70</sup> Joint ventures may enhance international relations by opening up possibilities for companies to invest in foreign countries by means of participation of a local, private or public, group.<sup>71</sup>

Horizontal co-operation may result in various kinds of potential efficiency benefits. Production efficiency is attained when goods are produced by means of the most cost-effective combination of productive resources available under existing technology. Innovation efficiency is attained through invention, development and diffusion of new products and production processes that enhance social wealth.<sup>72</sup> The process of R&D, arranged in order to gain technical progress or innovation, is a very costly activity. When joining together, undertakings can avoid duplication

---

<sup>68</sup> Furse, 2000, p. 104.

<sup>69</sup> Gutterman, 1997, p. 80.

<sup>70</sup> Furse, 2000, p. 270.

<sup>71</sup> Bovis, Christopher; *Business Law in the European Union*, Sweet & Maxwell, London, UK, 1997, p. 11; Gualtieri, Giuseppina; *The Impact of Joint Ventures on Competition. The case of Petrochemical Industry in the EC*, Final Report, September 1989, (Document prepared for use within the Commission) p. 30.

<sup>72</sup> Brodely, Joseph F.; *The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress*, New York University Law Review, Vol. 62, 1987, p. 1025 and f.

of research efforts; they can take advantage of each other's experience and knowledge and they do not need to misuse their sparse research resources. Furthermore they lower their costs, share the risks taken and increase the product quality. Horizontal co-operation serves as a benefit for consumers in the sense of lower prices and investment in products that respond to a somewhat uncertain demand or involve uncertain technologies.<sup>73</sup>

The most common area of concern in regard to horizontal collaboration is the prospect that the agreement will reduce competition in the market.<sup>74</sup> Collaboration between two, or more, undertakings may exclude possibilities for other undertakings to co-operate with the firms forming the joint venture. When a horizontal co-operation agreement is concluded, there is also a risk that the collaboration within the co-operative area will "spill over" into business areas outside of the joint venture. Once the undertakings find co-operation fruitful, they might cease to compete aggressively in other areas.<sup>75</sup> When collaborate activities are undertaken, the pace of innovation may actually be decelerated due to the fact that the undertakings no longer have an interest in engaging in a patent race in order to discover the resolution to an identified problem.<sup>76</sup> Horizontal co-operation may furthermore create networks of joint ventures. This is the case when a single technology provider enters into several joint ventures with different partners and thus prevents the joint ventures from competing with each other.<sup>77</sup>

Different kinds of horizontal restraints produce different anti-competitive effects. In the case of merger, two independent undertakings are fully integrated into one, rising the market concentration. When forming a joint venture, the undertakings participating should be autonomous economic entities. An agreement, with two or more independent undertakings proceeding to the partial integration of their business operations, which are put under some sort of joint control in order to

---

<sup>73</sup> Gutterman, 1997, p. 187.

<sup>74</sup> If the joint venture leads to reduced competition in the market, the undertakings participating in the joint venture will be able to demand more than the competitive price. For a full examination of the competition in the market an evaluation of the ease with which firms that are already in the market can expand their production must be done. The ease with which firms not already in the market but possibly entering it must additionally be examined. The measurement of concentration is difficult, in particular in regard to certain collaborative arrangements, such as R&D. Gutterman, 1997, p. 190.

<sup>75</sup> Korah, 2000, p. 328.

<sup>76</sup> Gutterman, 1997, p. 192.

<sup>77</sup> Korah, 2000, p. 329.

achieve certain commercial goals, forms a joint venture.<sup>78</sup> However, a full function joint venture which is likely to lead to integration of the former business and which may provide full efficiencies is treated under the Merger Regulation.<sup>79</sup> Co-operative joint ventures generally fall under the scope of Article 81, whereas “concentrative” joint ventures should be considered under the Merger Regulation.<sup>80</sup>

### 3.3 Horizontal arrangements in EC competition law

Certain forms of horizontal agreements, such as price-fixing cartels, are classified as illegal in themselves, without regard to the pro- or anti-competitive effects they may produce. The offences that these arrangements cause are invariably destructive to competition. Within the list of prohibited conduct in Article 81 (1), the direct or indirect fixing of purchase or selling prices can be found. “Hard core” cartels fixing prices, establishing output restrictions or quotas, or sharing or dividing markets are the most harmful to competition.<sup>81</sup>

Other types of horizontal arrangements do not hold the assumption of restricting competition. Their effect on competition depends instead on the nature of the

---

<sup>78</sup> Faull & Nikpay, 1999, p. 348. The Commission defines “joint venture” as “undertakings controlled by two or more other undertakings”. Commission Notice on the distinction between concentrative and cooperative joint ventures, 31 December 1994, (1994) OJ C385, paragraph 2. The joint venture defined is that of an “equity joint venture”.

<sup>79</sup> Joint ventures that cause a structural change in the market by creating a new autonomous entity are treated under the Merger Regulation. Grikscheit, Alyssa A.; *Are we compatible?: Current European Community Law on the Compatibility of Joint Ventures with the Common Market and Possibilities for Future Development*, Michigan Law Review, Vol. 92, 1994, p. 970.

<sup>80</sup> Council Regulation (EEC) 4064/89 of the 21 December 1989 on the control of concentration between undertakings, (1989) OJ L385, (1990) OJ L257 with amendments introduced by Council Regulation (EC) 1310/97 of 30 June 1997, (1997) OJ L180/1. Most of the joint ventures subject to a formal decision have been adopted under the Merger Regulations, while most of the joint ventures under negotiation have been treated under Article 81. Korah, 2000, p. 323. The distinction between concentrative and co-operative joint ventures is significant. These two types of joint ventures are treated very differently in both substantive analysis and procedure. For a study of these concepts, see Ellison, Julian and Kling, Edward; *Joint Ventures in Europe* Second Edition, Butterworths, London, UK, 1997, p. 5 and ff. See also Faull & Nikpay, 1999, p. 349 and ff.; Grikscheit, Alyssa A.; *Are we compatible?: Current European Community Law on the Compatibility of Joint Ventures with the Common Market and Possibilities for Future Development*, Michigan Law Review, Vol. 92, 1994, p. 979 and ff.

<sup>81</sup> Recommendation of the Council of concerning Effective Action against Hard Core Cartels, March 1998, C(98)35/Final (OECD).

agreement and the relevant market conditions.<sup>82</sup> These agreements are structured as joint ventures or sometimes as looser co-operation agreements. Agreements can be concluded in various stages of industrial activity, such as R&D, production, specialisation, distribution or purchasing.<sup>83</sup> Agreements do, however, rarely fall precisely under one of these categories. They often involve elements of co-operation at more than one level. In general, an agreement that primarily involves one area of co-operation will be assessed as such. Provisions related to other areas of co-operation will be considered in the light of their importance to the main co-operation.<sup>84</sup>

The general approach of the Commission towards joint ventures has been to concentrate on finding the restrictive conduct, which has importance for the result in the relevant market. The restrictions would usually constitute an infringement of Article 81 (1), but could be granted an exemption under Article 81 (3). A realistic analysis of the market has often been left out. Furthermore, as the Commission regarded actual and potential competitors when deciding if an agreement was restrictive on competition, a potential competitor could be anyone sufficiently interested in a project to enter a joint venture. This definition of potential competitor enabled the Commission to attach conditions and obligations to a granted exemption.<sup>85</sup>

The Commission has, however, attempted to adopt overall policy objectives with respect to the need of innovation.<sup>86</sup> In large, the Commission has presumed that restrictions integrated in a pro-competitive agreement, which would not have occurred in the absence of these restrictions, will not be regarded as restrictive on competition. The Commission launched a more realistic approach towards potential competition and the anti-competitive effects that horizontal restraints might bring in the Thirteenth Report on Competition Policy (1983). When deciding whether undertakings were potential competitors, the Commission said that it would consider each party's capacity of financing the operation

---

<sup>82</sup> Faull & Nikpay, 1999, p. 334.

<sup>83</sup> For a survey of common horizontal agreements, see Bellamy & Child, 1993, p. 173 and ff.

<sup>84</sup> Faull & Nikpay, 1999, p. 347.

<sup>85</sup> Korah, 2000, p. 325 and f.; Gutterman, 1997, p. 343; See also Commission decision 77/543 *De Laval/Stork*, (1977) OJ L215/11; (1977) 2 CMLR D69.

<sup>86</sup> The Commission seeks to balance reinforcement of competitiveness of European industry against the maintenance of a workable competition. It must be ensured that the technical progress resulting from research does not serve to produce monopoly profits. Thirteenth Report on Competition Policy (1983), point 42; Fifteenth Report on Competition Policy (1985), point 284.



independently, the productive ability of the parties, their knowledge of the process technology, their ability to bear the risk etc.<sup>87</sup> The fundamental issue is to determine whether the undertakings have, or would have, financial, technological and commercial resources to individually be able to enter the market of the joint venture, within a reasonable period of time.

Despite of this declared change of attitude, the Commission continued, in its decisions, to find potential competitors to be present on the basis of an apparently unsatisfactory examination. However, with time the Commission has changed its standpoint and has adopted a more economic approach towards potential competition.<sup>88</sup> The breakthrough came with the ruling of the CFI in *European Night Services*.<sup>89</sup> The CFI annulled the Commission's decision on exemption of an expensive and risky joint venture between four train operators in different Member States. The Commission found that the joint venture infringed Article 81 (1), but had no adequate reasons for this. The Commission had failed to state the market shares of the undertakings and their competitors, it had not established any appreciable effects on the market etc. The CFI emphasised the need of a realistic analysis before reaching the conclusion that existing and potential competition was restricted. It is of importance that undertakings have the possibility to co-operate in order to finance large risky investments.

When using an economic approach to examine co-operative arrangements under Article 81, the Commission balances the benefits of the arrangement against its

---

<sup>87</sup> Thirteenth Report on Competition Policy (1983), points 50 and ff. Some authors have criticised the Commission, claiming that this change of attitude it has taken a broad view when examining whether the parties of the joint venture were at least potential competitors and in this manner has managed to bring the joint venture under Article 81 (1). Bellamy & Child, 1993, p. 234 and ff.

<sup>88</sup> In Commission Decision 88/469 *Iveco/Ford*, (1988) OJ L230/39; (1989) 4 CMLR 40, the fact that the undertakings adopted non-compete obligations was assumed to indicate that they were at least potential competitors. However, the Commission did not find the parties in *Optical Fibres* to be potential competitors. The parties of the joint ventures contributed complementary technology to each other and could not have produced the different products without aid from the other. When not more than one of the parties can enter the relevant market, the joint venture does not have an inherent anti-competitive effect. *Optical Fibres*, OJ 1986 L236/30, paragraph 46. See also Thirteenth Report on Competition Policy (1983). For a full comment on the *Optical Fibres* case, see Korah, Valentine; *Critical Comments on the Commission's Recent Decisions Exempting Joint Ventures to Exploit Research that Needs Further Development*, ELR, Vol. 12, 1987, p.22 and ff.; The Commission's analysis has indeed become more economic when approaching the question of potential competition. Commission Decision 90/410 *Elopak/Metal Box-Odin*, (1990) OJ L209/15.

