Strategic Alliances in the Telecommunications Sector. An EC Competition Assessment

Meurling, Eva

2002

Strategic Alliances in the Telecommunications Sector

An EC Competition Law Assessment

Eva Meurling
eva.meurling@svefo.se

Eva Meurling, LL.M.

Master of Laws, Lund University, Sweden and Freie Univeristät, Berlin, Germany

This paper is based on Eva Meurlings's master thesis completed in June 2001 at the University of Lund, which was awarded second prize at a competition sponsored by the Centre of European Studies in Lund.

Eva Meurling finished her postgradual Master of Laws studies at the Freie Universität Berlin in December 2002 and is currently working for a law company called SVEFO in Gothenburg.

CFE Working paper series is published by
Centre for European Studies at Lund Univerity

Editor: Magnus Jerneck
Layout: Mikael Sundström
ISSN: 1403-6754

This paper is also available in pdf-format at CFE's web site: www.cfe.lu.se

CENTRE FOR EUROPEAN STUDIES AT LUND UNIVERSITY:

Box 52
SE-221 00 LUND
Sweden

Phone: +46 (0)46-222 88 99
Fax: +46 (0)46-222 40 06
Email: cfe@cfe.lu.se

Abstract

Strategic alliances can be defined as contractual co-operation agreements between two legally independent companies operating on the same horizontal level of the market, the purpose of which is to strengthen the competitiveness of the undertakings concerned through the achievement of strategic competitive advantages. Having its origin in theories of business management, the term has over the last decade become somewhat of a buzzword and a very popular form of co-operation between international undertakings. The objective of this working paper has therefore been to analyse the term "strategic alliance" according to Article 81 of the EC Treaty and its subordinated regulations and principles, e.g. what new types of circumstances may arise and what possible consequences may these have on competition in the relevant markets? The special emphasis, however, lies on the question whether the existing legal framework and legal principles of the EC Treaty offer a sufficient basis in order to make an adequate assessment of the phenomenon? A particular emphasis of this paper will also lie on the telecommunications sector, a market which over the last decade has been particularly affected and influenced by strategic alliances.

Introduction

One of the most interesting and controversial topics in business management theories today is the concept of 'strategic alliances', a term that defines a rather innovative and interesting form of relationship between companies or organisations. The growing importance and quickening pace of strategic alliances in all kinds of different industries all over the world are in economic theories regarded as the answer to an ever-growing globalisation of the relevant markets and an increased competition. Furthermore, they are seen as a preferable alternative to mergers and acquisitions and as a legitimate form of co-operation between enterprises that raises no concerns as regards competition between the participating undertakings or the rest of the relevant market.

Legal theorists however, especially those concerned with the Competition Rules of the EC Treaty, are not very impressed by this eulogy and in contrast tend to look upon strategic alliances with more critical eyes. When looking at the notion through the eyes of a lawyer rather than through those of a businessman, various questions automatically pop up: What new types of circumstances may arise out of strategic alliances? What possible consequences may these have on competition in the relevant markets? And: Do the existing legal framework and legal principles of the EC Treaty offer a sufficient basis in order to make an adequate assessment of the phenomenon?

Strategic alliances are not yet the subject of any Regulation or other specific legislative work and therefore have to be assessed according to the general framework of EC Competition Law, i.e. Article 81 and 82 of the EC Treaty and the Merger Regulation[1]. This paper will however only deal with aspects of Article 81 (1) and 81 (3) of the EC Treaty.

Strategic alliances are created in all kinds of different markets and industries, but there is one sector which over the last decade has been particularly affected and influenced by this new phenomenon: the telecommunications sector. The telecom market is not only one of the largest and most profitable sectors in the world but also one of the 'hottest' due to its convergence with the information technology and media industries. The evolution of the Internet and broadband services together with the introduction of full liberalisation and competition into the EU's telecommunications have forced the telecom companies to rethink and reposition themselves and to look for potential co-operation partners all over the world.

The notion of strategic alliances

The notion of strategic alliances is rather vague and it is quite a difficult task to try to give a clear and universally accepted definition of the term. Not only does there not exist an official definition, strategic alliances are furthermore the subject of interest in various different fields of scientific research such as legal and business management theories.

