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Joint Ventures & Horizontal Co-operation Agreements under EC Competition Law

Changes made & Effects

Master thesis
20 points

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European Competition Law

Spring 2001

Abbreviations

CMLR	Common Market Law Reports
ECLR	European Competition Law Review
ECMR	European Community Merger Regulation
ECR	European Court Reports
O.J.	Official Journal of the European Communities

1 Introduction

1.1 The object of examination

Alliances, partnerships, joint ventures and all sorts of co-operation agreements and concentrations between companies is one of the most significant trends in the industrial world today. It is a phenomena which has been seen quite a while, shifting in popularity between different sectors of the industry from time to time. It was first seen in the construction area, where the construction companies could take advantage of each others competence and at the same time spread their risks. In the eighties the air-line companies started an alliance trend which still is in progress. For instance, SAS, United Airlines and Lufthansa founded Star Alliance which today also includes Air Canada, Varig, Thai Airways, Air New Zeeland and Singapore Airlines. Star Alliance is now being challenged by Air France and Delta Airlines who wants to create a world-wide alliance. These alliances are more of a strategic type. The companies want to keep customers loyal to their companies by offering different kinds of favours such as better connecting flights or extra flight mileage points when customers use the companies within the alliance. The latest trend is due to the explosive development within the information technology sector in the nineties. All sorts of co-operation and joint ventures between companies in all areas in any way connected to the information technology sector has increased manifold. We have seen Ericsson and Microsoft setting up a jointly owned company which has as its only object to develop solutions for the mobile internet. Ericsson has also started joint ventures with Volvo and Telia in order to provide internet services for cars, and with Nokia, Motorola and Psion in order to develop and market the WAP technology. One of the latest deal in this sector is the joint venture to be between Telia and Netcom, which still is to be scrutinized by the competition authority competent for the matter.

Joint venture is a popular form of investment and co-operation for many reasons. Perhaps is the most important reason the possibility to spread the burden of risks and investments. A joint venture may also provide a company entry to new markets and systems of distribution, cheaper production and more customers in a faster and cheaper way than if a company tried to acquire such resources on its own. Another reason for a company to get involved in a joint venture may be to obtain large-scale production in order for a certain operation to be profitable. For companies in under-developed countries, or in countries which have not kept up with the fast industrial development of the west, a joint venture with a western company may offer access to new technology and know-how which may favour the whole country. Problems that may arise in joint ventures are usually about how the joint venture should be managed. There can be great difficulties for two or more parties with different ambitions and experiences, perhaps from different cultures, to agree on how the joint venture should be handled. Such problems may lead to compromises, which may diminish the efficiency of the joint venture.[1]

Regarding the ECMR, which applies to joint ventures with Community dimension, it was not until 1990 specific rules on the area were introduced. A draft Merger Regulation was presented to the Council in 1988, and in December 1989 an agreement on the text was reached. The resulting text is contained in Council Regulation 4064/89, and came into effect September 1990.

It was intended for the ECMR to be revised in 1993, this never happened however. Not until 1997 did the Council of Ministers reach an agreement on the reforming of the Merger Regulation. The two main changes to the Merger Regulation regarded the turnover thresholds and the treatment of joint ventures.

Under the present ECMR, all joint ventures with Community dimension are assessed under the ECMR. All other joint ventures assessed under EC competition law are assessed under Article 81 of the EC Treaty. In order to simplify the procedure granting exemption from Article 81(1) through Article 81(3), the Commission issues block exemptions. Two block exemptions recently revised are the block exemptions on research and development agreements and specialisation agreements.

This paper will examine how joint ventures are assessed under the ECMR, and what changes there have been regarding joint ventures during the last years. The paper focuses especially on co-operative joint ventures, how they have been treated and how they are treated today, and what the recently revised block exemptions on horizontal co-operation agreements will mean for those joint ventures falling within them. The jurisdictional thresholds of the ECMR and the block exemptions are of special interest; are the thresholds based on relevant factors and are they set at an optimal level?

1.2 Purpose

The purpose of the paper is to examine joint ventures under EC Competition law, and especially to look into horizontal co-operation agreements and the recent block exemptions on research and development and specialisation agreements. I wish to thoroughly look into and explain what the changes made to the ECMR and the block exemptions have meant for joint ventures generally and co-operative joint ventures especially.

[1] Svernlöv, Carl. Internationella joint ventures, 1997. p. 18f.

The paper does not examine or discuss the underlying causes for the reform of the ECMR and the revised block exemption Regulations on research and development and specialisation agreements and the issuance of the guidelines on horizontal co-operation agreements, which is the on-going reform of modernising European Competition policy.

1.3 Disposition

The first part of the paper gives a short account of the ECMR and the changes made to it during the revision in 1997. As all joint ventures, both concentrative and co-operative joint ventures, are assessed under the ECMR, it is of vital importance to have knowledge of the ways of the ECMR in order to understand the assessment of joint ventures. If one considers oneself to possess appropriate knowledge of the ECMR one may skip this chapter and move directly to the next chapter. However, I find it advisable for all readers to read the sub-chapter on jurisdiction as that matter is discussed in the analysis.

The second part of the paper deals with joint ventures that are assessed under the ECMR. It examines what the changes made to the ECMR meant for the assessment of joint ventures, it describes the way joint ventures are assessed, and it gives account for how coordination and other co-operative effects of joint ventures are dealt with.

The next part examines joint ventures that fall outside the scope of the ECMR, hence assessed under the EC Treaty, and how they may receive exemption from Article 81 through Article 81(3) or through block exemptions. As two new block exemptions were recently issued in the area of research and development and specialisation agreements, I have examined them more thoroughly. I have also looked thoroughly into the Guidelines on horizontal co-operation agreements which were issued together with the block exemptions.

Finally I give my thoughts on the matters gone through. I especially discuss the jurisdiction thresholds in the ECMR, as well as the thresholds found in the block exemptions. I also give my point of view on what it has meant for co-operative joint ventures to fall within the scope of the ECMR.

2 The ECMR

2.1 Background to joint ventures under the ECMR

There are many situations when a company will need a partner for a particular future project. The urge to go ahead alone may be strong, but for many companies the investment is too great for their own resources. The company may have adequate personnel, but inadequate finances, or alternatively, adequate finances but a lack of expertise among the personnel. In today's economic environment it is more and more common for companies to co-operate with each other.

A company that is jointly controlled by two or more parents is referred to as a joint venture, under the ECMR. Joint control distinguishes itself by the fact that the parent companies must all agree on the major decisions concerning the joint venture. Therefore, each parent has decisive influence over the joint venture. In practice, joint ventures can be seen in many different kinds of operations, from merger-like operations to co-operation for particular functions such as research and development, production or distribution.

Joint ventures originally fell within the ECMR only if it could be described as concentrative rather than co-operative. The Regulation contained detailed definitions of the two terms. A risk of co-ordination, via the joint venture, between the parent undertakings took the operation outside the Regulation and instead would Article 81 and 82 be applicable. There was great criticism against the system however. The application of and the distinction between the terms concentrative and co-operative proved to be hard. The Commission therefore issued a number of notices over the years which included detailed instructions for the solution of the problem. Another problem was that there was a great difference for a joint venture to be assessed under Article 81 compared to being assessed under the ECMR, there were procedural benefits to gain under the ECMR.[2] Undertakings therefore tried to structure their joint venture to be concentrative, hence falling under the ECMR.

Although many actions were taken in order to simplify and clarify the problems surrounding joint ventures, it was apparently not enough. On June 30, 1997, the Council adopted Regulation No. 1310/97[3] which amended

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[2] Korah, V. EC Competition Law and Practice, 2000. p. 324.

[3] Council Regulation (EC) No 1310/97 of 30 June 1997 amending Regulation (EEC) No 4 064/89 on the control of concentrations between undertakings, O.J. [1997] L 180.

Regulation No. 4064/89[4]. Two major modifications were made. With the amendments made, the importance of distinction between concentrative and co-operative joint ventures was almost totally removed. With effect from 1 March 1998, all full-function joint ventures, whether falling under the concentrative or co-operative joint venture category, must be dealt with under the ECMR. The other major modification was the change of the Community dimension thresholds.

As joint ventures thus falls under the ECMR, and the ECMR only applies to concentrations, it is of vital importance to fully understand the concept of concentration and the ways of the Regulation in order to understand joint ventures. Hence will there be a thorough study of the ECMR before carrying on with joint ventures.

2.1.1 Definition of undertaking

The term undertaking is frequently used in the ECMR, and will be used frequently throughout this paper. There is no definition of the term to be found in the EC Treaty, nor in the secondary legislation, although Regulation 17/62[5] gives some clues as to the probable scope when it in Article 11 deals with requests to undertakings for information. Article 11 imposes a duty to supply information upon the owners of the undertakings or their representatives, the authorised representatives of legal persons, companies or firms, or the authorised representatives of the associations which have no legal personality.

In practice, any form of entity which engages in economic activity, regardless of its legal status and the way in which it was financed, will be considered by the Commission, and the European Court, to be an undertaking. An economic entity is any activity consisting in offering goods and/or services on a given market.[6] Through case-law examples of undertakings have been given, such as:

(a) individuals[7];
(b) corporations[8];
(c) partnerships[9]; and
(d) organisations which are part of the "State", where they carry on economic or commercial activities[10].[11]

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[4] Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, O.J. [1989] L 395.
[5] Regulation No 17 of the Council of 6 February 1962, implementing Articles 85 & 86 of the Treaty, O.J. [1962] No 13.
[6] Case C-118/85 Commission v Italy [1987] ECR 2599, para 7.
[7] e.g. AOIP/Beyrard [1976] 1 CMLR D14; Rai/Unitel [1978] 3 CMLR 306.
[8] e.g. Case C-6/72 Europemballage Corp. and Continental Can Co. v Commission [1973] ECR 215; Case 89/85 Ahlström Oy v Commission [1993] 4 CMLR 407.
[9] e.g. Re William Prym-Werke [1973] CMLR D250.

2.1.2 Definition of concentration

The definition of a concentration as used in the Regulation is found in Article 3 of the Regulation. It is of course of great importance, in order to provide legal certainty, that there be no doubt as to what constitutes a concentration. Recital 23 of the Regulation describes concentrations as operations "bringing about a lasting change in the structure of the undertakings concerned". Article 3(1) of the Regulation gives a more precise definition of the changes which will bring about a concentration:

> "A concentration shall be deemed to arise where:
> (a) two or more previously independent undertakings merge, or
> (b) - one or more undertakings already controlling at least one undertaking, or
> - one or more undertakings acquire, whether by purchase or securities or assets, by contract or by any other means, direct or indirect control of the whole or parts of one or more other undertakings."

A concentration may thus appear either as a result of a merger or as a result of a change of control. Many concentrations involve one undertaking acquiring control of another undertaking, however the notion of concentration covers also a change in the quality or the nature of control, as where one shareholder in a joint venture sells out to another shareholder or to a third party.[12]

In order to provide guidance as to how the Commission interprets Article 3, the Commission has published a notice on the concept of concentration under the Merger Regulation. The original notice[13], issued in 1995, was replaced by a new notice[14], in 1998, due to the amendments made to the ECMR.

2.1.2.1 Concentration through merger[15]

A merger within the meaning of Article 3(1)(a) occurs when two or more independent undertakings unite and cease to exist as individual legal entities. It also occurs when an undertaking is absorbed by another

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[10] As opposed to the situation where the State acts in the exercise of official authority. e.g. Case C-41/90 Höfner and Elser [1991] ECR I-1979.
[11] EC Competition Law in practice, Inns of Court School of Law, 1999. p. 7f.
[12] Cook, C.J., Kerse, C.S.. EC Merger Control, 2000. p. 24.
[13] Commission Notice on the notion of a concentration under Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, O.J. [1994] C385/05.
[14] Commission Notice on the concept of concentration under Council Regulation (EEC) No 4064/89 on the control of concentration between undertakings, O.J. [1998] C66/02.
[15] Notice O.J. [1998] C66/02, chapter II.

undertaking, the latter remaining as a legal entity while the former ceases to exist.

A third form of merger within the meaning of Article 3(1)(a) may occur when, in the absence of a legal merger, two or more previously independent undertakings[16] combine their activities, resulting in the creation of a single economic unity. This could for instance be the case when two or more undertakings establish contractually a common economic management. The undertakings retain their individual legal personalities while forming a genuine common economic unit, which demands a permanent, single economic management.

2.1.2.2 Concentration through acquisition of control[17]

Reading Article 3(1)(b), it is clear that a merger may also occur through acquisition of control. This may be done by an undertaking acting alone, by two or more undertakings jointly, or by a person[18] already controlling an undertaking or a combination of persons and undertakings controlling undertakings.

The concept of previous independence applies also to acquisition of control. Internal restructuring within an undertaking does not constitute a concentration within the meaning of the Regulation, since a concentration is limited to changes in control. The different parts of an undertaking or a group have not been previously independent.[19] A small, yet a possibility which cannot be ruled out, is that a group which operates in a highly decentralised way may constitute separate economic units, hence capable of being treated as independent undertakings.[20]

A definition of control is given in Article 3(3):

> "For the purposes of this Regulation, control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by:

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[16] "Previously independent undertakings" as found in Article 3(1)(a) has been inserted to avoid the situation where undertakings formally merge, but are already concentrated in an economic sense. Cook, C.J., Kerse, C.S.. EC Merger Control, 2000. p. 25.
[17] Notice O.J. [1998] C66/02, chapter III.
[18] The term person in this context extends to public bodies and private entities, as well as individuals. A public body may also be the State itself.
[19] Cook, C.J., Kerse, C.S.. EC Merger Control, 2000. p. 26.
[20] In the light of the judgement of the Court of the First Instance in Case C 73-95P Viho v. Commission, [1996] ECR I 5457; [1997] 4 CMLR 419.

(a) ownership or the right to use all or part of the assets of an undertaking;
(b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking."

