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Application of the full-function  
criteria to joint ventures under the  
EU Merger Regulation

Master thesis  
30 credits

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European Union Competition Law

Spring 2012

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# Summary

Joint ventures represent a common method of cooperation between undertakings; hence the adequate treatment of joint ventures is a very important element of Union merger control. The concept of full-functionality is commonly considered to be crucial regarding scrutiny of joint ventures under the Merger Regulation. Article 3(4) of the Merger Regulation states that the creation of a joint venture shall constitute a notifiable operation only if the joint venture is a full-function one. The full-function criteria therefore delineate the scope of the Merger Regulation regarding the creation of joint ventures.

However, what does the term “creation” actually entail? Joint ventures can be established in several ways: *(i)* through the creation of an entirely new economic entity, *(ii)* through acquisition of joint control over a pre-existing undertaking from third parties, or *(iii)* through a change from sole to joint control over a pre-existing undertaking. This thesis aims to explore the practice of the European Commission on whether the full-function criteria must be fulfilled in all the above situations, or only in the first one.

Although the Commission’s practice has previously been inconsistent, since the adoption of the Consolidated Jurisdictional Notice the situation has become clearer: the term “creation” is interpreted narrowly and full-functionality will only be examined when there is creation of new joint venture undertakings. The second and third above-mentioned operations are to be treated as acquisitions of joint control under Article 3(1)(b) of the Merger Regulation to which the full-function criteria are not applicable, in accordance paragraphs 91 and 86 of the Consolidated Jurisdictional Notice. This stems from the text of the Merger Regulation, which makes a distinction between creation of joint ventures and acquisitions of joint control, and is explained by the fact that the object of control in a concentration must be considered as an undertaking or part of it.

In practice, this means that even the creation of a non-full function joint venture can fall within the scope of the Merger Regulation, if the parties structure the operation in such a way that instead of creating a new joint venture undertaking, they transform an a pre-existing undertaking into their joint venture. Such an operation would come within the scope of the Merger Regulation regardless of the joint venture’s full-functionality.

# Preface

Around this time in 2010, give or take a week or two, I was back home, in Sarajevo, anxiously waiting & hoping to be accepted to this master's programme in Lund. I had just finished law school, had a good job in an NGO and was generally in a rather decent position, better than most of my peers. However, I was not content. I wanted something else, something more and I chose to learn about this far-away, mystical concept of European Law (that *might* be an exaggeration; I did have courses in EU law). The point is, I wanted more: I wanted to fulfil my ambitions and to improve myself, both professionally and personally.

And I am very grateful I was given such an opportunity. The previous two years in Lund have been an amazing experience, more than I could have ever hoped for. I have grown and learned so much, I have had the chance to meet fantastic people and to live in a wonderful country, where I have truly felt at home. Of course, like everything in life, this time was not without its disappointments, large and small. However, the negatives are by far outweighed by the positives. I can safely say these have been the best two years of my life.

This thesis is the culmination of my time in Lund, the end of a chapter in a great book (one my personal favourites). The content of the next chapter is up in the air. I sincerely hope to beat the odds and be able to have a career in European law. Although prospects are currently looking bleak, one can only fight, never give up and always do the best job possible, in the hope of fulfilling one's ambitions.

No man is an island,<sup>1</sup> isolated from the contribution of others to his work and achievements. I would therefore like to offer my sincere gratitude to all those who have gifted me their time and help, not just for this thesis, but also during the entire previous two years.

I wish to thank my family (my father Adnan, mother Vesna and sister Anesa) for all the love and support they have given me, throughout my life, and for all the sacrifices they have made for me.

Furthermore, I also wish to thank professor Xavier Groussot, the man who selected me to take part in this master programme and an excellent professor of EU Constitutional Law. Xavier was also one of our team's coaches in the

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<sup>1</sup> John Donne, 16<sup>th</sup>-17<sup>th</sup> century English poet, satirist, lawyer and priest

European Law Moot Court, along with Angelica Ericsson and Eduardo Gill-Pedro. Together, they shaped us into a great team and twice led us on wonderful journeys to Luxembourg through which we learned more than ever before about European Union Law. They treated us not as students, but as friends and their equals and for that I sincerely thank them.

Finally, coming to my master thesis (to be honest, one would expect me to get here sooner), I want to thank Marcus Glader for helping me during a drought of inspiration and proposing this topic to me. I must admit, at first I had no idea what he was talking about, but gradually I managed to grasp (at least I certainly hope so) the issue. I also thank him for his general support and career advice.

I especially want to say a big thank you to professor Hans Henrik Lidgard, the supervisor of my master thesis. Hans Henrik (I believe this is the first time I address him in such a way) is one of the best professors I have ever had the pleasure of learning from. His knowledge, the calmness he projects and his kind approach to his students had a huge influence in developing my interest in competition law and steering me in the direction of trying to pursue a career in it. I sincerely thank professor Lidgard for all the patience and understanding he had with me during the writing of my thesis and I sincerely hope he is satisfied with the outcome of my work.

And last, but certainly not least, I wish to thank Irma Hodžić, my long time girlfriend and companion through life. We have experienced much together and she has always been there for me, through thick and thin, offering her advice, support and love. Having been together since we were 19 years old, we have shaped each other and I know that without her I would not be half the man I am.

Having said all this, and spent much more time on the preface than I had planned or than is customary, I will conclude by saying that I sincerely hope the reader will enjoy this master thesis.

Lund, May 2012

*Zlatan Balta*

# 1 Introduction

Since 21 September 1990, when the original European Union Merger Regulation<sup>2</sup> came into force, merger control has been an integral part of EU competition law and the European Commission has gained powers to scrutinize concentrations which have a Union dimension. The “one-stop-shop” notification procedure established by the Merger Regulation has been welcomed by industry and almost five thousand concentrations have been notified to the Commission since 1990.

Nearly half of all concentrations notified under the two Merger Regulations have consistently been joint ventures,<sup>3</sup> as a very common form of collaboration and concentration between undertakings. Joint ventures can be created in various ways: by creating a new undertaking under joint control, by acquiring joint control over pre-existing undertaking from a third party or by acquiring joint control of a pre-existing undertaking (previously under sole control) and exercising joint control with its former sole parent.

If a joint venture created in any of these ways constitutes a concentration with a Union dimension, it will fall within the scope of the Merger Regulation<sup>4</sup> and will have to be notified to and cleared by the Commission. The criteria to establish whether an operation such as the first method described above constitutes a concentration are relatively well established and clear: the relevant criteria are whether the new undertaking is a full-function joint venture or not. If it is a full-function joint venture, it must be notified.<sup>5</sup> If it is not a full-function joint venture, it is not considered a concentration and does not need to be notified to the European Commission.

However, do the same criteria apply to the second and third methods mentioned above? As will be shown, the Commission’s practice has previously been quite inconsistent. Therefore, there remains some uncertainty about when and to which operations the full-function criteria must be applied. This question is the subject matter of the thesis.

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<sup>2</sup> Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (original Merger Regulation)

<sup>3</sup> John Cook, Christopher Kerse, *EC Merger Control* (Sweet & Maxwell: 2005), para 1-008

<sup>4</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (Merger Regulation)

<sup>5</sup> Article 3(4) of the Merger Regulation; Paragraphs 91 to 109 of the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (Consolidated Jurisdictional Notice)

## **1.1 Purpose**

The purpose of this master thesis is to examine the European Commission's application of the full-function criteria to different types of operations through which a joint venture can be established (creating a new joint venture undertaking versus acquiring joint control over a pre-existing undertaking, thus transforming it into a joint venture) and to determine how the Commission can be expected to apply full-functionality in the future.

Essentially, the question I will attempt to answer is when do the full-function criteria need to be fulfilled to bring a joint venture within the scope of the Merger Regulation: only when a new joint venture undertaking is created, or also when joint control is acquired over a pre-existing undertaking (either from a third party or together with the undertaking's previous sole parent).

## **1.2 Methodology and materials**

In the research and writing of this thesis, I will utilize the traditional legal method in order to determine the Commission's previous and current practice. I will also attempt to analyze the reasoning behind its practice and attempt to predict how it will (or should) develop in the future.

I will rely on books and articles that address the relevant issues, as well as European Union primary, secondary and supplementary law. Union primary law is mentioned only briefly, as the background and legal basis of Union merger control. Most emphasis will be put on merger decisions of the European Commission, which will be examined in detail in order to establish how the Commission has applied the full-function criteria previously and whether there is consistency to its practice which allows a prediction of how the full-function criteria will be used in the future.

Union secondary law, specifically the Merger Regulation which deals with the jurisdictional and substantive aspects of Union merger control, will be analyzed in order to determine whether the Commission's practice is consistent with it and whether the Commission's practice (and reasoning behind it) can be considered as correct. In order to conduct such an analysis, much emphasis will be placed on the Consolidated Jurisdictional Notice, which describes the Commission's understanding of how the Merger Regulation is to be interpreted. The thesis will examine whether the Commission's practice is consistent with the Consolidated Jurisdictional Notice and whether the Notice itself is consistent with the Merger



Regulation. Since the purpose of the thesis is to analyze the Commission's application of the full function-criteria, reliance on Judgements of the Court of Justice of the European Union will be scarce, if any.

## 1.3 Delimitations

This thesis will investigate only the jurisdictional aspect of the Merger Regulation, *i.e.* when the conditions for notification to the Commission of the establishment of a joint venture are met. The two overall conditions under the Merger Regulation are that the operation *(i)* constitutes a concentration and that *(ii)* such a concentration has a Union dimension.

As the issue of Union dimension is well developed and explained through the turnover thresholds, the focus of the thesis will be on the concept of concentration and on the test used to determine whether the establishment of a joint venture constitutes a notifiable concentration.

The substantive analysis of the Merger Regulation to determine whether a concentration is compatible with the common market will not be addressed by the present thesis. The same applies to the potential substantive competition analysis under Articles 101 and 102 TFEU to concentrations outside the scope of the Merger Regulation. Including these issues would dilute the focus of the thesis and make it overly broad. However, these issues might possibly be mentioned to facilitate discussion regarding the subject matter of the thesis. Moreover, generalities such as the rationale behind merger control, historical development and the legal framework of EU merger control are very well described in literature and there is little point in their repetition here. Therefore, the thesis will only deal with jurisdictional issues relevant to joint ventures.

Moreover, due to the subject-matter of this thesis (which only deals with the establishment of a joint venture where no joint venture, *i.e.* joint control, existed previously), it will not deal with the issues of transforming a non-full function joint venture into a full-function one or with the addition or substitution of shareholders in an existing joint venture.

Commission decisions adopted under the simplified procedure have been left outside the thesis as they do not offer any insight into the issues that this thesis aims to resolve. Since the subject of the thesis is the practice of the European Commission, referrals by the Commission to member states' competition authorities have also been left out.

It must be stated that the present thesis deals with many of the same issues as a 2003 article by Luca G. Radicati di Brozolo & Magnus Gustafsson.<sup>6</sup> The analysis of the present thesis will continue from the period where this article left off and will not analyze in depth the prior practice.

The cut-off date for the materials used in this thesis is the 25<sup>th</sup> of May 2012. However, it must be noted that many Commission decisions are not immediately available after their adoption. Therefore, although they had been adopted prior to the cut-off date, there are few decisions from 2012 as most have not yet been made publicly available.

## 1.4 Structure

The thesis will start with two introductory chapters, which give a short overview of the scope of the Merger Regulation (and the Commission's jurisdiction under it) and present the premise that undertakings prefer to be subject to the regime of the Merger Regulation when establishing a joint venture, rather than the regimes of Articles 101 or 102 TFEU. In these chapters the definition of a joint venture will also be established and concepts of joint control and full-functionality presented. These issues are all very relevant for the main part of the thesis.

Thereafter, the main part of the thesis will describe the different methods of establishing joint ventures (creating new joint venture undertakings and acquiring joint control over pre-existing undertakings) and analyze the Commission's practice in applying the full-function criteria to these different methods. The analysis of the Commission's practice will generally be divided into three periods: *(i)* under the previous Merger Regulation, *(ii)* under the current Merger Regulation, prior to the adoption of the Consolidated Jurisdictional Notice and *(iii)* after the adoption of the Consolidated Jurisdictional Notice.

Finally, at the end of the thesis I will give an analysis of the Commission's practice and reasoning behind it, an assessment on how the Commission can be expected to apply the full-function criteria in the future as well as what relevance this has in practice when notifying the establishment of a joint venture under the Merger Regulation.

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<sup>6</sup> Luca G. Radicati di Brozolo & Magnus Gustafsson, *Full-function joint ventures under the Merger Regulation: the need for clarification* in *European Competition Law Review* 2003, 24(11), pages 574-579

# 2 Scope of Merger Regulation

## 2.1 Concentration with a Union dimension

Article 1 of the Merger Regulation provides that it will apply only to concentrations with a Union dimension. Therefore, an operation will be within the scope of the Merger Regulation (and under the Commission's jurisdiction) only if two elements are cumulatively met: *(i)* the operation must be a concentration within the meaning of the Merger Regulation; *(ii)* such a concentration must meet the turnover thresholds in the Merger Regulation in order to have a Union dimension.

### 2.1.1 Concentration

Article 3 of the Merger Regulation states that a concentration exists where there is a change of control (of an undertaking or part it) on a lasting basis, which results from *(i)* the merger of two or more previously independent undertakings, *(ii)* the acquisition, by a person or an undertaking, of control over another undertaking, a part of it or of its assets, and *(iii)* the creation of a full-function joint venture. Therefore, a concentration may arise either as a result of a merger between previously independent undertakings, or as a result of a change of control of an existing undertaking.<sup>7</sup>

#### 2.1.1.1 Control

It is evident that the concept of control (or change of control) is crucial for the notion of concentration. The concept of control is explained in the Merger Regulation and the Consolidated Jurisdictional Notice as the possibility to exercise decisive influence over an undertaking,<sup>8</sup> *i.e.* to determine its strategic business decisions. This decisive influence can be exercised through either positive or negative rights and control can be either solely or jointly held. In the case of sole control, an assessment is done to establish whether there exists the possibility of solely determining the strategic decisions of an undertaking. In the case of joint control, however, the assessment aims to establish whether the jointly controlling undertakings have the power to prevent the adoption of strategic business decisions.<sup>9</sup>

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<sup>7</sup> C.J. Cook C.S. Kerse, *EC Merger Control* (Sweet & Maxwell: 2009), para 2-002

<sup>8</sup> Merger Regulation, Article 3(2); Consolidated Jurisdictional Notice, Section (B) – the concept of concentration

<sup>9</sup> Eduarne Navarro, Andres Font, Jaime Folguera, Juan Briones, *Merger Control in the EU* (Oxford University Press, New York: 2005) – para 2.31;

### 2.1.1.2 Lasting basis

Furthermore, it is necessary that such a change of control is done on a lasting basis, so that it leads to a change in the structure of the market. Therefore, operations that lead only to a temporary change in control do not constitute concentrations.<sup>10</sup> Examples would be when several undertakings acquire another undertaking in order to immediately divide its assets, or when an interim buyer (often a financial institution) acquires control of an undertaking on behalf of a third party to which it will then sell the undertaking. It is impossible to say in general what time is needed for a change of control to be considered as lasting and an assessment is made based on the type of operation concerned. However, agreements lasting a year or two will probably not fulfil the lasting basis requirement, while agreements lasting five, eight or ten years have been found as fulfilling it.<sup>11</sup>

### 2.1.2 Union dimension

Once it has been established that the operation in question is a concentration for the purpose of the Merger Regulation, it is necessary to examine whether the turnover of the undertakings in the concentration meets the thresholds of Article 1 and thus whether the concentration has a Union dimension.

The Union dimension is established on the basis of two alternative sets of turnover thresholds in Articles 1(2) and 1(3) of the Merger Regulation. The conditions in a single set of thresholds are cumulative, but a concentration has a Union dimension if it fulfils either of the two sets. According to the first set of thresholds, a concentration has a Union dimension if *(i)* all the undertakings concerned have a combined aggregate worldwide turnover of more than 5 billion EUR, *(ii)* each of at least two undertakings concerned has more than 250 million EUR of aggregate turnover generated in the Union and *(iii)* each of the undertakings concerned do not achieve two thirds of its Union turnover in one member state.

According to the second set of thresholds, the concentration has a Union dimension if *(i)* the undertakings concerned have a combined aggregate worldwide turnover of more than 2,5 billion EUR, *(ii)* the combined aggregate turnover of the undertakings is more than 100 million EUR in each of at least three member states, *(iii)* in each of these three member states (in condition *ii*) the aggregate turnover of each of at least two undertakings is more than 25 million EUR, *(iv)* the aggregate Union

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<sup>10</sup> Consolidated Jurisdictional Notice, para 28

<sup>11</sup> Edurne Navarro, Andres Font, Jaime Folguera, Juan Briones, *Merger Control in the EU* (Oxford University Press, New York: 2005) – paras 2.06 – 2.10

turnover of each of at least two undertakings concerned is more than 100 million EUR, and (v) each of the undertakings concerned does not achieve more than two thirds of its Union turnover in one member state.

## **2.2 Advantages of coming within the scope of the Merger Regulation**

Whether it is beneficial for the parties to have their concentration reviewed under the Merger Regulation depends on a case by case basis. The work and documentation needed to notify a concentration to the Commission can sometimes exceed that of filing several national clearance applications.

However, generally it can be presumed that it is in the best interests of the parties for their concentration to be scrutinized under the Merger Regulation.<sup>12</sup> The biggest advantage that the Merger Regulation offers is the application of the one-stop-shop principle, which allows undertakings to be subject to a single proceeding on a Union level, rather than being subject to several different proceedings before national competition authorities. Even provided that the national competition authorities cooperate with each other, for the undertakings concerned this will usually mean higher legal fees, application of different criteria by the national authorities (or even different application of the same criteria), increased legal uncertainty as the undertaking must wait for several clearances, potentially increased duration of the transaction causing delays, etc.