Definition

The origin of the term strategic alliance can be found in business administration theory where Robert Hoxie introduced it for the first time in 1923 in regard to co-operations between trade unions. Hoxie considered such a co-operation to be strategic if it was used in order to overcome the disadvantages of a smaller trade union by a co-operation agreement with a larger one.[2]

Michael Porter, professor at Harvard Business School and according to many scientific authors responsible for coining the term in modern history, has defined a strategic alliance as a formal, long-term alliance between two companies, which has as its object the co-ordination of certain commercial activities but does not result in a complete merger. The alliance becomes strategic when it is used in a specific business field to increase the undertaking's overall competitive strength. Porter also includes an international component by pointing out that strategic alliances generally are used as part of a company's internationalisation strategy.[3]

Miguel Castellot understands by strategic alliances a "wide arrangement between companies which does not reach the level of a full merger of all their activities, but that goes beyond a limited agreement to do some activities in common."[4] He also points out as another feature that most strategic alliances "include a possibility of evolution in accordance with market changes"[5] and that they are "answers to a progressive, very substantial and quick change of the conditions and characteristics of the market".[6]

Peter Dicken defines the major objective of a strategic alliance as "to enable the firm to achieve a specific goal which it believes that it cannot achieve on its own".[7]

The European Commission has so far refused to give an official definition of a strategic alliance. It took a formal position for the first time in its *BT/MCI*[8] decision from 1993, where the created strategic alliance was held to be an "action intended to position the partners with a view to the full liberalisation to come and not limited to the provision of value-added services".[9]

A conclusive and summarizing definition can be presented as follows: A strategic alliance covers contractual co-operation agreements between two legally independent companies operating on the same horizontal level of the market. Its purpose is to strengthen the competitiveness of the undertakings concerned through the achievement of strategic competitive advantages.[10]

Characteristics

Strategic alliances generally have both a formalistic side giving objective characteristics, as well as a subjective one defining the undertakings' intentions in being strategic. The objective picture shows that strategic alliances have to be understood as a co-operation between two legally independent companies that has to be based on a contractual agreement. Strategic alliances never result in a complete merger and the parties will continue to operate their original businesses independently from each other. The most common opinion seems to be that strategic alliances are formed between companies operating on the same horizontal market level and thus being actual or potential competitors. However, some authors claim that strategic alliances also can be created on a vertical level, and that alliances often are targeted between a firm and its supplier.[11] Further objective characteristics show that strategic alliances generally are formed between large undertakings located in different countries, quite often in a dominant position in their market. A strategic alliance must also have a long-term dimension attached to it, i.e. the co-operation cannot only be connected to a temporary market transition. In most cases, the realisation of a strategic business goal will take at least several years.[12]

However, solely because two undertakings agree to co-ordinate certain commercial activities does not automatically make the alliance strategic, it also has to fulfil certain subjective criteria. The co-operation must be connected to one specific, usually quite weak, business field of the enterprise and its purpose has to be to strengthen this specific area in order to strengthen the competitiveness of the entire company. The heart of a strategic alliance is therefore the conviction that co-operation and the creation of synergies are better than a go-it-alone strategy.[13]

Legal structures

The different forms of co-operation agreements between enterprises lie on a scale which stretches from concentrations at one end and arms-lengths-transactions at the other. Concentrations are characterised by a durable change in the structure of the undertakings concerned brought about through the loss of one legally independent company.[14] Arms-lengths-transactions lie on the opposite side of the scale and consist of co-operation agreements which merely comprise of the exchange of economic goods. They emerge out of a temporary contact and do not lead to any integration between the undertakings concerned.[15]

Strategic alliances can be positioned in the centre of this scale, since they neither result in a complete merger, nor in only temporary co-operation. The forms strategic alliances take at this stage of the scale are virtually unlimited, but most alliances are formed through the setting up of a joint venture.[16] Joint ventures usually involve both a financial and commercial integration of the parents' activities, which makes them a rather intense form of a strategic alliance. If the parties do not want this kind of integration, they can sign a contractual co-operation agreement without setting up a commonly owned joint venture, e.g. R&D, specialisation or licensing agreements. These kinds of agreements either have as their object for example the sale of certain technology or the transfer of know-how. Other forms are joint marketing agreements, collaboration on product design and outsourcing of all types.[17]