The key element in determining control is thus the concept of decisive influence. A concentration occurs when one undertaking acquires rights over another undertaking, and those rights are sufficient to confer on the other undertaking the possibility of exercising decisive influence over that other.[21]

The possibility to exercise decisive influence over another is sufficient to constitute control within the meaning of the Regulation. Even if an undertaking chooses not to use its control, or does not need to, it can still be treated as controlling another. The possibility of exercising decisive influence is the crucial point, rather than the actual exercise of such influence.[22]

The acquisition of control may be in the form of sole or joint control. Control shall in both cases be constituted by rights, contracts or any other means which confer the possibility of exercising decisive influence on an undertaking.[23]

2.1.2.2.1 Sole control

Sole control can be acquired either through a legal or a de facto basis. In order to acquire sole control, it is normally required to obtain a majority of the voting rights of a company, merely a majority of the capital share is not in itself significant for control. An acquisition which does not include a majority of the voting rights does not normally confer control even if there has been an acquisition of the majority of the share capital. However, sole control may be acquired through a qualified minority.[24]

On a legal basis, there are usually specific rights attached to the minority shareholding. Such rights may be preferential shares leading to a majority of the voting rights, or the power to appoint more than half of the members of the supervisory board or the administrative board.[25]

On a de facto basis, a minority shareholder may obtain sole control for instance when the minority shareholder is highly likely to achieve majority at the shareholders meeting, which may be the case when the rest of the

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[21] Cook, C.J., Kerse, C.S.. EC Merger Control, 2000. p. 29.
[22] Notice O.J. [1998] C66/02, Para. 9.
[23] Article 3(3) ECMR.
[24] Notice O.J. [1998] C66/02, Para. 13.
[25] Notice O.J. [1998] C66/02, Para. 14.

shares are highly dispersed. In such a case it is unusual that all the smaller shareholders attend to the shareholders' meeting, which may give a minority shareholder the majority of the votes at the meeting, hence sole control.[26]

2.1.2.2.2 Joint control

Joint control is at hand when two or more undertakings have the possibility to exercise decisive influence over another undertaking. Significant for joint control is that the shareholders must reach agreement on major decisions concerning the controlled undertaking. Unlike sole control, where the control is characterised by the power to control an undertakings strategic decisions, joint control is characterised by the power to block action, to reject proposed strategic decisions, with the result of a deadlock situation.[27]

In its primary form, joint control exists between two undertakings, two parent companies, who equally share the voting rights in the controlled undertaking. However, joint control may exist where there is no equality between the two parent companies in votes or in decision-making bodies, or where there are more than two parent companies. The latter may be the case where there are minority shareholders.[28]

Minority shareholders may have rights to veto decisions which are important for the strategic behaviour of the controlled undertaking. These rights could either be set out in the statue of the controlled undertaking, or in a contract between the parent companies. It is also possible that certain decisions, for instance major strategic decisions, are subject to approval by a body where the minority shareholders are represented.[29]

There are a variety of veto rights a minority shareholder may possess. Some veto rights are normal protection for minority shareholders, rights that protect their financial interest as investors. Such veto rights do not confer joint control on the minority shareholders. Veto rights which confer joint control usually include decisions and issues such as the appointment of senior management[30], the budget[31], or the business plan[32]. The mere

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[26] Notice O.J. [1998] C66/02, Para. 14.
[27] Notice O.J. [1998] C66/02, Para. 18 & 19.
[28] Notice O.J. [1998] C66/02, Para. 20.
[29] Notice O.J. [1998] C66/02, Para. 21.
[30] Veto rights over the appointment of the management confer the power to exercise decisive influence on the commercial policy of an undertaking. See Para. 25 of the O.J. [1998] C66/2 Notice.
[31] The budget determines the precise framework of the activities of the controlled undertaking, and its investments. Veto rights over the budget also gives power in respect to the commercial policy of an undertaking, as in the case of appointment of management. See Notice O.J. [1998] C66/02, Para. 25.
[32] The business plan provides details of the aims of a company, together with the measures to be taken in order to achieve these aims. A veto right of a business plan may be sufficient

existence of such veto rights, hence the ability to influence the possibility to exercise decisive influence of the parent companies, is enough to have acquired joint control. It is not necessary that the veto rights are used, the possibility is enough to have joint control.[33]

Even in the absence of veto rights, minority shareholders may obtain joint control. This may be the case where the minority shareholders together provide the means for controlling the target undertaking. In such a case, the minority shareholders will have a majority of the voting rights, which they will exercise together.[34]

Joint control is consequently basically about commonality of interest. If there is no common interest there cannot be joint control of an undertaking. On a legal basis, joint control can be established through a pooling agreement, where the shareholders sign an agreement by which they undertake to act in the same way. Joint control on a de facto basis is usually proven and given through veto rights. Exceptionally, joint control on a de facto basis may occur where strong common interests exist between minority shareholders to such an extent that they would not act against each other when exercising their rights. Such joint control on a de facto basis is however quite rare, as it is hard to prove such strong common interest.[35]

2.1.2.2.2.1Ericsson/Nokia/Psion

A case which illustrates the concept of joint control under the ECMR is the Ericsson/Nokia/Psion-case[36]. Ericsson, Nokia and Psion created a joint venture, Symbian, in order to develop and market an operating system for mobile digital data. The joint venture was notified to the Commission who cleared it under the ECMR. When on a later stage Motorola joined the joint venture, the Commission refused to accept that Symbian continued to be under the joint control of its shareholders.[37]

The shareholdings of Symbian before and after the participation of Motorola were as follows:

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to confer joint control even in the absence of any other veto rights. See Para. 26 of the O.J. [1998] C66/2 Notice.

[33] Notice O.J. C66/02 [1998], Para. 22 & 23.

[34] Notice O.J. [1998] C66/02, Para. 30.

[35] Notice O.J. [1998] C66/02, Para. 31 & 32.

[36] Case No IV/JV.6 [1998] Ericsson/Nokia/Psion.

[37] Case No IV/JV.12 [1998] Ericsson/Nokia/Psion/Motorola.

	Symbian I	Symbian II
Ericsson	30 %	23,08 %
Nokia	30 %	23,08 %
Psion	40 %	30,77 %
Motorola	-	23,08 %

In Symbian I, strategic decisions on senior appointments, business plans and budgets required 67% majority vote according to the Symbian I shareholders' agreement. Hence each of the three original shareholders had veto rights. However, when Motorola joined them, this was no longer the case. There was no longer a situation of de facto joint control. The parties held as their understanding that there was in fact still de facto joint control. This opinion was based partly on that the four parties were to develop a new operational system which was going to be a new standard, hence would all four act for the same interest, partly that Ericsson and Nokia would not had agreed to surrender their unilateral veto rights had they not been of the view that there was commonality of interest between themselves and Motorola.

The Commission however did not agree. They found that Psion's interest was different from the other shareholders, due to the fact that Psion's activities relate to computer hardware and software while the other three will incorporate the products of Symbian in wireless information devices. They also found that no sufficient common interest was established between Ericsson, Nokia and Motorola, given that they would be competitors in a new market in which their interests and strategies might well diverge. A change in alliances between the shareholders could be expected, and when there is a possibility of such behaviour between minority shareholders the assumption of joint control can normally be excluded.[38] The Commission referred to the Concentration Notice and rejected the parties view that joint control existed, hence bringing the operation outside the scope of the ECMR.

The Ericsson/Nokia/Psion/Motorola-case shows that the Commission will require convincing evidence of commonality of interest before concluding that joint control exists.

2.1.3 Jurisdiction

The Commission has jurisdiction over concentrations which are of a substantial size and which take wider effect than simply within an individual member state. The operation which is to be examined must bring about a structural change, i.e. must constitute a concentration, and this change must

[38] Notice O.J. [1998] C66/02, Para. 35.

have such characteristics that it should be handled by the Community. Jurisdiction is based on the turnover of the present undertakings.

In the original wording of the Regulation, a concentration had a Community dimension when:

(a) the combined aggregate world-wide turnover of all the undertakings concerned[39] is more than 5 000 million €; and
(b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than 250 million €, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.[40]

When the Regulation was revised in 1997, the main objective, regarding the thresholds, was to bring within them those concentrations involving undertakings with a reasonably large turnover in at least three Member States but whose aggregate world and Community turnover fell below the original thresholds. Under the amended Regulation, the original Community dimension thresholds remain.[41] However, if those requirements are not met, the requirements under the new thresholds for a concentration with Community dimension are met if:

(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than 2 500 million €;
(b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than 100 million €;
(c) in each of at least three Member States included for the purpose of point (b), the turnover of at least two of the undertakings concerned is more than 25 million € each; and
(d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than 100 million €;

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.[42]

The new turnover thresholds have dual effect. They will lower the minimum turnover requirements and at the same time ensure that the undertakings

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[39] A recurring notion in Article 1 and throughout the Regulation is that of ”undertakings concerned”. This was clarified in the Commission Notice on the undertakings concerned O.J. [1994] C385/12. “From this point of view of determining jurisdiction, the undertakings concerned are, broadly speaking, the actors in the transaction in so far as they are the merging, or acquiring and acquired parties.” Para. 3 of the introduction.
[40] Article 1(2) ECMR.
[41] Goyder, D.G., EC Competition Law, 1998. p. 389.
[42] Article 1(3) ECMR.

concerned have a substantial overall turnover in at least three Member States and that there are at least two undertakings which have a significant turnover in each of these three Member States. This will make the Regulation applicable to more concentrations, hence giving more companies the opportunity to make one filing instead of multiple national filings.[43]

Detailed provisions regarding the calculation of turnover is given in Article 5 of the Regulation and explained in the Commission's notice on the calculation of turnover.[44] Turnover for ordinary trading companies is defined so as to cover all sales of goods and services but excluding value added tax and sales tax. The relevant turnover is that of the undertakings concerned, which in the case of a joint venture means the total turnover of all the parents.[45]

2.1.4 Notification

The ECMR is administered by the Merger Task Force (MTF), a division of DG IV in Brussels. The MTF is responsible both for pre-notification negotiations as well as for all matters arising after notification of a particular concentration.

In the pre-notification stage, i.e. before the conclusion of an agreement, the MTF will receive inquires from undertakings and their professional representatives as to whether a particular transaction falls within the Regulation, and if so, what kind of information that will be required in order for the Commission to carry out its first stage proceedings. The officials of the MTF may also express a preliminary, non binding, view on whether the transaction does or does not fall within the jurisdiction of the Regulation.

The rules for prior notification of concentrations is found in Article 4 of the Regulation. Notification for concentrations with a Community dimension is mandatory, and must be notified to the Commission within one week from the conclusion of the agreement, the announcement of the public bid or the acquisition of the controlling interest. The parties may not put the concentration into effect before it is notified and the Commission has completed its assessment by formal decision, or should have done so.[46]

[43] Ahlborn, C. Turner, V., Expanding Success? Reform of the Merger Regulation. E.C.L.R. Volume 19, 1998. p. 250f.
[44] Notice on the calculation of turnover under Regulation 4064/89 on the control of concentrations between undertakings, O.J. [1998] C66/25.
[45] Korah, V. EC Competition Law and Practice, 2000. p 307.
[46] Article 7 ECMR.

The concentration has to be notified on a Form CO[47], which basically is a document with a vast amount of questions concerning the concentration. The answers to these questions will apply the MTF with a substantial amount of information about the transaction. Form CO includes details of the method proposed for effecting the concentration of the relevant corporate groups, their recent accounts, and a full explanation of their ownership and control and of any relevant links between the undertakings. The answers given should also provide a complete analysis of the relevant markets, both the geographic and the product market, together with a detailed assessment of the market shares held by the parties and information as to actual or potential barriers to entry. In certain cases may further information be needed, such as the degree of vertical integration, research and development expenditure or distribution systems. An accurate and complete completion of all parts of Form CO is of vital importance since there are fines and penalties for inaccurate or incomplete completion.

The notification has to be made by the parties to the merger or those acquiring joint control in cases of mergers or acquisition of joint control, in all other cases must the notification be made by the person or undertaking acquiring control.[48] The notification shall be in one of the official languages of the Community, any supporting documents in non-EC language should be translated into the language of the proceeding.[49]

Only one notification per concentration is allowed, in order to avoid confusion and incomplete notifications.[50] Any personal secrets in cases of joint notifications should be protected from other parties by submitting them under separate covers, and with an explanation why confidentiality is claimed.[51]

There is also a provision for short-form notification. This provision applies to relatively small-scale agreements which nevertheless meet the thresholds requirements i.e. when a joint venture has no or only minimal actual or likely activities within the Community. Such cases occur where joint control of an undertaking is acquired by two or more companies and where:

(a) the turnover of the joint venture and/or the turnover of the activities contributed by the parents is less than 100 million € in the EEA territory;
and

[47] Article 2(1), Commission Regulation (EC) No 447/98 of 1 March 1998 on the notifications, time limits and hearings provided for in Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings.
[48] Article 4(2) ECMR.
[49] Article 2(4) Regulation (EC) 447/98.
[50] Article 1(3) & 2(1) Regulation (EC) 447/98 envisage the use of a single form per concentration.
[51] Chapter F, Form CO, (annexed to Regulation (EC) 447/98).

(b) the total value of assets transferred to the joint venture is less than 100
million € in the same territory.[52]

It may also occur where one or more undertakings acquire sole or joint control of another undertaking, provided that none of the parties to the concentration are engaged in business activities in the same relevant market. If two or more of the parties are engaged in business activities in the same relevant market and are in a horizontal relationship, their combined market share must not be 15% or more, if they are in a vertical relationship the combined market share must not be 25% or more, in order to benefit from the short-form notification.[53]

The intention of the short-form notification is to ease the notification requirements by only requiring the parties to submit a reduced form of the Form CO. It has been shown through experience gained by the Commission that concentrations such as the ones described above are normally cleared without having raised any substantive doubts, provided there were no special circumstances.[54] With the simplified procedure, the Commission aims to make Community merger control more focused and effective.

2.1.5 Procedure

Since the ECMR came into force in 1990, a substantial number of joint ventures have been notified to the Commission for approval under Article 6 of the ECMR. In accordance with Article 6, the Commission examines the notification as soon as it is received to decide whether or not it is a concentrative joint venture in accordance with Article 3(2), thus falling into the scope of the Regulation. If the Commission finds the joint venture to be concentrative, and if the joint venture is of Community dimension, the Commission then takes the joint venture through its first-stage proceedings. First the Commission must publish the fact of the notification, the names of the parties, the nature of the concentration and the economic sectors involved in the C version of the Official Journal.[55] Once official notification has been made, the MTF begin three weeks of intensive analysis of the information provided. They may also seek information from a wide variety of other sources such as suppliers, customers, trade associations and public authorities. It is examined whether the concentration raises serious doubts as to its compatibility with the common market. Three possible scenarios can be predicted:

[52] Chapter C, Form CO, (annexed to Regulation (EC) 447/98), & Commission Notice on a simplified procedure for treatment of certain concentrations, O.J. [2000] C217/32, Para.4.
[53] O.J. [2000] C217/32, Para.4.
[54] Goyder;D.G., EC Competition Law, 1998. p. 412.
[55] Article 4(3) ECMR.

(a) the concentration does for some reason not fall within the scope of the Regulation, e.g. because although it is a concentration, its turnover falls below the required thresholds; or
(b) the concentration falls within the scope of the Regulation and is regarded as compatible with the Common Market at the end of the first stage; or
(c) the concentration has raised serious doubts as to its compatibility with the Common Market and must proceed to a detailed stage two examination.[56]

Most cases are cleared upon this preliminary first stage examination, declared compatible with the Common Market, however some cases are found to raise serious doubts. Those that are cleared and declared compatible can proceed as if they have received exemption under Article 81(3).[57] Those that are found to raise serious doubts however, are referred to a second stage examination, which basically is a further examination of the effects of the concentration on the relevant market. The Commission carries out an in-depth investigation with the assistance of the competent authorities of the Member States.

After a stage two investigation, if necessary modifications have been taken, the Commission may issue a decision declaring the concentration compatible with the Common Market. In order to ensure that the undertaking concerned comply with the commitments made to the Commission, the Commission has power to attach conditions and obligations to the decision.[58] If the Commission finds the concentration to be incompatible with the Common Market after a stage two investigation, it may issue such a decision without reference to any conditions.[59]

In practice, most concentrations are declared compatible with the Common Market. During the time there has been merger control within the European Union, i.e. 10 years, there have only been 13 cases which have been declared incompatible. This is of course due to the fact that the parties to the concentration together with the Commission through different commitments and obligations reach an understanding which brings the concentration in focus out of a dominant position. Normally, the parties to a concentration engage in pre-notification discussions with the Commission at an early stage, and the parties usually have a number of modifications already worked out, ready to be carried out, even before they begin their discussions with the Commission. To give an example, say there is a joint venture to be between two fruit retailers. One of the parties are engaged in the apple and banana market, and the other party is engaged in the pear and banana market. The Commission may then find that there is an overlap in the banana market, i.e. the joint venture will have a dominant position in the

[56] Goyder, D.G., EC Competition Law, 1998. p. 415.
[57] Article 6(1)(b) ECMR.
[58] Article 8(2) ECMR.
[59] Article 8(3) ECMR.

banana market. The joint venture may then propose to the Commission that one of the parties sell its business in bananas, hence bringing the joint venture within the dominance test.