On the other hand, the Merger Regulation provides a reasonably expedient procedure based on a single set of criteria with (generally) consistent application by the Commission and a great deal of guidance and case law to assist the parties in assessing their concentration. Moreover, if there is doubt regarding the operation's compatibility with the internal market, the parties can generally offer commitments to rectify any concerns the Commission might have. Since the adoption of the original Merger Regulation, only a very small number of concentrations have been declared as incompatible with the internal market. In the previous 22 years, out of almost 5000 notifications only 22 operations were declared as incompatible,<sup>13</sup> although a small number of notifications have also been withdrawn in order to avoid negative decisions.

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<sup>12</sup> Bellamy & Child, *European Community Law of Competition*, edited by Peter Roth, Vivien Rose (Oxford University Press: 2008), para 6-012

<sup>13</sup> Statistics from the Commission for the period from 21 September 1990 to 30 April 2012, available at <http://ec.europa.eu/competition/mergers/statistics.pdf> - accessed 25.05.2010.

Moreover, a benefit of receiving clearance under the Merger Regulation is also the legal certainty it provides, especially regarding various restrictions concerning activities of the joint venture and relations with its parents:<sup>14</sup> the Commission's clearance decision also covers "restrictions directly related and necessary to the implementation of the concentration" (ancillary restraints).<sup>15</sup> Such restraints can include non-competition clauses, licence agreements, purchase and supply agreements, etc.<sup>16</sup> If the concentration is declared compatible with the internal market, the ancillary restraints would also be declared valid and would not be later scrutinized under Article 101 TFEU. On the other hand, if the operation is outside the scope of the Merger Regulation, any restrictions could be dealt with under Article 101 TFEU.

Even though undertakings would prefer for their operation to be within the Merger Regulation, due to its jurisdictional provisions it is generally difficult and unlikely for the parties to significantly change their operation to bring it within the scope of (or escape) the Merger Regulation. However, it has been suggested that a certain amount of forum shopping is possible.<sup>17</sup> As I shall attempt to establish, the uncertainty regarding application of the full-function criteria might also allow undertakings to structure their operations to easier come within the scope of the Merger Regulation.

## 2.3 Chapter summary

The Merger Regulation only applies to concentrations with a Union dimension. A concentration exists where there is a change of control of an undertaking on a lasting basis, which leads to a change in the structure of the market. If that concentration has a sufficient connection to the European Union and fulfils the monetary thresholds of Article 1, it will be within the scope of the Merger Regulation and will have to be notified to the European Commission. The Merger Regulation has established a quick and generally clear one-stop-shop procedure, which provides legal certainty to undertakings, which, as a rule, prefer their operations to be scrutinized under the Merger Regulation rather than under Articles 101 or 102 TFEU.

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<sup>14</sup> C.J. Cook C.S. Kerse, *EC Merger Control* (Sweet & Maxwell: 2009), para 2-036

<sup>15</sup> Articles 6(1)(b) and 8(2) of the Merger Regulation

<sup>16</sup> Michael Rosenthal, Stefan Thomas, *European Merger Control* (C.H. Beck, Hart publishing: 2010), page 230

<sup>17</sup> Morten P. Broberg, *Forum Shopping and the European Merger Control Regulation*, in *Columbia Journal of European Law*, Fall/Winter 1996/97, at page 109

# 3 Joint ventures under the Merger Regulation

## 3.1 Definition of a joint venture

The Merger Regulation and the Consolidated Jurisdictional Notice do not provide an explicit definition of a joint venture. However, it is not difficult to come to such a definition: for the purpose of the Merger Regulation, a joint venture is any undertakings that is under joint control by two or more mutually independent undertakings.<sup>18</sup> This was the definition given in the previous Commission Notice on full functionality<sup>19</sup> and although the explicit definition was not transferred to the Consolidated Jurisdictional Notice, it is clear that it has not changed: the Jurisdictional Notice repeatedly refers to undertakings under joint control as “joint ventures.”<sup>20</sup>

## 3.2 Joint control

Therefore, the concept of joint control is crucial to determine the existence of a joint venture. Joint control exists where two or more undertakings have the possibility of exercising decisive influence over another undertaking, *i.e.* when, as a practical matter, two or more independent undertakings must reach agreement on decisions of important commercial strategy of the undertaking under their control.<sup>21</sup> Unlike situations of sole control, where control is exercised by solely determining the undertaking’s strategic behaviour, in situations of joint control no single undertaking can itself determine the undertaking’s strategic behaviour. This means that it is the possibility of blocking strategic decisions which grants a company joint control (so-called “negative” control) and joint control exists if undertakings must reach agreement on major decisions concerning the joint venture.

### 3.2.1 Equal voting rights

There can be various forms of joint control. The clearest one is when there is equality between the parent undertakings, such as when they have equal

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<sup>18</sup> C.J. Cook C.S. Kerse, *EC Merger Control* (Sweet & Maxwell: 2009), para 2-036

<sup>19</sup> Commission Notice on the concept of full-function joint ventures under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings, para 3

<sup>20</sup> Consolidated Jurisdictional Notice, paras 62 - 82

<sup>21</sup> C.J. Cook C.S. Kerse, *EC Merger Control* (Sweet & Maxwell: 2009), para 2-031

voting rights in the joint venture (for example, if both hold 50% of the voting rights<sup>22</sup>). In such a situation, there is no need for further formal agreements regarding control between the parents (although they can be present).<sup>23</sup> Equality can also exist when both parents have the right to appoint an equal number of members in the joint venture's decision-making bodies.<sup>24</sup> When two or more undertakings have equal shareholdings in the capital, equal voting rights or equal representation in the joint venture's bodies, neither party has the ability to alone determine the joint venture's strategic policy, hence it is under their joint control.

### 3.2.2 Unequal voting rights & veto rights

However, joint control can exist even when the parents have unequal voting rights or unequal rights to appoint members to decision-making bodies (*i.e.* when there is a majority and a minority shareholder). Joint control in this case exists if the minority shareholder has additional rights which give it power to block important strategic decisions of the undertaking ("veto rights"), without which rights the other parent could exercise sole control.<sup>25</sup>

This is usually determined in the Statute/Articles of Association or in an agreement between the parents. Veto rights usually take the form of a specific quorum necessary for adoption of certain decisions (for example, necessary affirmative vote by 75% of the directors with at least one from each party<sup>26</sup>), a requirement that decisions are adopted unanimously or that they must be approved by all the parent companies, etc.<sup>27</sup>

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<sup>22</sup> For example, case M.5907 *Votorantim / Fischer / JV*; case M.6093 *BASF / INEOS / Styrene / JV*; Best example is case M.5473 *Fincantieri / ABB / JV*, where each parent had 50% of the share capital and voting rights in the joint venture, but no other preferential rights.

<sup>23</sup> In case M.6050 *DSM / DuPont / Actamax*, DSM and DuPont each had 50% share in the joint venture and both had the right to appoint the same number of board members. Even so, a number of strategic decisions required board unanimity; in case M.5249 *Edison / Hellenic Petroleum / JV*, the parents had 50% of the voting rights in a holding company that held 75% of shares in the joint venture.

<sup>24</sup> Consolidated Jurisdictional Notice, para 64; in case M.5781 *Total Holdings Europe SAS / ERG SPA / JV*, ERG had 51% of the voting rights in the joint venture and Total had 49%. They had the right to appoint 3 members each in the board and decisions could be made by approval of 4 out of 6 board members. However, 5 out of 6 votes were necessary for important strategic decisions; see also case M.5227 *Robert Bosch / Samsung / JV*.

<sup>25</sup> Edurne Navarro, Andres Font, Jaime Folguera, Juan Briones, *Merger Control in the EU* (Oxford University Press, NY: 2005), para 2.37; case M.5936 *EADS DS / Atlas / JV*

<sup>26</sup> As in case M.5399 *Mubadala / Rolls-Royce / JV*

<sup>27</sup> Consolidated Jurisdictional Notice, para 65; For example in case M. 5173 *STM / NXP / JV*, STM held 80% of the shares and the right to nominate 3 members to the Board of Directors, while NXP held 20% of the shares and the right to nominate 2 members to the board. However, the shareholders agreement stipulated that major strategic decisions had to be approved by at least one member of the board nominated by each party.



The veto powers are necessary only for important strategic decisions of the joint venture and must go beyond normal minority shareholder rights. It is not necessary that the parent actually uses its veto rights: the mere possibility of exercising them is sufficient. Moreover, joint control does not generally exist if one of the parents has a casting vote in deadlock situations. Exceptionally, joint control can exist when one of the parents has a casting vote if in practice it is of limited effectiveness and relevance.<sup>28</sup>

The Commission generally considers as important strategic decisions the appointment and dismissal of senior management, approval of the budget of the joint venture, adoption of its business plan, decisions on investment (where investment is essential for the joint venture's market behaviour)<sup>29</sup> and other decisions relevant to the specific industry where the joint venture operates. Veto rights over these decisions will give the parents joint control.

### 3.2.3 Absence of veto rights

Joint control can exist even in the absence of specific veto rights, where the minority shareholders together have a majority of voting rights and act together in exercising them. This kind of joint control can be effected through a binding agreement of the minority shareholders (through a holding company or through pooling of votes). Exceptionally, joint control can exist on a *de facto* basis where strong common interests mean the parents would not act against each other,<sup>30</sup> such as when there is a strong degree of mutual dependency, when each of them makes a vital contribution to the joint venture, where the decision-making procedures are tailored in such a way to allow joint control even without explicit veto rights, etc.<sup>31</sup>

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<sup>28</sup> Consolidated Jurisdictional Notice, paras 66, 67 and 82

<sup>29</sup> Consolidated Jurisdictional Notice, paras 69-71

<sup>30</sup> Consolidated Jurisdictional Notice, paras 75-76

<sup>31</sup> Nicholas Levy, *The control of concentrations between undertakings* in Competition Law of the European Community, ed. Valentine Korah (Matthew Bender & Co: 2010), pp. 5-87/89  
In case M.5332 *Ericsson / STM / JV*, Ericsson and STM created two joint ventures (JVD and JVS) that were treated as a single economic entity and a single joint venture. JVD conducted development of telecommunication technology, while JVS was intended to commercialize products developed by JVD. Ericsson had majority in JVD, while STM had majority in JVS. JVD and JVS shared the same management, to which Ericsson and STM each nominated 4 members. Decisions had to be made by unanimity, however, a deadlock could lead to a shareholder vote whereby Ericsson could solely make the decision in JVD and STM could do the same in JVS. However, the Commission found that joint control existed since JVD and JVS are complementary and mutually dependant entities within the overall joint venture. JVD has no sales or marketing capabilities and depends on JVS for financing. On the other hand, JVS will commercialize JVD's R&D and depends on JVD for products to place on the market. This means there is a high degree of mutual dependency between JVS and JVD and strong common interests of Ericsson and STM.

### 3.3 Full-function joint ventures

As discussed above, the Merger Regulation only applies to concentrations with a Union dimension. Article 3(1) states that a concentration exists when there is a change of control which results from *(i)* a merger of previously independent undertakings or parts of undertakings or *(ii)* the acquisition of control of the whole or parts of one or more undertakings. The jurisdiction to scrutinize the **creation** of joint ventures is provided in Article 3(4), which states that “The creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity shall constitute a concentration within the meaning of paragraph 1(b).”

This is what is called the full-function criteria. The creation of a joint venture that fulfils these criteria will be considered a concentration for the purpose of Article 3(1)(b) and will fall within the scope of the Merger Regulation. On the contrary, creation of a joint venture which does not fulfil the full-function criteria is outside the scope of the Merger Regulation. The full-function criteria were not present in the original Merger Regulation 4064/89 and were only introduced in 1997 when it was amended.<sup>32</sup> Prior to that, the original Merger Regulation made a distinction between cooperative and concentrative joint ventures.<sup>33</sup> With the introduction of the full-function criteria, that distinction became irrelevant.

A joint venture is a full-function one if it can operate independently on its relevant market and carry out the functions that other undertakings on the same market normally carry out.<sup>34</sup> The essential test of full-functionality is whether the joint venture is sufficiently independent from its parents to bring about a lasting change in the structure of the market. This autonomy means that the joint venture must enjoy economic and operational

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A similar situation was in case *M.5943 Abu Dhabi Mar / Thyssen Krupp Marine Systems*, where the parents set up 3 interdependent undertakings that together constituted their joint venture. The core business joint venture, BVN New, was jointly controlled by the parents. The first supporting joint venture, BVMS, would be jointly controlled by Thyssen Krupp and BVN New, while the other supporting joint venture, BVNI, would be jointly controlled by Abu Dhabi Mar and BVN New. Thyssen Krupp had a casting vote in BVMS while Abu Dhabi Mar had a casting vote in BVNI. However, all three companies were considered a single economic entity and a single joint venture under control of Thyssen Krupp and Abu Dhabi Mar, as they were all dependant on the core joint venture and on the parents.

<sup>32</sup> By Regulation 1310/97

<sup>33</sup> Concentrative joint ventures were autonomous entities which did not enable coordination of parents’ competitive behaviour (and were inside the scope of the Merger Regulation). Cooperative joint ventures were those that had as their object or effect coordination of parents’ competitive behaviour (and were outside the scope of the Merger Regulation)

<sup>34</sup> Edurne Navarro, Andres Font, Jaime Folguera, Juan Briones, *Merger Control in the EU* (Oxford University Press, New York: 2005), para 3.16

independence from its parents. However it does not have to be independent regarding adoption of strategic decisions, which the parents control<sup>35</sup> (otherwise the parents would not have joint control). The concept of a full-function joint venture therefore consists of two elements: (i) full-functionality of the joint venture (in the narrow sense) and (ii) permanence/long lasting nature of the joint venture.

### 3.3.1.1 Full-functionality

To assess whether the joint venture will be capable of performing functions usually carried out by competing undertakings, the Commission looks at a number of different characteristics and elements of the joint venture. One of the essential elements of full-functionality is whether the joint venture has *sufficient resources to operate independently on the market*, such as a dedicated day-to-day management and access to sufficient resources (finance, management and staff, tangible/intangible assets, etc).<sup>36</sup> The Commission will essentially look to establish whether the joint venture will be able to determine its own commercial policy pursuant to its own interests. This will depend on the conditions on the relevant market, as a certain behaviour might be normal in one market but not in another.

The requirement that the joint venture has its own management and staff is founded on the idea that in order to exist as an independent economic entity on the market it must control its key decisions, such as price setting, output production, quality and rate of production, distribution/sales of its goods and services, etc.<sup>37</sup> Personnel does not have to be employed by the joint venture itself, it can be staffed by a third party or staffing agency, especially if that is practice in the industry. Personnel can also be seconded from the parents, provided that it is only for a start-up period, that the joint venture can still employ its own staff and that it operates at arm's length with the parents.<sup>38</sup>

Moreover, the joint venture should generally have its own tangible and intangible assets.<sup>39</sup> Regarding tangible assets (such as infrastructure or

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<sup>35</sup> C.J. Cook C.S. Kerse, *EC Merger Control* (Sweet & Maxwell: 2009), para 2-037; Consolidated Jurisdictional Notice, para 93.

<sup>36</sup> Consolidated Jurisdictional Notice, para 94; See also case M.6050 *DSM / DuPont / Actamax*

<sup>37</sup> Nicholas Levy, *The control of concentrations between undertakings* in *Competition law of the European Community*, ed. Valentine Korah (Matthew Bender & Co: 2010), page 5-106

<sup>38</sup> Consolidated Jurisdictional Notice, para 94; In case M.5533 *Bertelsmann / KKR / JV*, Bertelsmann provided transitional services (tax administration, legal, procurement and corporate infrastructure services) and ongoing services (accounting, human resources and treasury services) to the joint venture. However, the joint venture was charged for the services and they would end after a certain period, hence it was considered as full-function.

<sup>39</sup> In case M.5907 *Votorantim / Fischer / JV*, the joint venture, operating in production of orange juice, had sufficient resources as it had its own groves of oranges, processing plants

facilities), even if the joint venture depends on its parents, it is possible for it to be autonomous if the parents are not able to exercise undue influence over it. The specific nature of the market must always be kept in mind and the joint venture might be considered full-function even where it does not have its own tangible assets.<sup>40</sup> Regarding intangible assets, the joint venture should generally have sufficient intellectual property rights to be able to independently compete on the market. Otherwise, it will not be considered full-function unless it receives a lifetime licence for them from its parents.<sup>41</sup>

Finally, regarding sufficient resources, full-function joint ventures should generally not depend on their parents for raw materials. However, a joint venture can be full-function even if it obtains raw materials from its parents, provided that it is for a limited duration and that the joint venture is also free to obtain raw materials from other suppliers.<sup>42</sup>

Furthermore, to be full-function a joint venture has to have *activities beyond one specific function of the parents*, which is not the case if it only performs activities which are auxiliary to the parents' activities (such as research and development, production or distribution, acquiring and holding real estate on parents' behalf, etc<sup>43</sup>). However, the Commission generally has an

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and logistics services for transportation of orange juice; in case M.4950 *Aviva / Bank Zachodni / Aviva Bank Zachodni* the parents set up two joint ventures to provide insurance services. The fact that the parents offered no financial guarantees and that the joint ventures had to bear the commercial risks themselves was an indication of sufficient resources.

<sup>40</sup> Eduarne Navarro, Andres Font, Jaime Folguera, Juan Briones, *Merger Control in the EU* (Oxford University Press: 2005), para 3.20; In case M.6093 *BASF / INEOS / Styrene / JV* an indication of sufficient resources was that the joint venture comprised all business functions (manufacturing, sales and marketing); In case M.5655 *SNCF / LCR / Eurostar* an indication of sufficient resources was that the joint venture had its own long-term strategy.

<sup>41</sup> In case M.6150 *Veolia Transport / Trenitalia / JV*, it was relevant to establish full-functionality that the joint venture would offer services under its own trademark; In case M.5936 *EADS DS / Atlas / JV*, it was relevant that the parents' transferred all intellectual property rights and know-how to the joint venture.