As most strategic alliances have the status of a horizontal co-operation, the question arises whether strategic alliances can be classified as a cartel. Examining the objective features of strategic alliances, one cannot differentiate them from a classic cartel. Both are horizontal arrangements between legally independent undertakings. However, if you look at the effect of these two kinds of co-operation agreements one can find substantial differences. Cartels have as their purpose to fix prices, share markets or limit productions and thus to make it almost impossible for fellow market participants to compete on equal terms on the market. Efficiency is gained not by making one´s own company stronger but by making the competitors weaker. Strategic alliances are arranged in order to improve efficiency by doing just the opposite: strengthening one´s own company and not interfering on unfair terms in the market game by way of fixing prices or sharing markets. It is also a general opinion that strategic alliances, in contrast to cartels, have an overall positive outcome on competition and that they make a positive contribution to the industrial market. However, one must not forget that these are the words of business management theorists and that legal analysts tend to see beyond this glorification of strategic alliances by way of analysing whether a cartel can hide behind such an alliance.[18]

Business management theory

Since strategic alliances have become so popular over the last decades it is important to analyse on the basis of business management theories why strategic alliances are formed in the first place and what are the critical factors governing a successful alliance. Furthermore one has to answer why strategic alliances have become such a preferable alternative to mergers and acquisitions.

Why are strategic alliances formed?

As a result of intensified foreign and global competition, shortened product cycles and the ever-growing demand for new technologies, strategic alliances are becoming more and more popular since their general and comprehensive goal is to strengthen the competitiveness of the undertakings concerned. This is achieved through the exploitation of each other's core competence and the results thereof, i.e. resources and connected strategic competitive advantages responsible for the undertaking's success. [19]

The most common reasons why strategic alliances are formed are often market- or technology-related, or a combination of the two. Mature industries generally incline towards market-related reasons to form alliances where the focus lies on the achievement of a stronger market position through the rationalisation of production, more effective distribution, increased range of products, improved resources for marketing etc. Market-related strategic alliances can also be important for companies wishing to penetrate a new market. Co-operation with the right partner can give access to essential distribution channels, new market segments and vital information about local market conditions and thus create possibilities to avoid numerous entry barriers. Franchising alliances can give the entrant access to a well-established brand and clientele.[20]

Companies who form alliances driven by technology-related factors are on the contrary usually non-mature undertakings fairly small and new on the market. These are enterprises either with a technology know-how at an embryonic stage which are looking for a partner to further develop their technology, or companies with recently matured technology know-how in need of a partner to apply and produce the technology. The emphasis here lies on an improvement in production and R&D and creating synergies by pooling resources, sharing expertise, increasing efficiency and reducing costs. Many high-tech productions are often too big and too time-consuming for any company to finance on its own and many technology-related strategic alliances have been found to be the basis for innovation rather than the individual companies themselves.[21]

Strategic alliances are thus being formed with such enthusiasm these days because no company on the market today is big and strong enough to do everything on its own. Strategic alliances give rise to an immense opportunity for risk diversification and image intensification and the global evolution of the world market demands international co-operation.[22]

Critical success factors

Despite the fact that strategic alliances create numerous advantages, they do not always achieve the desired results and up to 80% of all strategic alliances are terminated at an early stage.[23] Whether a strategic alliance will be successful depends on various factors such as finance, technology, marketing and management and they have to be based on a "win-win" relationship, i.e. mutual benefit must exist. The choice of partner is of course essential since that choice determines the mix of skills and resources available to the alliance. It is crucial to determine whether the selected partner has the capacity to meet the performance expectations of the alliance and therefore the values, commitment and capabilities of potential partners must be carefully scrutinised.[24]

Trust is another factor which is critical in a strategic alliance since each partner depends on the other to share information and to satisfy mutual goals. Trust can be examined from two distinct perspectives: character-based trust and competence-based trust. Character-based trust emphasises full awareness of each other's true strategic intentions, the willingness to be honest about problems and to maintain confidentiality about strategic plans and key information vis-à-vis third parties. Competence-based trust relies on knowledge about each other's specialised skills, ability to work well with others and decision making ability.[25]

Other critical success factors are the congruity between the partners about the purpose of the strategic alliance or about the process by which the agreed purpose is to be realised.[26] Cultural backgrounds may significantly impact the success of a strategic alliance, especially for those operating across national borders, e.g. between Europe and Asia.[27]

Alliances versus mergers

Rapid consolidation, market changes and deregulation in high technology industries and telecommunications have shown that companies must initiate mergers and search for potential partners among equals to survive. Often, however, the window of opportunity is so narrow that it is impossible to negotiate a merger or acquisition in a timely manner and that concentrations therefore become more and more disadvantageous. But what is it that makes the concept of strategic alliance such a preferable alternative? Firstly, strategic alliances can be quickly formed and disbanded if necessary, which enables companies rapidly to penetrate "hot" new markets and also to move on if something better comes along. They also allow the participating companies to enter into "trial marriage" before making the substantial commitment of resources that mergers and acquisitions entail.[28] Research, however, has shown that the transformation from a strategic alliance to merger and acquisition hardly ever takes place.[29]