2.1.5.1 Review periods

The time aspect is often of vital importance in business transactions. As earlier stated, notification of a concentration with a Community dimension must be done within one week after the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest. The week begins to run when the first of these events occur.[60]

Article 10 specifies the time limits for initiating proceedings and for decisions. A decision on a notification as described in Article 6(1), whether or not initiation of second stage proceedings shall take place, must be taken within one month from the day following that of the receipt of the complete notification. This period can be extended to six weeks if a Member State makes a request under Article 9[61] that the matter be referred to it or if, after notification, the parties offer commitments.[62] These periods shall begin at the beginning of the working day following the effective date of the notification, which is the date on which it was received by the Commission.[63] If the Commission decides to open a second stage investigation, the Commission must reach a decision within four months of the date on which proceedings are initiated.[64] There is however an exception to this rule. If the Commission decides to revoke a decision of compatibility and decides to substitute a decision of incompatibility under Article 8 (3) for its original decision, it is not bound by the four-month time-limit.[65] If the Commission fails to adopt a decision within the prescribed time-line, the concentration is deemed to have been declared compatible with the common market.[66]

The fact that the parties to a concentration usually have pre-notification discussions, the importance of the one week rule of notification has lessen. The notification comes naturally since the Commission usually is rather initiated already. However, the four-six weeks period of the first stage proceedings, and the four months period of the second stage proceedings are still very important, and must be followed.

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[60] Article 4(1) ECMR.
[61] See below, chapter 2.1.6.
[62] Article 10(1) ECMR.
[63] Article 6(4) Regulation (EEC) 447/98.
[64] Article 10(3) ECMR.
[65] Article 8(6) ECMR.
[66] Article 10(6) ECMR.

2.1.6 One-stop-shop[67]

The one-stop-shop principle was introduced with the ECMR. The idea with this principle is that either is a concentration's effects on competition examined at the Community level, i.e. by the Commission, or at the Member State level, i.e. by the national competition authorities.

Before the Regulation entered into force, a concentration could be examined under two different sets of competition rules within the Community. It could be examined by the Commission under Articles 81 and 82 of the EC Treaty, and in some of the Member States by the national competition authorities. The one-stop-shop principle introduced a system of reciprocal exclusivity. If a transaction comes within the jurisdiction of the Regulation, neither Articles 81 and 82 nor national competition laws are applicable. The general rule can be found in Article 21 of the Regulation, which in its first part states that only the Commission may take the decisions covered by the Regulation, and in its second part states that no Member State may apply its national legislation to a merger which has Community dimension.

The general rule is thus that the Regulation applies to all cases where a transaction constitutes a concentration and this concentration has a Community dimension. If the transaction has a community dimension but is not a concentration, it might come within the scope of Articles 81 and 82 and/or the Member States' competition rules. If it is a concentration without Community dimension it can not be examined under Articles 81 and 82 nor under the Regulation. Such cases thus falls within the exclusive jurisdiction of the Member State competition authorities.

The division of jurisdiction may be shown as below:

	Concentration	**Not Concentration**
Community Dimension	Merger Regulation	Articles 81 & 82 *or* National Competition Authorities
Not Community Dimension	National Competition Authorities	Articles 81 & 82 *or* National Competition Authorities

There are however a number of exceptions to the one-stop-shop principle. In accordance with Article 21 (3) of the Regulation, Member States may take appropriate measures to protect legitimate interests other than those taken

[67] This subchapter is based on Broberg, Morten,P., The European Commission's jurisdiction to scrutinize mergers, 1998. p. 4-6, unless otherwise stated.

into consideration by the Regulation, provided they that they are compatible with Community law. Listed as legitimate interests for these purposes are public security, plurality of the media and prudential rules. According to the German Clause, Article 9 (1), the Commission may make a referral of a notified concentration to the competent authorities of the concerned Member State. There must be a concentration with Community dimension which threatens to create or strengthen a dominant position on a distinct market. These cases are such that they may not be regarded as harmful from a Community perspective, but may be detrimental on a national level. The Commission has rejected a number of such applications from the Member States[68], but also accepted some, for instance a request from the United Kingdom who was the first successful applicant under this article.[69]. Article 22(3), or the Dutch Clause, provides for Member States to request the Commission to investigate a concentration which does not have Community dimension, but which may affect trade between the Member States. The purpose of this clause was to provide a mechanism for merger control where none existed at national level, however most Member States now have their own systems of merger control.[70] The Clause has been used several times, for instance in the British Airways/Dan Air case[71] in which Belgium sent a reference to the Commission, in two Dutch cases, Holland Media Group[72] and Blokker/Toys Я Us[73], and by Finland in the Kesko/Tuko case[74], concerning an acquisition which created a dominant position on the Finish commodities market. Finland, who at the time had no merger control of their own, referred the case to the Commission, who found the concentration to be incompatible with the common market.[75] Once the reference back to the Commission has been made, the Commission will deal with the case as if it was a concentration with Community dimension.[76]

2.1.7 Duration of clearance

Under the ECMR, clearance is permanent but could be revoked in exceptional cases if the parent companies could eliminate competition. This is one of the great benefits of having a concentration cleared under the ECMR, instead of under Article 81. An exemption given under Article 81 is issued for a specific period, in accordance with Article 8 of Regulation 17/62.

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[68] See e.g. Case IV/M41, Vartal Bosch O.J. [1991] L320/26; Case IV/M222, Mannesman/Hoesch [1993] O.J. L114/34.
[69] Case IV/M180 Tarmac/Steetly [1992] O.J. C50/25; [1992] 4 CMLR 343.
[70] Verloop, Peter. Merger Control in the EU,1999. p. 37.
[71] Case IV/M278 British Airways/Dan Air O.J. [1993] C68/15; 4 CMLR 235.
[72] Case IV/M553 RTL/Endemol/Veronica O.J. [1996] L34/32; [1995] 5 CMLR 26.
[73] Case IV/M890 Blokker/ToysяUs O.J. [1997] C71/12.
[74] Case IV/M784 Kesko/Tuko O.J. [1997] C110/53.
[75] Westin, Jakob. Introduktion till EG:s konkurrensregler- en praktisk översikt, 1998. p. 132 f.
[76] Goyder, D.G., EC Competition Law, 1998. p. 411.

3 The treatment of joint ventures under the ECMR

3.1 Joint ventures falling within the scope of the ECMR

With the changes made to the ECMR when it was amended in 1997, the scope of the ECMR regarding joint ventures was extended. This subchapter will look into the criteria for a joint venture to fall within the scope of the ECMR.

3.1.1 Joint ventures under the original ECMR

Prior to the entry of the amended ECMR, joint ventures that did not qualify as concentrative joint ventures were assessed under Article 81 of the EC Treaty. Any joint venture that was not concentrative to its nature was characterized as a co-operative joint venture, which could be derived from the wording of Article 3(2) of the original Regulation. Reading the second subparagraph of the same article, co-operative joint ventures would be:

- all joint ventures, the activities of which are not to be performed on a lasting basis, especially those limited in advance by the parents to a short time;
- joint ventures which do not perform all the functions of an autonomous economic entity;
- joint ventures which perform all the functions of an autonomous economic entity where they give rise to coordination of competitive behaviour by the parents in relation to each other or to the joint venture.

The delimitation between concentrative joint ventures and co-operative joint ventures proved to be difficult many times. In an attempt to clarify the distinction between concentrative and co-operative joint ventures, the Commission published in 1990 the so-called "1990 interface notice"[77]. Only those joint ventures performing on a lasting basis all the functions of an autonomous economic entity, and not giving rise to co-ordination of

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

competitive behaviour of the parents amongst themselves or between them and the joint venture, came within the Regulation.[78]

The joint ventures which lacked the necessary concentrative aspects to qualify as a concentration according to the ECMR due to their structure and/or purpose, had to be reviewed under Article 81 of the EC Treaty pursuant to the procedures of Regulation 17/62. Not only were the coordinating effects of the joint venture assessed under Article 81, but the whole agreement. The Commission hence carried out a limited form of merger control under Article 81.[79] Parties very often therefore tried to structure the joint venture to be concentrative in accordance with the ECMR, hence gaining the procedural benefits of it. The material assessment of a joint venture is considerably less rigid under the ECMR in comparison to assessment under Article 81. According to the ECMR, in order to receive exemption it is enough that the joint venture does not create or strengthen a dominant position which significantly hinders competition, while under Article 81 it is demanded that in order to receive exemption, a joint venture must create certain benefits for the consumers and that all elements that may distort competition are absolutely necessary in order to create those benefits.[80] One of the main criticisms against the original Regulation was based on this fact, that transactions which from an economic point of view were quite similar, were treated from a legal point of view very differently. In particular, the lack of legal certainty with respect to co-operative joint ventures was criticized.[81]

The Commission responded the criticism through different actions. At the end of 1992 they announced that as of January 1993, a so-called fast-track procedure would be introduced which would speed up the notification process for structural joint ventures. The fast-track procedure meant that within two months of receiving a complete notification of a structural joint venture[82], the Commission would inform the parties in writing if the joint venture would give rise to doubts about its compatibility with Article 85 of the EC Treaty and if so, how the Commission contemplated pursuing the case. In 1993, the Commission also issued a notice on co-operative joint ventures[83], which was an attempt from the Commission to specify some categories of joint ventures that it considered to be compatible with Article 85. It was an attempt to provide some legal certainty to the area. The notice recognises that many joint ventures do have beneficial effects and that these

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[78] Zonnekeyn, G.A., The Treatment of Joint Ventures Under the Amended E.C. Merger Regulation, [1998] E.C.L.R. Vol. 19. p. 414.
[79] Faull, Nikpay, The EC Law of Competition. 1999. p. 355.
[80] See below, chapter 4.1.2.
[81] Zonnekeyn, G.A., The Treatment of Joint Ventures Under the Amended E.C. Merger Regulation. p. 416.
[82] Structural joint ventures are joint ventures where major changes are made to the structure of the participating firms, bringing into existence a new full-function entity with its own production activity. Introduction to Form A/B, annex to Regulation (EEC) 3385/94.
[83] Notice concerning the assessment of co-operative joint ventures pursuant to Article 85 of the EEC Treaty, O.J. [1993] C43/02.

should be encouraged without fear of being prohibited. In 1994, the Commission revised the 1990 Interface Notice by the issuance of the 1994 Interface Notice[84] in order to further clarify the distinction between concentrative and co-operative joint ventures and with the intention of having more joint ventures being submitted under the ECMR.[85]

3.1.2 Joint ventures under Article 3 of the ECMR

As discussed earlier, Article 3 of the ECMR gives the definition of a concentration. When the ECMR was amended, certain parts of Article 3 were excluded.

The original drafting of the ECMR contained four essential requirements for a joint venture to be described as concentrative. It had to be under joint control, meaning that the each of the participants had to have sufficient rights over the joint venture. The rights given to one participants could not be substantially greater than the rights given to the other participants. Secondly must the joint venture have been formed on a lasting basis. Thirdly must the joint venture perform all the functions of an autonomous economic entity. Finally must the joint venture not have as its object or effect the co-ordination of competition between the participants, or between some of them on one hand and between the joint venture on the other.[86]

To be regarded as full-function under the amended Regulation, a joint venture must satisfy the first three conditions of the four conditions stated above, i.e. the joint venture must be under joint control, be formed on a lasting basis and perform all the functions of an autonomous economic entity. The fourth condition has been abolished as a result of the changes made to the ECMR, thus bringing all full-function joint ventures having Community dimension within the scope of the Regulation.[87]

In order to provide guidance as to how the Commission interprets the amendments made to the ECMR concerning joint ventures, the Commission published a notice on the concept of full-function joint ventures.[88] This notice replaced the Notice on the distinction between concentrative and co-operative joint ventures[89].

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[84] Commission Notice on the distinction between concentrative and co-operative joint ventures under Council Regulation (E.C.) No. 4064/89 of December 21, 1989, on the control of concentrations between undertakings, O.J. [1994] C385/01.
[85] Zonnekeyn, G.A., The Treatment of Joint Ventures Under the Amended E.C. Merger Regulation. p. 417.
[86] Goyder, D.G., EC Competition Law, 1998. p. 391.
[87] Goyder, D.G., EC Competition Law, 1998. p. 391.
[88] Commission Notice on the concept of full-function joint ventures under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings, O.J. [1998] C66/01.
[89] Notice O.J. [1994] C385/01.

When the Commission examines a joint venture to find out whether it is a full-function joint venture, it first looks at whether there is joint control between the parties, and then whether the joint venture is a full-function entity.

3.1.2.1 Joint control

As I already earlier, when explaining the concept of concentration, thoroughly explained the concept of joint control, I will only give a brief description of the main parts here.

A joint venture may fall within the scope of the ECMR where there is an acquisition of joint control by two or more undertakings. The control is based on the possibility to exercise decisive influence over an undertaking, i.e. the parent companies must reach agreement on major decisions concerning the controlled undertaking.[90]

The clearest form of joint control is between two undertakings equally sharing the voting rights in the joint venture, but joint control may also exist where there is no equality between the two parent companies or where there are more than two parent companies. When a joint venture is controlled by many shareholders, it is of great importance that there is commonality of interest in order to have joint control.

3.1.2.2 Full-function joint venture

A full-function joint venture is defined in Article 3(2) as the creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity. Such joint venture bring about a lasting change in the structure of the undertakings concerned.[91]

In order for a joint venture to perform the functions of an autonomous economic entity, the joint venture must operate on a market, carrying out a recognised activity on that market. It must thus have a management dedicated to its day-to-day operations, and have access to sufficient finance, staff and assets resources.[92]

However, if the joint venture only takes over one specific function of the parents' companies business without market access, the joint venture is not full-function. The joint venture needs to have sufficient commercial independence and identity of its own in order not to be merely an auxiliary

[90] Notice O.J. [1998] C66/01 para. 9.
[91] Notice O.J. [1998] C66/01 para. 11.
[92] Notice O.J. [1998] C66/01 para. 12.

or a service company for its shareholders. An example of this is for instance a joint venture limited to research and development or production.[93] The Commission will examine the relationship between a joint venture and its parent companies in order to judge whether the joint venture has a real commercial independent existence independent of their needs, a joint venture which is wholly dependent on its parents for supplies or is established to supply services or products exclusively to its parents is not a full-function joint venture.[94] However, such relationship between the joint venture and the parent companies may not affect the full-function character of the joint venture if that is only during the start-up phase of the joint venture, provided the objective of the joint venture is to establish an autonomous entity on the market.[95]

The joint venture must also be established and intended to operate on a lasting basis. The fact that the parent companies invest substantial financial resources in the joint venture, or transfer significant technical or commercial know-how to it demonstrates that this is the case.[96] The determining factor is whether the joint venture operates as an enduring independent entity and is intended to do so by its shareholders. A five to ten year horizon is usually sufficient, although much will depend on the nature of the markets in which the joint venture operates.[97]

A joint venture can still fall within Article 81, even though the requirements just mentioned are fulfilled, if the companies does not reach the thresholds of the Regulation, hence not having Community dimension. There are great advantages for a joint venture to fall within the Regulation instead of Article 85, especially since the Commission's handling of concentration cases is essentially faster than the handling of joint ventures under Article 85.