<sup>42</sup> Nicholas Levy, *The control of concentrations between undertakings* in Competition law of the European Community, ed. Valentine Korah (Matthew Bender & Co: 2010), page 5-108; In case M.5173 *STM / NXP / JV* the joint venture obtained its raw materials, which represented up to 85% of the manufacturing cost of the product, from the parents. The parents had a first option to supply raw material, as long as it was on competitive market terms. The minimum percentage to be obtained from the parents would be gradually decreased. However, the joint venture was a full-function one, as it would have its own assembly, testing, sales, marketing and R&D teams and it was common in the sector to source raw materials from specialized manufacturers; The same situation existed in case M.5332 *Ericsson / STM / JV*, where, however, there were no minimum requirements to buy the raw materials from the parents and the transactions were done on arm's length basis.

<sup>43</sup> Consolidated Jurisdictional Notice, paras 95-96; See also case M.5150 *UPM RUS / BRIST / JV*, para 9, where the Commission explicitly states this.

expansive view of this element and has often found joint ventures which have very narrow fields of activity as full-function joint ventures.<sup>44</sup>

Furthermore, *substantial sales or purchases between the joint venture and its parents*, which are significantly present in an upstream or downstream market, are also relevant for determining full-functionality. There will generally be no doubt of independence if the joint venture does not sell to or purchase from its parents, if the majority of the purchase/sales are with third parties, or if the commercial relations with the parents are on arm's length basis.<sup>45</sup> However, the fact that a joint venture might rely almost entirely on sales to or purchases from its parents for a start-up period (which should not exceed 3 years, depending on market conditions) will generally not affect the full-function character of the joint venture, as such sales/purchases might be necessary to establish the joint venture on the market.<sup>46</sup>

Finally, if the joint venture is *active in a trade market* it will generally not be considered full-function if it is auxiliary to the parents' activities, for example if it only distributes parents' products. A joint venture in a trade market will be considered full-function only where it performs the normal functions of a trading company on those markets, has its own facilities to operate as a stand-alone company and is likely to obtain a substantial proportion of its supplies from third parties.<sup>47</sup>

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<sup>44</sup> Nicholas Levy, *The control of concentrations between undertakings* in Competition law of the European Community, ed. Valentine Korah (Matthew Bender & Co: 2010), page 5-112; In case M.5332 *Ericsson / STM / JV* the joint venture conducted R&D previously done by Ericsson (through a subsidiary contributed to the joint venture) and Ericsson had the right to use some of the R&D for its own activities. It was considered full-function because it was intended to place products on the market and sell to third parties, which Ericsson's subsidiary had previously done; In case M.5936 *EADS DS / Atlas / JV*, the joint venture would act as a subcontractor to manufacture certain products for one of the parents. However, this represented only a small proportion of the joint venture's sales, was conducted on arm's length basis and did not affect the joint venture's full-functionality.

<sup>45</sup> Consolidated Jurisdictional Notice, para 97; case M.5249 *Edison / Hellenic Petroleum / JV*; case M.5846 *Shell / Cosan / JV*

<sup>46</sup> Consolidated Jurisdictional Notice, para 97; In case M.5479 *Lenza / Teva / JV* the parents created a joint venture for development, production and sale of bio-similar products. It would have complete control over development of current and future products and would own the intellectual property rights. However, in the initial stage the joint venture would rely on arm's length outsourcing contracts with its parents. The Decision did not specify how long that period was. However, the Commission noted that long lead times (6 to 8 years), high up-front investments and high risk of failure of R&D were characteristics of this industry and that outsourcing agreements were common. Hence, it can be inferred that it accepted a longer reliance on parents than 3 years. The joint venture was full-function, as after the start-up period it would be free to conduct its own recruitment policy, acquire and develop facilities and make outsourcing agreements with the parents or third parties.

<sup>47</sup> Consolidated Jurisdictional Notice, para 102

### 3.3.1.2 Long-lasting

Since the Merger Regulation is intended to apply only to structural changes in the market, the joint venture must be intended to operate on a lasting basis (and thus bring about a lasting change in the structure of the market) in order to come within the scope of the Merger Regulation.

A joint venture set up for an indefinite period will meet the long-lasting criteria. A joint venture that is set up for a short, finite duration, for example only to participate in a specific project, will generally not be considered as full-function. On the other hand, if a joint venture is set up for a certain period (*i.e.* is not intended to be permanent), it can still be considered as full-function if the period is sufficiently long to cause a lasting change in the structure of the market (periods of 5,<sup>48</sup> 8,<sup>49</sup> 12,<sup>50</sup> 10-15,<sup>51</sup> 10-20<sup>52</sup> years have been considered as sufficient, but a period of three years has not<sup>53</sup>).

## 3.4 Chapter summary

Under the Merger Regulation a joint venture is any undertaking that is under joint control. Joint control means that two or more undertakings have the possibility of exercising decisive influence over another undertaking, by preventing adoption of its strategic business decisions. Joint control exists when the jointly controlling parents have equal voting rights, or when they have veto rights to prevent adoption of strategic business decisions. Exceptionally, joint control can exist on a *de facto* basis when the parents' interests are mutually dependant.

Creation of a joint venture falls within the scope of the Merger Regulation only if the joint venture is a full-function one. Full-functionality means that the joint venture can operate independently on the relevant market on a long-lasting basis and perform functions its competitors normally perform. Indications of full-functionality are possession of own management, staff and sufficient resources, performing functions beyond a specific function of the parents, adequate sales/purchases with third parties, etc.

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<sup>48</sup> In case M.6436 *Volkswagen Financial Services / D'Ieteren*, the joint venture was set up for a period of 5 years, which was automatically renewable for an additional 5 years.

<sup>49</sup> Case M.2632 *Deutsche Bahn / ECT International / United Depots / JV*

<sup>50</sup> Case M.2903 *DaimlerChrysler / Deutsche Telekom / JV*

<sup>51</sup> Case M.3858 *Lehman Brothers / Starwood / Le Meridien*

<sup>52</sup> In case M.4950 *Aviva / Bank Zachodni*, the joint venture was intended to be created for an indefinite period. However, the joint venture agreement was signed for a period of 10-20 years with the possibility of automatic extension up to a further 10 years. This was more than enough to consider the joint venture as long lasting.

<sup>53</sup> Case M.3858 *Lehman Brothers / Starwood / Le Meridien*

# 4 Application of full-function criteria

## 4.1 Introduction

As has been briefly discussed above, the full-function criteria are used to delineate the Commission's jurisdiction to scrutinize the creation of joint ventures under the Merger Regulation: full-function joint ventures have to be notified under the Merger Regulation, while non full-function joint ventures do not. While this jurisdictional rule might seem clear and non-contentious, in practice some unclarities still exist.

A joint venture can be established by several different methods: *(i)* a completely new economic undertaking can be established (to which the parents can contribute existing subsidiaries or other assets); *(ii)* the parents can acquire joint control over a pre-existing undertaking from a third party (A and B acquire joint control over X from its parent C); *(iii)* an undertaking can acquire joint control over a pre-existing undertaking from its parent which was previously in sole control (change from sole to joint control - A and B have joint control over X. Previously, B had sole control over X).

In all three situations is a joint venture "created": after the operation a joint venture exists where it did not exist previously, either because the undertaking did not exist at all or because it was under sole control (*i.e.* it was not a joint venture). Therefore, the key to determining which jurisdictional rules apply to joint ventures, and whether the full-function criteria need to be met or not, will be the relationship between Article 3(1)(b) and 3(4) and the interpretation of the word "creation" in Article 3(4) of the Merger Regulation.

The fundamental question is does Article 3(4) (full-function joint ventures) limit the scope of Article 3(1)(b) (acquisition of control), so that acquisition of joint control comes within the scope of the Merger regulation only if it results in a full-function joint venture? Or does Article 3(4) complement Article 3(1)(b), by bringing an additional operation within the scope of the Merger Regulation, along with the acquisition of joint control already covered by Article 3(1)(b)?<sup>54</sup>

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<sup>54</sup> Lars-Peter Rudolf and Bettina Leupold, „*Joint Ventures - The Relevance of the Full Functionality Criterion under the EU Merger Regulation: There Remains a Need for*

Article 3(4) is often interpreted as limiting the scope of Article 3(1)(b) and it has been said that the “prevailing view” is that the term “creation” in Article 3(4) should not be interpreted restrictively: it should at the very least include changes from sole to joint control.<sup>55</sup> In that case, it would be reasonable to assume that all joint ventures, regardless of the method of structuring the operation, should be subject to the full-function criteria in order to determine whether the operation is notifiable and the Merger Regulation applicable. This is the opinion of *di Brozolo and Gustafsson*.<sup>56</sup>

However, this view needs to be further examined and analyzed as it is not supported by the Commission’s practice, which has been quite inconsistent: the Commission has been applying the full-function criteria very differently based on the *modus operandi* of establishment of joint ventures. This has led to uncertainty regarding a fundamental question which determines whether the parties have to notify a planned operation to the Commission or not.<sup>57</sup>

The different methods of establishing a joint venture that will be considered below are: *(i)* creating a completely new entity as a joint venture (for the purpose of the thesis referred to as “type 1 operation”); *(ii)* establishing a joint venture by acquiring joint control over a pre-existing undertaking from a third party which does not stay in joint control (“type 2 operation”); *(iii)* establishing a joint venture by acquiring joint control over a pre-existing undertaking together with the parent which previously had sole control (change from sole to joint control - “type 3 operation”).

## 4.2 Application of full-function criteria to type 1 operations

The application of the full-function criteria has been straightforward when it comes to the creation of new joint venture undertakings. The Commission has consistently applied the full-function criteria to determine whether or not the operation constitutes a concentration for the purpose of the Merger Regulation. Generally, a joint venture can be created as a completely new

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*Clarification*” in Journal of European Competition Law & Practice Advance Access, first published online May 9, 2012 doi:10.1093/jeclap/lps026, page 1

<sup>55</sup> Lars-Peter Rudolf and Bettina Leupold, „*Joint Ventures - The Relevance of the Full Functionality Criterion under the EU Merger Regulation: There Remains a Need for Clarification*” in Journal of European Competition Law & Practice Advance Access, first published online May 9, 2012 doi:10.1093/jeclap/lps026, page 7 and 9

<sup>56</sup> Luca G. Radicati di Brozolo & Magnus Gustafsson, “*Full-function joint ventures under the Merger Regulation: the need for clarification*” in European Competition Law Review 2003, 24(11), pages 574-579, at page 575.

<sup>57</sup> Supra note 55, page 7



economic entity which will operate on markets where its parent companies did not operate previously,<sup>58</sup> or it can be created by merging activities of the parent companies in a field where they were already present.<sup>59</sup>

The full-function criteria have been regularly applied to the creation of new joint ventures, from the entry into force of Regulation 1310/97 on 1<sup>st</sup> March 1998 to the latest Commission decisions.<sup>60</sup> In some of its decisions the Commission explicitly refers to Article 3(4) of the Merger Regulation when conducting the full-functionality test,<sup>61</sup> while in others it conducts the test without explicit reference to Article 3(4).<sup>62</sup>

However, it must be noted that the Commission does not always conduct an in-depth examination whether the full-function criteria have been met. In some decisions the Commission has only briefly noted that “since the newly created Joint Venture [...] will perform on a lasting basis all the functions of an autonomous economic entity, the transaction constitutes a concentration within the meaning of Article 3(4) EC Merger Regulation”,<sup>63</sup> without examining what elements will actually give the joint venture its full-function character.

In other, although rare, decisions the Commission was even briefer in its application of the full-function criteria. For example, in *Buitenfood / Ad van Geloven Holding / JV*<sup>64</sup> the Commission only states that “Consequently, in

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<sup>58</sup> For example, case M.5227 *Robert Bosch / Samsung / JV*, where Bosch and Samsung set up a joint venture to develop and produce lithium-ion battery systems for electric vehicles, a market which neither of the parties had operated in previously.

<sup>59</sup> For example, case M.5650 *T-Mobile / Orange*, where the parents, Deutsche Telekom and France Telecom, wished to merge the existing activities of their UK subsidiaries, T-Mobile UK and Orange UK, into a new undertaking, which would be owned by them 50-50.

<sup>60</sup> For example, cases such as M.1020 *GE Capital / Sea Containers*, case M.5072 *AMSSC / BE Group / JV*, case M.5479 *Lonza / Teva / JV*, case M.5781 *Total Holdings Europe SAS / ERG SPA / JV*, case M.6091 *Galenica / Fresenius Medical Care*, case M.6150 *Veolia Transport / Trenitalia / JV*, case M.6321 *Buitenfood / Ad Van Geloven Holding / JV*, case M.6436 *Volkswagen Financial Services / D'Ieteren*, and more.

<sup>61</sup> For example in case M.6050 *DSM / Dupont / Actamax JV*, case M.6093 *BASF / INEOS / Styrene / JV*, case M.6436 *Volkswagen Financial Services / D'Ieteren / Volkswagen D'Ieteren Finance JV*, and more.

<sup>62</sup> For example in case M.5655 *SNCF / LCR / Eurostar*, case M.6091 *Galenica / Fresenius Medical Care / Vifor Fresenius Medical Care Renal Pharma JV*, case M.6150 *Veolia Transport / Trenitalia / JV*, and more.

<sup>63</sup> Case M.5227 *Robert Bosch / Samsung / JV*, para 6; a similarly short statement can be found in case M.6091 *Galenica / Fresenius Medical Care / Vifor Fresenius Medical Care Renal Pharma JV*, para 10, where the Commission only states: „In line with the criteria laid down in the Commission's Jurisdictional Notice, the JV will be fully-functional as it will possess sufficient resources to operate independently on the market; will carry out activities going beyond one specific function for the parents; will be economically autonomous with regard to sale and purchase relations with its parents and will operate on a lasting basis.”

<sup>64</sup> Case M.6321 *Buitenfood / Ad van Geloven Holding / JV*, para 8

view of recital 92 of the Commission's Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, the acquisition has all characteristics of the creation of a joint venture within the meaning of Article 3(4) of the Merger Regulation”, also without mentioning what will actually make the new joint venture a fully-functioning one. This could perhaps be due to the fact that the parents contributed their pre-existing subsidiaries to the joint venture and it was presumed that the new joint venture will also be a full-function one. However, in other cases with similar situations the Commission had explicitly mentioned the presumption and stated that the joint venture would be a full-function one since it combined the existing activities of independent undertakings on the market.<sup>65</sup>

Regardless, the full-function criteria have consistently been applied in these cases. While the test may be more or less in-depth, the application of the full-functioning criteria is, in general, not problematic or unclear regarding the setting up of completely new joint ventures.

### 4.3 Chapter summary

The full-function criteria delineate the Commission's jurisdiction to scrutinize the creation of joint ventures under the Merger Regulation. However, a joint venture can be established by several methods, either by creating a new undertaking under joint control or by acquiring joint control over a pre-existing one. Furthermore, the term „creation“ can be given either a narrow or a wide interpretation: interpreted narrowly, the full-function criteria should be applied only to the creation of a new undertaking under joint control (type 1 operation); interpreted widely, it should be applied to all joint ventures (*i.e.* all acquisitions of joint control).

The only completely clear situation is creation of a new undertaking under joint control: the full-function criteria have been applied consistently. While the Commission's analysis can be more or less detailed, at times consisting only of a statement that the criteria are met without any further analysis, there is no doubt that the creation of a new joint venture undertaking will be within the scope of the Merger Regulation only if it is a full-function one.

But what about acquisition of joint control over pre-existing undertakings?

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<sup>65</sup> Case M.5650 *T-Mobile / Orange*, para 10

# 5 Application of full-function criteria to type 2 operations

The situation has not been as clear regarding operations where two or more undertakings acquire joint control over a pre-existing undertaking from a third party (for example, when undertakings A and B acquire joint control over the undertaking X from its previous owner, C; C no longer has any control over X, neither sole nor joint). The Commission's application of the full-function criteria has previously been very inconsistent.

## 5.1 Under the original Merger Regulation

In *Electrabel / Energia Italiana / Interpower*<sup>66</sup> under the original Merger Regulation, Electrabel and Energia, Italian undertakings active in *inter alia* production and supply of electricity, acquired joint control over Interpower, another Italian undertaking active in production of electricity in Italy. Interpower's previous owner was the company Enel, which through the operation lost all control over Interpower. In its assessment of the operation, the Commission examined whether Interpower would be a full-function joint venture after the acquisition of joint control. It stated that because most of the produced electricity would be sold to the parents (between 85% and 95%) and because the joint venture would not have its own commercial strategy or customers, Interpower would not be a full-function joint venture. Hence, the operation did not constitute a concentration and was outside the scope of the Merger Regulation.

Similarly, in *Sony / Time Warner / CDNow*,<sup>67</sup> Sony and Time Warner acquired joint control over the undertaking for distribution of media CDNow. The previously controlling shareholders, while still holding shares in CDNow, would lose all controlling powers over it. The Commission conducted the full-functionality test and determined that CDNow, which was already present on the market of online retail of music and video where it would continue to operate, would be a full-function joint venture. Hence, unlike in Interpower, the Merger Regulation was applicable.

On the other hand, in other decisions the Commission did not apply the full-function test. In *EnBW / EDP / Cajastur / Hidrocantabrico*<sup>68</sup> three

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<sup>66</sup> Case M.3003 *Electrabel / Energia Italiana / Interpower*

<sup>67</sup> Case JV.25 *Sony / Time Warner / CDNow*

<sup>68</sup> Case M.2684 *EnBW / EDP / Cajastur / Hidrocantabrico*

undertakings<sup>69</sup> acquired joint control over Hidrocanabrico, a company active in generation, distribution and supply of electricity in Spain. None of the jointly-controlling undertakings previously had control over the it. Unlike the decision in Interpower, the Commission only stated that “In the light of the above, it can therefore be concluded that [...] Hidrocanabrico will be jointly controlled by EnBW, EDP and Cajastur, the operation bringing about a lasting change in the structure of control of the Spanish electricity undertaking. The notified operation constitutes therefore a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.”<sup>70</sup> The Commission did not mention who the purchasers of Hidrocanabrico’s energy would be, which was decisive in Interpower, and did not conduct the full-function test nor even mention full-functionality.<sup>71</sup>

The Commission did not apply the full-function test in *Barilla / BPL / Kamps*<sup>72</sup> either, where Barilla and BPL acquired joint control of Kamps through a public bid. After briefly describing the joint control of the joint venture, the Commission immediately concluded that the operation was a concentration for the purpose of the original Merger Regulation, without considering the full-function criteria. While there are surely even more Commission decisions that can be listed here, these four are sufficient to show how similar operations received different treatment by the Commission regarding application of the full-function criteria, an essential formal element which delineates the scope of the Merger Regulation and jurisdiction of the Commission for the creation of joint ventures.