The telecommunications market

The telecommunications market is one of the largest and most profitable economic sectors in the world. In the European Union it is a strategic sector of considerable interest since it is vital for the transition to the information society. With a deadline of 1 January 1998, all telecommunications infrastructure and services were fully liberalised ending an era of public monopolies on the telecommunications market. So far, it has been a success story where new private entrants, new services, investments and job creations have resulted in an extraordinarily dynamic growth at the end of the last decade.[30]

In 1987 the Commission published its Green Paper on Telecommunications[31] with its policy for liberalisation of the markets for telecommunications services and equipment. It was first of all based on the principle of immediate liberalisation within the framework of EC Competition law of all existing networks except voice telephony and furthermore on the adoption of standards for interconnection and network access for competitive service providers, the so-called "Open Network Provision", ONP.[32]

The liberalisation process was put into effect by a series of Commission Directives based on Article 86 of the EC Treaty (formerly Article 90).[33] The Services Directive, last amended by the Full Competition Directive, removed all special or exclusive rights for the provision of telecommunications services and thus ended the era of telecom monopolies. It fixed the date for full liberalisation by 1 January 1998 in EC legislation and set out deadlines for progress in national implementation in preparation for this goal. The Services Directive also gives a framework for general authorisation and individual licences for telecommunication services.

The ONP framework Directives enacted under Art. 95 EC[34] contain procedural and organisational rules for the Community-wide harmonisation of the conditions for "open and efficient access to and use of public telecommunications networks and, where applicable, public telecommunications services".[35] They are intended to facilitate access by private companies to public telecommunications networks and services and to give guidelines on how to regulate conditions of access.

Two years after the full implementation of liberalisation in the EU telecommunications market we are witnessing immense opportunities for economic growth and development. The extent of competition can be seen on the basis that on EU average around 80% of the population can choose between more than five operators for long distance and international calls and 30% of the population regarding local calls. Prices for international and long-distance calls have fallen by some 90% and there is full possibility of choice in the field of mobile communication.[36]

Characteristics of telecommunications

The evolving nature of the telecommunications market has particular characteristics which can be classified as either demand or supply side characteristics. The demand patterns for telecommunications networks and services have traditionally always been closely linked together, e.g. the demand for telephone services has more or less determined the development of the telecommunications infrastructure.[37] Until the mid-1970´s, telephone networks were almost exclusively used for the transmission of voice services; today customer demands require the transmission of many other services, so called value-added network services (VANS), such as data-processing, transaction and database services. The phone is no longer only a tool in order to speak with another person over longer distances.[38] The globalisation of the world economy and the evolution of the Internet have also produced a demand for global and seamless telecom services with a consistent level of 24 hours a day. Today's international firms require services to be provided on a "one-stop-shopping" or "one-stop-billing" basis where services should not be affected by geographic location, national borders, languages, currencies or time zones. Customers require a unique contact point where they can get help for any kind of difficulties that may arise wherever in the world and to receive one bill in one currency.[39]

The fulfilment of the demand-side requirements requires an enormous effort to be made by the telecommunications operators. Networks have to be adapted to meet the requirements for VANS, both on a technical and on a legislative basis. Providing services outside national borders is a recent market which has only been developing since the full liberalisation took place. Furthermore, international telecommunications are more and more provided for via satellite communication and private networks, which leaves many of the operators outside the game since they still lack the needed know-how and technical equipment to be able to compete fully on those conditions. Operators also cannot survive on the market any longer if they do not globalise their companies and enlarge the customer base and the geographic market they cover.[40]

Strategic alliances in the telecommunications market

Without exaggeration, one could say that conditions in modern time have never been better to form strategic alliances within the telecommunications sector. Since full liberalisation has taken place, a wave of mergers and joint ventures are being formed in order to pick up the remainder of the deregulated monopolies. Economic operators not necessarily affiliated to the traditional telecommunications market see important market opportunities and try to benefit from them by forming alliances with telecom undertakings. The former monopolists have not left the market silently, but are repositioning and adjusting themselves to the new commercial environment. To recuperate losses of national profits they are forming alliances in order to penetrate new markets in other parts of the world.[41] Major telecom alliances in Europe can be divided into two main categories:[42]

Strategic alliances between telecom operators:
The main objective of these alliances is to provide advanced global and seamless telecommunications services to corporate clients.