3.2 The assessment of joint ventures under the ECMR

3.2.1 Dominant position

As both concentrative as well as co-operative joint ventures are now being assessed under the ECMR, they are both subject to the dominance test laid down in Article 2 of the ECMR. In early cases, the Commission was said to use the same terms as would an economist when defining the concept of a dominant position, i.e. focus on the discretionary power of the monopolist to set its prices and make other market decisions without being tightly

[93] Notice O.J. [1998] C66/01 para. 13.
[94] Cook, C.J., Kerse, C.S.. EC Merger Control, 2000. p. 51.
[95] Notice O.J. [1998] C66/01 para. 14.
[96] Notice O.J. [1998] C66/01 para. 15.
[97] Cook, C.J., Kerse, C.S.. EC Merger Control, 2000. p. 52.

constrained by competitive pressures.[98] In later cases however, it has become clear that a dominant position in the European Union differs from the economists' concept of power over price. In virtually all judgements since 1978, a dominant position has been defined as "a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciably extent independently of its competitors, customers and ultimately of consumers."[99]. This method is a bit like power over price, but also includes the ability of an undertaking to foreclose and keep other undertakings out of the market.

Article 2(1) sets out some provisions which the Commission shall take into account when establishing whether or not a concentration is compatible with the common market. When making the appraisal, the Commission shall take into account several factors, such as; the need to maintain and develop effective competition within the common market in view of the market structure and actual or potential competition from other undertakings, the economic and financial power of the parties and the alternatives available to the their suppliers and consumers, legal and other barriers to entry, trends of supply and demand in relevant markets, and the developments of technical and economic progress, provided it is to the consumers' advantage and does not form an obstacle to competition. Through case-law, it has been seen that the Commission and the Court of Justice commonly looks to barriers to entry as well as to market shares in order to assess the existence of a dominant position in the market defined as relevant.[100]

Article 2(2) and (3) read as follows:

- 2(2): A concentration which does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared compatible with the common market.

- 2(3): A concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared incompatible with the common market.

As Article 2(2) and (3) provides the legal framework which the final decision must be taken within, Article 2(1) provides a reminder to the Commission that in its analysis it should not overlook the many other factors, apart from competition and structural issues, to be taken into account when making its overall assessment.

[98] Korah, V. EC Competition Law and Practice, 2000. p. 81.
[99] Korah, V. EC Competition Law and Practice, 2000. p. 82.
[100] Korah, V. EC Competition Law and Practice, 2000. p. 94.

The ECMR gives no guidance on how the Commission should approach its task of defining relevant markets, which means the Commission must base their analysis upon experience. Traditionally under the European Competition Law the relevant market has been determined by two main factors, the products market and the geographic market. According to the practice of the Commission, a product market would comprise all products which had similar characteristics, which would satisfy a constant need, and which only to a limited extent could be substituted by other products. The geographic market was defined as an area which was sufficiently homogeneous and limited by realistic economic alternatives available to buyers and sellers, and where a dominant undertaking might be able to engage in abuses.[101] The great vagueness inherent in this method caused great uncertainty regarding the market definition and consequently regarding the undertakings' market shares.

Conscious of the importance of consistency in this field, the Commission has published a Notice[102] which sets out in detail the way in which it carries out its analysis of both product and geographic markets.

3.2.1.1 Relevant market

In the Form CO, the parties to the concentration are asked to identify the affected markets, both product and geographic. The parties normally seek a broader market definition in which the market shares will be lower, while the MTF of the Commission seeks a narrower market definition.[103] Sometimes the MTF does not need to make a detailed analysis of the market, and decide to give clearance to a concentration on the assumption that even the narrowest possible market definition, giving the highest possible market share, will not raise any problems.[104] However, in the great majority of concentrations, a decision on the relevant market will be needed.

The relevant product and geographic markets determine the scope within which the market power of the new entity resulting from the concentration must be assessed. In section 6 of the Form CO, the relevant product markets are defined as:

- "A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use."

The relevant geographic markets are defined as:

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[101] Cook, C.J., Kerse, C.S.. EC Merger Control, 2000. p. 66.
[102] Commission Notice on the definition of the relevant market for the purposes of Community competition law, O.J. [1997] C372/05.
[103] Goyder, D.G., EC Competition Law, 1998. p. 396.
[104] e.g. PepsiCo/General Mills, Case IV/M.232 O.J. [1997] C228/6.

- “The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of the relevant products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring geographic areas because, in particular, conditions of competition are appreciably different in those areas.”

The relevant market is subsequently established by the combination of the product and geographic markets. Once the product and geographic market relevant to a concentration has been determined, the degree of dominance which it will confer on those markets has next to be considered.

3.2.1.1.1 Product market

Undertakings are subject to three main sources of competitive constraints: demand substitutability, supply substitutability and potential competition. From an economic point of view, for the definition of the relevant market, demand substitution constitutes the most immediate and effective disciplinary force on the suppliers of a given product, in particular in relation to their pricing decisions. An undertaking or a group of undertakings cannot have a significant impact on competition if its customers are in a position to switch easily to available substitute products or to suppliers located elsewhere. Basically, the exercise of market definition consists in identifying the effective alternative sources of supply for the customers of the undertakings involved, both in terms of products/services and geographic location of suppliers.[105]

The assessment of demand substitution entails a determination of the range of products which are viewed as substitutes by the consumer. The MTF will look at the essential physical characteristics of products, their prices, and their intended use. They will also look at the circumstances in which they are marketed and the nature of the buyer.[106] The question to be answered is whether the parties' customers would switch to readily available substitutes or to suppliers located elsewhere in response to a small (in the range of 5%-10%) hypothetical but permanent relative price increase by a hypothetical monopolist of the products and in the areas being considered. If substitution by consumers to other products would be enough to make the price increase unprofitable because of the resulting loss of sales, additional substitutes and areas are included in the relevant market.[107] The procedure will continue until the products and the area, which the hypothetical monopolist controls, is wide enough to make the price increase profitable.

[105] Notice O.J. [1997] C372/05, Section 2.
[106] Goyder, D.G., EC Competition Law,1998. p. 397.
[107] Notice O.J. [1997] C372/05, Section 2.

A practical example of this test can be provided by its application to a concentration of, for instance, soft drink bottlers. An issue to examine in such a case would be to decide whether different flavours of soft drinks belong to the same market. In practice, the question to address would be if consumers of flavour A would switch to other flavours when confronted with a permanent price increase of 5% to 10% for flavour A. If a sufficient number of consumers would switch to flavour B, to such an extent that the price increase for flavour A would not be profitable due to the resulting loss of sales, then the market would comprise at least flavours A and B. The process would have to be extended in addition to other available flavours until a set of products is identified for which a price rise would not induce a sufficient substitution in demand.

Supply-side substitutability may be taken into account when defining markets in those situations in which its effects are equivalent to those of demand substitution in terms of effectiveness and immediacy. This requires that suppliers be able to switch production to the relevant products and market them in the short term without incurring significant additional costs or risks in response to small and permanent changes in relative prices. When these conditions are met, the additional production put on the market will have a disciplinary effect on the competitive behaviour of the undertakings involved.[108]

When assessing whether two products are demand substitutes, the MTF looks at a number of factors. Some of the more important factors can be singled out. The MTF often contact the main customers and competitors to the undertakings part of the concentration, to get their view on the scope of the market. Their views are of course backed with factual evidence. The MTF will also look at evidence of substitution in the recent past. For instance, launches of new products in the past can offer useful information, since it makes it possible to precisely analyse which products lost sales to the new product.

3.2.1.1.2 Geographic market

Just as important it is to identify the product market, it is necessary for the MTF to identify those undertakings which are actual or potential competitors to the undertakings being investigated. Potential competitors are those undertakings not yet in the in the specific product market, but which could join in the event of a general price increase. With consumer products, the geographic market is often a single Member State[109] due to the fact that

[108] Goyder, D.G., EC Competition Law, 1998. p. 398.
[109] e.g. Case IV/M222 Mannesmann/Hoesch O.J. [1992] C114/34; 5 CMLR 117.

distribution often is national, but the geographic market may also be two adjacent Member States, the whole European Union, or even world-wide[110].

Also in defining the geographic market, certain factors the MTF normally looks at can be singled out. The MTF will naturally contact the main customers and competitors of the parties, to get their views on the boundaries of the geographic market. Mainly however, in determining the geographic market, the MTF looks at all sorts of barriers to entry. Undertakings dealing with products that are heavy in relation to their value have great difficulties penetrating distant markets. Perhaps the clearest obstacle for a customer to divert its orders to other areas is the impact of transport costs and transport restrictions arising from legislation or from the nature of the relevant products. In Mannesmann/Hoesch[111], the MTF found that the geographic market was limited to Germany, based on the fact that the conditions of competition were very different in Germany from those in other Member States.[112] On the basis of the evidence gathered, the Commission will then define a geographic market that could range from a local dimension to a global one. As barriers to cross-border trade have been abolished under the internal market programme, many markets have become geographically wider.

The same hypothetical monopolist-test which is used to define the product markets, is used to define the geographic markets. If a non-transitory price increase of 5-10% would cause so many consumers to buy elsewhere as to make the raise unprofitable, the geographic market should be extended to those areas.[113]

3.2.1.2 Creating or strengthening a dominant position

Once the relevant market has been determined, the Commission has to assess whether the concentration creates or strengthens a dominant position. This is done by looking at overlaps in the relevant market, either in the same market as the joint venture itself, in a downstream market, an upstream market or a neighbouring market. What makes the assessment difficult is of course that the Commission must predict the effect of a concentration on the relevant market. Just as when assessing the relevant market, the concept of dominance has to strike a balance between existing fact and probable future developments. The combined market share of the parties and the market share of the joint venture are naturally of very high significance when appraising the risk of dominance, but other factors may also be of relevance, such as the difference between the parties’ combined market share and that

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[110] e.g. Case IV/M890 Boeing/McDonnell Douglas O.J. [1997] C336/16.
[111] Case IV/M222 Mannesmann/Hoesch [1992].
[112] Goyder, D.G., EC Competition Law, 1998. p. 401.
[113] Cook, C.J., Kerse, C.S.. EC Merger Control, 2000. p. 89.

held by their competitors, the evolution of the parties' market share over time, and the dynamic and growing nature of the market.[114]

Merely looking at the market shares, a combined market share of less than 25% raises no presumption of dominance, rather a presumption of non-dominance. With a market share between 25% and 40% it is hard to make any presumption at all, but over 40% the presumption for dominance gradually increases. Once the market share is above 60% there is almost always dominance at hand unless the circumstances are extremely unusual. As for the difference between the market share held by the parties to a concentration and that held by their competitors, it is of course a great difference if for example the market share of the parties to a concentration is 40% and the nearest competitor has a market share of 5%, or if the nearest competitors has a market share of 25%. In the latter case, competition between the competitor and the concentration can be anticipated, hence perhaps may the concentration be cleared. Regarding the evolution of the parties' market share over time, there is great difference between undertakings in more traditional industries compared to undertakings in an industry subject to innovation and where research and development play an important role. For undertakings in traditional industries, the market may have signs of more stability, as opposed to the latter industry, where market shares are likely to vary and are a less certain indicator of market power.[115]

The fact that so many factors are taken into account apart from the market share, has lead to the clearance of concentrations which have very high market shares. In one case[116] the combined market share was 60% of the relevant market, and in another case[117] the combined market share was above 80%.

3.2.2 Coordination and other co-operative effects of joint ventures under the ECMR

As previously stated, the amended ECMR has extended the scope regarding joint ventures. Prior to the amendments made, certain operations were excluded from its application on the grounds that they could lead to co-operation between the parent companies outside the joint venture. A joint venture only fell within the Regulation if it was properly described as concentrative, otherwise it was a co-operative joint venture. With the amended Regulation all joint ventures are assessed under the ECMR.

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[114] Art, Jean-Yves, Developments in EC Competition Law in 1998; CMLR Vol.36, 1999. p. 997.
[115] Goyder, D.G., EC Competition Law, 1998. p. 403f.
[116] Renault/Volvo, Case IV/M.004 [1991] 4 CMLR 297.
[117] Alcatel/Telettra, Case IV/M.042 [1991] L122/48, 14 CMLR 73

However, there are of-course still concentrative joint ventures and co-operative joint ventures, and they are treated differently, but the difference lies in whether or not they are full-function. Co-operative joint ventures can be sub-divided into those falling under the Regulation, so called co-operative full-function joint ventures, which are subject both to the dominance test and Article 81, and those falling under Regulation 17 and other implementing regulations, so called co-operative non-full-function joint ventures, to which only Article 81 and 82 apply. With the amendments made to the Regulation, Article 2(4) was introduced to provide the Commission with the legal basis to apply the criteria of the EC Treaty Article 81 to the co-operative aspects of a joint venture's establishment. It follows from Article 2(4) of the Regulation that the joint venture will be subject to the dominance test of Article 2(1)-(3), and, to the extent that it will bring about co-operative spill-over aspects, the Commission must apply the test of Article 81 to that aspect of the transaction.

In making the appraisal whether a joint venture, which has as its object or effect the coordination of competitive behaviour, is compatible with the common market, the Commission shall take into account in particular:

> "-whether two or more parent companies retain to a significant extent activities in the same market as the joint venture or in a market which is downstream or upstream from that of the joint venture or in a neighbouring market closely related to this market;
> -whether the coordination which is the direct consequence of the creation of the joint venture affords the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products or services in question."[118]

Hence, whenever the creation of full-function joint ventures leads to the co-ordination of the competitive behaviour of companies that remain independent the Commission must apply the test of Article 81(1) to that aspect of the operation.[119]

Co-operation between the parent companies outside the joint venture that may appear in connection with the creation of a full-function joint venture can be grouped into three main categories:

- ancillary restrictions,
- spill-over effects,
- other co-operative aspects.

Regardless of in which of these categories the co-operation between the parent companies belongs to, the joint venture will be considered under the dominance test of the Regulation as long as it fulfils the full-function

[118] Article 2(4) ECMR.
[119] Faull, Nikpay, The EC Law of Competition. 1999. p. 350.

criteria, and the turnover thresholds are met. Regarding the co-operation, depending on how it is classified it will be treated differently. Ancillary restrictions will be recognised as an integral part of the concentration and will be assessed together with the joint venture itself under the Regulation.[120] The second category of restriction, spill-over effects, will be assessed in the same procedure as the concentration and subject to the same short time limits, but under the rules of the Treaty, Article 81(1) & (3). Other co-operative aspects, restrictions that do not fall under neither of the other categories, will normally be assessed under Article 81 and 82.[121]

3.2.2.1 Ancillary restrictions

The ancillary restrictions are contractual arrangements that are directly related to and necessary for the implementation of the concentration. It refers to restrictive clauses whose presence is commercially essential to the transaction to which they are connected, and without those clauses the transaction would probably not take place. In its "Notice regarding restrictions ancillary to concentrations"[122], the Commission indicated that restrictions would be considered necessary where "in their absence the concentration could not be implemented or could only be implemented under more uncertain conditions, at substantially higher cost, over an appreciably longer period or with considerably less profitability of success"[123].