<sup>89</sup> T-374, 375, 384 and 388/94 *European Night Services and others v Commission* (1998) ECR II-3141.

anti-competitive effects. The potential restrictions on the relevant market and the restrictions that the co-operation agreement might place upon trade relations within the EC are of special importance.<sup>90</sup> However, the administrative structure and the workload laid upon the Commission have prevented a swift examination of horizontal co-operative agreements. If the transition proposed in the White Paper on Modernisation is fully implemented, the troublesome operation of notification would disappear and the power to grant exemptions would become a matter for the Member States' courts and authorities. Yet, the analysis of the horizontal co-operation agreement's effect on competition would have to be a more realistic and fact-based economic evaluation in regard to potential competition.

## 3.4 R&D agreements

### 3.4.1 Definition

In general, undertakings are dedicated to maximising the investment return on cash and other assets contributed to it. Undertakings also engage in business activities that are more directly associated with the actual use of their resources. In certain industries, such as pharmaceutical, computing and electronics, an undertaking's level of innovation has become a significant competitive feature.<sup>91</sup> Innovation can be defined as "the search for, and the discovery, development, improvement, adoption and commercialization of, new progresses, new products, and new organizational structures and procedures."<sup>92</sup> The search for innovation is enormously complex and costly and contains a great deal of uncertainty, risk taking, experimenting, analysing and testing. A great amount of co-operation is therefore required.

There are several stages of innovation, including product conceptualisation, technical feasibility, product development and commercial validation and pre-production preparations. These stages can generally be referred to as research and development.<sup>93</sup>

---

<sup>90</sup> Gutterman, 1997, p. 80; Elmstedt, Johanna; *Faktisk eller potentiell konkurrens vid bedömning av joint ventures*, Konkurrens, No. 4, 1999, p. 15.

<sup>91</sup> Faull & Nikpay, 1999, p. 372.

<sup>92</sup> Gutterman, 1997, p. 97.

<sup>93</sup> *Ibidem*, p. 97.

During the phase of product conceptualisation, an effort is made to verify that a concept for a potential new product is feasible. Furthermore, a definition of the key performance specifications and objectives of the product is made. An effort is also made in order to identify the major potential barriers to development, manufacturing and marketing of the new product. Technical feasibility work is designed to validate that it is technically and economically viable to continue the development of the product concept into a commercial product. Completion of numerous experiments and engineering tests are required and at the end of this phase there should be sufficient information available to prepare for the next step of the process. A cost and time schedule shall also be set up. In the product development stage, engineers and designers perform the essential work on material, process and design, in order to test and prove that the product is commercially producible. The final stage in the R&D procedure is the commercial validation and preparation for production. The product has been developed, and the idea is now to complete development of the manufacturing techniques and to demonstrate the validity of the new product in the open market. There is often a preproduction prototype or process prepared at this stage, which is to be tested by potential users.<sup>94</sup>

The stages of innovation shall be closely linked to the undertaking's overall business planning process. This is generally verified by the undertaking's approach to each of the crucial functional areas involved in identifying, developing and commercialising new products and services. The undertaking must evaluate its resources in each of these areas. It is vital to be able to determinate the competitive advantages and characteristic competencies of the firm. In doing so a decision, concerning areas in which collaborative relationships would be most beneficial, can be realised.<sup>95</sup>

As a rule, undertakings will be implicated in several different R&D projects simultaneously, each of which will set up its own distinct collection of risks and landmarks. R&D agreements are structured in many different forms. An undertaking's R&D activities should emphasise the new products that are anticipated to be of importance in order to respond to the competitive challenges and demands of the market. R&D can be set up under an agreement stating that one party shall finance the research work of the other party in return for the rights to use the resultant technology in numerous applications. If the parties have

---

<sup>94</sup> Gutterman, 1997, p. 98.

congruent technical skills and assets they may develop a program, sharing scientific and engineering personnel. In some situations, the R&D agreement is one of several agreements in a much more complex set of economic relationships between the parties. R&D co-operation often ends up as the first step towards a broader collaboration.<sup>96</sup>

When entering an R&D agreement, the parties must consider several issues, such as the scope and content of the research program set up, the budget for conducting this program, the contributions of technology, services and materials which might be made by the parties in order to properly complete the program, arrangements with respect to further work relating to the commercialisation of the technologies and products created during the research program etc.<sup>97</sup>

### **3.4.2 Political objectives**

The significant Community objectives are to integrate the European market, guarantee current competition in order to ensure consumers' benefits as a result of the market and maintain equality in the market. In order to preserve the fairness in the market, SMEs need some extra support. SMEs are dynamic and can help to create job opportunities and they will aid to control the larger undertakings in their attempts to manipulate and take over marketplaces.<sup>98</sup>

When creating the European Communities, the priority was initially placed on creating a common market for natural resource-based industries such as coal, steel and agriculture. Europe became a strong contributor in these areas. Yet, the foremost reasons for economic development and social wealth remain innovation and technical progress. R&D agreements, concluded in order to reach innovation and technical progress, do not need to be free of any harmful effects on competition to be found beneficial. Nevertheless, a workable and sufficient competition must be maintained.

The Europeans seem to be somewhat incapable of competing with the Americans and Japanese/Asians in high technology industries. The pace of innovation and

---

<sup>95</sup> Ibidem, p. 100.

<sup>96</sup> Ibidem, p. 112 and p. 168.

<sup>97</sup> Ibidem, p. 169.

<sup>98</sup> The European policy makers have treated SMEs in a favourable way. Commission Recommendation concerning the definition of small and medium-sized enterprises (1996) OJ L107/4.

technical alteration is very rapid and it is of uttermost importance that there is not a vast technology difference between the European market and that of U.S. and Asia. European undertakings are, in some areas, less productive in R&D than their competitors. They have been investing less and they have been under a quite restrictive regulation, which then again is changing since the Commission seems to have realised that joint ventures for further development of R&D require a favourable anti-trust treatment.

Within the period between 1973 and 1983, two million jobs were lost in the Common Market while 16 million new jobs were created in the U.S. and almost five million in Japan.<sup>99</sup> European firms have in part been unable to follow in the new high technology based industries. They have lost ground in the technologically most progressive industries, in the markets for hardware, software and services.<sup>100</sup> They have been particularly weak in comparison with American firms. Not enough of the top software firms have been identified as European. One reason for this has been that solid banks are exceedingly suspicious and venture capitalists have no one to sell their investments to.<sup>101</sup> It is, however, important to underline that innovation is not, in itself, a “quick fix” for unemployment, though product innovation may increase employment through increased demand for products representing the new technologies.<sup>102</sup>

European industries’ competitiveness can be further discussed. A major alternation has taken place during the last decade, increasing European competitiveness. If European industry had been largely inferior in comparison with U.S. and Asia, leading undertakings operating in these markets would most certainly have flattened it. European undertakings have created economic success in certain fields, such as the car industry. Nevertheless, European competitiveness needs to be enhanced.

In the Fourteenth Report on Competition Policy (1984) the Commission stated: “Competition has never been a matter of only quantities and prices for existing goods and services. Today, it relies increasingly on innovation, that is: the creation

---

<sup>99</sup> Korah, Valentine; *Critical Comment on the Commission’s Recent Decisions Exempting Joint Ventures to Exploit Research that Needs Further Development*, ELR, Vol. 12, 1987, p. 18 and f.

<sup>100</sup> Fagerberg, Jan; *The Need for Innovation-Based Growth in Europe*, Challenge, Vol. 42, 1999, p. 72.

<sup>101</sup> Temple Lang, John; *European Community Antitrust Law: Innovation markets and High Technology Industries*, Fordham International Law Journal, Vol. 20, 1997, p. 722.

of new or improved products on the market stimulates competition within the common market, and helps to strengthen the ability of European industry to compete internationally. In both contexts, research and development (R&D) plays an essential role. In fact, R&D promotes and maintains dynamic competition, characterized by initiation and imitation and in doing so assures economic growth.”<sup>103</sup>

In order to enhance European competitiveness, international co-operation might serve a purpose. European firms can win ground in a foreign market and may gather knowledge regarding technological processes etc. However, research reveals that the greater the distance between two territories, the lower the degree of knowledge flowing between the two firms. The flow of knowledge is greater within countries than between them, suggesting that the national element in innovation systems remains strong.<sup>104</sup>

A more rapid pace of innovation, which is vital for European growth and competitiveness in general, might further intensify the regional disparities within the European Union. Economic and social cohesion is one of the fundamental objectives of the European Union. It has, nevertheless, clearly been indicated that most low-income regions have failed to exploit the potential for technology diffusion. There exists hence a need to improve the capacity of such regions to absorb new technologies. Comparable issues arise in relation to the Eastern European countries that are expected to join the European Union within the near future.<sup>105</sup>

In order to increase the European competitiveness and change the disturbing trend towards slow growth, increasing inequality and unemployment, a modification of policies must take place. There must be an alteration from the traditional emphasis on process innovations and reduction of labour costs to a stronger focus on product innovation and intensification in quality. There are great opportunities for raising quality as the central competitive advantage of the European Union through a strategy founded on higher product innovation, upgrading of skills and increased R&D efforts. Overall, a much greater emphasis

---

<sup>102</sup> Fagerberg, 1999, p. 75.

<sup>103</sup> Fourteenth Report on Competition Policy (1984), point 28.

<sup>104</sup> Fagerberg, 1999, p. 73 and f.

<sup>105</sup> *Ibidem*, p. 74.

must be placed on reproducing more rapid, pervasive and effective innovation in technologies, organisations and institutions.<sup>106</sup>

### 3.4.3 Benefits

Innovation is of profound importance as it is a key contributory factor to economic growth and social wealth. The outcome of successful R&D activity can be interpreted as a piece of new information or knowledge. However, the information is expensive to produce, cheap to reproduce and difficult to profit from. Why induce in an R&D project? Undertakings will hardly find motivation to initiate research activities when they can benefit from spillovers, whereby the research is done by one firm but can be used by other firms even though they have not received permission to do so.<sup>107</sup>

Problems of opportunism and asymmetric information will also reduce the undertakings' incentives to commence an innovative process. Furthermore, in highly concentrated industries, firms enjoy considerable profits and will be motivated to carry out R&D. The more competitive the relevant market becomes, the smaller the amount of profit per firm and the weaker the motivation for R&D. Thus, in some fields there will arise a duplication problem and in other fields the requirement for incentive to carry out R&D will be enormous.<sup>108</sup>

There are two major benefits with co-operative R&D agreements. By allowing firms to share their research output, co-operative R&D agreements increase the efficiency of R&D efforts and eliminate wasteful duplication. A co-operative R&D agreement also serves as mechanism to internalize the externalities created by spillover. Undertakings can continue to share information when overcoming the free-rider problem. These benefits provide firms with greater incentive to

---

<sup>106</sup> Ibidem, p.75 and ff.