Strategic alliances between telecom operators and non-telecom companies:
These alliances are usually intended to permit telecom operators from one country to benefit from the forthcoming liberalisation in another country or to benefit from other market opportunities created by new technolo-

gies. The non-telecom companies are often undertakings capable of providing to the alliance either a strong financial base, e.g. a bank, or an existing network, e.g. energy companies.

The Commission has examined a number of strategic alliances between telecom companies under Article 81 of the EC Treaty, of which the most important ones will be presented hereafter. All cases relate to strategic alliances in the form of joint ventures and were based on notifications for exemption pursuant to Article 4 of Regulation No. 17.[43]

BT/MCI[44]

The first case in which the European Commission took a formal decision concerning a strategic alliance between telecom operators was the *BT/MCI* decision in 1994. British Telecommunications (BT), the former UK monopolist telecommunications operator, and MCI Communications Corporation (MCI), the second largest telecommunications common carrier in the US, notified a request for negative clearance and/or exemption pursuant to Regulation 17.[45]

The notified operation comprised two main transactions, under the first BT was to take a 20% stake in MCI and under the second the two companies were to create a joint venture undertaking, *Newco*, for the provision of enhanced and value-added global telecommunications services to multinational or large regional companies.[46] This market covered a wide range of global trans-border services, in which *Newco* was expected to offer a portfolio of global products including services in the areas of data transfer, value-added applications, travelling, intelligent networks and global outsourcing. Meeting the new demands of the telecommunications market, *Newco* was to provide ubiquitous service across multiple borders on a consistent service level making time zones, languages and local infrastructures irrelevant.[47] The relevant product market was held to be the market for value-added and enhanced services and the relevant geographic market was held to be global, although only the European market was examined by the European Commission.[48] *Newco* was held to be a strategic alliance since these projects' current expressions were actions "intended to position their partners with a view to the full liberalisation to come and are not limited to the provision of value-added services".[49]

The notified joint venture agreement consisted of a number of contractual provisions ancillary to the mere creation of the strategic alliance which also were examined by the Commission:

(1) *Non-compete provision*[50]
Each shareholder and its ultimate parent company undertook that it would not carry on or be engaged in any activities in conflict with those of *Newco*.

(2) *Licenses granted to Newco*[51]
Each parent company assumed an obligation to license *Newco* with all technical information and intellectual property rights needed to carry out its activities.

(3) *Distribution of Newco products*[52]
Newco appointed MCI as its exclusive distributors for global products in the US, and BT for the rest of the world. In addition, the parents agreed to obtain from *Newco* all requirements for the products concerned

(4) *Loss of rights provision*[53]
In the event that either BT or MCI were to engage, directly or indirectly, in the core business of the other, i.e. entering each other's exclusive territories, the engaging party would lose certain rights.

Atlas[54]

Another strategic alliance notified to the Commission was the *Atlas* joint venture owned to 50% by France Télécom (FT) and to 50% by Deutsche Telekom (DT), the public telecommunications organisations in France and Germany.[55] This is a strategic alliance which shows great similarities with the *BT/MCI* alliance. The purpose of *Atlas* was to provide value added services to corporate users both Europe-wide or national, i.e. to large multinational companies as well as to smaller national firms. However, there was no intention to provide global services. The portfolio of *Atlas'* services comprised fields such as data transmission, international end-to-end links, customer defined networks, outsourcing and very small aperture satellites (VSAT).[56]

The relevant markets were defined as the market for customized packages of corporate telecommunications services and the market for packed-switched data communications services. The former market contains services which are commercially viable only to multinational corporations, while the latter is of interest to smaller undertakings.[57] The geographic markets for both markets where held to be either Europe-wide or nationally.[58] The *Atlas* agreement contained the same contractual ancillary provisions as the *BT/MCI* decision, except for the loss of rights provision.[59]

International Private Satellite Partners (=IPSP)[60]

The IPSP alliance is rather different compared to other strategic alliances which so far have been notified to the Commission since it was not created between incumbent telecom operators, but between a number of other private companies not previously active in the telecommunications field.