The most common types of conditions and obligations are non-competition clauses. For instance, in a case where concentration arises due to acquisition of sole control of an undertaking, the seller may agree to refrain to a certain extent from competing with the acquirer. The Notice just mentioned states that such restriction of competition is justified only when its duration, its geographical field of application, its subject matter and the persons subject to it do not exceed what is reasonably necessary to that end.[124] In a case where the concentration is in the form of a joint venture, the parent companies may enter into an agreement not to compete with their joint venture. Another example in the area of joint ventures could be where there is to be a transfer of intellectual property rights from the parent companies to the joint venture, the parent companies may not be willing to assign those rights absolutely. The parent companies may then grant a license for the joint venture to use the rights for specific purposes for which the joint venture was set up.[125] Licences of intellectual property rights are normally acceptable as necessary and ancillary and may be limited to certain fields of

[120] Notice O.J. [1998] C66/01, Para. 16.
[121] Faull, Nikpay, The EC Law of Competition. 1999. p. 223.
[122] Commission Notice reagarding restrictions ancillary to concentrations, O.J. [1990] C203/05.
[123] Notice O.J. [1990] C203/05,Part II, Recital 5,
[124] Notice O.J. [1990] C203/05, Part III, Section A, Recital 1,
[125] Faull, Nikpay, The EC Law of Competition. 1999. p. 223.

use. Article 8(2) ECMR provides in its last sentence that "the decision declaring the concentration compatible with the common market shall also cover restrictions directly related and necessary to the implementation of the concentration".

3.2.2.2 Spill-over effects

The spill-over aspects of a concentration can be said to be the effects on a concentration not resulting from the contractual arrangement, provisions that more or less automatically flow from the structure that is created by the concentration. Normally spill-over effects will be found between two or more parent companies carrying on significant activities either in the market of the joint venture or in a closely related market. Even though there is no express agreement, it often leads to the alignment of the commercial policies of the parties, and many times the joint management of the joint venture will lead to a kind of co-operative atmosphere which weakens the competitive spirit between the parent companies in other related areas. It has also been seen that the parent companies will normally not compete with the joint venture.[126]

Other spill-over effects may be foreclosure effects, which for instance was considered in the Odin-case[127]. The concern of the Commission was whether the parties to the joint venture were such a big part of that particular industry that it left no firms for other undertakings to form a joint venture with. In the Optical Fibres-case[128], the spill-over effect taken under consideration was the network effect resulting from the setting up of so called interlocking joint ventures, i.e. joint ventures with at least one common parent company. Such a network may deter the joint ventures from competing with each other.

3.2.2.3 Other co-operative aspects

Co-operative aspects that fall outside the two above mentioned areas will normally have to be examined outside the ECMR, by means of Article 81 & 82 of the Treaty.

3.2.2.4 The assessment of co-operative joint ventures under Article 2(4)

[126] Faull, Nikpay, The EC Law of Competition. 1999. p. 354.
[127] Case 90/410/EEC Odin [1991] CMLR 832.
[128] Case 86/405/EEC Optical Fibres O.J. [1986] L236/30.

The relative size of the Article 2(4) market and the joint venture's market, which is assessed for dominance purposes, has been important in assessing the likelihood of co-ordination. The nature of the markets themselves have also played a part in the Commission's assessment, i.e. whether it is a dynamic or an unprogressive market.[129]

As for the dominance test, the Commission focuses on the combined market share held by the joint venture and its parent companies as well as the competitive advantage the joint venture may have over third parties through access to the parent companies' resources. The assessment of the risk of co-ordination of competitive behaviour is a more complex test, and can be said to consist of three main steps. The first step consists of identifying the candidate markets for co-ordination. Pursuant to Article 2(4), candidate markets for co-ordination are to be found where two or more parents retain to a significant extent activities in the same market as the joint venture, or the market which is upstream or downstream from that of the joint venture or a neighbouring market closely related to that of the joint venture, in which two or more parent companies retain significant activities. The next step in the assessment of the joint venture under Article 2(4) consists in determining whether the parent companies have any interest in co-ordinating their competitive behaviour on the candidate market, or whether the creation of the joint venture may have such effect. In doing so, the Commission focuses primarily on the parent's combined market share. The third stage consists of finding a casual link between the possible co-ordination of the competitive behaviour of the parent companies and the creation of the joint venture in question. If such casual link is not found, the prerequisite for the application of Article 81 of the Treaty is not satisfied.[130]

3.2.2.4.1 Telia Telenor

The first case in which the Commission had the opportunity to develop its new approach towards full-function co-operative joint ventures was a case in the Internet sector, the Telia/Telenor/Schibsted-case[131]. The case is rather representative as analyses of other cases examined under Article 2(4) have broadly followed the same lines as in this case.

The case concerned the setting up of a joint venture between Telia, the main telecommunications operator in Sweden, Telenor, the main telecommunications operator in Norway, and Schibsted, a Norwegian publishing and broadcasting company with Internet related activities. The joint venture was to provide Internet gateway services and offer web site

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[129] Denness, J., Application of the New Article 2 (4) of the Merger Regulation, Competition Policy Newsletter, Number 3 October 1998.
[130] Art, Jean-Yves, Developments in EC Competition Law in 1998; CMLR Vol.36, 1999. p. 992f.
[131] Case No IV/JV.1 [1998] Telia/Telenor/Schibsted.

production services. With regard to Article 2(4) of the Merger Regulation, the Commission stated in the case that "In order to establish a restriction of competition in the sense of Article 81(1) EC Treaty, it is necessary that the co-ordination of the parent companies' competitive behaviour is likely and appreciable and that it results from the creation of the joint venture, be it as its object or as its effect."[132] Although the requirement of appreciability was already part of the Commission's normal practice in handling spill over effects, the need to show likelihood on more than a theoretical basis and the requirement to prove causality constitute two significant and important changes in the Commission's approach to the applicability of Article 81(1) to joint ventures.[133]

In its analysis of the case, the Commission found that advertising on web sites and content on web sites for which the user had to pay to get access to, were relevant markets for the purposes of dominance, as was the production of web sites. The impact of the joint venture on these markets were later assessed and cleared under the dominance test. Next the Commission proceeded to the identification of the so-called candidate markets for co-ordination. The production of web sites was considered a candidate market for the analysis of co-ordination under Article 2(4), hence being assessed in accordance with Article 81(1) of the EC Treaty. The market of dial-up Internet access was also identified as a candidate market since both Telia and Telenor were present on this market, and because access to the Internet is a necessary prerequisite for any use of the Internet. The dial-up Internet access market was thus considered as a market upstream to the joint venture's markets and thus considered closely related to the joint venture's markets.

The Commission first looked at whether the creation of the joint venture had as its object the co-ordination of the competitive behaviour of the parent companies, but there were no indications to prove such intentions. The Commission then looked at whether the effect of the operation could be to give way to the co-ordination of competitive behaviour. Regarding the web site production market, it involved the presence of the joint venture and two of the parent companies on the same market. However, the combined market share of the parent companies and the joint venture on the narrowest and most unfavourable market definition to the parties was less than 10%. The Commission concluded that even if the parent companies were to co-ordinate their activities, it would not amount to an appreciable restriction of competition.

Regarding the other part, the dial-up Internet access market, the Commission found that it was characterized by high growth and relatively low barriers to entry and low switching costs. Both Telia and Telenor did have substantial market shares, however, the Commission considered the market shares of

[132] Point 28, [1998] Telia/Telenor/Schibsted.
[133] Faull, Nikpay, The EC Law of Competition. 1999. p. 366.

limited significance in relation to the growing market. In addition, the when comparing the relative size of the dial-up Internet access market with the size of the markets on which the joint venture was active, the likelihood of co-ordination was further reduced. The dial-up Internet access market was substantially larger than the other markets. The Commission therefore concluded that there would be no likelihood for the parent companies to co-ordinate on that market. Consequently there was no need to examine any casual link between the creation of the joint venture and the behaviour of the parent companies outside the joint venture on that market.

4 Joint ventures falling outside the scope of the ECMR

4.1 Article 81 and block exemptions

Regarding the joint ventures that do not fall within the scope of the ECMR there are two major groups, those that are not full-function, and those that fall beneath the thresholds of the ECMR. Such joint ventures will be assessed under Article 81 of the EC Treaty, or in special cases by national competition authorities. All joint ventures falling under Article 81 are prohibited if they are found to have as their object or effect the prevention, restriction or distortion of competition within the common market, according to Article 81(1), and shall be automatically void according to Article 81(2). The forms or means adopted by the undertakings is of lesser importance, the issue is whether the action will restrict competition. As Article 81(1) covers a large number of agreements and practices within its scope, it will also include agreements and practices with socially beneficial effects. Article 81(3) therefore offers the possibility of exemption from the effects of Article 81(1) when the conduct in question contributes to the improvement of production or distribution of goods or to the promotion of technical or economic progress. If a joint venture falls under Article 81(1), the only possibility for further existence of the joint venture is for the joint venture to be awarded individual exemption under Article 81(3), or to fall within one of many block exemptions.

The criteria for assessing joint ventures under Article 81(1) are stricter than those relevant under the ECMR, having the object or effect of perceptibly restricting competition, as opposed to creating or strengthening a dominant position.

Two Commission regulations legalize co-operation between undertakings in the form of joint ventures, the block exemption on research and development agreements and the block exemption on specialisation agreements. These two block exemptions were revised and two new block exemptions were introduced with legal validity from 1 January 2001. Due to the fact that these two block exemptions are so recently introduced, I have focused on them in this paper.

As a complement to the Block Exemption Regulations on research and development and specialisation agreements, guidelines on the applicability of Article 81 to horizontal co-operation was issued[134]. The purpose of the guidelines is to provide an analytical framework for the most common types of horizontal co-operation agreements. The guidelines address many kinds

[134] Draft Guidelines on the Applicability of Article 81 to horizontal co-operation.

of horizontal co-operation agreements, this paper however only deals with the basic principles for the assessment under Article 81, research and development agreements and specialisation agreements.

I shall first look into the assessment of joint ventures under Article 81, and then the block exemptions.

4.1.1 Article 81(1)

Joint ventures which fall within Article 81(1) without fulfilling the conditions for the application of a group exemption regulation are not inevitably prohibited. They can be exempted by an individual decision of the Commission. According to Articles 4 and 5 of Regulation 17/62, an individual exemption can be issued only if the participating undertakings have notified the agreement, decision or concerted practice on which co-operation is based, to the Commission. Certain agreements which are less harmful to the development of the common market are dispensed from the requirement to notify by Article4(2) of Regulation 17/62.

Article 81(1) applies to joint ventures and co-operation agreements which have as their object or effect the prevention, restriction or distortion of competition. Some agreements are by nature assessed under Article 81(1). This is for instance the case with agreements that have as their object a restriction of competition by means of price fixing, output limitation or sharing of markets or customers, so called hard-core restrictions which are per se illegal.[135]

Most agreements however, do not have as their object a restriction of competition. In those cases an analysis of the effects of the agreement is necessary. The effects of the agreement must be such that they affect 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 determine the capability of the co-operation to affect overall competition to such a significant extent, one must look at the economic context, taking into account both the nature of the agreement and the parties' combined market power.[136]

4.1.1.1 Nature of the agreement

The nature of an agreement depends on factors such as the area and the objective of the co-operation, the competitive relationship between the parties and the extent to which they combine their activities.

[135] Draft Guidelines on the Applicability of Article 81 to horizontal co-operation, Para. 16.
[136] Draft Guidelines on the Applicability of Article 81 to horizontal co-operation, Para. 18.

Some agreements do not fall under Article 81(1) due to their very nature. This is true for co-operation agreements that do not imply a co-ordination of the parties' competitive behaviour in the market, such as co-operation between non-competitors or co-operation between competing companies that can not independently carry out the project or activity covered by the co-operation.[137]

As said above, some agreements fall under Article 81(1) due to the nature of the agreement. This concerns co-operation agreements that have the object to restrict competition by means of price fixing, output limitation or sharing of markets or customers. These restrictions are considered to be the most harmful since they directly interfere with the outcome of the competitive process. It can be presumed that such restrictions have negative market effects, therefore they are almost always prohibited.

Agreements which can not be categorised to either fall under or outside Article 81(1) need further analysis when to decide whether they should fall under Article 81(1). The analysis contains of looking at the market position of the parties and other market related factors. Both the combined market power of the parties as well as the parties' individual market shares are taken into account. Depending on the market position of the parties and the concentration in the market, other factors such as entry barriers, the stability of market shares over time and the nature of the products may be considered as well.[138]

The pros and cons of a joint venture will be weighed against each other on an overall economic balance, by means of which the type and the extent of the respective advantages and risks can be assessed. If the parents are economically and financially powerful and have over and above that a high market-share, their exemption applications will need a rigorous examination.

4.1.2 Article 81(3)

Agreements that come under Article 81(1), hence being automatically prohibited and nullified in accordance with Article 81(2), may be granted exemption under Article 81(3). In order to find out whether an agreement will be granted exemption, it will be subject to the four-tier test of Article 81(3). Under Article 81(3) it is tested whether the agreement:

(a) contributes to improving the production or distribution of goods or to promoting technical or economic progress,

[137] Draft Guidelines on the Applicability of Article 81 to horizontal co-operation, Para. 23.
[138] Draft Guidelines on the Applicability of Article 81 to horizontal co-operation, Para. 27-29.

(b) allows consumers a fair share of the resulting benefit,
(c) does not impose restrictions which are not indispensable to the attainment of the above listed objectives; and
(d) does not afford the possibility of eliminating competition in respect of a substantial part of the products in question.

Of the four conditions, the condition that considers economic benefits is normally considered first and probably the most important in the eyes of the Commission. It is important that the economic benefit is clearly identified, and its effect on competition. This condition has been given a broad interpretation, responsive to many different kinds of economic progress and technical improvement. It has especially been generously interpreted in a large number of proposed joint ventures concerning technological areas, such as telecommunications, computers and multimedia.[139]

The second condition, concerning the consumers and their share of the resulting benefits, sometimes seem to be satisfied too easily. The Commission tends to assume that if the first condition is satisfied, then the competitive market itself will ensure that the benefits will be passed on to the consumers. According to the Commission, the competitive pressure will ensure that the cost-savings will be passed on by way of lower prices, or that companies will have an incentive to bring new products to the market as quick as possible. It seems that this condition is not analysed with the same amount of thoroughness as the first condition.[140]

The third condition deals with the effect of the restrictions on the undertakings. The restrictions of competition must be necessary to achieve the economic benefits. If such economic benefits can be achieved through less restrictive means, the claimed efficiencies cannot be used to justify the restrictions of competition.[141]

The final condition relates to the external effects of the agreement. When finding out whether or not competition is likely to be eliminated, a market analysis is used. The analysis can be carried out on the basis of the assessment of market power and market structures under Article 81(1). Under Article 81(3), a higher degree of market power is permitted however, provided that significant efficiencies are generated which outweigh the anti-competitive effects.[142]

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[139] Goyder, D.G., EC Competition Law, 1998. p. 137f.
[140] Goyder, D.G., EC Competition Law, 1998. p. 140f.
[141] Goyder, D.G., EC Competition Law, 1998. p. 141.
[142] Draft Guidelines on the Applicability of Article 81 to horizontal co-operation, Para. 37.