<sup>107</sup> Katz, Michael L.; *An analysis of cooperative research and development*, Rand Journal of Economics, Vol. 17, 1986, p. 527; Gualtieri, 1989, p. 53. One way of protecting the information/innovation is to grant the undertaking a patent. However, the granting of a patent cannot always prevent spillovers of research results to rival competitors, as the imitation through reverse engineering is possible. Furthermore, knowledge once produced has the characteristics of a "public good" – the use of information by one party does not exclude synchronized use by others at no further cost. Grossman, Gene M. and Shapprio, Carl; *Research Joint Ventures: An Antitrust Analysis*, Journal of Law, Economics and Organization, Vol. 2, 1986, p. 316 and f.

<sup>108</sup> Poyago-Theotoky, Joanna A.; *Competition, Cooperation, Research and Development. The Economics of Research Joint Ventures*, Macmillan Press LTD, London, UK, 1997, p. 1 and f; Katz, 1986, p. 527 and f.

undertake R&D. R&D joint ventures are especially attractive as means of sharing risks across firms and as a way of allowing participating firms to diversify their research portfolios.<sup>109</sup>

It is more likely that two firms of the same size co-operate. Large firms have less incentive to form an R&D joint venture with smaller firms in order to increase market power. Furthermore it appears that the technology involved in the two firms collaborating is similar, yet product market competition between the firms are to a certain extent complementary.<sup>110</sup>

### **3.4.4 Effects on competition**

#### **3.4.4.1 Restrictions**

R&D collaborations, regardless of the form in which they are carried out, generally include a variety of restrictions and obligations that will apply to the activities of the parties, with respect to the subject matter of the R&D program. In average, the restrictions imposed on the parties affect their ability to freely compete in the business field in which the co-operation takes place. The parties may be restricted in their ability to engage in independent research activities outside of the collaboration. They may further be restricted in the manner in which they are allowed to use the results of the joint research work.<sup>111</sup>

The analysis of restrictions on competition in the context of R&D joint ventures is similar, but since R&D is generally materially removed from the market place for the products of the development work, the potential for an appreciable effect on competition will probably be much less than in other types of joint ventures which include activities closer to the market. However, a co-operative R&D arrangement might serve as a possibility for the undertakings involved to discuss means of conspiring in the product market. The R&D joint venture may diminish

---

<sup>109</sup> Rölller, Lars-Hendrik, Tombak, Mihkel M. and Siebert, Ralph; *Why Firms Form Research Joint Ventures: Theory and Evidence*, CEPR Discussion Paper No. 1654, May 1997, p. 1; Katz, 1986, p. 528.

<sup>110</sup> There is no evidence that the complementary aspect exists for all co-operating partners. In addition, this feature seems more related to vertical joint ventures than to horizontal. Rölller, Tombak & Siebert, 1997, p.4 and p. 21 and f.

<sup>111</sup> Gutterman, 1997, p. 389.



product-market competition and can result in the founding of an increased monopoly power in the market.<sup>112</sup>

Collusive behaviour on the part of the joint venture participants can certainly generate in an inefficient equilibrium result. If the product market becomes concentrated because of joint venture parties scheming together, there would be inefficiency in the R&D market. The pace of technical innovation would be slower and the utilisation of the new technological know-how would be limited.<sup>113</sup> When vigorous competition in R&D is replaced with co-ordinated R&D, innovation is less intense and less likely to have early success.<sup>114</sup>

However, restraints on competition may be necessary to reduce the possibilities for opportunistic behaviour and free-riding, conduct that can undermine the R&D joint venture. Necessary, or ancillary, restraints will be accepted based on the reason that these restraints are indispensable in order to conclude and realise the innovation developed in the R&D agreement. When examining horizontal R&D agreements, the restriction that is placed on competition must be measured against the economic progress and the competitiveness that the R&D results bring about.

#### **3.4.4.2 Application of Article 81**

The assessment of R&D joint ventures in European competition law is made through the application of Article 81. When applying competition law to R&D joint ventures, significant losses in dynamic efficiency may be caused, because traditional competition law is aimed at preventing harmful concentration of static market power.<sup>115</sup> However, lately several steps have been taken towards a clarification of how co-operative R&D agreements shall be considered. A somewhat new policy, promoting technical co-operation, has been launched by the Commission in order to improve the competitiveness and cohesion of the EC.<sup>116</sup> The EC has furthermore adopted a new block exemption regulation relating to horizontal R&D agreements.

---

<sup>112</sup> Katz, 1986, p. 541.

<sup>113</sup> Gualtieri, 1989, p. 57 and f.

<sup>114</sup> Ordovery, Janusz A. and Willig, Robert D.; *Antitrust for High-Technology Industries: Assessing Research Joint Ventures and Mergers*, The Journal of Law and Economics, Vol. 28, 1985, p. 317.

<sup>115</sup> Ordovery & Willig, 1985, p. 312.

<sup>116</sup> Katsoulacos, Yannis and Ulph, David; *Technology Policy: A Selective review with Emphasis on European Policy and the Role of R&D*; Poyago-Theotoky, 1997, p. 13. The

The market for new ideas and information is quite unlikely to function efficiently in the absence of legislative intervention. Guiding principles need to be established in order to separate legal co-operative agreements from illegal arrangements. The guidelines shall promote dynamic efficiency through innovation and shall prevent the tendencies of a market power so strong that it delays technical progress. The ruling principles should be based on an economic analysis of the R&D joint venture. All restraints and requirements imposed by an R&D agreement should be analysed by using a realistic, economic approach generating from the “rule of reason” application.<sup>117</sup>

An appreciable restriction of competition, in regard to the application of Article 81, is more likely to arise when the agreement is concluded between actual or potential competitors, i.e. horizontal agreements. The focus of the European competition rules is on the effect that the co-operative agreement may have on third parties. Will the R&D joint venture exclude others from the market?

When determining whether the agreement might be restrictive of competition there are several features to consider. Thus, the smaller the participating undertakings, both as regards to turnover and market share, the less likely there is to be an appreciable restriction of competition within the meaning of Article 81 (1). If the co-operative project is well defined and limited in both time and scope, the co-operation is less probable to restrict competition. Furthermore, if a research project is so difficult, expensive and risky that not more than one of the participants could carry it out individually, the fact that it is carried out mutually will not in itself be a restriction of competition. When examining this attribute, the technical and financial resources of the undertakings must be evaluated in order to decide whether the undertakings could in fact carry out the R&D project on its

---

European approach has been influenced by the development in the U.S.. R&D joint ventures have not really played a central role in the development of new products and processes in U.S. firms until lately. In U.S. the Sherman Act is the base for antitrust legislation. In 1984 the National Cooperative Research Act was formed, giving the U.S. Department of Justice (DOJ) or the Federal Trade Commission (FTC) the right to certify R&D joint ventures. The objective of the Act was to encourage business regarding the likely legality of many joint venture efforts and to identify circumstances in which R&D agreements can be approved. Grossman & Shapiro, 1986, p. 316 and 319; White, Eric L.; *Research and Development Joint Ventures Under EEC Competition Law*, IIC, Vol. 16, 1985, p. 668. Unfortunately the National Cooperative Research Act did not attain the breakthrough hoped for. However, the U.S. has continued to develop legislation in this area and the latest developed guidelines, Antitrust Guidelines for Collaborations Among Competitors, April 2000 seem to serve their purpose. The American legislation has presumably affected the Commission when adopting the new block exemption regulation in relation to horizontal R&D agreements.

<sup>117</sup> Ordovery & Willig, 1985, p. 312; Grossman & Shapiro, 1986, p. 317.

own. The risks of the project, due to the complex nature of the technology involved and due to the amount of the investment required, have to be examined.<sup>118</sup>

There still remain a few fields of uncertainty and confusion when examining co-operative R&D agreements under Article 81 (1). Several undertakings find it difficult to assess the potential effect of such an agreement on the market, because there may not yet be an actual product and furthermore, there is no guarantee as to whether the R&D will be successful.<sup>119</sup> The major difficulty when examining R&D agreements is, nevertheless, to define the parties' market positions. The market definition in R&D cases can be extremely problematical.

If an R&D agreement is found to restrict competition according to Article 81 (1), there is still the possibility that the agreement fulfils the criteria laid down in the block exemption regulation regarding R&D agreements. And if the agreement falls outside the block exemption it is still possible to exempt it according to Article 81 (3). The analysis under Article 81 (3) will consider the potential benefits and the potential negative effects on competition. The type and purposes of the joint venture will strongly affect the decision on an individual exemption.

The Commission has striven to emphasise that it generally takes a liberal position towards R&D co-operation. The Commission has also actively encouraged co-operation over the most recent years, promoting R&D joint ventures as effective solutions to address threats to the domestic high-technology industries.<sup>120</sup>

#### **3.4.4.3 Relevant markets**

European Community law has traditionally defined the relevant market by using two factors; products and geographic area. A product market consists of the totality of products which, with respect to their characteristics, are particularly suitable for satisfying constant needs and are only to a limited extent interchangeable with other products in terms of price, usage and consumer

---

<sup>118</sup> White, 1985, p. 671 and ff.

<sup>119</sup> Faull & Nikpay, 1999, p. 373.

<sup>120</sup> Ibidem, p. 383. The Commission has supported various research programs, such as ESPRIT (European Strategic Programme for R&D in Information Technologies), RACE (Research in Advanced Telecommunication Technology for Europe Programme), BRITE (Basic Research in Industrial Technology for Europe Programme) and EUREKA (European Research Coordination Agency). Gutterman, 1997, p. 389.

preference.<sup>121</sup> The relevant geographic market is defined by the area in which the dominant firm “may be able to engage in abuses which hinder effective competition.”<sup>122</sup> These two definitions can be further specified, but they do have a very broad definition and there has not been any success in the attempts to apply economic concepts in relation to the definition of the relevant market.<sup>123</sup> The Commission has, however, released a Notice on the definition of relevant market, which has clarified and specified the random characteristics of the past analysis.

It can be argued that a collaborative relationship at the R&D stage should not be evaluated by reference to the Commission’s version of “relevant market”. An R&D agreement is better evaluated by reference to the market for further research and development rather than the present product market. The commonly used definition of market share might not be a good indicator of the individual or collective market power in a market characterised by rapid innovation. Existing market shares may alter rapidly among competitors as they develop new and improved versions of existing products or significantly reduce costs and therefore prices. Furthermore, if innovation is not limited to the firms existing, new can enter and render even collective high market shares insignificant in a relatively short period of time. The traditional use of market shares shall be applied with caution, because an undertaking with low, or even non-existent, market shares may be likely to become successful innovator and might therefore play an important role in the future.<sup>124</sup>

R&D joint ventures operate in an upstream market, the market for information, not in the downstream market for goods and services that are produced using the technologies developed by the R&D joint venture.<sup>125</sup> Innovation is dynamic and evolutionary. The product subsisting on the future market might simply be a more advanced version of the product existing today. Innovation may also be aimed at improving the process for producing an existing product. Moreover, innovation

---

<sup>121</sup> Case 85/76 *Hoffmann-La Roche & Co. AG v Commission* (1979) ECR 461, p. 516; Case 31/80 *NV L’Oréal and SA L’Oréal v PVBA De Nieuwe AMCK* (1980) ECR 3775, p. 3793.