## **5.2 Under the current Merger Regulation (before Consolidated Jurisdictional Notice)**

The above decisions were all adopted prior to the entry into force of the current Merger Regulation, on 1<sup>st</sup> May 2004. However, the jurisdictional provisions in the current Merger Regulation regarding the determination of concentration did not substantively change from the previous ones. Article 3(1) of the original Merger Regulation is very similar to Article (3)(1) of the current Merger Regulation.<sup>73</sup> The relevant provisions on joint ventures are

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<sup>69</sup> Electricidade de Portugal S.A. (EDP), Energie Baden-Württemberg A.G. (EnBW) and Caja de Ahorros de Asturias (Cajastur).

<sup>70</sup> Case M.2684 *EnBW / EDP / Cajastur / Hidrocanabrico*, para 15

<sup>71</sup> Luca G. Radicati di Brozolo & Magnus Gustafsson, “*Full-function joint ventures under the Merger Regulation: the need for clarification*” in *European Competition Law Review* 2003, 24(11), pages 574-579, at page 576.

<sup>72</sup> Case M.2817 *Barilla / BPL / Kamps*

<sup>73</sup> The rules are nearly identical, although worded slightly differently. The biggest change might be the addition of the concept of „change of control on a lasting basis“ in the current

even worded identically.<sup>74</sup> Therefore, it was to be expected that the practice of the Commission regarding application of the full-function criteria to acquisitions of joint control over pre-existing undertakings would not be significantly changed. And indeed, initially it remained equally inconsistent.

In *CVC / Permira / AA*<sup>75</sup> the undertakings CVC and Permira acquired joint control over the undertaking AA Corporation from its previous parent.<sup>76</sup> AA was active in providing roadside assistance, repair and maintenance services, certain financial services and other motoring services in the United Kingdom and Ireland. When examining the operation, the Commission described the joint control that would exist between CVC and Permira after the operation and, after concluding that the operation was an acquisition of joint control, stated that it constituted a concentration for the purpose of Article 3(1)(b) of the Merger Regulation. The full-functionality of the undertaking after the operation was not considered.

However, in *Carlyle / Advent / HT Troplast*,<sup>77</sup> a Decision also adopted in 2004 as the previous one, the Commission did examine full-functionality of the joint venture. The private equity investors Carlyle and Advent acquired joint control over the undertaking HT Troplast, active in the market for production of vinyl profiles for windows and doors. After establishing the mode of joint control, the Commission concluded that “HT Troplast will **continue** to operate on the markets for profiles for windows and doors [...]. It will **continue** to perform on a lasting basis all the functions of an autonomous economic [entity] and has the necessary resources and personnel to operate the business.” (emphasis added). Not only did the Commission examine the full-function criteria after the operation, it considered the status of HT Troplast before it as well. It then concluded the operation was a concentration within the scope of the Merger Regulation and explicitly referred to Article 3(4). As we can see, the Commission’s

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Merger Regulation. Whereas the old Merger Regulation simply states that a concentration shall arise when there is a merger between independent undertakings or the acquisition of control of another undertaking, the current Merger Regulation states that a concentration exists where there is a „*change of control on a lasting basis*“ which is the result of a merger or acquisition of control. Therefore, it seems the old Merger Regulation considers the operation itself as a concentration, while the current Merger Regulation considers the change of control on a lasting basis which results from the operation as the concentration. The main difference seems to be in the „lasting basis“ element, through which the Merger Regulation wishes to bring outside its scope purely temporary changes in control.

<sup>74</sup> Article 3(2) in the original Merger Regulation (after amendment by Regulation 1310/97) and Article 3(4) in the current Merger Regulation.

<sup>75</sup> Case M.3517 *CVC / Permira / AA*

<sup>76</sup> GB Gas Holdings Ltd

<sup>77</sup> Case M.3642 *Carlyle / Advent / HT Troplast*

practice in the two cases described above was very different<sup>78</sup> and no clear pattern or reasoning can be easily recognized to explain the difference.

The Commission's practice did not get any clearer during 2005. The Commission again adopted a number of Decisions where it either **did**<sup>79</sup> or **did not**<sup>80</sup> apply the full-function test. For example, in *Zeiss / EQT / Sola JV*, Carl Zeiss, an optical products manufacturer, and EQT, a private equity portfolio company, acquired joint control over Sola, a manufacturer of optical lenses. After establishing the mode of joint control the Commission stated that "Whilst TopCo itself will function as a mere holding company, its subsidiaries will operate a stand-alone-business and act as an independent market participant *vis-a-vis* third parties. TopCo will have sufficient funds, personnel and assets at its disposal to operate permanently and independently of Carl Zeiss and EQT III. TopCo can thus be considered as a full-function joint venture within the meaning of Art. 3(4) of the ECMR."<sup>81</sup> On the other hand, in *EDF / AEM / Edison*, where energy companies EDF and AEM acquired joint control over Edison, another energy company, the full-function criteria were not mentioned at all.<sup>82</sup>

However, during 2006 and 2007 the Commission's position was somewhat consolidated and more consistency could be seen in its decisions. The Commission would generally consider the acquisition of joint control as a concentration without the need to consider whether the full-function criteria would be fulfilled. During 2006 and 2007 the Commission adopted a number of Decisions which dealt with acquisition of joint control over pre-existing undertakings where the full-function criteria or references to them were consistently omitted.<sup>83</sup>

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<sup>78</sup> The application of the full-function criteria was inconsistent in other decisions in 2004 as well. In *Danish Crown / HK Ruokatalo / Sokolów* (case M.3552), a Decision adopted approximately two weeks after *CVC / Permira / AA*, the Commission also did not consider the full-function criteria. However, in the next Decision (case M.3550 *Midewa / Stadtwerke Halle / Fernwasser Sachsen-Anhalt*) the full-function criteria were used, while in the Decision after (case M.3440 *EDP / ENI / GDP*) they were not.

<sup>79</sup> Cases where the full-function criteria **was** applied: case M.3670 *Zeiss / EQT / Sola JV*, case M.3884 *ADM Poland / Cefetra / BTZ*, case M.3939 *Electra / CVC / CPI*, case M.4042 *Toepfer / InVivo / Soulès*

<sup>80</sup> Cases where the full-function criteria was **not** applied: case M.3511 *Wiener Börse et al. / Budapest Stock Exchange / Budapest Commodity Exchange / KELER / JV*, case M.3595 *Sony / MGM*, case M.3728 *Autogrill / Altadis / Aldeasa*, case M.3729 *EDF / AEM / Edison*, case M.3858 *Lehman Brothers / SCG / Starwood / Le Meridien*, , case M.3883 *GDF / Centrica / SPE*

<sup>81</sup> Case M.3670 *Zeiss / EQT / Sola JV*, para 4

<sup>82</sup> Case M.3729 *EDF / AEM / Edison*

<sup>83</sup> In 2006: case M.4036 *TPG IV / APAX / Q-Telecommunications*, case M.4050 *Goldman Sachs / Cinven / Ahlsell*, case M.4083 *ABN Amro / L Capital / Sanutri*, case M.4085

However, this period of clarity provided by the above-mentioned decisions was briefly interrupted by the Commission's Decision in *KKR / Permira / ProSiebenSat.1*.<sup>84</sup> In this case the private equity companies KKR and Permira acquired joint control over the TV company ProSiebenSat.1 by jointly acquiring 75.1% of its shares. In assessing the operation, the Commission, although briefly, noted that "KKR and Permira will exercise joint control over P7S1 which has already been active in the market for many years and will **constitute a full-function joint venture**. Hence, the proposed transaction constitutes a concentration pursuant to Article 3(1)(b) of the Merger Regulation." (emphasis added). Thus, the Commission briefly brought back from the dead the full-function test regarding operations discussed in this section. However, this revival was not to be long-lasting.

### 5.3 After the Consolidated Jurisdictional Notice

The Commission's practice became fully clear in April 2008, after the adoption of the Consolidated Jurisdictional Notice which replaced the previous four Notices on jurisdictional issues.<sup>85</sup> The Consolidated Jurisdictional Notice made it clear that the acquisition of joint control over a pre-existing undertaking from a third party will be considered a concentration without it being necessary to examine the full-function criteria.<sup>86</sup> This has since been strongly affirmed by subsequent case law.

In *Deutsche Bank London / Lloyds TSB Bank / Antin Infrastructure Partners / Porterbrook Leasing*<sup>87</sup> the banks Deutsche Bank and Lloyds TSB Bank, together with the investment fund Antin Infrastructure, acquired joint

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*Arcelor / Oyak / Erdemir*, case M.4087 *Eiffage / Macquarie / APRR*, case M.4160 *ThyssenKrupp / EADS / Atlas*, case M.4164 *Ferrovial / Quebec / GIC / BAA*, case M.4206 *Veolia Transport-BCP / SNCM*, case M.4217 *Providence / Carlyle / UPC Sweden*, case M.4420 *Crédit Agricole / Fiat Auto / Fidis Retail Italia*, case M.4478 *KKR / Goldman Sachs / Kion*

In 2007: case M.4367 *APW / Nordic Capital / APSA / Capio*, case M.4495 *Alfa Acciai / Cronimet / Remondis / TSR Group*, case M.4579 *Investor / Morgan Stanley / Mölnlycke*, case M.4685 *Enel / Acciona / Endesa*, case M.4809 *France Télécom / Mid Europa Partners / One*

<sup>84</sup> Case M.4547 *KKR / Permira / ProSiebenSat.1*; a Decision in 2006 interrupted the Commission's consistency as well: case M.4384 *Hombergh / De Punder / PIB / Ovako*.

<sup>85</sup> Notice on the concept of concentration; Notice on the concept of full-function joint ventures; Notice on the concept of undertakings concerned; Notice on calculation of turnover.

<sup>86</sup> Consolidated Jurisdictional Notice, para 91

<sup>87</sup> Case M.5263 *Deutsche Bank London / Lloyds TSB Bank / Antin Infrastructure Partners / Porterbrook Leasing*, paras 8-9

control over the undertaking Porterbrook Leasing from its previous parent. In its Decision, the Commission stated that “The concentration concerns the proposed acquisition of joint control [...] of Porterbrook from its current owner [...]. [T]he notified operation leads to the acquisition of joint control and constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.” Similarly, in *Barclays / Investcorp / N&W Global Vending*<sup>88</sup> the investment companies Barclays and Investcorp acquired joint control over N&W Global Vending, a manufacturer of food and beverage vending machines. In the Decision the Commission simply stated that “[T]he proposed transaction qualifies as a concentration within the meaning of Article 3(1)(b) of the EC Merger Regulation, whereby Barclays and Investcorp will acquire joint control over N&W Global Vending.”

In *Talanx International / Meiji Yasuda Life Insurance / Warta*,<sup>89</sup> one of the latest Decisions regarding this type of operation, Talanx and Meiji Yasuda, a German and a Japanese insurance company, acquired joint control over the Polish insurer Warta. The Commission briefly described the mode of joint control before concluding that “[...] TINT and MY will acquire joint control over Warta and the notified transaction represents a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.”

Therefore, it is evident that the application of the full-function criteria to acquisitions of joint control over a pre-existing undertaking from a third party should no longer be considered as unclear, as the issue has been resolved by the Consolidated Jurisdictional Notice and confirmed by a steady line of decisions, where the issue of full-functionality was consistently omitted.<sup>90</sup>

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<sup>88</sup> Case M.5338 *Barclays / Investcorp / N&W Global Vending*, para 5

<sup>89</sup> Case M.6521 *Talanx International / Meiji Yasuda Life Insurance / Warta*, para 8

<sup>90</sup> In 2008, for example, case M.5051 *APW / GMG / Emap*, case M.5105 *Abertis / SEPI / CDTI / INTA / Hispasat*, case M.5171 *Enel / Acciona / Endesa*, case M.5230 *CapMan / Litorina / Cederroth*, case M.5263 *Deutsche Bank London / Lloyds TSB Bank / Antin Infrastructure Partners (BNP Paribas) / Porterbrook Leasing*, case M.5338 *Barclays / Investcorp / N&W Global Vending*.

In 2009, for example: case M.5548 *Barclays / RBS / Hillary*.

In 2010, for example: case M.5729 *Bank of America / Barclays Bank / DSI International*, case M.5826 *Anglo Irish Bank / RBS / Arnotts*, case M.5901 *Montagu / GIP / Greenstar*, case M.5942 *Lloyds TSB Bank / Svenska Handelsbanken AB / Dyson Group*, case M.5958 *Goldman Sachs / TPG / Ontex*, case M.5968 *Advent / Bain Capital / RBS WorldPay*.

In 2011, for example: case M.6053 *CVC / Apollo / Brit Insurance*, case M.6058 *Bank of Scotland / Barclays Bank / Kew Green Hotels*, case M.6141 *China National Agrochemical Corporation / Koor Industries / Makhteshim Agan Industries*, case M.6149 *Suntory / Castel / GMdF / Savour*, case M.6163 *AXA / Permira / Opodo / GO Voyages / eDreams*, case M.6172 *Daimler / Rolls-Royce / Tognum / Bergen*, case M.6184 *Indorama / Sinterama /*



## 5.4 Analysis of the current practice

### 5.4.1 A change in quality of control?

Type 2 and type 3 situations are often considered as operations of change in quality of control, from sole to joint control, often without a notable distinction being made between them.<sup>91</sup> And indeed, the Consolidated Jurisdictional Notice does state that a change in quality of control constitutes a concentration for the purpose of the Merger Regulation.

Paragraph 86 of the Consolidated Notice states that “A move from sole control to joint control is considered a notifiable operation, as this changes the quality of control over the joint venture.”<sup>92</sup> However, a move from sole to joint control in essence “creates” a joint venture where it did not exist before (under the definition given in section 3.1. that a joint venture is every undertaking under joint control), but the full-function criteria are not mentioned together with changes in quality of control. Moreover, paragraph 86 is placed outside and before the section on full-function joint ventures, so it certainly seems clear that the full-function criteria do not apply to it.

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*Trevira*, case M.6264 *Rhône Capital / Triton / Evonik*, case M.6302 *F2i / AXA Funds / G6 Rete Gas*, case M.6354 *CVC / Virgin Group Holdings / Virgin Active Group*.

In 2012: case M.6521 *Talanx International / Meiji Yasuda Life Insurance / Warta*.

<sup>91</sup> For example, Nicholas Levy, *The control of concentrations between undertakings in Competition law of the European Community*, ed. Valentine Korah (Matthew Bender & Co: 2010), page 5-96, simply states that a change from sole to joint control is a notifiable operation, without a distinction being made whether the previously solely controlling parent stays in control. The distinction is not made in the next section on entry of new shareholders either, where only addition of shareholders to existing joint venture is considered; Edurne Navarro, Andres Font, Jaime Folguera, Juan Briones, *Merger Control in the EU* (Oxford University Press, New York: 2005), para 2.79 also very briefly considers the change from sole to joint control, and no distinction is made between these two situations; C.J. Cook C.S. Kerse, *EC Merger Control* (Sweet & Maxwell: 2009), para 2-021 also does not make any distinction between these operations; However, Michael Rosenthal, Stefan Thomas, *European Merger Control* (C.H. Beck, Hart Publishing: 2010), page 39, does make a distinction between all three types of operations.

<sup>92</sup> As the Commission stated in paragraphs 83 to 90 of the Consolidated Jurisdictional Notice, a change in quality (or nature) of control can occur through the entry of shareholders or the reduction of number of shareholders in the controlled undertaking. For example, if one controlling parent in a joint venture is replaced by another, such an operation will be considered as a notifiable concentration (although there was a situation of joint control both before and after the operation), since the operation will lead to a change in quality of control of the joint venture. Regarding this example, paragraph 87 of the Consolidated Jurisdictional Notice states “[...] the quality of control of the joint venture is determined by the identity of all controlling shareholders. It lies in the nature of joint control that [...] the jointly controlling shareholders have to take into account each other’s interests and are required to cooperate [...] The nature of joint control therefore does not exhaust itself in a pure mathematical addition of the blocking rights exercised by several shareholders, but is determined by the composition of the jointly controlling shareholders.”

This was not a change introduced by the Consolidated Jurisdictional Notice and the previous notices had very similar statements regarding changes in quality of control. Paragraph 8 of the Notice on the Concept of Concentration states that a concentration occurs in the case of acquisition of control, sole or joint, while paragraph 18 states that a change from sole to joint control is considered acquisition of joint control, implying that it is a concentration regardless of the full-function criteria. Paragraph 41 of the Notice on the Concept of Undertakings Concerned also states that a change in quality of control occurs when there is a change from sole to joint control and again the full-functioning criteria were not mentioned.<sup>93</sup>

Therefore, the statements on changes in quality of control were substantially very similar in the previous notices as well. Yet, under the previous notices the Commission's practice was very inconsistent on whether to apply the full-function criteria or not. The statements on changes in quality of control in paragraphs 83 to 90 of the Consolidated Jurisdictional Notice do not provide much new guidance, especially when we consider that they do not even apply to the operation described in this section (acquisition of joint control over a pre-existing undertaking from third parties).

The relevant part of the Notice, paragraph 86, describes a situation where the previously controlling undertaking remains in joint control (type 3 operations). The Notice states that “[...] the new acquisition of control makes the controlled undertaking to a joint venture which changes decisively also the situation for the **remaining controlling undertaking** under the Merger Regulation. [...] Before, it could either determine the strategic behaviour of the controlled undertaking alone (in the case of sole control) or was not forced to take into account the interests of specific other shareholders and was not forced to cooperate with those shareholders permanently.” (emphasis added) Therefore, it seems clear that, when discussing changes in quality of control, the Commission refers to situations when the previously controlling undertaking remains in joint control, which is not a type 2 operation discussed in this section. Hence, paragraphs 83 to 90 of the Consolidated Jurisdictional Notice are inapplicable to such operations.