4.1.3 Background to the block exemptions

As mentioned, co-operative joint ventures are common, and there are many economic benefits to gain through such operations. Over the years, two kinds of co-operative joint ventures or agreements have been singled out for special treatment, specialisation agreements and research and development agreements. Based on case-law experience, the commission has adopted block exemptions covering some of the simpler forms within these two categories.

A block exemption can be described as a codification of the requirements in Article 81(3) in relation to a generic category of agreements. An individual agreement which complies with all the conditions set out in a block exemption is automatically exempted from Article 81(1). No notification or any application for individual exemption is necessary. Consequently, once an agreement qualifies for a block exemption it provides legal certainty and saves a lot of time.[143]

4.1.3.1 Research and Development Agreements

Compared to specialisation agreements, research and development agreements are more common and more important in their economic and commercial effects. Though many joint ventures are not easy to place in a distinct group, research and development agreements are quite similar and can be recognized without difficulty; such arrangements have as their purpose to arrange for the carrying out of a number of functions, which are all essential steps in the process of a product from the inventor's first creative step to the finished product made available to the customers. Co-operation at the level of research and development is increasingly important to many companies. The costs and risks associated with research and development can be very high, therefore may companies choose to spread these risks through co-operation. There are also potentially enormous benefits, measured both in effort and economically, to gain from research and development co-operation.[144]

Due to the positive effects of research and development co-operation, such agreements have always been treated with a sympathetic attitude from the Commission. Early the Commission stressed that agreements, particularly between small- and medium-sized undertakings, relating only to research and development did not generally present any danger to competition. Problems that could arise were more probable to do so when the result of the research and development agreement was to be exploited. Evidence of the Commission's view could be found in Regulation 17/62 in which Article 4(2) stated that all joint research and development agreements were to be

[143] Korah, V. EC Competition Law and Practice, 2000. p. 358.
[144] Goyder, D.G., EC Competition Law, 1998. p. 466.

free from notification requirements provided that the objects did not extend beyond joint research and development.[145]

There are however also risks with research and development agreements. Three types of negative market effects can be singled out; it may restrict innovation, it may cause the co-ordination of the parties' behaviour in already existing markets, and thirdly, it may cause foreclosure problems at the level of the exploitation of possible results.

Although the enactment of Regulation 2821/71 had given the Commission the power to issue a block exemption for research and development agreements, a draft was not published until 1984, which after amendment was adopted as Regulation 418/85[146]. The differences between the original draft and the final version are striking. In the draft, the exemption would only be available to undertakings whose aggregate annual turnover did not exceed 500 million €. In the final version, all reference to the participants' aggregate turnover was removed, although a market share limit of 20% was included. In the draft there was no time limit for the exemption of the agreement, whereas in the final version a five-year limitation applied once the contract products were first marketed within the Common Market.[147]

Another change between the draft and the final version is the extensive definition of research and development agreements which can be found in the final version but is not part of the draft. The definition contained in the final version covers three categories; joint research and development alone, joint research and development coupled with exploitation but excluding distribution and sale, and exploitation of the product as the result of earlier research and development agreements between the same parties. Research and development itself is defined as "the acquisition of technical knowledge and the carrying out of theoretical analysis, systematic study of 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".[148]

The block exemption was subsequently amended and its scope was slightly extended through Regulation 151/93[149]. The block exemption came to apply to research and development agreements which included the exclusive distribution of products by either a party or a third party, provided that the

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[145] Goyder, D.G., EC Competition Law, 1998. p. 467.
[146] Commission Regulation (EEC) 418/85 of 19 December 1984 on the application of Article 81 (3) of the Treaty to categories of research and development agreements, [1985] O.J. L 53.
[147] Goyder, D.G., EC Competition Law, 1998. p. 472.
[148] Goyder, D.G., EC Competition Law, 1998. p. 473.
[149] Commission Regulation (EEC) 418/85 of 19 December 1984 on the application of Article 81 (3) of the Treaty to categories of research and development agreements as amended by Commission Regulation (EEC) 151/93, [1993] O.J. L21.

parties' share of the relevant market through the joint venture did not exceed 10% of the relevant market in the Common Market.

4.1.3.2 Specialization Agreements

A specialization agreement is basically an allocation of production, so that each party can specialize in manufacturing part of a range of goods. This kind of allocation is usually combined with close technical co-operation and a mutual obligation to supply each other with the specialized products produced, so that each of the parties can sell the full range of products. Such agreements may lead to a reduction in the number of producers of a certain type of product, but may on the other hand benefit the companies with longer production runs and better use of their manufacturing capacities. This may then lead to lower production costs through a reduction of the fixed costs, thus enabling a lower final price to the consumer.[150]

An example and a useful model of this kind of agreement and co-operation is the Jaz/Peter-case[151] from 1969. Jaz was a German company, specializing in electric clocks and alarm clocks, while Peter was a French company specializing in large mechanical alarm clocks. Under the arrangements made between the two, they each agreed to supply the other with its special range of products and spare parts and not to supply any other customers. Each of them agreed that the other would be entitled to sell the full range of combined products in its own territory, Jaz in France and Peter in Germany, and that they would not buy from third parties any clocks or watches covered by the agreement. Because of this agreement, each of the two companies could manufacture much larger quantities of the range of clocks in which they were specialized. The increase in production led to a reduction in costs, however pricing restrictions were not a part of the agreement but left to the individual companies.

Clearly a restriction of competition was at hand. A customer in France could not choose between clocks supplied by Jaz or Peter since Jaz was the only distributor for the entire range of clocks in France, and Peter the only distributor for the entire range of clocks in Germany. However, since they both could produce a greater amount of clocks meant that they could, and did, reduce the price of their clocks during the time of the agreement. The exchange of technical information also proved of mutual benefits. The Commission thus found that none of the restrictions went beyond the level that was required to support the specialization agreement.

Another form of specialization is where the parties allocate the responsibility for the production and development of individual components

[150] Goyder, D.G., EC Competition Law, 1998. p. 458.
[151] Case Jaz/Peter [1970] CMLR 129.

for a product they wish to produce jointly. In ACEC/Berliet[152], ACEC, which was a Belgian company specialized in electronic transmissions had entered into a collaborative arrangement with Berliet, a French company which had experience in the manufacture and selling of buses. They agreed they would co-operate for ten years in the joint development of a bus which would have the ACEC transmission, but the basic structure of the Berliet bus. ACEC would deliver its transmission equipment in France only to Berliet, and Berliet would only buy electric transmissions made by ACEC.

Restrictions on competition were clearly inherent in the arrangement, as other manufacturers of electric transmissions were no longer able to sell them to Berliet and some bus manufacturers were no longer able to buy the ACEC transmission. The joint venture was however granted exemption from the Commission. They reasoned that the specialization agreement would permit the manufacture of buses in longer production runs, which could lead to a production of a new model offering better performance and comfort to its users. The fact that ACEC remained free to make contract with other bus manufacturers outside France, and that such buses would be able to compete with the joint venture, also justifies the collaboration in the view of the Commission.

As the Commission came across more and more of such agreements during the 1960s, it became obvious that it was better to issue a block exemption covering all forms of specialization agreements engaged in by smaller undertakings. As the Commission had no powers to issue such a regulation, the Council provided the Commission with such powers by adopting Regulation 2821/71[153]. The Commission then introduced its own block exemption through Regulation 2779/72[154].

The definition of a specialization agreement given in the regulation was: "agreement whereby with the object of specialization, undertakings mutually bind themselves for the duration of the agreement not to manufacture certain products or cause them to be manufactured by other undertakings and to leave it to the other contracting parties to manufacture such products or cause them to be manufactured by other undertakings."[155]. This definition covered the co-operation agreement in the Jaz/Peter-case, but not the agreement made in the ACEC/Berliet-case. There were also restrictions regarding the size of the undertakings concerned, the exemption only covered smaller undertakings.

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152 Case ACEC/Berliet [1968] CMLR D35.

153 Council Regulation (EEC) No 2821/71of the Council of 20 December 1971 on application of Article 85 (3) of the Treaty to categories of agreements, decisions and concerted practices, [1971] O.J. L 285.

154 Commission Regulation (EEC) No 2779/72 group exemption for specialisation agreements, [1972] O.J. L 292.

155 Goyder, D.G., EC Competition Law, 1998. p. 460.

During the 1970's and 80's, the commission handled a considerable amount of co-operation agreements which of course gave them a much experience. This lead to further block exemptions, now on a more generous basis. Regulation 2779/72 was replaced by Regulation 3604/82[156], in which both the categories of agreements and the financial limits of the undertakings were extended. The financial limit was raised from 150 million € to 300 million €, and the market share threshold was raised from 10 to 15 %. Cases such as ACEC/Berliet would now also come within the scope of the block exemption.

The new regulation came into effect on 1 January 1983, and was intended to remain in force for 15 years. However, already after less than three years, in 1985, the regulation was revised through Regulation 417/85[157] in which the financial limits were further expanded, this time to 500 million €, and the market share thresholds were raised to 20 %. The process of liberalization continued with Regulation 151/93[158], an amendment to Regulation 417/85, which increased the permitted aggregate turnover to 1000 million €.[159]

4.2 Present Situation regarding the block exemptions

The duration of both the block exemption on research and development and the block exemption on specialization agreements were extended until the end of the year 2000 through Regulation 151/93. New regulations must therefore be presented, regulations that meet the two requirements of ensuring effective protection of competition and providing adequate legal certainty for undertakings. In addition, the need to simplify administration and the legislative framework should also be taken under consideration. In 1997, a review of the competition rules applicable to horizontal co-operation agreements began. In order to collect information of how the existing competition rules worked, consultation of a great number of European companies took place. It showed that industry regarded the existing block exemption regulations as too focused on legal clauses and that there is a need for clearer guidance.[160]

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[156]Commission Regulation (EEC) No 3604/82 on specialisation agreements, [1983] O.J. L 376.

[157] Commission Regulation (EEC) No 417/85 of 19 December 1984 on the application of Article 81(3) of the Treaty to categories of specialisation agreements, [1985] O.J. L 53.

[158] Commission Regulation (EEC) No 417/85 of 19 December 1984 on the application of Article 81(3) of the Treaty to categories of specialisation agreements as amended by Commission Regulation (EEC) No 151/93, [1993] O.J. L 21.

[159] Goyder, D.G., EC Competition Law, 1998. p. 465.

[160] Press Release by Mario Monte, Commission reforms competition rules for co-operation between companies, 29 November 2000.

The two regulations which ceased to exist on 31 December 2000 were replaced by two new regulations[161], with effect from 1 January 2001. As a complement, guidelines[162] were also issued. The guidelines describe the general approach which should be followed when assessing horizontal co-operation agreements and set out a common analytical framework. In comparison to the former regulations the new texts are designed to be more user-friendly, with greater clarity and an increased scope of application. The guidelines help companies to assess with greater certainty whether or not an agreement is restrictive of competition and, if so, whether it would qualify for an exemption.[163]

Regulation 2821/71, which gave the Commission power to issue block exemption, requires the Commission to include three specifications in block exemptions. The exempting regulation must define the categories of the agreements, decisions and concerted practices to which it applies, specify the restrictions or clauses which may, or may not, appear in the agreements, decisions or concerted practices, and specify the clauses which must be contained in the agreements, decisions and concerted practices or other conditions which must be satisfied.[164]

In the new regulations, the method of a white list consisting of listed exempted clauses is abandoned. Instead the new regulations have introduced a system which defines the categories of agreements which are exempted up to a certain level of market power, and which specifies the restrictions or clauses which are not to be contained in such agreements.[165] The market share threshold for exemption of all parties to an agreement combined is set at 20% for specialisation agreements, and at 25% for research and development agreements. Beyond these market shares, research and development or specialisation agreements will not automatically be prohibited but will have to be assessed individually.[166]

Only those agreements for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 81 (3), may benefit from the block exemptions.

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[161] Commission Regulation (EEC) No 2658/2000 on the application of Article 81(3) of the EC Treaty to categories of specialisation agreements, & Commission Regulation (EEC) No 2659/2000 on the application of the EC Treaty to categories of research and development agreements, [2000] O.J. L 304.
[162] Draft Guidelines on the Applicability of Article 81 to horizontal co-operation.
[163] Press Release by Mario Monte, Commission reforms competition rules for co-operation between companies, 29 November 2000.
[164] Regulation 2821/71, Article 1(2).
[165] Regulation 2658/2000 p.2., & Regulation 2659/2000 p.2.
[166] Regulation 2658/2000 Article 3, & Regulation 2659/2000 Article 3(2).

4.2.1 Research and Development Agreements

4.2.1.1 Agreements falling within the block exemption

Research and development[167] agreements may vary in form and scope. Some co-operation agreements are concerned solely with research and development which finishes when this has been completed, but many times the co-operation extends into one or more areas of subsequent functions. Article 1 of Regulation 2659/2000 gives a definition of research and development agreements to which the block exemption applies.

In the wording of Article 1, Article 81(1) of the Treaty shall not apply to agreements entered into between undertakings which relate to the conditions under which those undertakings pursue:

(a) joint research and development of products or processes and joint exploitation of the results[168] of that research and development;
(b) joint exploitation of the results of research and development of products or processes jointly carries out pursuant to a prior agreement between the same undertakings; or
(c) joint research and development of products or processes excluding joint exploitation of the results.

Most research and development agreements do not fall under Article 81(1). This is of course true for agreements relating to research and development at a rather theoretical stage, with no object of marketing any possible results, hence no risk of distorting competition.[169] Then there is co-operation between non-competitors, which generally does not restrict competition. The relationship between the parties has to be analysed regarding existing markets and/or innovations. If the parties are not able to carry out the necessary research and development independently, there is no competition to be restricted. Co-operation between non-competitors can however be subject to Article 81(1) if there is exclusive exploitation of the results and if the agreement is concluded between firms of which one has significant market power with respect to key technology.[170] Research and development co-operation which excludes the exploitation of any possible results by

[167] The definition of research and development as given in Regulation 2659/2000 is: "Research and development of products or processes means the acquisition of know-how 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." Regulation No 2659/2000, Article 4(3).
[168] "Exploitation of the results" means the manufacture, selling, distribution or promotion of the contract products or the application of the contract processes or the assignment or licensing of intellectual property rights or the communication of know-how required for such manufacture or application." Regulation No 2659/2000, Article 4(7).
[169] Draft Guidelines on the Applicability of Article 81 to horizontal co-operation. Para. 52.
[170] Draft Guidelines on the Applicability of Article 81 to horizontal co-operation. Para. 53.

means of licensing, production and/or marketing rarely falls under Article 81(1). Such agreements can only cause competition problems if effective competition with respect to innovation is significantly reduced.[171]

Some research and development agreements do not truly concern research and development but are merely tools in order for the concerned undertakings to engage in a disguised cartel, i.e. otherwise prohibited price fixing, output limitation or market allocation. Such agreements naturally falls under Article 81(1) and are prohibited. However, agreements including joint marketing of possible future results are not necessarily restrictive of competition.[172]

Research and development agreements which are set up at a close stage to the market launch, and which are agreed between companies that are competitors on either existing product markets or on innovation markets, may fall under Article 81(1). Such agreements cannot be assessed as clearly non-restrictive and have to analysed in their economic context.[173]

In order for the block exemption to apply, certain conditions must be fulfilled. All the parties to the agreement must have access to the results of the work. There is however an exception to this rule in the case of academic bodies or research institutes which are not active in the industrial exploitation of the results of research and development.[174] Where the agreement only provides for joint research and development, and no further obligations, each party must be free to exploit the results of the joint research and development and any know-how necessary therefore independently.[175]

4.2.1.2 Agreements falling outside the block exemption

As it can be assumed that most research and development co-operation agreements bring about economic benefits, such agreements are block exempted with specified exceptions as to agreements which restrict competition too much. Agreements that fall outside the regulation are agreements where the combined market share of the parties in the affected existing market exceed 25%, and agreements with so called hard core restrictions.