In 1993, 20 agreements relating to the creation of a company, International Private Satellite Partners (IPSP), were notified to the Commission. The company had been created in the form of a limited partnership organised under United States law and its main purpose was to build, launch and operate its own telecommunications satellites and to use them in order to provide international business telecommunications services to businesses in Europe and North America on a one-stop shop basis.[61] There were eight partners to the agreement, all independent companies who each would contribute with their specific know-how and abilities to realise the project. One company however, Orion Satellite Corporation, was to serve as the general partner given exclusive responsibility for the management and control of the alliance, while the rest were to serve as limited partners.[62]

IPSP was the first venture to offer services solely trough satellites in order to address the growing need of multinational companies for advanced end-to-end communications between their geographically dispersed locations around the world.[63] The relevant product market was held to be the international private business telecommunications services and the relevant geographic market was the area covered by the reach of the satellite, i.e. the European Union.[64]

Eirpage[65]

The *Eirpage* decision from 1991 differs from the other decisions in the matter of the services provided by the strategic alliance and therefore is of special interest. Bord Telecom Eireann (Telecom), the former Irish telecom monopolist, and Motorola Ireland Ltd (Motorola), a wholly-owned subsidiary of the American company Motorola Inc., created a 51-49 strategic alliance joint venture, *Eirpage*, in order to set up, promote and operate a nationwide paging system in Ireland interconnected to the public telecommunications network. The main strategic goal was to pool Telecom's technological expertise in the provision of telecom infrastructure and services and Motorola's marketing and product expertise in radio-paging services.[66]

The above presented case law of the European Commission, i.e. BT/MCI, Atlas and Eirpage were all held to infringe Article 81 (1) due to a number of reasons which will be presented further on in this paper. However, they were also held eligible for an exemption under Article 81 (3). The IPSP decision is the only decision which was not held to fall under the application of Article 81 (3) in the first place.

Article 81 (1)

Article 81 (1) prohibits all agreements, decisions and concerted practices between undertakings and associations of undertakings which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market. An EC Competition Law assessment of strategic alliances will take its starting point in assessing whether Article 81 (1) offers an adequate basis to analyse the anti-competitive effects of strategic alliances by subsuming the term under its application.

First of all, the concept of 'agreement' is very widely drawn and all different forms of strategic alliances can be subsumed under its definition. For an agreement to exist it is "sufficient if the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way".[67] The form the agreement takes is irrelevant, it can be written or oral, signed or unsigned.[68] Strategic alliances generally involve quite high stakes of risks concerning both finances and aspects of trust and are therefore normally founded on a contractual agreement signed between the two parties. Strategic alliances thus without further evidence meet the requirement of an agreement according to Article 81 (1) and without having to analyse them according to concerted practices or decisions. Strategic alliances are also formed on an international basis between companies from different countries and do therefore effect trade between Member States.[69]

Restriction of competition

The agreement forming the strategic alliance must have as its object or effect the prevention, restriction or distortion of competition in order to be caught by Article 81(1). Although the wording of the Article differs between three different forms of restriction, the case law of the ECJ has subsumed all three under the notion of 'restriction'.[70] Restrictions by object constitute by their very nature a restriction of competition and no account has to be taken of the concrete effect of the agreement. If the agreement however does not have as its object to restrict competition, one has to analyse its effect and consequences. The competition in question must be understood within the actual context in which it would occur in the absence of the agreement in dispute.[71]

The two most common features of strategic alliances occur either in the form of a commonly owned joint venture or in a looser co-operation agreement. However, in order for these two forms of strategic alliances to be caught by the notion 'restriction of competition', both parties to the agreement must be actual or potential competitors.

Actual or potential competition

The legal assessment of a strategic alliance, either in the form of a joint venture or a looser form of contractual co-operation, takes a starting point in evaluating the relationship between the undertakings who are parties to the agreement and whether the agreement is likely to restrict competition between them. Competition between the parties can be restricted through co-operation only to the extent that they already are actual or potential competitors prior to the creation of the co-operation. The parties are actual competitors if they are engaged in the same product and geographical market. The assumption of potential competition is however especially important since one of the parties in a strategic alliance often is a new entrant to the relevant market. The notion of potential competition has been given a rather broad definition by the Commission and presupposes that each parent alone is in a position to fulfil the tasks assigned to the co-operation and that it does not forfeit its capabilities to do so by the creation of the strategic alliance.[72]

The key factors, which the Commission believes should be considered in making an evaluation of potential competition, have been enumerated as follows: Does each party have sufficient financial resources and managerial qualifications on their own to carry out the planned investment? Is each party familiar with and do they have access to the necessary input products, technical know-how and process technique? Is the actual or potential demand on the market such that it would be feasible for each of the parties to manufacture the product on its own? Does each partner have access to the necessary distribution channels needed to sell the product manufactured by the alliance? Could each party on its own bear the technical and financial risks associated with the co-operation?[73]