<sup>122</sup> Case 27/76 *United Brands Company and United Brands Continentaal B.V. v Commission* (1978) ECR 207, p. 274.

<sup>123</sup> Van den Bergh, Roger; *Modern Industrial Organisation versus Old-fashioned European Competition Law*, ECLR, Vol. 17, 1996, p. 82.

<sup>124</sup> Hay, George A.; *Innovations in Antitrust Enforcement*, *Antitrust Law Journal*, 1995, p. 4 and f. The article has been downloaded from Lexis-Nexis. The Internet version of the article stretches over 7 pages (1-7). This is not identical in the text version, where the Article starts at page 7. I will refer to the Internet version.

may also set sights on developing a product that does not exist today.<sup>126</sup> To be able to analyse the future state of the product market it is necessary to analyse the current state of R&D competition that could influence that market, as well as the range of current products expected to maintain competitive significance.<sup>127</sup>

The distinction between the upstream research market and the downstream product market is of importance, as the characteristics of these markets - barriers to entry, market shares, appreciation of competition - vary significantly. When analysing the R&D joint venture's effect on product market competition, the interaction between the research and the product market must be evaluated. These interactions make the analysis of co-operative R&D agreements challenging. It must be taken into consideration that the only undertaking capable of entering the research may be one with substantial power in the product market. Moreover, two undertakings forming an R&D joint venture might form it not only to lower research expenses, but also in order to limit their ex post competition.<sup>128</sup>

U.S. antitrust authorities have taken an approach towards innovation markets that can be described as a claim that firms compete in a separate market to make new products or provide new services.<sup>129</sup> The option would be to worry about the number of markets in which innovation can be used as a competitive weapon. To correctly analyse the competitive issues in those markets may require a more high-technological background than possessed by the ordinary antitrust individual.<sup>130</sup> The innovation market would be a market where undertakings develop new products, improve existing products etc. The market would be separate and identifiable for the antitrust authorities. An innovation market consists of the research and development directed to particularly new or improved goods or processes and its close substitutes.<sup>131</sup>

In the 1995 Intellectual Property Licensing Guidelines, American antitrust authorities set up the criteria they use to define an innovation market. The

---

<sup>125</sup> Grossman & Shapiro, 1986, p. 319.

<sup>126</sup> Hay, 1995, p. 5 and f.

<sup>127</sup> Ordoover & Willig, 1985, p. 312.

<sup>128</sup> Grossman & Shapiro, 1986, p. 320.

<sup>129</sup> Landman, Lawrence B.; *Innovation Markets in Europe*, ECLR, Vol. 19, 1998, p. 21.

<sup>130</sup> Hay, 1995, p. 4.

<sup>131</sup> U.S. Department of Justice and Federal Trade Commission, 6 April 1996, Antitrust Guidelines for the Licensing of Intellectual Property, Article 3.2.3; OECD Competition Policy Roundtables OECD/GD (97) 44, No. 9, Paris, 1997; *Application of Competition Policy to High Technology Markets*, p. 8 and 11.

Guidelines were based on the market definition policies of agencies' 1992 Horizontal Merger Guidelines. These Guidelines say that an undertaking has market power if it can raise the price of goods without causing a significant number of customers to buy other goods instead. Correspondingly, the Intellectual Property Guidelines say that an undertaking has market power in an innovation market if it can lower its R&D expenses without causing other undertakings to simultaneously increase their R&D investments. Several other data must additionally be considered.<sup>132</sup>

The Commission has not developed a method in order to find a separate R&D market and will thus not directly apply competition policy to "innovation markets". The concept of market power will, however, play an important role in competition policy. The Commission will indeed consider the dynamic aspects of transactions, as a part of the market it is analysing. The Commission attempts to promote competition to innovate. It has adopted an overall strategy to encourage innovation in Europe.<sup>133</sup>

Judging competition in reference to innovation markets is rather complicated, because it is very speculative to try to define markets for invention, research and innovation. An option to the identification of innovation markets is to try to identify the future market for the product, which would then be considered as the relevant market for antitrust purposes.<sup>134</sup> The identification of markets containing future generations of products can be based on observable R&D capacities and incentives, and on the existing assets of the firm. It is however hard to identify a future market, because innovation may considerably transform the competitive landscape of the products.<sup>135</sup>

---

<sup>132</sup> U.S. Department of Justice and Federal Trade Commission, 2 April 1992, Horizontal Merger Guidelines, revised 2 April 1997; U.S. Department of Justice and Federal Trade Commission, 6 April 1996, Antitrust Guidelines for the Licensing of Intellectual Property, Article 3.2.3; Landman, 1998, p. 22.

<sup>133</sup> Landman, 1998, p. 22 and p. 31; OECD; *Application of Competition Policy to High Technology Markets*, p. 90. See also Case IV/M555 *Glaxo/Wellcome*, (1995) OJ L309/1, where the Commission did touch upon the concept of innovation markets.

<sup>134</sup> Gutterman, 1997, p. 190; Hay, 1995, p. 6.

<sup>135</sup> OECD; *Application of Competition Policy to High Technology Markets*, p. 8, 13 and f.

# 4 The Block Exemption on R&D agreements

## 4.1 Introduction

European Competition rules are going through a phase of transition and so are the rules governing one of the key areas of competition policy; co-operative R&D agreements. The Commission has launched a new and modernized block exemption on R&D agreements, which changes the principles laid down by the previous block exemption on the subject. The rules on the subject of R&D agreements have changed substantially and the new block exemption represents an updated vision as regards to the function of block exemptions.

The new block exemption is accompanied by guidelines. The guidelines are more generally written and cover not only R&D agreements, but also agreements concerning production, purchasing, commercialisation etc. The purpose of the guidelines is to set out principles for the assessment of horizontal co-operation agreements under Article 81 of the Treaty.

## 4.2 Block exemption 418/85<sup>136</sup>

Despite the Commission's somewhat increased flexibility when using Article 81 as regards to the inherent anti-competitive effect of co-operative joint ventures, it has been fairly reluctant of exempting joint ventures by regulations. The Commission had the legislative competence to grant a block exemption on R&D agreements already in 1971 through Council Regulation 2821/71, but did not proceed.<sup>137</sup> The Commission's decision to finally grant a block exemption for R&D joint ventures was therefore welcomed. The R&D block exemption Regulation supported the Commission's policy on integration of the numerous national markets, particularly by assisting SMEs to compete with larger firms. The Regulation also played a crucial role in maintaining and enhancing the European industries' competitiveness

---

<sup>136</sup> Commission Regulation No 418/85 of 19 December 1984 on the application of Article 85 (3) of the Treaty to categories of research and development agreements, (1985) OJ L53/5. The recitals and articles referred to in this chapter can be found in this Regulation.

vis-à-vis their world-wide competitors, especially those in the high technology markets.<sup>138</sup>

The block exemption was composed of recitals and articles. The recitals formed an important part of the Regulation, expressing the deliberate acts of the Commission. The most important of them, recital 2, stated that it was not necessary to exempt certain agreements that did not continue into joint exploitation in the field of R&D, since they generally were not caught by Article 81 (1). Recital 3 proposed that when an agreement extends to joint exploitation, it is more likely to generate anti-competitive effects.<sup>139</sup> The Regulation covered principally all sectors of economy. Recital 14 additionally provided that agreements covered by the Regulation also might benefit from other block exemption Regulations. The fact that the Regulation did not prevent the use of other Regulations became a quite controversial issue.<sup>140</sup>

Block exemption regulation 418/85 was constructed in a traditional way. Articles 1, 2 and 3 defined the key notions of the Regulation. Article 1 (1) exempted agreements concluded for the purpose of joint R&D. Paragraphs 2 and 3 of Article 1 defined joint R&D of products and processes and exploitation of the results. These definitions were important since agreements for joint exploitation were subject to more severe conditions than “normal” R&D agreements. However, joint exploitation was regarded as a natural outcome of co-operative R&D.<sup>141</sup>

Article 2 provided various conditions that had to be fulfilled for the application of the Regulation. It expanded the definition of the categories of agreements covered by the block exemption. Article 3 presented the most important condition; it set out market share criteria for the application of the Regulation. The market share thresholds were set out in order to maintain effective competition, i.e. the Regulation had to guarantee that several independent poles of research could exist

---

<sup>137</sup> Greaves, Rosa; *EC Block Exemption Regulations*, Chancery Law Publishing, Chichester, UK, 1994, p. 97; Gutterman, 1997, p. 393.

<sup>138</sup> Greaves, 1994, p. 91.

<sup>139</sup> Korah, Valentine; *R & D and the EEC Competition Rules. Regulation 418/85*, ESC Publishing Limited, Oxford, UK, 1986, p. 12 and ff; Korah, 2000, p. 339.

<sup>140</sup> Korah, 1986, p. 17.

<sup>141</sup> Article 1 (1) defines three types of agreements with the purpose of R&D. For the exact reading of the articles, see Commission Regulation 418/85. See also Korah, 1986, p. 18 and ff; Höög Magnus; *Forsknings- och utvecklingsavtal under EG:s konkurrensregler; något om Gruppundantagsförordning 418/85*, Svensk Jurist Tidning, 1987, p. 455 and ff.



in any economic sector. Thus, the block exemption only applied to agreements between undertakings not exceeding 20 % of the relevant market.<sup>142</sup> It was however very difficult to calculate the exact market share of a new product because of the problems that innovative processes brought about. It was difficult to define the correct market. Even when the correct market had been established it would often be exceeded since, in all probability, the innovative nature of the new products would bring the undertakings advantages over their potential competitors.<sup>143</sup>

Article 4, 5 and 6 listed several provisions that might or might not form a part of an exempted R&D agreement. An exhaustive list of “white” clauses was set out in Article 4. The provision listed arrangements in R&D agreements that were exempted even though they might restrict competition. Article 5 introduced a “grey” list with obligations not deemed to restrict competition if they were imposed on the parties during the stretch of the agreement. Article 5(d) allowed restrictions to be imposed on the parties even after the termination of the agreement. The “black” list was provided in Article 6 and presented clauses that would take the R&D agreement outside the protection of the block exemption. The restrictions listed in Article 6 were clearly harmful on competition.<sup>144</sup>

Article 7 put forward the semi-automatic application of the block exemption to agreements that related to joint R&D and/or exploitation of R&D results. This practice, the opposition procedure, provided the Commission with a wide discretion regarding the contents of the block exemption Regulation. The categories of agreements brought within the scope of the block exemption had to be capable of being presumed to satisfy the conditions of Article 81 (3). Article 8 concerned confidentiality and stated that the information acquired under Article 7 should be used only for the purpose of the Regulation.