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<sup>93</sup> Para 41: „Irrespective of whether the number of shareholders decreases, increases or remains the same subsequent to the operation, this acquisition of control can take any of the following forms:

- entry of one or more new shareholders (change from sole to joint control, or situation of joint control both before and after the operation),
- acquisition of a controlling interest by one or more minority shareholders (change from sole to joint control, or situation of joint control both before and after the operation),
- substitution of one or more shareholders (situation of joint control both before and after the operation).”

## 5.4.2 Acquisition of joint control over a pre-existing undertaking from a third party

The Consolidated Jurisdictional Notice did, however, bring about a change compared to the previous notices, although not in the sections described above. The Commission's new position on type 2 operations is visible at the very beginning of the section on full-function joint ventures, specifically in paragraph 91 where it explicitly states that the full-function criteria will not be applied to the acquisition of a pre-existing undertaking by several jointly controlling parents: "[...] The new acquisition of another undertaking by several jointly controlling undertakings therefore constitutes a concentration under the Merger Regulation. [...] [S]uch an acquisition of joint control will lead to a structural change in the market even if [...] the acquired undertaking would no longer be considered full-function after the transaction [...]. Thus, a transaction involving **several undertakings acquiring joint control of another undertaking** or parts of another undertaking, fulfilling the criteria set out in paragraph 24, from third parties will constitute a concentration according to Article 3(1) **without it being necessary to consider the full-functionality criterion.**" (emphasis added).

This statement by the Commission was only introduced in the Consolidated Jurisdictional Notice and cannot be found in the previous Notice on the concept of full-function joint ventures, nor in any of the other previous Notices. It confirms the development of the Commission's practice in 2006 and 2007 (with the exception of *KKR / Permira / ProSiebenSat.1*), that the full-function criteria will not be applied to type 2 operations.

However, a question that can be asked after reading paragraph 91 of the Consolidated Jurisdictional Notice is whether the full-function criteria are inapplicable to these types of operations, or whether they are just presumed to be fulfilled without the need for their examination. The decisions mentioned above do not offer any indication in that regard: generally, they only state that the operation constitutes a concentration for the purpose of Article 3(1)(b).

Perhaps a clue can be found in the placement of paragraph 91: it is the first paragraph of the section on full-function joint ventures, which can be taken as implying that the criteria as such are applicable, although not necessary to be examined as they are presumed to be fulfilled. Otherwise, the content of paragraph 91 could be placed in the section on joint control. The last sentence of paragraph 91 also points in the same direction, where the Commission says that the operation will be considered as a concentration "without **it being necessary to consider** the full-functionality criterion."

(emphasis added). The Commission does not expressly state the criteria do not apply, but merely that they do not need to be considered.

A similar conclusion could be reached from the Commission's Decision in *Elia / IFM / 50Hertz*,<sup>94</sup> where the undertakings Elia and IFM acquired joint control over the undertaking 50Hertz, by purchasing all of its shares from its previous owner Vattenfall AB. In paragraph 6 of the Decision the Commission stated that “[...] Elia and IFM will have joint control over 50Hertz. As a consequence, the operation constitutes a concentration within the meaning of Articles 3(1)(b), **(4)** of the Merger Regulation.” (emphasis added). While the full-function test was not conducted in the Decision, the Commission refers to Article 3(4) of the Merger Regulation, which is the provision that sets out the full-function criteria, thus implicitly stating that the criteria are fulfilled without the need to examine them.

An even clearer indication can be found in *ENI / AcegasAps / JV*<sup>95</sup> where ENI S.p.A. and AcegasAps S.p.A, two undertakings active in the energy sector, acquired joint control of three companies active in the electricity and gas distribution sectors from their previous parent, IRIS. After considering the question of joint control, the Commission explicitly referred to paragraph 91 of the Consolidated Jurisdictional Notice. It said in paragraphs 9 and 10 of the Decision: “For the purpose of the present case there is **no need to assess the full-functionality nature** of the Target as the envisaged transaction consists of the **acquisition of joint control over a pre-existing business with a market presence consistent** with Paragraph 91 of the Commission Jurisdictional Notice. It follows from the foregoing, that the operation consists in a concentration within the meaning of **Article 3(4)** of the Merger Regulation.” (emphasis added). These two paragraphs would imply that the operation concerns a full-function joint venture, but that it is not necessary to actually examine whether the full-function criteria are fulfilled, *i.e.* they are presumed to be fulfilled.

However, despite these indications that paragraph 91 of the Consolidated Jurisdictional Notice should be interpreted as a presumption that the full-function criteria are fulfilled when there is an acquisition of joint control over a pre-existing undertaking, I believe that paragraph 91 of the Notice should be interpreted as meaning that the full-function criteria do not apply at all to this kind of operation. As such, there is no need by the Commission (and is in fact quite misleading) to refer to Article 3(4) of the Merger Regulation in decisions such as *Elia / IFM / 50Hertz* and *ENI /*

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<sup>94</sup> Case M.5827 *Elia / IFM / 50Hertz*

<sup>95</sup> Case M.6068 *ENI / AcegasAps / JV*

*AcegasAps / JV*. And if the full-function criteria in Article 3(4) do not apply at all, surely the operation can not constitute a full-function joint venture for the purpose of Article 3(4), as the Commission stated in these two decisions.

The reasoning for this claim is, hopefully, rather simple: if paragraph 91 of the Consolidated Jurisdictional Notice were interpreted as meaning that there is a presumption of full-functionality when joint control is acquired over a pre-existing undertaking, it would also mean that such a presumption can be rebutted; and in case that the presumption of full-functionality is rebutted the operation would fall outside the scope of the Merger Regulation. However, the presumption of full-functionality cannot be rebutted. This kind of operation will always constitute a concentration, regardless of whether the full-function criteria are fulfilled or not. This, in turn, means the full-function criteria are irrelevant and inapplicable, as the acquisition of joint control is in itself a notifiable concentration.

This can be clearly seen from the middle of paragraph 91 of the Consolidated Jurisdictional Notice, where the Commission says that “The new acquisition of another undertaking by several jointly controlling undertakings therefore constitutes a concentration under the Merger Regulation. [...] [S]uch an acquisition of joint control will lead to a structural change in the market **even if**, according to the plans of the acquiring undertakings, **the acquired undertaking would no longer be considered full-function after the transaction** [...]” (emphasis added). It is evident from the above that the full-function criteria will not only be presumed as fulfilled, but that the operation will constitute a concentration even if it is clear they are not fulfilled. This means they are completely inapplicable to these operations and that it is the acquisition of joint control itself that constitutes a concentration. Hence, the Commission’s references to Article 3(4) in the two decisions mentioned above are completely unnecessary and misleading.

It should be noted that paragraph 91 of the Consolidated Jurisdictional Notice is also applicable to acquisitions of joint control over **parts** of an undertaking and acquisitions of joint control over assets. The relevant part of paragraph 91 states that “a transaction involving several undertakings acquiring joint control of another undertaking or parts of another undertaking, **fulfilling the criteria set out in paragraph 24**, from third parties will constitute a concentration according to Article 3(1) without it being necessary to consider the full-functionality criterion.” (emphasis added).

Paragraph 91 of the Notice, although not mentioning explicitly acquisition of joint control over assets, refers to the conditions in paragraph 24, which state that acquisition of control over the whole or a part of an undertaking shall constitute a concentration and that the acquisition of control over assets shall constitute a concentration **only** if those assets have a market presence to which a turnover can be attributed.<sup>96</sup> The only conditions in paragraph 24 are those about control over assets and nearly all of paragraph 24 deals with control over assets. Therefore, it is logical to consider that acquisition of joint control over assets (for example, when undertakings A and B jointly acquire production plants or trademarks from undertaking C) will constitute a concentration if the assets have a market presence to which a turnover can be attributed, also regardless of the full-function criteria.

It should be noted that the “market presence to which a market turnover can be attributed” test is applicable only to acquisition of joint control over assets, but not to acquisitions of joint control over a part of an undertaking. From the text of paragraph 24 it is clear that acquisition of control over part of an undertaking constitutes a notifiable concentration in itself,<sup>97</sup> although it can sometimes be difficult to distinguish between acquisition of control over assets or over a part of an undertaking.<sup>98</sup>

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<sup>96</sup> Nicholas Levy, *The control of concentrations between undertakings* in Competition law of the European Community, ed. Valentine Korah (Matthew Bender & Co: 2010), page 5-55; A case which deals with acquisition of joint control over assets from a third party is the above mentioned case M.6068 *ENI / AcegasAps / JV*; regarding acquisition of sole control over assets see for example case M.5727 *Microsoft / Yahoo! Search Business*, case M.5859 *Whirlpool / Privileg Rights*, case M.6323 *Tech Data Europe / MuM VAD Business*, etc.

<sup>97</sup> “The object of control can be one or more, or also parts of, undertakings which constitute legal entities, or the assets of such entities, or only some of these assets. The **acquisition of control over assets can only** be considered a concentration if those assets constitute the whole or a part of an undertaking, *i.e.* a business with a market presence, to which a market turnover can be clearly attributed”; See, for example, case M.6214 *Seagate / HDD Business of Samsung*, case M.6218 *INEOS / Tessenderlo Group S-PVC Assets*, etc.

<sup>98</sup> For example, in case M.6323 *Tech Data Europe / MuM VAD Business* the undertaking Tech Data Europe acquired the assets of the undertaking Mensch und Maschine Software in a number of European countries. The Commissions stated that “As a result, Tech Data Europe will acquire, by purchase of the assets pertaining to MuM VAD Business, the direct control of parts of MuM, and thus of another undertaking” and applied the market presence test. However, in case M.6214 *Seagate / HDD Business of Samsung* the Commission stated that “The proposed transaction concerns the acquisition by Seagate of sole control over the Samsung HDD Business. The business to be acquired consists of substantially all tangible and intangible assets used exclusively by Samsung [...]” Although the operation seems similar to the previously mentioned case, the Commission simply stated that the operation is a concentration for the purpose of Article 3(1)(b), without applying the market presence test. The situation is equally confusing in case M.6164 *Barclays Bank / Egg Credit Card Assets*, where the Commission did not apply the market presence test to a situation which seems a rather clear example of acquisition of control over assets (“The proposed transaction consists of the acquisition by Barclays of certain credit card assets and liabilities previously under the sole control of Egg”). However, this issue is not the topic of the thesis.

As can be seen from the discussion above, unlike the assumption one could make after reading Article 3(4) of the Merger Regulation, the full-function criteria are not applicable to all joint ventures equally: while they will be applied to newly created joint ventures, they will not be applied to joint ventures established through acquisition of joint control over pre-existing undertakings (or joint control over assets with a market presence) from a third party. Therefore, we can conclude that different jurisdictional rules apply to joint ventures depending on the method of their establishment.

## **5.5 Chapter summary**

The Commission's practice had previously been rather inconsistent regarding application of the full-function criteria to acquisitions of joint control over pre-existing undertakings from third parties. Under the previous Merger Regulation, the Commission would, seemingly randomly, either apply or not apply the full-function criteria. The same inconsistent practice initially continued even after the current Merger Regulation came into force. However, the Commission's practice began to consolidate in 2006 and 2007, when it consistently omitted the full-function test when examining this type of operation. The new practice was confirmed by paragraph 91 of the Consolidated Jurisdictional Notice, which states that the full-function criteria do not need to be examined when there is an acquisition of joint control over a pre-existing undertaking (or assets with a market presence to which a turnover can be attributed) from third parties. However, paragraph 91 does not presume the full-function criteria are fulfilled, but instead considers them as completely inapplicable to such operations. This practice by the Commission has been confirmed in a constant stream of subsequent cases.

Therefore, it is evident that the full-function criteria are applicable to the creation of a completely new joint venture undertaking, but are not applicable when a joint venture is established by acquiring joint control over a pre-existing undertaking from a third party.

But what about a change from sole to joint control (type 3 operations)?

# 6 Application of full-function criteria to type 3 operations

## 6.1 Under the original Merger Regulation

The next type of operation which will be analyzed is the change from sole to joint control, *i.e.* acquisition of joint control over a pre-existing undertaking together with the previously controlling parent (for example, undertaking B buys 50% of shares in undertaking A's subsidiary X; A and B therefore have joint control over X). As is the case with the previously analyzed operation, there was a great deal of inconsistency in the Commission's application of the full-function criteria. "With regard to several such cases the Commission has verified the satisfaction of the full-functionality criterion, whilst it has failed to do so in a considerable number of other cases."<sup>99</sup>

For example, in *Telia / Oracle / Drutt*,<sup>100</sup> Telia intended to acquire joint control over the Drutt Corporation, whose only activities were conducted through its Swedish subsidiary Drutt Svenska AB, the owner of the Halebop brand. Drutt was under the sole control of the Oracle Corporation. Under the proposed transaction, Oracle and Telia would each hold 40% of Drutt's shares and thus have joint control over it, while the remaining non-controlling 20% of the shares would be held by key personnel in the company. After describing the joint control in paragraph 8 of the Decision, the Commission stated that the Drutt Corporation would be a full-function joint venture and that therefore the operation was a notifiable concentration.

On the other hand, in *YLE / TDF / Digita / JV*<sup>101</sup> TDF, a subsidiary of France Telecom, acquired 49% of the undertaking Digita, which was under sole control and ownership of the Finnish public broadcaster YLE. After the operation TDF and YLE would have joint control over Digita. However, in the Decision the Commission did not examine or at all refer to the full-function criteria. A similar inconsistency can also be seen in other decisions from the period prior to the adoption of the current Merger Regulation.<sup>102</sup>

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<sup>99</sup> Luca G. Radicati di Brozolo & Magnus Gustafsson, "Full-function joint ventures under the Merger Regulation: the need for clarification" in *European Competition Law Review* 2003, 24(11), pages 574-579, at page 575

<sup>100</sup> Case M.1982 *Telia / Oracle / Drutt*

<sup>101</sup> Case M.2300 *YLE / TDF / Digita / JV*

<sup>102</sup> *Supra* note 99, see case law in footnotes 8 and 9; As an example of the application of the full-function criteria see also case M.3415 *CRH / Semapa / Secil JV*.



## 6.2 Under the current Merger Regulation (before Consolidated Jurisdictional Notice)

Similarly to type 2 operations, the entry into force of the current Merger Regulation did not offer any clarity or consistency to the Commission's approach. The subsequent decisions adopted under the current Merger Regulation would either apply<sup>103</sup> or not apply<sup>104</sup> the full-function criteria and the situation stayed largely the same as previously.

For example, in *EADS / BAES / FNM / NLFK*,<sup>105</sup> EADS, a producer of aerospace and defence equipment, transferred two of its subsidiaries to a pre-existing joint venture it operated together with BAES and FNM, also producers of aerospace and defence equipment. Through this operation and transfer to the existing joint venture, BAES and FNM gained joint control, together with EADS, of two businesses (VM and TDW) which were previously under sole control of EADS. In paragraph 4 of the Decision, the Commission stated that "The transaction brings about a structural change to the extent there is a switch from EADS Deutschland's sole control over VM and TDW to joint control over VM and TDW by EADS, BAES and FNM [...]. It is therefore a concentration within the meaning of Article 3(1)(b) [...]." The Commission did not examine whether the full-function criteria were fulfilled, neither before nor after the operation. It considered that the change from sole to joint control itself constituted a concentration.

This was consistent with the Commission's statements in the previous jurisdictional notices, which also recognized the change from sole to joint control as a notifiable concentration, as explained in section 5.4.1. above. But this does not explain the difference in application of the full-function criteria in other cases, where they were applied. For example, in *OEP / MSP-Stiftung / DVG / Dailycer Group*<sup>106</sup> the Commission, although it did not conduct any in depth examination, applied the full-functionality test by

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<sup>103</sup> Cases where the full-function criteria **was** applied: case M.3099 *Areva / Urenco / ETC JV*, case M.3556 *Fortis / BCP*, case M.3764 *Belgacom / Swisscom / JV*, case M.3786 *BPI / Euler Hermes / COSEC*, case M.3798 *NYK / Lauritzen Cool / LauCool JV*, case M.3902 *HeidelbergCement / De Hoop Terneuzen / Mermans Beton / JV*, case M.4738 *OEP / MSP-Stiftung / DVG / Dailycer Group*

<sup>104</sup> Cases where the full-function criteria **was not** applied: case No. M.3985 *EADS / BAES / FNM / NLFK*, case M.4146 *GE / Bayer / OSi Europe Business*, case M.4191 *Thales / DCN*, case M.4202 *Charterhouse / Elior*, case M.4229 *APHL / Netcare / General Healthcare Group*, case M.4238 *E.ON / Pražska plynárenská*, case M.4338 *Cinven-Warburg Pincus / Casema-Multikabel*, case M.4392 *DSGI / FR-Invest / F-Group JV*, case M.4727 *Segulah / Capman / JV*, case M.4785 *Russian Machines / Magna*, case M.4808 *CVC / Charterhouse / PHL / AA / Saga*, case M.4814 *FDC / AIB / JV*, case M.5032 *Roxel / Protac*

<sup>105</sup> Case M.3985 *EADS / BAES / FNM / NLFK*

<sup>106</sup> Case M.4738 *OEP / MSP-Stiftung / DVG / Dailycer Group*, para 4

apparently presuming it was met. It stated that „As a result of the transaction, Dailycer Group and DVG will **combine their activities in a full-function joint venture** controlled jointly by OEP and MSP. The operation therefore constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.“ (emphasis added).

### 6.3 After the Consolidated Jurisdictional Notice

Unlike the situation regarding type 2 operations, where the Consolidated Jurisdictional Notice clarified the Commission’s practice and offered predictability to its future practice, the same was not the case regarding type 3 operations analyzed in this section. Even after the adoption of the Consolidated Jurisdictional Notice, the application of the full-function criteria differed on a case-by-case basis. In *StatoilHydro / St1 / St1 Avifuels JV*<sup>107</sup> StatoilHydro purchased 51% of the shares of St1’s fully owned subsidiary, St1 Avifules, which would be under the joint control of both StatoilHydro and St1 after the operation. In its Decision the Commission did not examine (or even mention) the full-function criteria. It merely stated that “The present transaction constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation, **given** that StatoilHydro will acquire joint control, together with St1, **on a pre-existing undertaking.**” (emphasis added). This statement implies that the Commission is following the guidance given in paragraph 91 of the Consolidated Jurisdictional Notice, where it stated that the full-function criteria is not applicable to the acquisition of joint control over pre-existing undertakings from third parties.