The undertakings party to the agreement are potential competitors in the light of the above questions if they could reasonably be expected to act autonomously and if other forms of co-operation such as licensing agreements or specialisation agreements could be expected to lead to the same type of benefits.[74]

Joint ventures

Joint ventures can be defined as undertakings which are jointly controlled by two or more other undertakings.[75] Joint control exists where the parent companies must decide on major decisions concerning the joint venture's activities.[76]

Prior to the amendment of the Merger Regulation[77], one had to distinguish between concentrative and co-operative joint ventures where the former were to be assessed under the Merger Regulation and the latter according to Article 81 of the EC Treaty. The distinction between concentrative and co-operative was based on whether the agreement had as its object or effect the co-ordination of the competitive behaviour of the parent undertakings or not.[78] Today all full-function joint ventures, i.e. a joint venture performing on a lasting basis all the functions of an autonomous economic entity, generally fall under the scope of the Merger Regulation and will therefore not be assessed under Article 81 (1).[79] Article 81(1) only applies to non-full-function joint ventures and where the creation of a full-function joint venture as a direct consequence leads to the co-ordination of the competitive behaviour of the parent undertakings.[80] This means that the issue of co-ordination will still be assessed within the context of Article 81.[81] This section of the paper will therefore not deal with any aspects of the Merger Regulation, e.g. the dominance test, but only with the co-operative elements of the joint venture agreement and their compatibility with the common market.

The Commission has in its decisions on strategic alliances in the telecom sector made a clear statement according to actual or potential competition between two joint venture parents. In the *BT/MCI* decision, the two parents BT and MCI were very large and important incumbent telecommunications operators with direct activities outside their home markets by means of subsidiaries and activities in international organisations throughout the world. The Commission concluded that each of them could have entered the international value-added market on its own and they could thus be considered actual or at least potential competitors.[82] In addition, although both parents had indicated that they had withdrawn from the market that *Newco* would be addressing, they would retain the ownership of their respective know-how and intellectual property rights and would only grant a licence to use the technology. *Newco* itself would not engage in any R&D on its own but would award contracts to its parents to do so. The Commission considered that the parent companies would not only keep but also increase their proficiency and know-how required to re-enter the market and thus could be considered to be at least potential competitors in relation to their created strategic alliance.[83]

In the *IPSP* decision, the partners of the strategic alliance were not considered to be actual or potential competitors since none of the parents was in a position to meet all of the requirements connected with the financing, construction, launch and operation of the satellite and the business by itself.[84] A facility-based provider wishing to penetrate the market of international corporate telecommunications services faces significant barriers to entry arising from the remaining regulation of telecommunications services, the size of investment necessary and the difficulty and the cost and length of time necessary to establish a sufficient business size and reputation.[85] The most important factor was however that none of the parties concerned prior to the creation of *IPSP* was active in the telecom field and that instead of restricting competition, a new competitor was introduced. The creation of *IPSP* therefore fell outside the scope of Article 81 (1).[86]

The appraisal of whether joint ventures restrict competition to an appreciable extent in the light of Article 81 (1) will first of all focus on the mere creation of the joint venture and its impact on competition in the common market. The next step will be to analyse the contractual provisions of the joint venture agreement ancillary to the creation of the agreement. Last, it is important to analyse the agreement´s impact on third parties and its network effects.

Creation of the joint venture

In general, if two actual or potential competitors decide to set up a joint venture, the Commission will presume an appreciable restriction of competition due to the replacement of two undertakings by one, the joint venture. This presumption further relates to the fact that the parent companies generally have an incentive to co-ordinate their competitive behaviour and align their commercial policies, especially if both parents remain at least potential competitors on the same market as the joint venture. After all, the creation of a joint venture normally is a rationale to eliminate competition and exercise market power, not vice versa. If the parents are present on the same market as the joint venture, the likelihood of co-ordination will depend upon the economic importance of the joint venture to the parents, for example if the alliance produces a significant proportion of the parents' output or if it is responsible for the parents' main sales support. The likelihood of co-ordination also depends on the combined market share of the parents in relation to the joint venture. A joint venture that is significantly larger than the parents' independent operations naturally reduces the incentive for the companies to compete with each other.[87]

If the parents are competitors on other markets than that of the joint venture, either upstream or downstream, the mere fact of having made significant investment in the joint venture reduces the incentive to compete as actively in these markets. Competition can only be restricted where there is a high degree of interdependence between the two markets and the Commission has not yet forbidden any co-operation solely on the grounds of its potential spill over effects on adjacent markets.[88]