Article 9 contained a provision with reference to associated firms or “connected undertakings” which were identified as parties for the purpose of the Regulation.

---

<sup>142</sup> White, 1985, p.683 and f; Plompen, P.M.A.L.; *Commission Regulation No. 418/85 of 19 December 1984 on the Application of Article 85 (3) of the Treaty to Categories of Research and Development Agreements*, Legal issues of European integration, Vol. 2, 1985, p. 54 and f.

<sup>143</sup> Gutterman, 1997, p. 394.

<sup>144</sup> Article 4, 5 and 6 Regulation 418/85. For an analysis on the articles and their function, see White, 1985, p. 688 and ff; Greaves, 1994, p. 98 and ff; Gutterman, 1997, p. 398 and ff; Korah, 1986, p. 38 and ff; Venit, James S.; *The Research and Development Block Exemption Regulation*, ELR, Vol. 10, 1985, p. 161 and ff.

The definition of “connected undertakings” became standard in the Commission Regulations recently adopted. The definition was based on the undertakings’ common control through shareholding of over half of the assets etc. Article 10 stated that the Commission had the authority to withdraw the benefit of the Regulation. It further gave examples on situations when this might happen. Article 11 contained intermediary provisions. Articles 12 and 13 were formal provisions.

The creation of the block exemption was indeed a breakthrough for undertakings involved in R&D agreements. It was very much consistent with the Commission’s objective to promote co-operative agreements. The legal certainty for specific categories of R&D (and exploitation) agreements that was provided by the Regulation was welcomed. In comparison with other EC block exemptions, and other acts regulating the same subject, the terms of the 418/85-block exemption regulation were considered quite generous.<sup>145</sup>

However, the R&D Regulation has not been in practical use as aspired for. The block exemption was subject to some major limitations and conditions, and its scope was somewhat unclear. The Regulation was adopted without the benefit of experience in a sufficient number of individual cases. As a result, it was not sufficiently detailed and precise and has left a number of question marks about its scope and application. The Regulation could be applied directly or through the opposite procedure. However, the opposition procedure was technically difficult and did not confer to legal certainty. It was hard to know when to use it and when the conditions posed by it were fulfilled. Furthermore, the application of the opposition procedure required that a notification be made. As a consequence of the Regulation considerable space for interpretations, with all the risks and uncertainties that this causes, has been permitted.<sup>146</sup>

Few agreements qualified under the Regulation when they needed the results for the same purpose; the Regulation did not apply when there were ancillary provisions in the agreements enabling each party to ensure that the other did not over exploit. Quotas were blacklisted and a very little territorial protection was permitted, although a field-of-use restriction might have been well enough when the parties needed the results for different markets.<sup>147</sup> The Regulation provided a time-limited exclusive territorial protection for a period of five years. The parties

---

<sup>145</sup> White, 1985, p. 702 and f.

<sup>146</sup> Plompen, 1985, p. 59; Korah, 1986, p. 16 and f; White, 1985, p. 703; Venit, 1985, p. 172.

<sup>147</sup> Article 6 Regulation 418/85; Korah, 2000, p. 339.

were permitted to incorporate an obligation not to manufacture the agreement products or to apply the processes in territories that were reserved for other parties.<sup>148</sup> However, the restrictive territorial protection has been considered too short, as innovation is a time-consuming and expensive activity.

Regulation 418/85 showed that the Commission was reluctant to run the risk that the parties of a co-operative R&D agreement might divide the European Common market through the use of territorial sales restrictions.<sup>149</sup> There were several “black clauses” in the Regulation that assured that the parties would be able to engage in independent competition. The time limit in relation to territorial protection, in addition to the fact that the parties’ products had to be available elsewhere, had contributed to the fact that the undertakings were not able to sufficiently protect themselves. This added to their reluctance to engage in innovative collaboration.<sup>150</sup>

### 4.3 An updated approach

Regulation 418/85 has been difficult to apply and has left many uncertainties. The 20 % limit excluded the bigger companies from the block exemption. The Regulation concentrated instead on SMEs, which was fully in line with the Commission’s policy. The Regulation has however not been frequently applied.

The Commission has tried to show how the Regulation is intended to work. In *BP/Kellogg* the parties formed a joint venture for the development and design of ammonia plants. The Commission concluded that the joint venture fell within Article 81 (1). Regulation 418/85 could not be employed, because the restrictions included in the agreement between the co-operating firms also affected products and processes that they had developed individually. The parties’ freedom of commercial decision was materially restricted by the mutual obligations. Nevertheless, the Commission found that the process developed by the firms was of importance for economy and represented a technical progress. The ancillary restraints imposed on the parties were necessary and the parties were granted an individual exemption.<sup>151</sup>

---

<sup>148</sup> Article 4 (1) (d) Regulation 418/85.

<sup>149</sup> Article 1 (1) Regulation 418/85. See also Gutterman, 1997, p. 412.

<sup>150</sup> Gutterman, 1997, p. 412 and f.

<sup>151</sup> Commission Decision of 2 December 1985, IV/30.971 - *BP/Kellogg*, (1985) OJ L369/6; Höög, 1987, p. 471 and f.

The Commission has tried to further update their position in regards to co-operative R&D agreements. In 1993 the Commission's Notice concerning the assessment of co-operative joint ventures was presented. The purpose of the Notice was to summarise the Commission's administrative practice to date so that undertakings could recognize the legal and economic criteria, which would guide the Commission in the application of Article 81.<sup>152</sup> The Notice further introduced some changes that touched upon the existing block exemptions. The changes were concluded in Regulation 151/93. In regards to Regulation 418/85 it extended the permission of exploitation to manufacture, distribution and marketing if relevant conditions were fulfilled.<sup>153</sup>

In 1997, the Commission decided to reflect on its policy on horizontal agreements. The block exemption regulations relating to R&D and specialisation agreements were in particular in need of an examination. The Commission carried out an internal study as well as consulted the business world. The overall approach was that the policy on horizontal R&D agreements had to be reviewed. The study showed that undertakings co-operated to a much higher extent, in order to respond to the challenges of globalisation, the swift development of advanced technology and severe competition. Regulation 418/85 was generally considered as inadequate and too focused on legal clauses. There existed a need for clearer guidance.<sup>154</sup>

The fact that Regulation 418/85 was hardly used, partly outdated and led to several notifications resulted in an intensification of the Commission's assessment of the policy on horizontal agreements. The rules had to be updated and improved in terms of clarity and coherence. A proposal of guidelines and possibly revised block exemption regulations was created. The Commission had put in effort in creating an economic approach towards vertical restraints and the same course should be followed in relation to horizontal agreements.<sup>155</sup>

---

<sup>152</sup> The Commission's Notice concerning the assessment of cooperative joint ventures pursuant to Article 95 of the EEC Treaty (1993) OJ C43/2.

<sup>153</sup> Commission Regulation (EEC) No 151/93 of 23 December 1992 amending Regulations (EEC) No 417/85, (EEC) No 418/85, (EEC) No 2349/84 and (EEC) No 556/89 on the application of Article 85 (3) of the Treaty to certain categories of specialization agreements, research and development agreements, patent licensing agreements and know-how licensing agreements, (1993) OJ L21/8, Article 2.

<sup>154</sup> Commission Twenty-seventh Report on Competition Policy (1997), point 46 and f.

<sup>155</sup> Commission Twenty-eighth Report on Competition Policy (1998), point 54 and f.

During 1999 the Commission's work on a reviewed approach towards horizontal co-operation agreements continued. It prepared drafts of revised block exemption regulations on specialisation and R&D agreements. It additionally prepared draft guidelines on the applicability of Article 81 to horizontal co-operation agreements. The objective was to clarify the Commission's policy in the area of horizontal co-operation and to make it more effective for the future economic and legal environment. The updated approach and the review of the rules on horizontal co-operation formed an important pillar in the Commission's attempts to modernise the EC competition rules. By illuminating the rules, the Commission should be able to leave responsibility to the Member States and concentrate on more essential cases. With the object of direct applicability of the system under Article 81, a reinforcement of the legislative framework as well as the development of mechanisms, such as informative guidelines, was indispensable in order to ensure the uniform application of Article 81.<sup>156</sup>

The reactions to the Commission's reviewed approach towards R&D have generally been positive. The reform of horizontal agreements fits into the wider revision of the competition rules. It is in favour of a more economic approach, based on the concept of market power. The economic benefits of horizontal co-operation are elevated. It has however been urged that the Commission should also regulate other categories of horizontal co-operation, which now only are covered by the non-binding guidelines.<sup>157</sup>

The 29<sup>th</sup> of November 2000, the Commission adopted a block exemption Regulation on the application of Article 81 (3) of the Treaty to categories of research and development (R&D) agreements, a block exemption Regulation on the application of Article 81 (3) of the Treaty to categories of specialisation agreements and guidelines on the applicability of Article 81 to horizontal co-

---

<sup>156</sup> Commission Twenty-ninth Report on Competition Policy (1999), point 38 and f.

<sup>157</sup> Opinion of the Economic and Social Committee on "Competition rules relating to horizontal cooperation agreements – Communication pursuant to Article 5 of Council Regulation (EEC) No 2821/71 of 20 December 1971 on the application of Article 81 (3) of the Treaty to categories of agreements, decisions and concerted parties modified by Regulation (EEC) No 2743/72", (2001) OJ C14/3; Draft Commission Regulations on the Approach of Article 81 (3) EC to Categories of R&D and Specialisation Agreements And Draft Guidelines on Horizontal Co-operation, UNICE Comments, 23 May 2000, p. 1 and ff. These documents present an opinion on the new Regulations and the guidelines. They commend, criticise and propose improvements.

operation agreements.<sup>158</sup> The Regulations and the guidelines entered into force the first of January 2001 and shall apply for ten years, expiring on 31 December 2010.

#### **4.4 Block exemption 2659/00<sup>159</sup>**

The new block exemption sets out a number of recitals<sup>160</sup>, introducing the Commission's reviewed economic approach. It states that agreements on the joint execution of research or the joint development of the results of such research do not generally fall within the scope of Article 81 (1) of the Treaty. In certain circumstances they do however fall under Article 81 (1) and should therefore be included within the scope of the Regulation. The block exemption emphasises that ensuring effective protection of competition and providing adequate legal security for undertakings are requirements that have to be satisfied. The Regulation further recognises the need of co-operation in R&D in order to promote technical and economic progress and states that it is appropriate to move away from the traditional approach and put greater emphasis on an economics based approach which considers the impact of the agreement on the relevant market.

The benefit of the block exemption should be limited to agreements that can be assured to fulfil the conditions of Article 81 (3). The Regulation shall nevertheless also apply to provisions in R&D agreements, which do not primarily constitute the object of such agreements, but are directly related to and necessary for their implementation. The exemption granted under the Regulation shall further be limited to R&D agreements that do not provide the undertakings with any possibilities of eliminating competition. Maintenance of effective competition has to be guaranteed; the block exemption shall cease to apply if there is a risk of elimination of competition. Furthermore, agreements containing restrictions that are not indispensable to attain the good effects of co-operative R&D, shall not be exempted. In addition, the Commission has always the power to withdraw the benefits of the block exemptions if anti-competitive effects incompatible with Article 81 (3) appear.