4.2.1.2.1 Market share

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[171] Draft Guidelines on the Applicability of Article 81 to horizontal co-operation. Para. 55.
[172] Draft Guidelines on the Applicability of Article 81 to horizontal co-operation. Para. 56.
[173] Draft Guidelines on the Applicability of Article 81 to horizontal co-operation. Para. 57.
[174] Regulation No 2659/2000, Article 2(2).
[175] Regulation No 2659/2000, Article 2(3).

Three negative market effects that may appear caused by research and development co-operation are; restriction of competition, co-ordination of the parties' behaviour in existing markets, and thirdly foreclosure problems that may occur at the level of the exploitation of possible results. However, these types of negative market effects are only likely to appear when the parties to the co-operation have significant market power and/or competition with respect to innovation is significantly reduced. Without market power there is no incentive to co-ordinate behaviour on existing markets or to reduce or slow down innovation, and a foreclosure problem may only arise when at least one of the parties to the co-operation has significant market power and the exclusive exploitation of results.[176]

Agreements falling outside the regulation due to a combined market share exceeding the allowed 25% do not necessarily restrict competition. However, the stronger the combined market position and/or the more competition in innovation is restricted between the parties, the more likely is the application of Article 81(1) and hence the need for a more detailed analysis.[177]

If the research and development is directed at the improvement of existing products, possible effects concern the relevant markets for those existing products. Effects on prices, output or innovation in existing markets are however only likely if the parties together have a strong position, entry is difficult and a few other innovation activities are identifiable. Through an analysis such matters are clarified.[178]

If the research and development is directed at an entirely new product which creates its own new market, price and output effects on existing markets are rather unlikely. In such cases the analysis focuses on possible restrictions of innovations concerning for instance the quality and variety of possible future products or the speed of innovation.[179]

Most research and development agreements will lie somewhere in between the two kinds of agreements described above. There will then be effects both on innovation as well as on existing markets.

The 25% market share threshold also applies to situations where there is joint distribution of the products which were jointly developed. Under the former block exemption, the threshold for such agreements was 10%.

4.2.1.2.2 Hard core restrictions

[176] Draft Guidelines on the Applicability of Article 81 to horizontal co-operation. Para. 58.
[177] Draft Guidelines on the Applicability of Article 81 to horizontal co-operation. Para. 60.
[178] Draft Guidelines on the Applicability of Article 81 to horizontal co-operation. Para. 61.
[179] Draft Guidelines on the Applicability of Article 81 to horizontal co-operation. Para. 63.

Some agreements are specifically not covered by the regulation, agreements including so called hard core restrictions. Article 5 of the regulation specifies the agreements which fall under this category.

Agreements which are not covered by the block exemption are those agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:

(a) to restrict the freedom for participating undertakings[180] to carry out research and development independently or with third parties in a field unconnected with that which the research and development agreement is carried out;
(b) to prohibit that after completion of the research and development programme the parties will challenge the validity of intellectual property rights which protect the results of that research and development within the common market, or the validity of the same rights after the expiry of the agreement;
(c) the limitation of the output or sales;
(d) price fixing;
(e) restrictions as to the customers the participating undertakings may serve, within the common market after the end of the initial five year period;
(f) the prohibition to make passive sales for the contract products[181] in territories reserved for other parties;
(g) the prohibition to put the contract products on the market or to pursue an active sales policy for them in territories within the common market that are reserved for other parties, after the end of five years from the time the contract products were first put on the market;
(h) to prohibit the parties from granting licenses to third parties to manufacture the contract products or to apply the contract processes[182] when joint manufacture is outside the scope of the agreement;
(i) the requirement to refuse to meet demand from users or resellers in their respective territories who would market the contract products in other territories within the common market, or
(j) the requirement to make it difficult for users or resellers to obtain the contract products from other resellers within the common market.[183]

However, there are exceptions to some of these hard core restrictions. The setting of production targets where the exploitation of the results includes

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[180] ”Participating undertakings” are: (a) undertakings party to the agreement; and (b) their respective connected undertakings. Regulation No 2659/2000, Article 4(1).
[181] ”Contract product” means a product arising out of the research and development. Regulation No 2659/2000, Article 4(6).
[182] ”Contract process” means a technology or process arising out of the research and development. Regulation No 2659/2000, Article 4(5)
[183] Regulation No 2659/2000, Article 5(1).

the joint production of the contract products, is allowed. The same applies for the setting of sales targets and the fixing of prices to immediate customers where the exploitation of the results includes the joint distribution of the contract products.[184]

4.2.1.3 The duration of the exemption

At the beginning of a research and development operation, many factors are not known, such as the parties future market position, the success of the research and development co-operation, or the development of future product or technology markets. When a research and development operation is granted an exemption, it will therefore cover the research and development phase plus, in as far as the joint production and marketing of the possible results is concerned, an additional phase for a possible launch and market introduction.[185]

If the participating undertakings are not competing manufacturers of products capable of being improved or replaced by the contract products, the exemption shall apply for the duration of the research and development and, where the results are jointly exploited, for five years from the time the contract products are first put on the market.[186]

In the case where two or more of the participating undertakings are competing manufacturers of products capable of being improved or replaced by the contract products, the exemption and its time limits shall apply only if the participating undertakings at the time the agreement is entered into do not have a combined market share which exceeds 25% of the relevant market for the products capable of being improved or replaced by the contract products.[187]

In both cases above shall the exemption continue to apply after the first period and the additional five years as long as the participating undertakings do not have a combined market share which exceeds 25% of the relevant market for the contract products.[188]

The reason for the additional phase, the five year period after the research and development period, is that the first companies to reach the market with a new product or technology will often enjoy very high initial market shares and perhaps has the research and development rewarded intellectual property protection. A strong market position due to these circumstances cannot normally be seen as elimination of competition. Therefore does the

[184] Regulation No 2659/2000, Article 4(2).
[185] Draft Guidelines on the Applicability of Article 81 to horizontal co-operation. Para. 69.
[186] Regulation No 2659/2000, Article 3(1).
[187] Regulation No 2659/2000, Article 3(2).
[188] Regulation No 2659/2000, Article 3(3).

block exemption cover the research and development agreement for an additional five year period irrespective of whether or not the parties obtain a high market share within this period.[189]

4.2.1.4 Withdrawal of the exemption

If the Commission, although exemption has been given in accordance with the block exemption, finds that an agreement is not compatible with the conditions laid down in Article 81(3), the Commission may withdraw the exemption. Article 7 of the Regulation specifies five different scenes where withdrawal may be done, and they are where:

(a) the agreement in question substantially hinders third parties from carrying out research and development in the relevant area due to limited research capacity elsewhere;
(b) the agreement restricts third parties from entering the market for the contract products, due to the particular structure of supply;
(c) the parties, without any valid reason, do not exploit the results of the joint research and development;
(d) the contract products are not subject to effective competition from products considered equivalent in view of their characteristics, price and intended use;
(e) the agreement would eliminate effective competition in research and development on a particular market.[190]

The last provision, which concerns the protection of competition in innovation, has been added to the revised regulation.

4.2.2 Specialisation Agreements

4.2.2.1 Agreements falling within the block exemption

The essence of specialisation agreements and why there is a need for a block exemption on the area is set out in the recitals of Regulation 2658/2000.

Paragraph 8 of the recital states that "agreements on specialisation in production generally contribute to improving the production or distribution of goods, because the undertakings concerned can concentrate on the manufacture of certain products and thus operate more efficiently and supply the products more cheaply." It can be assumed that, as a general rule, where the parties market share does not exceed 20 %, specialisation agreements will give rise to economic benefits in the form of economies of scale or

[189] Draft Guidelines on the Applicability of Article 81 to horizontal co-operation. Para. 69.
[190] Regulation No 2659/2000, Article 7.

better production technologies, while allowing the consumers a fair share of the resulting benefits.[191]

Three different forms of specialisation agreements can be singled out, where advantages such as those mentioned above can arise. There are agreements where one participant gives up the manufacture of certain products or provision of certain services in favour of another participant, so called unilateral specialisation[192] which the scope of the Regulation 2658/2000 was extended to bring within, then there are agreements where each participant gives up the manufacture of certain products or provision of certain services in favour of another participant, so called reciprocal specialisation, and finally there are agreements where the participants agree to jointly manufacture certain products or provide certain services, so called joint production.[193]

The three agreements above are the agreements referred to as specialisation agreements in Regulation 2658/2000, with the important remark that unilateral agreements falling within the regulation are only the ones between competitors. According to Article 1 of the regulation shall Article 81(1) of the Treaty not apply to these kinds of agreements. The block exemption applies to such agreements to the extent that they contain restrictions of competition falling within the scope of Article 81(1) of the Treaty.[194] In addition, the block exemption also applies to provisions contained in specialisation agreements, necessary for their implementation, such as those concerning the assignment or the use of intellectual property rights.[195] The exemption provided for in Article 1 shall also apply to related purchasing or marketing agreements whereby the parties accept an exclusive purchase and/or supply obligation in the context of the agreements described above, or in the case of a joint production agreement whereby the parties provide for distribution by a third party.[196]

The main source of competition problems in the field of production agreements is the co-ordination of the parties' competitive behaviour as suppliers. The competition problems arises where the parties are actual or potential competitors on at least one of the relevant markets concerned by the co-operation or possible spill-over markets.

Agreements that are entered into between non-competitors rarely fall under Article 81(1), due to the fact that they are not caused by a competitive

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[191] Regulation No 2658/2000, Recital para. 13.

[192] The coverage of unilateral agreements in Regulation 2658/2000 is limited to agreements between competitors, as agreements between non-competitors may benefit from the block exemption provided by Commission Regulation 2790/1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, [1999] O.J. L 336.

[193] Regulation No 2658/2000, Recital para. 9.

[194] Regulation No 2658/2000, Article 1(1).

[195] Regulation No 2658/2000, Article 1(2).

[196] Regulation No 2658/2000, Article 2.

relationship between the parties but by a strong market position of at least one of the parties. This gives rise to a more complementary relationship between the parties, rather than a competitive relationship which restricts competition on the market.[197] Even production agreements between competitors do not necessarily come under Article 81(1). If there is co-operation between firms which at the same time compete on markets closely related to the market concerned by the co-operation, the co-operation can not be defined as restricting competition if the co-operation is the only way for the parties to launch a new product, enter a new market or carry out a specific project.[198] One can also look at the costs in common for the competitive parties in order to see the effects on the parties competitive behaviour. If the parties have a small proportion of their total costs in common, an effect on the parties competitive behaviour is most unlikely.[199]

Agreements that almost always fall under Article 81(1) are agreements including hard core restrictions. Such restrictions have the object of restricting competition, hence are they prohibited per se due to their very existence.

Agreements that cannot easily be characterized neither as restrictive of competition nor non-restrictive of competition, may fall under Article 81(1) and be analysed in their economic context. Such agreements may for instance be co-operation agreements between competitors which do not contain hard core restrictions but which creates a significant degree of costs in common.[200] If the parties have a large proportion of their total costs in common, it is more likely that they may restrict competition, for instance through lowering their competitive behaviour against one another, due to the fact that they have great costs in common which they want to take advantage of as much as possible.

4.2.2.2 Agreements falling outside the block exemption

The regulation was formerly primarily aimed at small and medium sized undertakings, it contained both a market share and annual turnover limit. Agreements between undertakings whose combined aggregate annual turnover exceeded 1000 million € did not fall under the block exemption. This turnover limitation is excluded in Regulation 2658/2000, the market share limitation is however still in force. The block exemption is only applicable to agreements between undertakings who do not have a combined market share which exceeds 20% of the relevant market, which seems reasonable given that the benefits specialisation agreements bring with them

[197] Draft Guidelines on the Applicability of Article 81 to horizontal co-operation. Para. 81.
[198] Draft Guidelines on the Applicability of Article 81 to horizontal co-operation. Para. 82.
[199] Draft Guidelines on the Applicability of Article 81 to horizontal co-operation. Para. 83.
[200] Draft Guidelines on the Applicability of Article 81 to horizontal co-operation. Para. 85.

outweigh a limited degree of market power.[201] Agreements between undertakings exceeding the 20% limit shall be assessed under normal procedures under Article 81.

As under the research and development regulation, specialisation agreements containing hard core restrictions do not fall within the block exemption.

4.2.2.2.1 Market share

Regarding specialisation agreements, without significant market power the parties to an agreement do not have an incentive to co-ordinate their competitive behaviour. There is also no effect on competition in the market without market power of the parties even if the parties would co-ordinate their behaviour.

There has been a constant liberalization of the market share percentage over the years. In the first block exemption from 1973, the market share limit was 10%. In 1983 it was raised to 15%, and in Regulation 417/85 it was finally raised to 20% which it still is. The process is a reflection of the desire to increase the ability of small and medium-sized companies within the community to enter into specialisation agreements. A crucial difference between the market share limit from 1973 and the block exemption of today is the calculation of the market share. In the original block exemption, the percentage was calculated simply on the basis of market share in individual member states, whereas under the block exemption of today the percentage applies to the relevant market/markets, which may be the share of an individual Member State but may also be a lesser area such as a region within a larger Member State.[202]

If the parties, at the time of the closing of the agreement, do not exceed the 20% market share limit, but subsequently rise above this limit without exceeding 25%, the exemption shall continue to apply for two years following the year in which the 20% limit was first exceeded. In the case where the parties initially do not exceed the 20% limit but subsequently rise above 25% the exemption shall continue to apply for one year following the year in which the level of 25% was first exceeded. The benefit of the extra time after the 20% limit has been exceeded may however not be combined so as to exceed a period of two years.[203]

4.2.2.2.2 Hare core restrictions

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[201] Regulation No 2658/2000, Article 3.
[202] Goyder, D.G., EC Competition Law, 1998. p. 466.
[203] Regulation No 2658/2000, Article 6.

As agreements with hard core restrictions restrict competition to such an extent the benefits cannot justify the restrictions, such agreements are not covered by the block exemption. Article 4 specifies agreements which have as their object price fixing, output restriction or market and customer allocation as agreements which fall outside the block exemption.

These exceptions do not, however, apply to agreements where the parties have agreed on the amount of products to be outsourced in the context of unilateral and reciprocal specialisation agreements, or the setting of the capacity and production volume of a production joint venture in the context of joint production specialisation agreements.[204] Neither is the fixing of prices that a production joint venture charges to its immediate customers forbidden, provided that the joint venture also handles the distribution of the products in question, hence making the price fixing the effect of integrating the various functions.[205]

4.2.2.3 Withdrawal of the exemption

The Commission may withdraw the benefit given in accordance with the block exemption[206], if it finds in a particular case that an agreement given exemption nevertheless has effects which are inconsistent with Article 81(3) of the Treaty. This is in particular so when it is found that the consumers are not receiving a fair share of the resulting benefit, the benefits are not in proportion to the restrictions of competition, and in cases where the products which are the subject of the specialisation agreement are subject to effective competition from products considered to be equivalent in view of their characteristics, price and intended use.[207]

[204] Regulation No 2658/2000, Article 4(2)(a).
[205] Regulation No 2658/2000, Article 4(2)(b). Such a production joint venture, which also carries out joint distribution, is in most cases a full-function joint venture, and should be assessed under the rules for full-function joint ventures.
[206] Pursuant to Article 7 of Regulation (EEC) No 2821/71.
[207] Regulation No 2658/2000, Article 7.