However, in a decision adopted only 5 days before *StatoilHydro / St1 / St1 Avifuels JV*, the full-function criteria were applied and examined in some detail. In *Hutchison / Evergreen*<sup>108</sup> the undertaking Hutchinson acquired 50% of the shares in the undertaking TCT, which was previously under the sole control of Evergreen who held 90% of the shares. TCT operated a shipping container terminal in Italy, while Hutchinson and Evergreen were

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<sup>107</sup> Case M.5422 *StatoilHydro / St1 / St1 Avifuels JV*; similarly, in case M.5093 *DP World / Conti 7 / Rickmers / DP World Breakbulk*, the Commission did not conduct any examination of the full-function criteria, nor even mention them. After establishing joint control it simply stated that „The proposed concentration is a concentration in the meaning of Article 3(1)(b), Article 3(4) of the Merger Regulation.“ The reference to Article 3(4) could mean that the Commission, following paragraph 91 of the Consolidated Jurisdictional Notices, presumes full-functionality without the need to examine it. However, as explained above, I believe that paragraph 91 of the Consolidated Jurisdictional Notice states that the full-function criteria are not applicable at all. Hence, Article 3(4) should not be referred to.

<sup>108</sup> Case M.5398 *Hutchison / Evergreen*

active in the shipping business. After the operation TCT would be under joint control of Hutchinson (50% of the shares) and Evergreen (40%), with a non-controlling 10% being held by minority shareholders. In paragraph 5 of the Decision the Commission stated that “TCT has all the characteristics of a joint venture performing on a lasting basis all the functions of an autonomous economic entity: it has dedicated senior management in charge of operating the terminal, access to sufficient resources including finance, staff and assets and is intended to operate for at least [...] years. It follows from the above, that the operation constitutes a concentration within the meaning of Article 3 (1)(b) of the EC Merger Regulation.”

Therefore, even after the adoption of the Consolidated Jurisdictional Notice, the application of the full-function criteria to changes from sole to joint control continued to be inconsistent and the full-function test either was<sup>109</sup> or was not<sup>110</sup> applied. Although in recent years, specifically in 2011 and 2012, there have been more decisions where the full-function criteria have not been applied, the few cases that have applied the full-function criteria and the inconsistency in Commission’s practice since the adoption of the

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<sup>109</sup> For example, cases where it **was** applied: case M.5066 *Eurogate / APMM*, case M.5169 *Galp Energia España / Agip España*, case M.5183 *Centrex / ZMB / Eni / JV*, case M.5210 *Siemens / Ortner / JV*, case M.5414 *Samsung SDI / Samsung SEC / SMD*, case M.5445 *Mytilineos / Motor Oil / Corinthos Power*, case M.5484 *SGL Carbon / Brembo / BCBS / JV*, case M.5629 *Normeston / MOL / MET JV*.

In 2010: case M.5880 *Shell / Topaz / JV*, case M.6023 *Schweizerische Post / Österreichische Post / JV*.

In 2011: case M.6151 *PetroChina / Ineos / JV*, case M.6315 *Hochtief / GeoSea / Beluga Hochtief Offshore JV*.

<sup>110</sup> For example, cases where it **was not** applied: case M.5032 *Roxel / Protac*, case M.5243 *CVC / Evonik*, case M.5347 *Mapfre / Salvador Caetano / JVs*, case M.5557 *SNCF-P / CDPQ / Keolis / Effia*, case M.5643 *ArcelorMittal / Miglani / JV*, case M.5714 *Scholz / Scholz Austria / Kovosrot*; in case M.5450 *Kühne / HGV / TUI / Hapag Lloyd*, para 7, the Commission stated that „As a result of the transaction Kühne, HGV and TUI will acquire joint control of HL AG in the meaning of Article 3(4) of the EC Merger Regulation for the reasons laid down below.“ However, the paragraph below discusses full-functionality of the holding company used to exercise joint control over the joint venture for the parents. The full-functionality of the joint venture which is the subject of the concentration is never considered, similarly to *StatoilHydro / St1 / St1 Avifuels JV*.

In 2010: case M.5838 *Bertelsmann / Planeta / Circulo*, case M.5841 *Cathay Pacific Airways / Air China / ACC*, case M.5862 *Mahle / Behr / Behr Industry*, case M.5902 *LWM / RWI / F&F*, case M.6012 *CD&R / CVC / Univar*.

In 2011: case M.6170 *First Reserve Fund XII / Finmeccanica / Ansaldo Energia*. In this case as well, the Commission does not conduct the full-function test, it merely notes that the operation constitutes „a concentration within the meaning of Article 3(4) of the Merger Regulation **given that FNM and FR will acquire joint control over a pre-existing undertaking**“ (emphasis added), thus presuming the criteria are fulfilled without actually applying them; similar situation is in case M.6113 *DSM / Sinochem / JV* as well. Other cases are case M.6225 *Molaris / Commerz Real / RWEAmprion*, case M.6261 *North Sea Group / Argos Groep / JV*, case M.6401 *Waterland / Alychlo / Omega Pharma*.

In 2012: case M.6411 *Advent / Maxam*.

Consolidated Jurisdictional Notice mean that a clear position by the Commission cannot yet be identified with certainty.

## 6.4 Analysis of current practice

So far, three different approaches, which lead to two outcomes, can be (more or less clearly) identified in the Commission's treatment of type 3 operations. The first approach is to treat them as the creation of a new joint venture and to examine whether the full-function criteria is fulfilled in order to determine whether the operation constitutes a concentration.

In *Hochtief / GeoSea / Beluga Hochtief Offshore JV* the undertaking GeoSea acquired joint control of Beluga Hochtief Offshore (BHO) from Hochtief, its solely controlling parent. Previously BHO had been a joint venture between Hochtief and the undertaking Beluga. However, before the operation subject to the Commission's Decision, Hochtief had purchased Beluga's share in the joint venture (which meant that the operation between Hochtief and GeoSea was a change from sole to joint control, rather than replacement of a parent in a joint venture). The Commission conducted a relatively detailed examination of the full-function criteria: it stated that BHO has and will continue to have its own management and staff, that it possesses the necessary financial resources, that it will carry out all commercial and operational activities, that it would contract with third parties and that it will continue to be active on the market for an indefinite period.<sup>111</sup> As can be seen, in this case the Commission conducted a more extensive full-functionality test than it does for some type 1 operations.

The second approach that can be identified is for the Commission to treat this type of operation as an acquisition of joint control over a pre-existing undertaking within the meaning of paragraph 91 of the Consolidated Jurisdictional Notice, which states that the full-function criteria will not apply to acquisitions of joint control over pre-existing undertakings from third parties. This approach is visible in *First Reserve Fund XII / Finmeccanica / Ansaldo Energia*<sup>112</sup> for example, where the investment fund First Reserve Fund acquired a 45% stake in and joint control over the power generation undertaking Ansaldo Energia, which had previously been under sole control by Finmeccanica, an undertaking active in the aerospace, defence and security sectors. In paragraph 8 of the Decision, after very briefly analysing the mode of joint control, the Commission stated that "[...] the operation consists in a concentration within the meaning of Article

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<sup>111</sup> Case M.6315 *Hochtief / GeoSea / Beluga Hochtief Offshore JV*, paras 14 and 15

<sup>112</sup> Case M.6170 *First Reserve Fund XII / Finmeccanica / Ansaldo Energia*

3(4) of the Merger Regulation given that FNM and FR will **acquire joint control over a pre-existing undertaking.**” (emphasis added). This implicitly says the same as the statement in *ENI / AcegasAps / JV* described in section 5.4.2. above and is a clear reference to paragraph 91 of the Consolidated Jurisdictional Notice. However, as I have stated before, I believe this reference to Article 3(4) is rather illogical: if the Commission is following paragraph 91 of the Consolidated Jurisdictional Notice, which states that the full-function criteria are not applicable at all, it makes little sense to then refer to the article that sets out the (completely inapplicable) full-function criteria. The reference should clearly be to Article 3(1)(b), as the operation is considered a concentration without the need to even consider full-functionality in Article 3(4).

The Commission’s third approach that can be identified is to treat this operation as a change in quality of control, which constitutes a notifiable concentration without the need to consider the full-function criteria. The change from sole to joint control is covered by paragraph 86 of the Consolidate Jurisdictional Notice, which states that “A move from sole control to joint control is considered a notifiable operation as this changes the quality of control of the joint venture.”

As shown previously, a joint venture exists whenever an undertaking is under joint control. Therefore, a change from sole to joint control will lead to the undertaking being transformed into a joint venture. However, paragraph 86 of the Consolidated Jurisdictional Notice is outside and before the section on full-functionality. Stating that a change from sole to joint control is itself a notifiable operation means that the Commission considers the full-function criteria as completely inapplicable to such situations rather than being presumably fulfilled, although they concern the transformation of an undertaking into (or the “creation” of) a joint venture.

This third approach can be seen in *Cathay Pacific Airways / Air China / ACC*.<sup>113</sup> In this case the airline Cathay Pacific acquired 49% of the voting rights (and joint control) of Air China Cargo, the cargo division of the airline Air China. In its Decision the Commission stated that “[...] the present transaction constitutes **a change from sole control to joint control** of ACC. The operation **therefore constitutes** a concentration within the meaning of Article 3(1)(b) of the Merger Regulation” (emphasis added). It is evident that the Commission considers the operation to be a concentration for the purpose of the Merger Regulation simply because there is a change in the quality of control from sole to joint control, as stated in paragraph 86

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<sup>113</sup> Case M.5841 *Cathay Pacific Airways / Air China / ACC*

of the Consolidated Jurisdictional Notice. The same statement can also be found in the Decision in *Mahle / Behr / Behr Industry*.<sup>114</sup>

Therefore, the Commission's second and third approach lead to the same result: non-application of the full-function criteria. However, although these approaches lead to the same outcome, perhaps one is more suitable than the other to justify the omission of the full-function criteria. Since the adoption of the Consolidated Jurisdictional Notice the Commission has consistently relied on paragraph 91 of the Notice (acquisition of joint control over a pre-existing undertaking from third parties) when examining type 2 operations, in order to declare them as concentrations without examining their full-functionality. However, perhaps such an operation could also be considered as a change in quality of control under paragraph 86 of the Notice: in essence, there is a change from sole control by undertaking A to joint control by undertakings B and C. However, are paragraphs 86 and 91 suitable for both types of operations (type 2 and type 3), or is each one of them suitable for application to only one type of operation?

As shown above, in type 3 operations (change from sole control by A to joint control by A and B) the Commission has in certain cases, at least implicitly, relied on its guidance in paragraph 91 of the Notice.<sup>115</sup> However, I believe that a closer reading will reveal that paragraph 91 should not be applied to such operations. The entire paragraph 91 reads: "Article 3(1)(b) provides that a concentration shall be deemed to arise where control is acquired by one or more undertakings of the whole or parts of another undertaking. The **new acquisition** of another undertaking **by several jointly controlling undertakings** therefore constitutes a concentration under the Merger Regulation. As in the case of the acquisition of sole control of an undertaking, such an acquisition of joint control will lead to a structural change in the market even if, according to the plans of the acquiring undertakings, the acquired undertaking would no longer be considered full-function after the transaction (e.g. because it will sell exclusively to the parent undertakings in future). Thus, a transaction involving **several undertakings acquiring joint control** of another undertaking or parts of another undertaking, fulfilling the criteria set out in paragraph 24, **from third parties** will constitute a concentration according to Article 3(1) without it being necessary to consider the full-functionality criterion." (emphasis added).

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<sup>114</sup> Case M.5862 *Mahle / Behr / Behr Industry*

<sup>115</sup> Such as case M.6170 *First Reserve Fund XII / Finmeccanica / Ansaldo Energia*

The beginning of paragraph 91 states that it shall apply to **new** acquisitions of control by **several** jointly controlling undertakings. However, where the previously controlling parent remains in joint control for that undertaking there is no new acquisition of control: it already had (sole) control and simply changed its nature (or quality). In the first paragraph of decisions regarding type 3 operations, the Commission usually states that undertakings A and B acquire joint control over undertaking C. However, in reality only one undertaking acquires new control; the other one simply changes the quality of its control, from sole to joint. Therefore there is no **new** acquisition of control by **several** undertakings, as stated in paragraph 91. Instead, there is a new acquisition of control by **one** undertaking and the change in the nature of **existing** control of the other (provided, of course, that the operation leads to a change to joint control by only two undertakings; however, the other arguments in this section are valid even if there are more undertakings that will gain joint control after the operation).

This opinion is strengthened even more by reading the last sentence of paragraph 91, which states that a concentration exists when several undertakings acquire joint control from a third party. However, in type 3 operations there is no third party. If we look at its definition, the term third party signifies “a person or group besides the two primarily involved in a situation.”<sup>116</sup> When a controlling undertaking changes the quality of its control over the controlled undertaking from sole control to joint control, it does not become a third party. Since it will remain in joint control it is still very much part of the situation and the joint venture and there can be no acquisition of joint control from a **third party**. Hence, paragraph 91 is unsuitable for application to this type of operation and is applicable only to type 2 situations. Otherwise, the concept of change in quality of control in paragraph 86 of the Notice would be superfluous.

On the other hand, paragraph 86 is suitable for operations of change from sole to joint control (type 3 operations), but it would not be suitable to operations of acquisition of joint control over pre-existing undertakings from third parties (type 2 operations). Paragraph 86 of the Consolidated Jurisdictional Notice reads: “A move from sole control to joint control is considered a notifiable operation as this changes the quality of control of the joint venture. **First**, there is a new acquisition of control for the shareholder **entering** the controlled undertaking. **Second**, only the new acquisition of control makes the controlled undertaking to a joint venture which changes

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<sup>116</sup> "third party *noun*" *Oxford Dictionary of English*. Edited by Angus Stevenson. Oxford University Press, 2010. *Oxford Reference Online*. Oxford University Press. Lunds Universitet. 26 May 2012 <http://www.oxfordreference.com.ludwig.lub.lu.se/views/ENTRY.html?subview=Main&entry=t140.e0859490>

decisively also the situation for the **remaining** controlling undertaking under the Merger Regulation: In the future, it has to take into account the interests of one or more other controlling shareholder(s) and it is required to cooperate permanently with the new shareholder(s). **Before**, it could either determine the strategic behaviour of the controlled undertaking **alone** (in the case of sole control) or was not forced to take into account the interests of specific other shareholders and was not forced to cooperate with those shareholders permanently.” (emphasis added). Therefore, paragraph 86 requires that there is a previously solely controlling undertaking which stays in joint control after the operation. It does not acquire any new control, but the quality of its existing control is changed because it now must take the interests of the new, entering parent into account. This is exactly the situation in type 3 operations (but not in type 2 operations).

Having analyzed its practice regarding changes from sole to joint control, the Commission seems to be quite uncertain on how to treat such operations. Its application of the full-function criteria still remains very inconsistent. If the Commission wishes to consolidate its practice, in the future it should expressly rely on paragraph 86 of the Notice and consistently omit the full-function test when examining such operations.

## 6.5 Chapter summary

The Commission’s practice has been very inconsistent regarding application of the full-function criteria to changes in quality of control from sole to joint control. The Commission examined full-functionality in some cases while it did not in others, seemingly without a clear reason. The situation did not change even after entry into force of the current Merger Regulation or after the adoption of the Consolidated Jurisdictional Notice. This inconsistency can still be seen in some very recent decisions. The Commission has had three different approaches to such operations: to treat them as new joint ventures and examine full-functionality; to treat them as acquisition of joint control over pre-existing undertakings from third parties under paragraph 91 of the Notice; or to treat them as changes in quality of control under paragraph 86 of the Notice. In the latter two cases, the full-function criteria will be inapplicable. However, only the third approach can be considered as suitable and correct. Hence, only it should be used by the Commission to consolidate its practice in the future.

From the analysis of the different operations so far, it is evident that the full-function test will not be applied to all joint ventures: its application depends on the method used to establish the joint venture. The question that then arises is whether the distinction between different operations is justified?



# 7 Relationship between Article 3(1)(b) and 3(4)

## 7.1 Introduction

As stated in the beginning of the thesis, any undertaking that is under joint control of two or more undertakings constitutes a joint venture. However, we can now conclude that the jurisdictional treatment of joint ventures differs significantly depending on the operation used to establish joint control: currently, we have (or at least should have) three different approaches for three methods of establishing joint control.

The creation of a greenfield joint venture (undertaking which did not previously exist as a separate entity) will be subject to the full-function criteria of Article 3(4). The acquisition of joint control over a pre-existing undertaking from a third party, where the previous parent does not stay in control, will not be subject to the full-functioning criteria, in accordance with paragraph 91 of the Consolidated Jurisdictional Notice. And finally, a joint venture established when there is a change from sole to joint control (and the previous sole parent stays in joint control) would also not be subject to the full-function test, in accordance with paragraph 86 of the Consolidated Jurisdictional Notice, provided that the Commission settles on a clear position, considering that its current practice is still inconsistent. If it wishes to follow the same reasoning as with acquisition of joint control over pre-existing undertakings, the only logical solution would be to consolidate its practice by consistently following paragraph 86 of the Notice.

Having established the Commission's current practice, the question arises whether the Commission is correct in its (non)application of the full-function criteria? If they were intended by the Merger Regulation to apply to all joint ventures, regardless of the method of their establishment, then the Commission does not have the power to change the application of the full-function criteria, nor can the Consolidated Jurisdictional Notice change the jurisdictional or substantial rules of the Merger Regulation. And even if the Commission's recent practice regarding application of the full-function criteria is not contrary to the Merger Regulation, what are the reasons for it and are they satisfactory? Regarding the first question, the crucial issue is the relationship between Articles 3(1)(b) and 3(4).