---

<sup>158</sup> The Regulations can be found in OJ L304 (2000) and the guidelines can be found in OJ C3 (2001). See also the Competition DG's website at: <http://europa.eu.int/comm/competition/antitrust/legislation/>.

<sup>159</sup> Commission Regulation (EC) No 2659/2000 of 29 November 2000 on the application of Article 81 (3) of the Treaty to categories of research and development agreements, OJ L304/7. The recitals and articles referred to in this chapter can be found in the Regulation.

<sup>160</sup> Regulation 2659/00, see recitals 3 and ff.

The first Article of the Regulation exempts R&D agreements, and agreements pursuing the exploitation of the results of R&D, from Article 81 (1). Ancillary restraints, which are not directly about R&D but whose presence is a necessary component of the agreement, will also be covered by the exemption. Article 2 defines several notions of importance to the Regulation; R&D is defined as “the acquisition of know-how relating to products or processes and the carrying out of theoretical analysis, systematic study or experimentation, including experimental production, technical testing of products or processes, the establishment of the necessary facilities and the obtaining of intellectual property rights for the results”.<sup>161</sup>

Article 3 sets out conditions for the granting of an exemption. In brief, the parties must have access to the results of the joint R&D. When the agreement concluded is only in relation to R&D, the parties must be free to exploit it in any way they wish and when the agreement includes provisions for joint exploitation, this can only be permitted where the results are protected by intellectual property and are “substantial”. Furthermore, when the agreement constitutes provisions for manufacture by ways of specialisation, the undertakings engaged in such activity must fulfil orders from all the parties, unless the agreement also provides for joint distribution.

Article 4 provides the market share test. The block exemption is only available to agreements concluded by undertakings as long as their combined market share does not exceed 25 %. This provision has received some criticism; the opinion seems to be that it would make more sense to try to achieve consistency with the vertical block exemption Regulation where the limit is set at 30 %. The figure of 30 % provides a safe harbour for a large number of contracts and could reduce the legal uncertainties that the market share limit itself creates.<sup>162</sup>

Agreements not covered by the exemption, the “black list”, are provided in Article 5. An agreement which has one of the objectives listed in Article 5 is removed from the scope of the Regulation. These include (a) the elimination of independent poles of research, (b) agreements which claim to prevent the challenges to the validity of intellectual property rights, (c) limiting output or sales, (d) price fixing, (e) – (j) a number of territorial restrictions, with their origin in different practices.

---

<sup>161</sup> Regulation 2659/00, Article 2 (4).

Article 6 relates to the calculation of market shares. The market share shall be calculated on the market sales value, on data relating to the preceding calendar year. The Article tries to give guidance but, because of the R&D related nature, the difficulties of calculating market shares remain and should need further guidance. Article 7 states the Commission's power to withdraw the benefits of the block exemption. Article 8 specifies the transitional period and Article 9 lays down the period of validity.

## 4.5 The Guidelines<sup>163</sup>

The guidelines execute a complement to the block exemptions on R&D and specialisation. They are applicable to R&D agreements not covered by the Regulation, and also to several other types of competitor collaboration.<sup>164</sup> The guidelines describe the general approach that should be followed when examining horizontal co-operation agreements, and they set out a common analytical framework. The guidelines are aimed at helping undertakings to consider their co-operation agreements under EC competition rules. The undertakings can, with greater certainty, consider whether their agreement is restrictive of competition and if so, if it would qualify for an exemption.

The guidelines discuss the relationship between Article 81 (1) and different kinds of co-operative agreements. All types of horizontal co-operation agreements covered by the guidelines are analysed according to a common analytical framework. A horizontal co-operation agreement is only capable of restricting competition if it is likely to reduce the competition in the market to such an extent that negative market effects as to prices, output, innovation or the variety or quality of goods and services can be expected. In order to cause a restriction on competition, the parties generally need appropriate tools to co-ordinate their behaviour and an amount of market power. The co-operation has to be assessed in an economic context, taking both the nature of the agreement and the parties'

---

<sup>162</sup> ECOSOC's opinion, OJ C14/3 (2001); UNICE Comments, 23 May 2000, p. 2.

<sup>163</sup> Commission Notice. Guidelines on the applicability of Article 81 of the Treaty to horizontal cooperation agreements, (2001) OJ C3/2.

<sup>164</sup> Competitor collaboration in R&D, production, purchasing, commercialisation, standardisation and environmental are covered by the guidelines. These types of co-operation may generate efficiency gains. The part regarding R&D shall be discussed in this chapter.



combined market power into account. These factors will determine the capability of the co-operation to reduce overall competition to such a significant extent.<sup>165</sup>

When performing the analysis, the “position of the parties in the market affected by the co-operation” is of central consideration.<sup>166</sup> The undertakings’ market power is likely to determine whether any harmful effects flow from the agreement. The basic approach is that an agreement with the effect of eliminating competition is prohibited. In order to examine the market concentration, i.e. the position and number of competitors, the Commission uses the Herfindahl-Hirshman Index (HHI), which is normally used by the American antitrust authorities when analysing market structure for the purpose of merger control. This practice is of importance for the assessment of possible market effects caused by co-operation. Other features, such as the stability of market shares over time, entry barriers etc. may also be taken into account.<sup>167</sup>

Agreements that fall under Article 81 (1) may be exempted if the conditions in Article 81 (3) are fulfilled. The agreement has to contribute to economic benefits, providing the consumers with a fair share. The restrictions stated in the agreement have to be indispensable and may not lead to elimination of competition. When an undertaking is, or is becoming, dominant as a result of the horizontal agreement, which is producing anti-competitive effects in the meaning of Article 81 (1), it can not be exempted.<sup>168</sup>

The guidelines further form a complement to Regulation 2659/00 on R&D agreements. The guidelines try to give guidance on the subject of relevant markets. The solution to the problem of the identification of relevant markets is to assess the R&D agreement and identify the products, technologies or R&D effects that will act as a competitive restriction on the parties. The effects of the co-operation on innovation have to be considered. The guidelines provide definitions on existing markets, i.e. product markets and technology markets. When the undertakings conclude a co-operative R&D agreement for the improvement of existing products, these products and their substitutes form the relevant market concerned by the co-operation. However, R&D co-operation

---

<sup>165</sup> The Guidelines, paragraph 19 and f.; Commission Thirtieth Report on Competition Policy (2000), p. 17.

<sup>166</sup> Ibidem, paragraph 27.

<sup>167</sup> The method of the HHI is stated in paragraph 29. Ibidem, paragraph 29 and f.; Furse, 2000, p. 134 and f.

<sup>168</sup> Ibidem, paragraph 31 and ff.

may also concern technology. When rights to intellectual property are marked separately from the products to which they relate, the technology market has been identified. Technology markets entail the intellectual property that is licensed and its close substitutes.<sup>169</sup>

R&D aims at significantly improving or even replacing existing products or technology. The new or improved product/technology might no longer be included in the existing market, but still be relevant to it. The bringing together of R&D efforts may result in co-ordination of the parties' behaviour as suppliers of existing products. Because of the frequent changes in the existing market it is difficult to define the parties' position in the market. Exploitation of power is only possible if the co-operating parties have a strong position in regards to the existing market and the R&D efforts. In technology markets especially, emphasis must be put on potential competition.<sup>170</sup>

R&D co-operation may also effect competition in innovation. If a product or technology replaces an existing product/technology or even creates a completely new demand, competition in innovation is affected. If it is possible, as in pharmaceutical industries, to identify R&D pools at an early stage, it can be assessed whether the number of R&D pools remaining after the co-operative agreement is sufficient in order to maintain competition. If the innovative effects in an industry are not visibly structured as to allow the identification of R&D pools, the Commission has to limit its assessment to product and/or technology markets which are related to the R&D co-operation in question.<sup>171</sup>

The calculation of market shares has to reflect the distinction between the existing markets and competition in innovation. If R&D aims at improving an existing product, market shares can be calculated on the basis of the sales value of the existing products. If R&D create a new product, it will, if successful, become a substitute to the existing product, and market shares can again be calculated on the sales value of the existing products. However, if R&D aims at creating a product that generates a new demand, the market shares can not be calculated based on sales value. Merely an analysis of the effects of the agreement on

---

<sup>169</sup> Ibidem, paragraphs 44 and 47.

<sup>170</sup> Ibidem, paragraph 45 and ff.

<sup>171</sup> Ibidem, paragraph 50 and ff.

competition in innovation is possible. These agreements are exempted by the Regulation for a certain period of time regardless of market shares.<sup>172</sup>

The guidelines further consider the application of Article 81 to R&D agreements. The guidelines assess agreements that do and do not fall under Article 81. They also consider agreements that may fall under the Article, i.e. agreements that can cause negative market effects. Such R&D agreements can have the effects of restricting innovation, causing co-ordinate behaviour in existing markets and shutting third parties out of the market. These effects are however only likely to occur when the co-operating parties have significant power on the existing markets and/or competition in respect to innovation is considerably reduced. If concentration is present in the market, this could result in difficulties to enter the market, few other innovation activities taking place in the market or even negative effects on prices and output in existing markets. However, R&D co-operation with reference to entirely new products/technologies is, in general, pro-competitive.<sup>173</sup>

The guidelines furthermore assess the possible application of Article 81 (3) to R&D agreements. This part is much similar to the general approach of the guidelines in regards to all agreements covered by them. The economic benefits brought by the agreement, the necessity of the restrictions imposed and the effect on competition have to be examined. The section of the guidelines relating to R&D agreements ends with certain examples provided in order to give clear guidance in specific situations.

## **4.6 Principal changes and improvements**

The new Regulation presents a more economic approach to horizontal R&D agreements, which is in line with the essential modernisation of the EC competition rules. The basic aim of the approach is to allow competitors to co-operate when it contributes to economic welfare without creating a risk for competition. The common objective of the new set of rules is to simplify the rules and reduce the regulatory burden for undertakings, especially those lacking market power. The new documents are more user-friendly and they give better guidance to market participants. The Regulation is more comprehensible, has a wider scope and a

---

<sup>172</sup> Ibidem, paragraph 53 and f.; Regulation 2659/00, Article 4 (3).