5 Analysis

5.1 Generally

Co-operation between undertakings in all forms is one of the most significant trend in the industrial world today. Undertakings co-operate and initiate joint ventures in order to develop new products, divide production between parties, treat customers with better service, etc.

As important competition is for a developing and keeping a healthy industrial climate, as important is it to have sound and clear rules to hinder unfair monopolisation and other anti-competitive operations between undertakings. Competition law within the EU is constantly under rigid supervision, both from the institutions of the EU as well as from the industry. As the environment of the industry is swiftly changing, the competition law needs to develop correspondingly.

Recently there have been changes in the area of co-operation between undertakings. In 1997 the ECMR was revised, an amended version was published which brought along significant changes for concentrations in general, and for co-operative joint ventures in particular. The new ECMR came into force in March 1998, incorporating a number of amendments. Of these amendments, the new Community dimension thresholds, and the extension of the scope of the ECMR to include co-operative joint ventures were the most significant.

The changes in the ECMR have recognised that transactions that were often quite similar economically speaking, were treated very differently. Concentrative joint ventures were assessed under the ECMR, with fast handling periods and a less rigid material assessment than co-operative joint ventures which were assessed under Article 81 of the EC Treaty. Under the ECMR, it is enough for a joint venture not to create or strengthen a dominant position in order to receive exemption, while under Article 81 a joint venture must create certain benefits for the consumers, and any elements which may restrict or distort competition must be absolutely necessary in order to create those benefits.

Regarding two special kinds of joint ventures based on horizontal co-operation agreements the benefit of block exemptions have been issued by the European Commission, namely specialisation agreements and research and development agreements. New regulations regarding the block exemptions were introduced January 1st 2001, as the old block exemptions ceased to exist at the end of the year 2000.

The revision of the block exemptions on research and development and specialisation agreements, and the issuance of guidelines on horizontal co-operation agreements proved to be a step towards more user-friendly rules, which will bring about greater legal certainty, and which seem to have a more economic-driven approach than the former block exemptions. The system of exempting all agreements within the threshold of the block exemptions, except those containing hard-core restrictions, as opposed to a white list of exempted clauses in the former block exemptions, provides for improved contractual flexibility in the field of research and development and specialisation agreements.

5.2 The thresholds of the ECMR

The thresholds that were introduced in the amended ECMR extended the scope of the ECMR to include transactions which have a significant cross-border effect but which would not have satisfied the previous turnover thresholds. The Commission wanted such operations to benefit from the one-stop-shop principle and not have to notify their operation to a number of different Member States.

The new thresholds will benefit a certain amount of companies the opportunity of making one filing instead of multiple national filings. This should help these companies in cutting their administrative and legal costs and reduce the uncertainties resulting from possible varying assessments at national level. They will also of course benefit from the faster handling under the ECMR.

Between the period from March 1998 and December 1999, the number of notifications the Commission received under the amended Article 1 (3) were 45, which represents 9% of all notifications during that period of time.[208] Consequently, it is not that many companies that are helped by the lower thresholds. By contrast, the new thresholds will mean that in the case of transactions involving a number of parties active in several Member States or all across the Community, it will be necessary to consider a wide variety of combinations of turnover in order to establish whether the ECMR will apply. This will require a detailed and thorough examination of the parties' Community turnover by Member State, calculated in accordance with the provisions of the ECMR. This could consequently lead to higher administrative and legal costs, and a number of these transactions will after the necessary calculations not require notification to the Commission.

Another possible problem under the amended Regulation is the potential error in calculation when calculating the lower thresholds. It seems to me

[208] Report from the Commission to the council on the application of the Merger Regulation thresholds. Brussels, 28.6.2000.

the potential for error should be higher when calculating the thresholds on a Member State basis rather than on a Community-wide or world-wide basis, as under the old thresholds.

There has been a need for a reform of the thresholds, and the reform given in the amended ECMR is a good step towards better assessment of concentrations. It has expanded the scope of the ECMR to include more concentrations, i.e. giving a larger number of concentrations Community dimension. However, the discrepancy between meeting the thresholds and having real Community dimension is a subject worth looking into. Only because a concentration meets the thresholds under the ECMR does not mean that it necessarily has effects on competition within the Community, as well as there are many concentrations that do not meet the thresholds requirements that do have substantial effect on their market within the Community. This leads to situations where concentrations which possibly may distort competition within the Community are left to be assessed under national competition authorities. This is all but optimal since there is no corresponding competition regulation between the different Member States, and some Member States still have no merger control. The Regulation may thus fail to catch concentrations, and the Member State regulation may not be developed enough to properly deal with them, concentrations which may create or strengthen a dominant position as a result of which effective competition may be significantly impeded in the common market or in a substantial part of it. A solution could be to require the Member States to introduce uniform and sufficient merger control schemes. Concentrations falling short of the ECMR, but possessing competitive effects which could be negative to the common market, would then be assessed properly also under national competition authorities.

In other cases, transactions which meet the community dimension thresholds but have no significant effect on competition within the Community, there are different problems. The parties to such concentrations have to go through the heavy burden of notifying although the concentration in reality will possess no appreciable effects. The Commission has issued the short form notification form for notifying relatively small joint ventures, but that is also a costly and time consuming process for parties to a concentration which has no real Community dimension.

The problem is that the concentrations singled out by the turnover thresholds are not for sure the concentrations that are most likely to create problems at a Community level. Possible solutions to this problem could from my point of view be three. Instead of having a system based on turnover, there could be a system based on market shares. Concentrations creating market shares above a given level would have to be notified. Another similar solution would be to have thresholds based on the size of the transaction instead of the size of the parties. A third solution could be to retain the system of thresholds based on the size of the parties, but refine the allocation of jurisdiction through the use of a de minimis rule based on the size of the transaction.

A good solution must be better than the system of today to catch the concentrations not possessing real Community dimension, it must provide legal certainty, and it must not be excessively time and money consuming. The first solution, a system based on market shares, could be a good solution. Merger control is in many ways a system to find out whether a concentration creates market power. Market power is not the same thing as market shares, however, market shares are more related to market power than the size of the parties to a concentration. That fact in itself speaks of a better system for catching concentrations with real Community dimension. However, to calculate market shares is rather difficult. One must look at the product market and the geographic market, even slight differences when calculating these may lead to significant changes in the final market share figure. It would be necessary to draw up guidelines as to how to define the relevant market, and it would be necessary to make different guidelines for all different sorts of products. Even if one would accept the uncertainty in calculating the market shares, I believe it would be troublesome to obtain the necessary information from the parties to the concentration to be. At the stage of notification, often the parties to a concentration are competitors and probably not too keen on giving up their sales figures. Using merely market shares for showing market power is not very credible in a developed market power analysis. Other factors such as barriers to entry, industrial structure, access to capital etc. must also be taken under consideration.

The second solution, which is a system based on the size of the transaction, is a system that which would be mostly different for joint ventures since thresholds based on the size of the parties is quite the same as the size of the transaction in cases of true mergers. In a system based on the size of the transaction, a fair number of smaller transactions would be excluded, transactions that probably have no significant effect on competition but yet are caught within a system with thresholds based on the size of the parties, due to the size of the parent companies. It would also be quite a precise system, using certified accounting figures of the business involved in the transaction. However, such a system may lose some important concentrations which are small but still have effects on competition.

Refining the present system, which is the third solution given above, is perhaps the best solution of the given three. The present system would be improved by adding a de minimis rule based on the size of the transaction to the present thresholds. Through such a de minimis rule, the advantages of the present system would be retained, and at the same time the concentrations lacking real Community dimension could be found. There is already this kind of de minimis rule to be found concerning short-form notification, although it is not a true de minimis rule since it does not exclude joint ventures from the scope of the ECMR but merely eases the notification requirements. Introducing a true de minimis rule for concentrations, along the lines given in the short-form notification rule, would prevent many superfluous notifications. There is of course the risk of excluding concentrations that would need closer scrutiny in introducing such a rule, but this could be compensated for by lowering the turnover thresholds, hence catching the notifications with significant effect on competition which fall below the present thresholds.

5.3 Full function co-operative joint ventures

One of the most significant changes made by the amendments to the ECMR was the redefinition of concentration. Prior to the changes made, even a full-function joint venture of lasting and structural effect would not meet the definition of concentration in Article 3 of the Regulation if it had the object or the effect of co-ordinating the competitive behaviour of independent undertakings.

In parallel with the extension of its scope, an Article 81-type analysis has been incorporated into the ECMR. Full-function joint ventures which have the object or the effect of co-ordinating the competitive behaviour of independent undertakings will not only be subject to the dominance test in Article 2(2), but also be assessed regarding the co-operation under criteria parallel to those under Article 81(1) and (3).

The amendment to the ECMR to include also co-operative joint ventures in the scope of the EC Merger control rules was warmly welcomed by the industry as it finished with the distinction between concentrative and co-operative joint ventures. The distinction was difficult to apply and resulted in different treatment of situations which economically speaking often were considered quite similar.

Under the ECMR, all full-function joint ventures with a Community dimension will be assessed accordingly to the rules of the ECMR. All such joint ventures will thus be able to benefit from advantages that are to be found under the ECMR, such as the time-limit for a Commission decision, the duration of clearance and the one-stop-shop principle. Prior to the amended ECMR, joint ventures that were not characterized as concentrative were seen as co-operative joint ventures, thus falling outside the scope of the ECMR, and instead assessed in accordance with Article 81 of the EC Treaty. The strange thing was, that not only were the spill-over effects of the joint venture to be assessed under Article 81, but also the forming of the joint venture, that is the concentration. Under the ECMR this has changed. All joint ventures that falls within the scope of the ECMR under the thresholds are assessed under the dominance test, and any possible spill-over effects are assessed under Article 81. Two significant and welcomed developments in the Commission's approach to the applicability of Article 81(1) to joint ventures have been seen in the Commission's practice when dealing with spill-over effects of full-function co-operative joint ventures. In order to establish a restriction of competition in the sense of Article 81(1), it is necessary that the co-ordination of the parent companies' competitive behaviour is likely and appreciable and that it results from the creation of the joint venture. These two requirements, the need to show likelihood of the competitive behaviour on more than a purely theoretical basis, and the need to prove causality between the competitive behaviour and the creation of the joint venture, shows a new, more economic-driven approach to the application of Article 81(1) to joint ventures.

The better economic approach towards co-operative joint ventures due to the reform of the ECMR is in my point of view the great advantage of the reform. The assessment of co-operative joint ventures under the ECMR gives all joint ventures which falls within the ECMR the procedural benefits of the ECMR and the benefit of being subject to the dominance test instead of the test of Article 81.

5.4 Horizontal co-operation agreements

The reform of horizontal co-operation agreements regarding research and development and specialisation agreements was of vital importance. In order to be apart of the competitive world of industry of today it is crucial that there are modern, up-to-date rules, which are clear and simple to understand. Companies need to respond to the increasing competitive pressure and a changing market place due to the speed of technological progress, globalisation and the generally more dynamic nature of the markets. Co-operation can be a means to share risks, save costs and launch new innovations faster. There are of course also anti-competitive risks in co-operation agreements. It may lead to price fixing, division of markets, and also to negative effects regarding the quality of goods or innovation. In particular for small and medium sized companies co-operation is a means to adopt to the changing economic environment.

The former block exemptions on research and development agreements and on specialisation agreements were thought to be too narrow, too focused on legal clauses and not clear enough by the industry. The reformed block exemptions have been revised in order to make them more user-friendly and to increase their scope and clarity. Under the new block exemptions, the former "white list" of explicitly exempted clauses are abolished. Instead all conditions under which undertakings pursue research and development and specialisation agreements are exempted, though there are certain conditions to be fulfilled, and all hard core restrictions are forbidden. This moves the block exemptions away from a clause based approach, and gives more contractual freedom to the parties.

A condition that must be fulfilled in order for the agreements to fall within the scope of the block exemption, hence being exempted from Article 81, is that the combined market share of the parties to an agreement is below 20% in the case of specialisation agreements and below 25% in the case of research and development agreements. The market share thresholds have been increased in the case of research and development agreements from 20 to 25% which of course has been done to widen the scope of the block exemption. The increase in the market share recognises that research and development collaboration is helpful in creating efficiency, and that restrictive effects are less likely than for other types of co-operation. For specialisation agreements, the market share thresholds were not increased compared to the previous block exemption. However, in order to increase the scope of the block exemption, the turnover thresholds were abandoned. The deletion of the turnover thresholds shows a more economic approach towards horizontal specialisation agreements. As mentioned, there is no clear link between turnover and market power. However, I think the 20% market share threshold for specialisation agreements at least should have been increased to 25%. Considering the list in Article 4 of the block exemption on specialisation agreements, which prohibits agreements that are clearly restrictive to competition, and that the threshold for research and development agreements was increased to 25%, I think an increase of the threshold for specialisation agreements could be justified.

As discussed earlier, market share thresholds are not the best way to measure market power. However, using market share thresholds to limit the application of a block exemption regulation may very well fulfil its purpose. The use of market share as a limitation of whether an operation falls within the scope of a block exemption is quite enough, as the full analysis of an agreement takes place later if needed. When assessing potential market power and the anticompetitive effects of an agreement, market share alone is not a sufficient tool. For an analysis with legal certainty and a more economic approach, many other factors affecting the potential market power must be supplemented. These must be taken under consideration when doing a full analysis of a potential anti-competitive agreement.

The market share thresholds play a very important role in the field of co-operation. When co-operation is at hand, foreclosure effects may appear. When too many firms from a particular industry joins up, it may leave no firms for other undertakings to form joint ventures with. Firms with access to separate, scarce resources combine to create a monopoly. The market share thresholds hinders such effects. However, one could argue that the thresholds are not set at an optimal level. The Commission seems to have accepted that the kinds of horizontal agreements within the scope of the block exemptions are broadly speaking beneficial. Agreements not in line with the block exemption are exempted through the black list. The same approach can be found in the block exemption on vertical agreements[209], in

[209] Commission Regulation 2790/1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, [1999] O.J. L 336.

which the market share threshold is set at 30%. To achieve consistency between the block exemptions, a market threshold set at 30% for horizontal co-operation agreements could be justified and would no doubt be welcomed and useful for many undertakings who need to adopt to the swiftly changing environment in the industry of today.

A great criticism against the former block exemption on research and development was that it was totally useless in practice. Given the fact that research and development agreements usually concern a brand new product, the potential market share is extremely high. Therefore it is very difficult for horizontal co-operation agreements on research and development to fall within the market thresholds of the block exemption, regardless of whether it is 20% or 25%. There is thus a large risk that this criticism will remain. Perhaps is there a need for more specific guidelines as to how identify markets and calculate market shares in the case of horizontal research and development agreements.

Although there are some points to criticize regarding the reform of the block exemptions and the guidelines, they are absolutely a step in the right direction. A more efficient policy towards horizontal co-operation will reduce the regulatory burden for companies, while ensuring an effective control of agreements between companies holding market power. This will benefit consumers, companies and the Commission alike.

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