## 7.2 The prevailing view

As stated above in section 4.1, the prevailing view is that full-functionality in Article 3(4) limits the acquisition of joint control in Article 3(1)(b). If that were true, then any acquisition of joint control would also have to meet the full-function criteria in order to come within the scope of the Merger Regulation. However, it is evident that the practice is not such and that the Commission does not examine full-functionality in every case of acquisition of joint control. If the prevailing view were the correct one, then what would be the reasons for the non-examination of full-functionality?

*Di Brozolo and Gustafsson*, who strongly support this view, offer several possible explanations.<sup>117</sup> One of the potential reasons offered is that the Commission considers that the full-function criteria are beyond dispute and presumed. However, I must agree with them that this seems as a very improbable answer. The Commission's practice is generally to assess all elements relevant to the decision even when they are non-contentious, not to consider them as presumed. This is evident from several decisions on the creation of new joint ventures. Even if it did not offer any specific or in-depth reasons why it considered the joint venture as full-function, the Commission would still explicitly state that the joint venture would perform on a lasting basis all functions of an autonomous economic entity, as this was an essential element to establish its jurisdiction. If full-functionality were a necessary element for all acquisitions of joint control, it could not be simply presumed to be met, but would have to be explicitly mentioned.

Other explanations offered are that perhaps the Commission simply overlooked the issue, possibly because the parties did not bring it up, or that the Commission voluntarily turned a blind eye to full-functionality and accepted to examine the operation under the Merger Regulation (even though it did not fulfil the full-function criteria) because of the advantages it would provide to the parties. However, both these arguments seem to be very unpersuasive. It is highly unlikely that the Commission would simply overlook a crucial jurisdictional requirement, as it is unlikely that it would voluntarily accept jurisdiction where it does not exist.

The prevailing view is based on the argument that there should be no distinction between joint ventures based on the method of acquisition of joint control or on any other circumstance of the transaction. The only

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<sup>117</sup> Luca G. Radicati di Brozolo & Magnus Gustafsson, "*Full-function joint ventures under the Merger Regulation: the need for clarification*" in *European Competition Law Review* 2003, 24(11), pages 574-579, at page 576-577

relevant element should be the effect of the transaction. For these reasons, *di Brozolo and Gustafsson* adopt a wide interpretation of the term “creation of a joint venture” and argue that Article 3(4) limits Article 3(1)(b).

The reason for extensively citing their arguments above is because initially I largely agreed with them and considered putting forward very similar arguments in my work: the Merger Regulation should not make a distinction between joint ventures based on the method of their establishment (or “creation”). Technically, even when joint control of a pre-existing undertaking is acquired or when there is a change from sole to joint control of an undertaking a joint venture *is* created: while the undertaking did exist, the joint venture did not. However, while I still do agree with some of their claims, I must disagree with their interpretation of Article 3.

### **7.3 Article 3(4) doesn’t limit Article 3(1)(b)**

If the prevailing view were correct then any acquisition of joint control would have to meet the full-function criteria in order to come within the scope of the Merger Regulation. But, as has been shown, that is not the case in practice. As stated by *Rudolf and Leupold*,<sup>118</sup> this prevailing view seems to be driven by the objective to explain the guidance of the Consolidated Jurisdictional Notice as much as possible in a coherent way. It can also be claimed that the text of the Merger Regulation is partially to blame: Article 3(4) states that the creation of a full-function joint venture shall constitute a concentration “within the meaning of Article 3(1)(b).” This can be interpreted as meaning that the two paragraphs are mutually connected (*i.e.* that Article 3(4) limits Article 3(1)(b)), instead of being interpreted as meaning that they create two separate notifiable operations, as has been the case in the Commission’s practice and as is claimed in this thesis.

The Commission’s practice has not helped resolve such uncertainty either. If anything, it has exacerbated the confusion in its decisions, when stating which provision it used to establish its jurisdiction under the Merger Regulation. If Article 3(4) is not intended to limit Article 3(1)(b), then Articles 3(1)(b) and 3(4) determine two different bases for establishing jurisdiction: the former for operations of acquisition of sole or joint control, the latter for creation of new joint venture undertakings.

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<sup>118</sup> Lars-Peter Rudolf and Bettina Leupold, „*Joint Ventures - The Relevance of the Full Functionality Criterion under the EU Merger Regulation: There Remains a Need for Clarification*” in *Journal of European Competition Law & Practice* Advance Access, first published online May 9, 2012 doi:10.1093/jeclap/lps026, pages 8-9

In that case, when determining existence of a concentration, the Commission should refer to either Article 3(1)(b) or Article 3(4) (as it does in certain cases), but not to both simultaneously. Yet, that is exactly what it often does. In *Agrana / RWA / JV* the parents created a new joint venture to combine the activities of their subsidiaries active in production and sale of fruit juice. The Commission described the mode of joint control, examined full-functionality and then stated that “[...] the notified operation is a concentration within the meaning of **Article 3(1)(b) and 3(4)** of the Merger Regulation.”<sup>119</sup> (emphasis added). Moreover, the confusion was not helped by certain cases where the Commission explicitly referred to Article 3(4) while at the same time stating that full-functionality does not need to be examined, like in *ENI / AcegasAps / JV* described above.

In my opinion, Article 3(1)(b) and Article 3(4) do not apply to the same operations and Article 3(4) cannot be interpreted as limiting the scope of Article 3(1)(b), *i.e.* as meaning that the acquisition of joint control in Article 3(1)(b) constitutes a concentration only if it results in a full-function joint venture. Articles 3(1) and 3(4) read: “**(1)** A concentration shall be deemed to arise where a change of control on a lasting basis results from: **(a)** the merger of two or more previously independent undertakings or parts of undertakings, or **(b)** the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings. [...] **(4)** The creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity shall constitute a concentration within the meaning of paragraph 1(b).”

From the above, it is immediately evident that Article 3(1)(b) defines what constitutes an acquisition of control that is necessary for a concentration to exist. It relates to the acquisition of sole control as well as the acquisition of joint control (“the acquisition [...] by [...] more undertakings”). In my opinion, Article 3(1) can only be interpreted as a self-standing provision which determines the scope of what constitutes a concentration: the merger of previously independent undertakings, or the acquisition of control, either sole or joint, over an undertaking, part of an undertaking or over assets.

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<sup>119</sup> Case M.6439 *Agrana / RWA / JV*, para 19; The Commission used the exact same sentence in case M.6339 *Freudenberg & Co / Trelleborg / JV*, para 8, for example; However, the Commission (correctly) referred only to Article 3(4) in case M.6369 *HBO / Ziggo / HBO Nederland* para 12, for example: “Based on the above, and in line with the provisions of the Commission Consolidated Jurisdictional Notice, it can be concluded that HBO Nederland will be a full-function joint venture and that therefore the transaction constitutes a concentration within the meaning of **Article 3(4)** of the Merger Regulation.” There are many more examples, but these Decisions were selected as they are very recent: the first two were adopted in April and May 2012 respectively, and the last one in December 2011.

If it were otherwise, there would be no need to separate a single concept in two different, not even neighbouring, paragraphs and thus create potential confusion. Article 3(1)(b) could itself state that an acquisition of joint control is a concentration only if it results in the undertaking under control being a full-function joint venture. Moreover, if Article 3(4) were meant to be applicable to all acquisitions of joint control, there would simply be no need for the concept of joint control in Article 3(1)(b): instead, it would be much more logical to have one provision apply only to acquisitions of sole control, leaving the other (the current Article 3(4)) to deal with all acquisitions of joint control. There is no need nor does it make sense to duplicate provisions on joint control in both Article 3(1)(b) and 3(4).

Therefore, Article 3(4) is not intended to limit the scope of Article 3(1)(b), but to bring a specific operation (the creation of a new joint venture) within the scope of the Merger Regulation, without prejudice to the existing scope of Article 3(1)(b) which deals with operations other than the creation of a joint venture. Article 3(4) simply clarifies that an operation which can be interpreted as being different and separate from acquisition of control is a concentration within the meaning of Article 3(1)(b). It could be considered that, since the joint venture does not yet exist, the control is not acquired. Rather, it is created. If Article 3(4) was meant to be a *condition sine qua non* for an acquisition of joint control to constitute a concentration, the wording in it would have to be much more explicit. Instead, its wording is significantly different than that of Article 3(1)(b): the word joint venture is not mentioned anywhere in the text of Article 3(1)(b); the term used is acquisition of control by more than one person. Article 3(4) does not state that the acquisition of joint control in Article 3(1)(b) shall constitute a concentration only if it results in a full-function joint venture; instead it only says that a certain operation comes within the meaning of Article 3(1)(b).

A further indication can perhaps also be found in the position of Article 3(4): under the original Merger Regulation the full-function criteria were placed in Article 3(2), just after the rules on acquisition of (joint) control in Article 3(1)(b). Thus, it could seem that these two provisions were directly connected. However, in the current Merger Regulation the provision on full-function joint ventures has been moved to paragraph 4 of Article 3. The provisions previously placed after the full-function criteria have been positioned between the full-function criteria and the concept of acquisition of joint control, although they stayed the same in substance.<sup>120</sup> Therefore the reorganization of Article 3 could be seen as an effort to distance the

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<sup>120</sup> With the exception of the addition of the concept „change of control“ in paragraph 1 and a slight re-wording of other paragraphs. However, the wording of the paragraph on full-function joint ventures has remained identical.

full-function criteria from the concept of acquisition of joint control. The paragraphs in between them are directly related to explaining Article 3(1)(b) and deal with the concept of control, describing how control can be constituted and by whom. However, Article 3(4) does not explain or qualify the content of Article 3(1)(b) in the way that articles 3(2) and 3(3) do. Instead, it brings the concept of creation of full-function joint ventures within the scope of Article 3(1)(b), without prejudice to the existing concept and scope of acquisition of joint control.<sup>121</sup>

Therefore, when establishing its jurisdiction for the creation of a new full-function joint venture the Commission should only refer to Article 3(4), to avoid any confusion. It is completely unnecessary to mention Article 3(1)(b), since reference to it is already contained in Article 3(4) itself. Explicitly mentioning Article 3(1)(b), as in *Agrana / RWA / JV*, risks creating the (incorrect) view that Article 3(4) limits Article 3(1)(b).

## 7.4 “Creation” of a joint venture

Another indication that Article 3(4) is not meant to limit Article 3(1)(b) can be found in the text of Article 3(4), which states that it only applies to the creation of full-function joint ventures. The term “creation of a joint venture” can be interpreted either narrowly or widely. Therefore, the meaning of Article 3(4) hinges on the interpretation of that term and specifically on interpretation of the word “creation.” Interpreted widely, Article 3(4) limits Article 3(1)(b). Interpreted narrowly, it does not.

In the opinion of *di Brozolo and Gustafsson*, the term “creation” should be understood widely: a joint venture is created every time joint control is established where it did not previously exist. Hence, an acquisition of joint control is a concentration only if it fulfils the full-function criteria and there is no room for a distinction based on the method in which joint control is established: the only relevant issue should be the end result of the operation, *i.e.* whether there is a self-standing undertaking capable of operating on the market. They do not agree with a narrow understanding of the word “creation”, meaning that only the creation of a completely new entity should be subject to the full-function test. Such an interpretation is, in their opinion, unpersuasive as there is no justification for making a distinction between the different types of operations which establish a joint venture. Hence, the difference in terminology of paragraphs 3(1)(b) and 3(4) is irrelevant and

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<sup>121</sup> This is also the opinion of *Rudolf and Leupold*, while *di Brozolo and Gustafsson* believe that all Article 3(4) limits Article 3(1)(b) and that all acquisitions of joint control should be subject to the full-function test.

the full-function criteria simply qualify the acquisition of joint control in Article 3(1)(b): the term “creation of a joint venture” in Article 3(4) should be understood as meaning “acquisition of joint control” in Article 3(1)(b).

It must be noted that at the time of the article by *di Brozolo and Gustafsson*, the Commission’s Notice on full-functionality had a somewhat different wording than exists today. It provided the definition of a joint venture (as any undertaking under joint control) and it stated that joint ventures come within scope of the Merger Regulation “if they meet the requirements of a concentration set out in Article 3 thereof.” The Notice on full-functionality did not mention the word “creation”, (although old Article 3(2) did): it simply stated that a joint venture must meet the requirements in Article 3 to be considered a concentration. It could easily be interpreted that the requirements of Article 3 included the full-function criteria in old Article 3(2).<sup>122</sup> Perhaps even more importantly, the previous Notice on full-functionality also stated that joint ventures must perform, on a lasting basis, all the functions of an autonomous economic entity to bring about a lasting change in the structure of the undertakings. The word “creation” is again not mentioned.<sup>123</sup> Therefore, from these rather general statements that joint ventures must be full-function to come within the scope of the Merger Regulation, it is easy to believe that Article 3(4) limits Article 3(1)(b).

However, the wording of the Consolidated Jurisdictional Notice has not remained the same as in the previous notices. The full-function section of the Notice now explicitly states that the “*creation*” of a full-function joint venture constitutes a concentration (paragraph 11 of the old Full-function Notice does not mention the word “creation”). It also explicitly states that acquisition of joint control over a pre-existing undertaking constitutes a concentration regardless of full-functionality.

Thus, it is clear the Commission interprets the word “creation” in Article 3(4) narrowly: it only considers the creation of new economic entities as subject to the full-function criteria. This can also be interpreted from footnote 84 of the Consolidated Jurisdictional Notice, where it seems that the Commission states that the term “creation of a joint venture” in Article 2(4) is not the same as that in Article 3(4);<sup>124</sup> it distinguishes between the

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<sup>122</sup> Notice on the Concept of Full-functionality, para 4

<sup>123</sup> Notice on the Concept of Full-functionality, para 11

<sup>124</sup> Footnote 84 of the Consolidated Jurisdictional Notice states: „These considerations do not apply to Article 2(4) in the same way. Whereas the interpretation of Article 3, paragraphs (1) and (4) relates to the applicability of the Merger Regulation to joint ventures, Article 2(4) relates to the substantive analysis of joint ventures. The ‘creation of a joint venture constituting a concentration pursuant to Article 3’, as provided for in Article 2(4), comprises the acquisition of joint control according to Article 3, paragraphs (1) and (4).“

meaning of the word “creation” in Article 2(4), which deals with joint ventures possibly falling under Article 101 TFEU, and in the jurisdictional rules of Article 3. It seems the word “creation” has a wider sense in Article 2(4), which covers both the creation of a full-function joint venture under Article 3(4) and an acquisition of joint control under Article 3(1)(b). On the other hand, the term “creation” in Article 3(4) has, as stated above, a narrower meaning and covers only the creation of a new joint venture undertaking, not acquisition of joint control over a pre-existing one. And of course, for the purpose of establishing whether an operation must be notified under the Merger Regulation, only Article 3 is relevant.

Again, contrary to *di Brozolo and Gustafsson*'s view, it must be emphasized that it would make little sense if both Article 3(1)(b) and 3(4) dealt with the same operations, *i.e.* if Article 3(4) was applicable to every acquisition of joint control. It would create even more confusion and lead to an unnecessary duplication of provisions: in such a case it would make much more sense to have one provision deal only with acquisition of sole control and leave the other to deal only with acquisition of joint control.

## 7.5 Why is there still uncertainty?

As has been shown above, although the its previous practice was very inconsistent, in recent times the Commission has provided relative clarity (at least for type 2 operations and hopefully soon for type 3 operations) that the term “creation” should be interpreted narrowly, so that full-functionality is examined only when a new joint venture undertaking is created. This has also been reflected in the Consolidated Jurisdictional Notice. I believe that such a change in approach is fully consistent with the Merger Regulation, which makes a distinction between acquisition of joint control and creation of new full-function joint ventures: it considers them as different operations and, hence, does not intend for Article 3(4) to limit Article 3(1)(b).

But if full-functionality is relevant only for the creation of a new joint venture undertaking, why does the Commission still refer to full-functionality at times, in operations of change from sole to joint control (type 3 operations)? In their article, *Rudolf and Leupold*<sup>125</sup> suggest that not much weight should be given to the Commission's references to full-functionality in these cases, as they believe this was simply *obiter dictum* by the Commission, likely mentioned only because the parties discussed the

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<sup>125</sup> Lars-Peter Rudolf and Bettina Leupold, „*Joint Ventures - The Relevance of the Full Functionality Criterion under the EU Merger Regulation: There Remains a Need for Clarification*” in *Journal of European Competition Law & Practice* Advance Access, first published online May 9, 2012 doi:10.1093/jeclap/lps026, page 4, footnote 17



full-function criteria. However, I do not see this as a plausible explanation. It is unlikely that the Commission would perpetuate the parties' misconceptions instead of correcting them, as it has done in some cases.

In *Buitenfood / Ad van Geloven Holding / JV*, the parties wanted to merge the activities of their subsidiaries active in production of frozen food and snacks, by contributing them to a holding company under the parents' joint control. The parties considered that this was an operation of acquisition of joint control under Article 3(1)(b). The Commission, however, disagreed and expressly corrected the parties by stating: "The Parties claim that the operation constitutes the acquisition of joint control in accordance with Article 3(1)(b). However, the merged entity is created by SHV and Lion contributing assets [...] which SHV and Lion previously owned individually. The proposed transaction brings them under a holding company [...]. Consequently, in view of recital 92 of the Commission's Jurisdictional Notice [...], the acquisition has all characteristics of the creation of a joint venture within the meaning of Article 3(4) [...]."<sup>126</sup>

Therefore, the argument that full-functionality is mentioned only as *obiter dictum* does not sound particularly convincing. In my opinion, it is far more likely that the Commission is still unsure of how to treat changes from sole to joint control, although there is guidance in the Consolidated Jurisdictional Notice. Since there is no "clear house view" in the Commission,<sup>127</sup> perhaps application of full-functionality depends on the individuals within DG COMP which assesses the operations and their understanding of the criteria.