<sup>173</sup> Ibidem, paragraphs 55 and ff.

greater flexibility than the previous Regulation on the subject. The new legal framework is set out in order to encourage types of co-operation that potentially can generate economic benefits.<sup>174</sup>

The new block exemption Regulation replaces the former system of specifically exempted “white list” clauses by a general exemption of all conditions under which undertakings pursue R&D agreements. This gives the undertakings greater contractual freedom and removes the “strait-jacket” imposed by the previous Regulation. The new exemption further deletes the requirement to draw up a framework programme prior to entering into R&D agreements. The market share threshold for the exemption is increased from 20 % to 25 %. Beyond this limit, R&D agreements have to be assessed individually. The increase shows that R&D collaboration is especially favourable in creating efficiencies, while the restrictive effects are less likely to appear than in other types of co-operation agreements. Furthermore, if the agreement foresees joint distribution of the developed products, the market share threshold is increased from previously 10 % to 25 %. The safety margin for market share variation has been increased from 2 % to 5 %.<sup>175</sup>

Joint exploitation of a jointly developed product is covered by the block exemption, regardless of market share. It used to be covered during a period of five years, which has now been increased to seven years. The main reason for this is that there are a number of industries where R&D investments are unlikely to be recovered within five years. Furthermore, the procedure of non-opposition has been removed from the block exemption Regulation. The Commission considered that it was no longer necessary, as all restrictions are going to be dealt with in the new Regulation on R&D. One provision has been added, stating that the Commission has the power to withdraw the exemption in cases where an agreement would eliminate effective competition in R&D in a particular market.

---

<sup>174</sup> Lücking, Joachim and Woods, Donnadh; *Horizontal Co-operation Agreements: New Rules in Force*, Competition Policy Newsletter, No 1, February 2001, p. 8; Commission thirtieth Report on Competition Policy (2000), paragraph 22 and f.; ECOSOC’s opinion, OJ C14/3 (2001), paragraph 3.3.1 and f.; Commission reforms competition rules for CO-OPERATION between COMPANIES, Press release IP/00/1376, 29/11/2000, p. 2.

<sup>175</sup> Press release, 29/11, 2000, p. 2 and f.; Lücking and Woods, 2001, p. 9.

## 5 Analysis

One of the main objectives of the EC is the completion of an internal market. One of the most important ambitions today is however the application of a vigorous competition policy, which encourages increased innovation, consumer welfare and protection of employment. These aspirations represent an economic vision that gradually has been acknowledged in Europe.

The European policy makers' application of a realistic and economic analysis has been influenced by the U.S. competition policy. Restrictive agreements etc. will be evaluated with reference to their pro- and anti-competitive effects on competition. The Commission's general approach is thus altering. The strict legal analysis under Article 81 (1), the possible individual/block exemptions under Article 81 (3) and the time-consuming, costly and complex notification system presented in Regulation 17/62 are being modernised. The Commission has presented a proposal for a reform, in order to strengthen the enforcement of the EC competition rules and provide efficient supervision and a simplified administrative system. The reform introduces furthermore a system involving decentralised application of the competition rules.

The economic approach is of foremost importance when assessing horizontal co-operation agreements. These agreements primarily distort competition as they join together independent undertakings in collaboration. A common concern with reference to horizontal co-operation agreements, in particular in concentrated markets, is that they may reduce competition. Moreover, they can produce foreclosure effects and the co-operation might result in a "spill over" to other business areas than the ones intended when concluding the agreement. These negative effects may reduce the degree of competition, encouraging undertakings to conspire and to use their potential joint market power in anti-competitive ways. Collusive behaviour in the market may lead to inefficiency.

However, horizontal co-operation agreements bring several benefits, especially when formed for the purpose of R&D and innovation. R&D is a very costly activity, which involves a great deal of risk taking. It can lead to spillover problems, in addition to duplication and free-rider problems. In order to provide undertakings with incentive to invest time and money in R&D, collaboration has to be allowed. In this scenario, firms engaging in R&D can share risks and costs, the

efficiency of R&D efforts is likely to increase and the externalities created by spillover can be internalized.

R&D and innovation provide the prime reasons for economic development and social wealth, which is why it is of uttermost importance that European firms engage in these activities. In comparison with U.S. and Asia, Europe has somewhat been lacking behind in the field of high technology industries. This has resulted in slow growth and increased unemployment. European ability in competing internationally has to be strengthened. For this to happen, R&D agreements have to be assessed under flexible and economic-based rules. Furthermore, certain parts of the EC need to develop a greater ability to absorb new technologies. Potential problems may arise with the incorporation of the Eastern European countries.

EC competition authorities have recognised that European competitiveness has to be enhanced and has adopted a competition policy with focus on the need of R&D and innovation. In order to provide an economic analysis, the Commission has to measure the restrictions on competition against the economic progress and competitiveness that R&D bring. It has however been difficult to apply EC competition rules to co-operative R&D agreements. This traditional framework, aimed at preventing restrictions on competition and harmful concentration of market power, does not fully agree with the dynamic and evolutionary innovation activities.

Nevertheless the market where innovation is pursued must be regulated in order to function. Guidance is needed to separate legal co-operative agreements from illegal arrangements and to balance pro- and anti-competitive effects against each other. Dynamic efficiency through innovation has to be promoted, but concentration through market power so strong that it delays technical progress must be prevented. When evaluating an agreement under Article 81 there are several factors that have to be considered. The assessment of R&D agreements provides problems concerning the definition of the parties' market position. The common definition of the relevant market can not entirely be used because of the swift changes that occur when innovation is involved. Market shares alter rapidly among competitors and undertakings with low or non-existing market shares may take an important position.

It has been argued that collaborative R&D arrangements should be evaluated with reference to the market for further R&D. The innovation procedure transforms however the competitive landscape of products, which is why the future market of a product may be very difficult to identify. The American approach has been to claim that firms involved in innovation compete in a separate market. Markets where firms develop new products or improve existing products can be defined as innovation markets.

The Commission has adopted an overall economic approach, which encourages innovation. It has not developed a definite market for innovation, but will consider the distinct characteristics of markets involving rapid innovation. Apart from the realistic and economic analysis developed in the field of competition, the Commission has adopted Regulation 2659/00 and complementary guidelines. The new rules concerning R&D agreements present a modernisation, not only substantially but also in regards to the way the Regulation is composed. The traditional system applying to block exemption Regulations has been altered. The Commission has had the intention of creating a more flexible and user-friendly Regulation. The complementary guidelines apply to several forms of horizontal co-operation. With reference to R&D agreements, they seek to be informative and give guidance. The question is if they will succeed. Some complaints have already been filed in regards to the new rules, requesting clearer guidance on the subject.<sup>176</sup>

Another key question on the subject is whether the new rules will provide any sincere changes. R&D agreements were, to a very high degree, individually exempted before the adoption of the new rules. But, individual exemptions, involving notifications etc. are time-consuming and complex. Hopefully the new rules can provide a framework easier to apply, leaving out the need of individual exemption.

The substantial amendments provided by the new rules can be discussed. The market share limit for undertakings falling within the scope of the Regulation has been stretched and the former “white list” has been removed, but the practical consequences of these actions can be conferred. I believe nonetheless that the new rules, forming a pillar of the revision of EC competition rules, may be of great importance. Ancillary restraints will presumably be more easily accepted, with

---

<sup>176</sup> ECOSOC’s opinion, OJ C14/3 (2001); UNICE Comments, 23 May 2000.

reference to the changed attitude of the Commission along these lines. In my opinion the key issue at this point is to create a change of approach in regards to competition policy. The new rules on the topic of R&D agreements are in line with this. Even if these rules mostly result in cosmetic modifications, I believe they serve a purpose in the process of change, which is actually taking place. The new rules provide a much more informative and market stimulating framework in comparison with the previous Regulation. They invite to be taken under consideration and actually applied. The concrete variations are however somewhat difficult to define.



# Bibliography

## Commission documents

Commission First Report on Competition Policy [1972]

Commission Thirteenth Report on Competition Policy [1983]

Commission Fourteenth Report on Competition Policy [1984]

Commission Fifteenth Report on Competition Policy [1985]

Commission Notice on Agreements of Minor Importance [1986] OJ C231/2, amended [1994] OJ C368/20

Commission Twenty-first Report on Competition Policy [1991]

Commission Notice concerning the assessment of cooperative joint ventures pursuant to Article 95 of the EEC Treaty (1993) OJ C43/2.

Commission Notice on the distinction between concentrative and cooperative joint ventures, 31 December 1994, [1994] OJ C385

Commission Recommendation concerning the definition of small and medium-sized enterprises, 3 April 1996, [1996] OJ L107/4

Commission Twenty-seventh Report on Competition Policy [1997]

Commission Notice on the definition of Relevant Market for the Purposes of Community Competition Law, 9 December 1997, [1997] OJ C372/3

Commission Notice on Agreements of Minor Importance, 9 December 1997, [1997] OJ C372/3

Commission Twenty-eighth Report on Competition Policy [1998]

Commission Twenty-ninth Report on Competition Policy [1999]

Commission White Paper on Modernisation of the Rules Implementing Articles 85 and 86 [*now Articles 81 and 82*] of the EC Treaty, 28 April 1999, Commission programme No. 99/027

Commission White Paper on Reform of Regulation 17. Summary of the observations. Competition DG Document – 29.02.2000

Commission Proposal for a Council Regulation on the implementation of the rules of competition laid down in Articles 81 and 82 of the Treaty and amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87, 29.09.2000, COM 2000 582 final

Commission Thirtieth Report on Competition Policy [2000]

Commission Notice. Guidelines on the applicability of Article 81 of the Treaty to horizontal cooperation agreements, [2001] OJ C3/2

## **Regulations**

Council Regulation 17/62, First Regulation implementing Articles 85 and 86 of the Treaty [1962] OJ Spec. Ed. 1959-1962

Commission Regulation No 418/85 of 19 December 1984 on the application of Article 85 (3) of the Treaty to categories of research and development agreements, [1985] OJ L53/5

Commission Regulation (EEC) No 151/93 of 23 December 1992 amending Regulations (EEC) No 417/85, (EEC) No 418/85, (EEC) No 2349/84 and (EEC) No 556/89 on the application of Article 85 (3) of the Treaty to certain categories of specialization agreements, research and development agreements, patent licensing agreements and know-how licensing agreements, [1993] OJ L21

Commission Regulation (EC) No 2659/2000 of 29 November 2000 on the application of Article 81 (3) of the Treaty to categories of research and development agreements, [2000] OJ L304/7

## **OECD**

OECD Competition Policy Roundtables OECD/GD (97) 44, No. 9, Paris, 1997;  
*Application of Competition Policy to High technology Markets*

Recommendation of the Council of concerning Effective Action against Hard  
Core Cartels, March 1998, C(98)35/Final

## **American Antitrust Documents**

U.S. Department of Justice and Federal Trade Commission, 2 April 1992,  
Horizontal Merger Guidelines, revised 2 April 1997

U.S. Department of Justice and Federal Trade Commission, 6 April 1996,  
Antitrust Guidelines for the Licensing of Intellectual Property

## **Articles**

Brodley, Joseph F.; *Joint Ventures and Antitrust Policy* [1982] 95, Harvard  
Law Review pp. 1523-1588

J. F. Brodley; *The Economic Goals of Antitrust: Efficiency, Consumer  
Welfare, and Technological Progress* [1987] 62, New York University Law  
Review pp. 1020-1053

J. Elmstedt; *Faktisk eller potentiell konkurrens vid bedömning av joint  
ventures* [1999] 4, Konkurrens pp. 15-18

Fagerberg, Jan; *The Need for Innovation-Based Growth in Europe* [1999] 42,  
Challenge pp. 63-78

I. Forrester and C. Norall; *The Laicization of Community Law: Self-Help and  
The Rule of Reason: How Competition Law Is and Should Be Applied* [1984]  
21, CMLRev pp. 11-51

T. Frazer; *Competition Policy after 1992: The Next Step* [1990] 53, The  
Modern Law Review pp. 609-623

A. A. Grikscheit; *Are we compatible?: Current European Community Law on the Compatibility of Joint Ventures with the Common Market and Possibilities for Future Development* [1994] 92, Michigan Law Review pp. 968-1033

G. M. Grossman and C. Shapprio; *Research Joint Ventures: An Antitrust Analysis* [1986] 2, Journal of Law, Economics and Organization pp. 315-336

G. A. Hay; *Innovations in Antitrust Enforcement* [1995] Antitrust Law Journal pp. 7-. Internet version from Lexis-Nexis, pp. 1-7

M. Höög; *Forsknings- och utvecklingsavtal under EG:s konkurrensregler; något om Gruppundantagsförordning 418/85* [1987] Svensk Jurist Tidning pp. 451-472

M. L. Katz; *An analysis of cooperative research and development* [1986] 17, Rand Journal of Economics pp. 527-543

V. Korah; *EEC Competition Policy – Legal Form or Economic Efficiency* [1986] 39, Current Legal Problems pp. 85-109

V. Korah; *Critical Comments on the Commission's Recent Decisions Exempting Joint Ventures to Exploit Research that Needs Further Development* [1987] 12, ELR pp. 18-39

L. B. Landman; *Innovation Markets in Europe* [1998] 19, ECLR pp. 21-31

Lücking, Joachim and Woods, Donncadh; *Horizontal Co-operation Agreements: New Rules in Force* [2001] Competition Policy Newsletter, No 1, February, pp. 8-10

J. A. Ordoover and R. D. Willig; *Antitrust for High-Technology Industries: Assessing Research Joint Ventures and Mergers* [1985] 28, The Journal of Law and Economics pp. 311-333

P.M.A.L. Plompen; *Commission Regulation No. 418/85 of 19 December 1984 on the Application of Article 85 (3) of the Treaty to Categories of*

*Research and Development Agreements* [1985] 2, Legal issues of European integration pp. 46-68

J. Temple Lang; *European Community Antitrust Law: Innovation markets and High Technology Industries* [1997] 20, Fordham International Law Journal pp. 717-818

H. Ullrich; *Harmonisation within the European Union* [1996] 17, ECLR pp. 178-184

R. Van den Bergh; *Modern Industrial Organisation versus Old-fashioned European Competition Law* [1996] 17, ECLR pp. 75-87

J. S. Venit; *The Research and Development Block Exemption Regulation* [1985] 10, ELR pp. 151-172

R. Wessling; *THE Commission White paper on Modernisation of E.C. Antitrust Law: Unspoken Consequences and Incomplete Treatment of Alternative Options* [1999] 20 ECLR pp. 420-433

E. L. White; *Research and Development Joint Ventures Under EEC Competition Law* [1985] 16, IIC pp. 665-703

R. Wish and B. Surfin; *Article 85 and the Rule of Reason* [1987] 7, YBEL

## **Books**

C.W. Bellamy and C. Graham; *Common market law of competition* [1993] Fourth Edition, Sweet & Maxwell, London UK. First supplement to the fourth edition [1996] Sweet & Maxwell, London, UK

S. Bishop and M. Walker; *The Economics of EC Competition Law* [1999] Sweet & Maxwell, London, UK

C. Bovis; *Business Law in the European Union* [1997] Sweet & Maxwell, London, UK

P. Craig and G. De Búrca; *EU Law. Text, cases and materials* [1998] Second Edition, University Press, Oxford, UK

J. Ellison and E. Kling; *Joint Ventures in Europe* [1997] Second Edition, Butterworths, London, UK

J. Faull and A. Nikpay; *The EC law of competition* [1999] University Press, Oxford, UK

M. Furse; *Competition law of the UK & EC* [2000] Second Edition, Blackstone Press Limited, London, UK

R. Greaves; *EC Block Exemption Regulations* [1994] Chancery Law Publishing, Chichester, UK

A. S. Gutterman; *Innovation and Competition policy: A Comparative Study of the Regulation of Patent Licensing and Collaborative Research & Development in the United States and the European Community* [1997] Kluwer Law International, London, UK

V. Korah; *An Introductory Guide to EC Competition Law and Practice* [2000] Seventh Edition, Hart Publishing, Oxford, UK

V. Korah; *R & D and the EEC Competition Rules. Regulation 418/85* [1986] ESC Publishing Limited, Oxford, UK

J. A. Poyago-Theotoky; *Competition, Cooperation, Research and Development. The Economics of Research Joint Ventures* [1997] Macmillan Press LTD, London, UK

J. Steiner and L. Woods; *Textbook on EC Law* [2000] Seventh Edition, Blackstone Press Limited, London, UK

### **Other Sources**

Gualtieri, Giuseppina; *The Impact of Joint Ventures on Competition. The case of Petrochemical Industry in the EC*, Final Report, September 1989. (Document prepared for use within the Commission)

Röller, Lars-Hendrik, Tombak, Mihkel M. and Siebert, Ralph; *Why Firms Form Research Joint Ventures: Theory and Evidence*, CEPR Discussion Paper No. 1654, May 1997

Draft Commission Regulations on the Approach of Article 81 (3) EC to Categories of R&D and Specialisation Agreements and Draft Guidelines on Horizontal Co-operation, UNICE, 23 May 2000

Speech made by Commissioner Mario Monti at the CBI Conference on Competition Law Reform, London, June 12, 2000

Commission reforms competition rules for CO-OPERATION between COMPANIES, Press release IP/00/1376, 29/11/2000

Opinion of the Economic and Social Committee on “Competition rules relating to horizontal cooperation agreements – Communication pursuant to Article 5 of Council Regulation (EEC) No 2821/71 of 20 December 1971 on the application of Article 81 (3) of the Treaty to categories of agreements, decisions and concerted parties modified by Regulation (EEC) No 2743/72”, (2001) OJ C14/3

#### **Web sites**

[www.europa.eu.int/comm/competition](http://www.europa.eu.int/comm/competition)

[www.oecd.org](http://www.oecd.org)

<http://www.usdoj.gov/atr/pubdocs.html>

[www.unice.org](http://www.unice.org)

# Table of Cases

Cases 56 and 58/64 *Etablissements Costen SARL and Grundig-Verkaufs-GmbH v Commission*, (1966) ECR 299

Case 56/65 *Société La Technique Minère v Maschinenbau Ulm* (1966) ECR 235, (1966) CMLR 357

Case 23/67 *Brasserie de Haecht SA v Wilkin* (No 1), (1967) ECR 407, (1968) CMLR 2

Case 5/69 *Völk v Etablissements Vervaecke Sprl* (1969) ECR 295

Cases 41, 44 and 45/69 *ACF Chemiefarma NV v Commission* (1970) ECR 661

Case 48/69 *ICI v Commission* (1972) ECR 619

Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 *Coöperatieve Vereniging "Suiker Unie" and others v Commission*, (1975) ECR 1663

Case 2/74 *Reyners v Belgium* (1974) ECR 631

Case 26/76 *Metro-SB-Grossmärkte GmbH & Co. KG v Commission and SABA* (1977) ECR 1875, (1978) 2 CLMR 1

Case 27/76 *United Brands Company and United Brands Continentaal B.V. v Commission* (1978) ECR 207

Case 85/76 *Hoffmann-La Roche & Co. AG v Commission* (1979) ECR 461

Case 19/77 *Miller International Schallplatten GmbH v Commission* (1978) ECR 131

Cases 209/78, etc. *Van Landewyck v Commission*, (1980) ECR 3125, (1981) 3 CMLR 134

Case 258/78 *LC Nungesser KG and Kurt Eisele v Commission* (1982) ECR 2015, (1983) 1 CMLR 278

Case 31/80 *NV L'Oréal and SA L'Oréal v PVBA De Nieuwe AMCK* (1980) ECR 3775



Case 262/81 *Coditel SA, Compagnie générale pour la diffusion de la télévision v Ciné-Vog Films* (1982) ECR 3381

Cases 43 & 63/82 *VBVB and VBBB v Commission* (1984) ECR 19, 88 (1985)  
1 CMLR 27

Cases 96 to 102, 104, 105, 108 and 110/82 *NV IAZ International Belgium and others v Commission*, (1983) ECR 3

Case 8/83 *Vereeniging van Cementhandelaren v Commission*, (1985) ECR 391

Case 193/83 *Windsurfing International Inc. v Commission*, (1986) ECR 611

Case 42/84 *Remia and others v Commission*, (1985) ECR 2545

Case 161/84 *Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgallis* (1986) ECR 353, (1986) 1 CMLR 414

Case 246/86 *SC Belasco v Commission*, (1989) ECR I-2117

Cases C-89, 104, 114, 116, 117 and 125 to 129/85 *Wood Pulp-A. Ahlström OY and others v Commission*, (1988) ECR 5193

Case T-7/89 *SA Hercules Chemicals NV v Commission* (1991) ECR II-1711

Case C-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH* (1991)  
ECR I-1979

Case C-250/92 *Gottrup-Klim v Dansk Landbrugs* (1994) ECR I-5641

Case C-244/94 *Fédération Française des Sociétés d'Assurances and Others v Ministère de l'Agriculture et de la Pêche* (1996) ECR I-4013

T-374, 375, 384 and 388/94 *European Night Services and others v Commission* (1998) ECR II-3141

Case C-219/95P *Ferriere Nord v Commission* (1997) ECR I-4411

Case C-343/95 *Diego Cali & Figli Srl v Servizi ecologici porto di Genova SpA (SEPG)* (1997) ECR I-547.

Cases C-215 and C-216/96 *Carlo Bagnasco v Banca Popolare di Novara and Cassa di Risparmio di Genova e Imperia* (1999) ECR I-135  
369

Case C-306/96 *Javico International v Yves Saint Laurent Parfumes*, (1998)  
ECR I-1983

### **Commission Decisions**

Decision IV/27.073 - *Re Bayer and Gist-Brocades NV* (1976) OJ L30/13

Decision 77/543 *De Laval/Stork*, (1977) OJ L215/11; (1977) 2 CMLR D69

Decision IV/30.971 - *BP/Kellogg*, (1985) OJ L369/6

Decision IV/30.320 - *Optical Fibres*, (1986) OJ 1986 L236/30

Decision 86/398 *Polypropylene* (1986) OJ L230/1, (1988) CMLR 347

Decision 88/469 *Iveco/Ford*, (1988) OJ L230/39; (1989) 4 CMLR 40

Decision 90/410 *Elopak/Metal Box-Odin*, (1990) OJ L209/15