## 7.6 Is the distinction justified

### 7.6.1 External growth

In spite of the uncertainty that still exists regarding changes from sole to joint control, it is evident that the Commission (as seen in the Consolidated Jurisdictional Notice) is of the opinion that acquisition of joint control can be considered a concentration in itself. It is also evident that such a position is based on the Merger Regulation, which considers acquisitions of joint control and creation of full-function joint ventures as different operations to which different jurisdictional criteria apply (*i.e.* full-functionality will only apply to creation of new joint ventures). However, even if it is formally

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<sup>126</sup> Case M.6321 *Buitenfood / Ad van Geloven Holding / JV*, paras 7-8

<sup>127</sup> Lars-Peter Rudolf and Bettina Leupold, „*Joint Ventures - The Relevance of the Full Functionality Criterion under the EU Merger Regulation: There Remains a Need for Clarification*” in *Journal of European Competition Law & Practice Advance Access*, first published online May 9, 2012 doi:10.1093/jeclap/lps026, page 4 and footnote 20

correct under the Merger Regulation, is such a position justified? As stated by di *Brozolo and Gustafsson*, in practice this leads to different jurisdictional criteria applying to operations which essentially have the same result and effect: regardless of whether a new undertaking is created or if joint control is acquired over a pre-existing undertaking, the result is that a joint venture is established where it did not previously exist.

Regarding acquisition of joint control over a pre-existing undertaking from third parties (type 2 operations), certain authors consider that such an operation constitutes a notifiable concentration without the need to consider the full-function criteria because the operation creates external growth of the new parents, which leads to a notifiable structural change in the market:<sup>128</sup> the parents acquire new resources which they did not previously possess, in the form of the acquired joint venture. This is perhaps comparable to acquisitions of sole control, where it is not important what the parent intends to do with the undertaking for the operation to constitute a concentration.

On the other hand, according to the same authors, there is no external growth when it comes to operations of change from sole to joint control and creation of a new full-function joint venture: in both cases the parents only have their combined resources and therefore full-functionality should be examined. In changes from sole to joint control there is a growth of resources for the new parent but a decrease of resources for the previous sole parent: however, in total their combined resources are the same before and after the operation. This is also the case when a new full-function joint venture is created: the parents use/contribute their own assets to the joint venture, thus there is no external growth of their combined resources.

But is this explanation adequate? As we have seen in the above sections, the Commission has often omitted to apply the full-function criteria to changes from sole to joint control, even though it should have applied them according to the above explanation of external growth. Furthermore, should the Commission correctly consolidate its practice in line with the Consolidated Jurisdictional Notice, in the future it will consistently omit to apply the full-function criteria in accordance with paragraph 86 of the Notice. Therefore, it is evident that external growth is not the determining factor for examination of full-functionality.

Moreover, can acquisition of joint control really be compared to acquisition of sole control when it comes to external growth? Whereas in acquisitions of sole control it is irrelevant what the fate of the acquired undertaking will

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<sup>128</sup> Michael Rosenthal, Stefan Thomas, *European Merger Control* (C.H. Beck, Hart Publishing: 2010), page 39

be and there is definite external growth, the acquired control is not of the same quality in cases of joint control. As the Commission has stated, the quality of joint control is determined by the identity, composition and relationship of the jointly controlling undertakings.<sup>129</sup> Therefore, joint control is significantly different than sole control; whereas an undertaking can alone decide on the fate of resources it solely controls, it cannot do the same with resources it controls jointly with another undertaking.

## 7.6.2 Concept of “undertaking”

The more probable explanation is offered by *Rudolf and Leupold*,<sup>130</sup> who argue that the distinction between creation of a new joint venture and acquisition of control over a pre-existing undertaking is based on the concept of “undertaking”. According to the Merger Regulation the object of a change of control, which is necessary for a concentration to exist, is an undertaking or a part of an undertaking. Article 3(1) reads: “A concentration shall be deemed to arise where a change of control on a lasting basis results from: *(a)* the merger of two or more previously independent **undertakings or parts of undertakings**, or *(b)* the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the **whole or parts of one or more other undertakings**.” (emphasis added).

The same can be read from paragraph 24 of the Consolidated Jurisdictional Notice, as well as recital 20 of the Merger Regulation, which states that the Regulation should cover operations that bring about a lasting change in control of the undertakings concerned and thus lead to a lasting change in the structure of the market. Hence, to come within scope of the Merger Regulation an operation must have an undertaking or part of an undertaking as its object. Therefore, operations which do not directly involve acquisition of control over an undertaking or part of it need to fulfil additional criteria in order to be considered as “undertakings” (or at least comparable to undertakings) in Article 3(1). Acquisitions of control over assets, for example, need to fulfil the additional “market presence to which a market turnover can be attributed” test. Assets which do not fulfil these requirements cannot be considered as undertakings or parts of them and

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<sup>129</sup> Consolidated Jurisdictional Notice, para 143

<sup>130</sup> Lars-Peter Rudolf and Bettina Leupold, „*Joint Ventures - The Relevance of the Full Functionality Criterion under the EU Merger Regulation: There Remains a Need for Clarification*” in *Journal of European Competition Law & Practice* Advance Access, first published online May 9, 2012 doi:10.1093/jeclap/lps026

hence their change of control will not lead to a change in the structure of the market and does not need to be notified to the Commission.

Logically, the same will be true for joint ventures. It is not certain whether a newly created joint venture will be an “undertaking” or not. Therefore, the additional full-functionality test needs to be conducted, as it essentially examines whether the joint venture is an independent undertaking on the market, *i.e.* whether it is an undertaking for the purpose of Article 3(1)(b). This is also stated in recital 20 of the Merger Regulation: for a concentration to exist there must be a change of control over an undertaking or part of it and therefore in the structure of the market; creation of a joint venture will lead to a change in the market structure only if it is a full-function one. Thus, Article 3(4) does not limit Article 3(1)(b), but simply explains what conditions a new joint venture must fulfil to be considered an “undertaking” for the purpose of Article 3(1)(b). Pre-existing undertakings are already considered as “undertakings” for the purpose of Article 3(1)(b), hence they do not have to fulfil the full-function criteria. From this perspective, it seems perfectly reasonable that there is no need to examine full-functionality when there is an acquisition of joint control over pre-existing undertakings from third parties or a change from sole to joint control.

Therefore, acquisitions of joint control over a pre-existing undertaking from third parties (type 2 operations) or changes from sole to joint control over a pre-existing undertaking (type 3 operations) can correctly be considered as different from the creation of new joint ventures (type 1 operations). However, correctness aside, this approach is not immune to criticism. Perhaps the biggest criticism is that it can lead to different jurisdictional treatment of very similar (or essentially the same) operations and that it distinguishes joint ventures solely on the method used for their establishment. Merger control generally adopts a structural, substantive and forward-looking approach which has regard to the effects of the transaction on the market, not simply its form.<sup>131</sup> If a new joint venture intended to operate only for the parents (*i.e.* is not full-function) does not have to be notified when established, should the acquisition of joint control over a pre-existing undertaking which only operates for its parent and will after the operation only operate for its parents be notifiable?

An example of very similar operations being subject to different jurisdictional rules can be seen by comparing the decisions in *T-Mobile* /

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<sup>131</sup> Luca G. Radicati di Brozolo & Magnus Gustafsson, “*Full-function joint ventures under the Merger Regulation: the need for clarification*” in *European Competition Law Review* 2003, 24(11), pages 574-579, at page 576-577

*Orange*<sup>132</sup> and *North Sea Group/Argos Groep/JV*.<sup>133</sup> In *T-Mobile / Orange*, T-Mobile UK was a subsidiary of Deutsche Telekom, while Orange UK was a subsidiary of France Telecom. Both T-Mobile and Orange independently provided telecommunication services on the UK market. Deutsche Telekom and France Telecom wished to create a joint venture to which they would contribute their respective subsidiaries and hence merge their activities. The Commission classified the operation as the creation of a new joint venture undertaking to which the parents contributed their subsidiaries. It then applied the full-function criteria by stating that the joint venture would combine the existing activities of the subsidiaries, which undoubtedly had all the characteristics of autonomous economic entities. It thus concluded that the joint venture would be a full-function one.

On the other hand, in *North Sea Group / Argos Groep / JV*, the undertakings Reggeborgh and Argos Energy Group wanted to merge the activities of their respective subsidiaries, North Sea Group and Argos Groep. They structured the operation in such a way that Argos Energy Group transferred all its shares in Argos Groep to Reggeborgh's holding company of its subsidiary North Sea Group. In return for its transfer of shares, the Argos Energy Group received shares in the holding company which now held the shares of both previous subsidiaries. Thus, Argos Energy Group and Reggeborgh would have joint control over their previous subsidiaries through the holding company, which through the operation became their joint venture. The Commission classified the operation as an acquisition of joint control over pre-existing undertakings (each other's subsidiaries). Thus, it did not consider the full-function criteria and after establishing joint control declared that the operation constituted a concentration within the meaning of Article 3(1)(b) of the Merger Regulation. Thus, it is evident that two essentially equal operations (both leading to the merging of activities of the parents' subsidiaries and joint control over the combined undertaking) were treated quite differently based on the structure of the operation.

Moreover, another important problem can exist in the fact that even a new joint venture can be created in several ways, not just by incorporating an entirely new entity. For example, in *Veolia Transport / Trenitalia / JV*<sup>134</sup> the parties created a new joint venture through a shell company<sup>135</sup> which was

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<sup>132</sup> Case M.5650 *T-Mobile / Orange*

<sup>133</sup> Case M.6261 *North Sea Group / Argos Groep / JV*

<sup>134</sup> Case M.6150 *Veolia Transport / Trenitalia / JV*

<sup>135</sup> "A non-trading company used as a vehicle for various financial manoeuvres or kept dormant for future use in some other capacity" – "shell company *noun*" *Oxford Dictionary of English*. Edited by Angus Stevenson. Oxford University Press, 2010. *Oxford Reference Online*. Oxford University Press. Lunds universitet. 26 May 2012 <http://www.oxfordreference.com>

previously under the sole control of Veolia. The transaction consisted in “**the creation** by Trenitalia and Veolia Transport of a joint venture company. To this end, they will use an existing shell company currently fully owned by Veolia Transport. Veolia Transport will sell 50% of the shares of the shell company to Trenitalia. The joint venture company will thus be jointly owned on a 50/50 basis by Trenitalia and Veolia Transport.”<sup>136</sup> (emphasis added). As the shell company did not have any previous activities, the Commission considered the operation to be the creation of a new joint venture and hence examined full-functionality.

However, the question arises, if a new joint venture can be created through a shell company, what exactly are the limits of a shell company? This question becomes important to determine whether the operation will be considered as a creation of a new joint venture through a shell company (where full-functionality will be applied) or as a change in quality of control from sole to joint control (where full-functionality will not be applied). But where does a company stop being a shell company and start being an independent undertaking on the market? What test is used to establish that?

If the test is whether the company had any activities before the transaction or not, what amount or intensity of activities is sufficient? If the test of that was whether the undertaking has an independent presence on the market, would that lead to the paradox that the, essentially, full-functionality prior to the operation would determine whether the full-function test would be applied to the assessment of concentration (so that if the company was a full-function one before the operation the test would not be applied to the operation, and *vice versa*, if the company was not full-function prior to the operation it would be considered a shell company and the full-function test would be applied to the operation)? This is, admittedly, very hypothetical and taking the potential uncertainty to the extreme. However, the intent was to show that it is sometimes difficult to distinguish between different situations, which can lead to transactions which have very similar results being subject to different jurisdictional rules based on their structure.

## 7.7 Three proposed approaches

Considering the above, perhaps it would be more desirable for all operations which have the same result (that a joint venture exists where there was no joint control previously) to be treated in the same way, *i.e.* that the

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[oxfordreference.com/ludwig.lub.lu.se/views/ENTRY.html?subview=Main&entry=t140.e0763380](https://oxfordreference.com/ludwig.lub.lu.se/views/ENTRY.html?subview=Main&entry=t140.e0763380)

<sup>136</sup> Case M.6150 *Veolia Transport / Trenitalia / JV*, para 8

full-function test is applied to all methods of establishing a joint venture. This is the proposal given by *di Brozolo and Gustafsson*.

However, the opposite solution is proposed by *Rudolf and Leupold*. They argue that full-functionality should only be applied to the creation of new joint ventures, as it is uncertain they will constitute undertakings for the purpose of Article 3(1)(b). If there is an acquisition of joint control over a pre-existing undertaking from a third party or a change from sole to joint control over a pre-existing undertaking the full-function criteria should not be applied, since the companies being transformed into joint ventures are already undertakings for the purpose of Article 3(1)(b). The same is true for the creation of a new joint venture when the parents contribute their subsidiaries to the joint venture (like, for example, in *T-Mobile / Orange*, mentioned above). This operation would also, essentially, involve a change from sole to joint control over the contributed companies, which can already be considered as undertakings for the purpose of Article 3(1)(b).

Hence, full-functionality should not be examined in such cases either. It should only be examined when the parents create a new joint venture to which they contribute resources which cannot be considered as undertakings for the purpose of Article 3(1)(b) (such as capital or assets without a market presence). It must be noted that this is an even narrower approach than the one currently adopted by the Commission, which applies the full-function criteria to creation of new joint ventures even when the parents contribute their pre-existing subsidiaries to the joint venture (as, for example, in *T-Mobile / Orange*). Paragraph 92 of the Consolidated Jurisdictional Notice expressly states that “The full-functionality criterion therefore delineates the application of the Merger Regulation for the creation of joint ventures by the parties, irrespective of whether such a joint venture is created as a ‘greenfield operation’ or **whether the parties contribute assets** to the joint venture which they previously owned individually.” (emphasis added).

Therefore, it is evident that three different approaches exist regarding application of full-functionality to joint ventures. The first approach is the widest one: to apply the full-function criteria to all acquisitions of joint control, as proposed by *di Brozolo and Gustafsson*. The second, middle approach, is the Commission’s current approach to apply the full-function criteria only to the creation of new joint ventures (provided that it clarifies its practice regarding changes from sole to joint control and follows paragraph 86 of the Consolidated Jurisdictional Notice). The third, most narrow approach is to apply the full-function criteria only to creation of new joint ventures when the parents do not contribute their existing undertakings to the joint venture, as proposed by *Rudolf and Leupold*.

While all the approaches surely have certain flaws, in my opinion the third approach is the most suitable one, as it preserves the distinction between acquisition of joint control over pre-existing undertakings and creation of new joint ventures, as intended by the Merger Regulation. It also prevents very similar operations being subjected to different jurisdictional rules (changes from sole to joint control and contribution of existing undertakings to a new joint venture, for example). However, it is probably unlikely that the Commission will change its approach that much or modify the text of the Consolidated Jurisdictional Notice. The next best thing, then, would be for the Commission to continue its current approach, with clarification of its position regarding changes from sole to joint control: it should follow paragraph 86 of the Consolidated Jurisdictional Notice and consistently omit to apply the full-function criteria.

## **7.8 Chapter summary**

The Commission's current practice regarding the full-function criteria is, as a rule, to apply them only to the creation of new joint ventures. Whether such an approach is correct depends on the relationship between Articles 3(1)(b) and 3(4). The prevailing view is that Article 3(4) limits Article 3(1)(b) and that full-functionality should be examined for every acquisition of joint control. However, that view is incorrect. It would make no sense for the Merger Regulation to create confusion by duplicating provisions on joint control. Moreover, the term „creation of a joint venture“ must be interpreted narrowly, otherwise the concept of acquisition of joint control in Article 3(1)(b) would be superfluous. Therefore, Article 3(4) does not limit Article 3(1)(b) and the full-function criteria is intended to be applied only to newly created joint ventures. This is because the object of control in the Merger Regulation is an “undertaking” (or part of it). When a new joint venture is created its full-functionality is examined to determine whether it constitutes an „undertaking“ for the purpose of Article 3(1)(b).

The best approach to full-functionality would be for the criteria to apply only to the creation of a new joint venture when the parents do not contribute pre-existing undertakings to it, so that similar operations are not treated differently. However, it is unlikely the Commission will adopt such an approach. Therefore, it should further clarify its existing approach by consistently omitting to apply full-functionality to changes from sole to joint control, where some uncertainty still exists. Then, full-functionality would only be applied to new joint ventures (regardless of whether the parents contribute pre-existing undertakings to it). Such an approach would be fully consistent with the Consolidated Jurisdictional Notice.



## 8 Conclusion

At the beginning of this thesis, I had set out to clarify the application of the full-function criteria to different methods of establishing joint ventures: in which cases will the Commission examine the full-function criteria and why? It is easy to think that the full-function criteria should be applied to all joint ventures, regardless of how they were formed. However, that is not the case. The Commission's approach since the adoption of the Consolidated Jurisdictional Notice is that only the creation of new joint venture undertakings will be subject to the full-function criteria. Establishing a joint venture by acquiring joint control over a pre-existing undertaking from third parties will be considered a notifiable concentration without the need to examine full-functionality, following paragraph 91 of the Notice. However, there is still some uncertainty regarding changes from sole to joint control over a pre-existing undertaking. The Commission's recent practice has not been fully consistent. However, this operation is covered by paragraph 86 of the Notice, which states that the full-function criteria shall not be applied. It is reasonable to assume that in the future the Commission will consolidate its practice and make it consistent with the Notice regarding this type of operation as well, which would remove any remaining uncertainty.

In my opinion, this approach by the Commission should not present significant problems to industry, as long as there is sufficient clarity and predictability when full-functionality will be examined. While there will be no difference regarding the creation of new joint ventures which the parties intend to be full-function ones, the current approach gives industry an easier way to structure their transactions in order to bring non-full-function joint ventures within the scope of the Merger Regulation and obtain the Commission's clearance, which is what the parties, as a rule, prefer.

In the case of non-full-function joint ventures, instead of creating a new undertaking the parties would need to structure their operation in such a way that it constitutes an acquisition of joint control over a pre-existing undertaking. They could do so, for example, by acquiring joint control over a pre-existing company on the market to which they can afterwards contribute their assets or subsidiaries, or by one parent establishing a subsidiary (which is not merely a shell company) over which the other party can later acquire joint control and contribute its assets to it. There are surely even more ways how the transaction can be structured to achieve the same result: that the parties can establish joint ventures which will come within the scope of the Merger Regulation and can receive the Commission's clearance even if they are not full-function joint ventures.

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