In the *BT/MCI* decision, the Commission held that the creation of Newco fell within the scope of Article 81 (1), since it had not been demonstrated conclusively that the creation of *Newco* was the only objective means for the parent companies to enter and stay in the relevant market. Both companies had substantial activities in similar fields and the financial and technologies required to enter the market on their own. In addition, the creation of the joint venture meant that each parent company was unlikely to develop on its own a similar set of products for use in the relevant market.[89]

Contractual provisions of the joint venture

The second step in analysing the compatibility of a joint venture with the EC competition policy of the common market is to assess the agreement's contractual provisions, i.e. its ancillary restraints. Ancillary restraints are those contractual agreements that on the one hand are directly related to the joint venture agreement and objectively necessary for its existence, but on the other hand remain subordinate in importance to the main object of the agreement. Ancillary restraints usually focus on the level of competition between the joint venture and the parents, and will not be assessed separately but are subsumed under the joint venture agreement itself.[90]

The application of the ancillary restraints doctrine has revealed a willingness to adopt a more economic approach to the analysis of the individual case, meaning that even where the joint venture agreement itself is found to fall outside Article 81 (1), restrictive clauses within it may still infringe the prohibition.[91] In general, the European Courts have held that ancillary restraints are tolerated for a limited period of time where they are objectively necessary in order to secure the implementation of a lawful agreement.[92]

The Commission has shown an identical approach towards ancillary restraints in telecommunications strategic alliances in its *BT/MCI* and *Atlas* decisions. Both joint venture agreements contained non-competition obligations as regards the activities of the joint ventures, and obligations of the parent undertakings to purchase from their joint ventures all their requirements for their respective products. Both provisions were held to be ancillary to the creation and successful initial operation of the joint ventures. They were regarded as different expressions of the same commitment made by the two parent companies towards each other and towards the joint venture, and required for the joint ventures successfully to enter the market. The alliances were expected to incur substantial losses during their early years of operation and the restraining provisions thus aimed at ensuring a steady stream of revenue for the joint ventures and at increasing their credibility and market reputation. Due to the particular circumstances of the market in which the joint ventures would be operating, including substantial investments and associated risks, the ancillary restraints were not only accepted for a limited period of time, but for the entire duration of the exemption granted to the joint ventures.[93]

In the *IPSP* decision, the strategic alliance joint venture was held to fall outside the application of Article 81 (1). As ancillary restraints are to be assessed together with the company created, the ancillary restraints were not held to restrict competition and to be prohibited under Article 81(1).[94]

Effect on third parties

The creation of a strategic alliance in the form of a joint venture may structure the market to the extent that it becomes difficult for third parties to enter the market or to continue to compete. Two companies committed in an alliance are less willing to co-operate with a third party in the same field. The restrictive effect depends on the venture's activities in relation to its parents; for example if the joint venture handles the purchases or sales of the parents, the market will be more and more oligopolised and the choice available to suppliers or customers restricted.[95]

The effect on third parties further depends on the combined market power of the undertakings concerned, i.e. the pooling of the market power of two economically significant undertakings will result in stronger barriers than a venture between two quite small companies.[96] In the *Eirpage* decision, *Eirpage* was held to have a deterrent effect on potential market entrants since the joint venture would be the only provider of interconnected paging services on the Irish market.[97]

Joint venture networks

If the assessment of an individual joint venture does show any restriction of competition, it might do so because it is part of a larger joint venture network. A company may for example set up several joint ventures active in the same product market but in different geographic areas. This network of alliances could be used to co-ordinate behaviour in a manner which might eventually lead to market sharing among the joint ventures. The Commission has repeatedly shown a very strong aversion to territorial division of the EC market which concludes that in almost all cases Article 81 (1) will be infringed when there is a danger of network effect.[98]

Looser forms of co-operation agreements

Although a majority of strategic alliances are created through the setting up of a common joint venture, they can also take the form of a looser co-operation arrangement without the fusion of certain activities. These strategic alliances involve co-operation activity in R&D, production, specialisation, distribution or purchasing as well as other forms of co-operation agreements such as exchanges of information. These forms of co-operation can, as joint venture agreements, only restrict competition to an appreciable extent if the contractual parties are actual or potential competitors. The three most common forms of strategic alliance co-operations are R&D, production specialisation and distribution agreements, which all take place at different stages of the production chain.

Research and development agreement

R&D is the most common field of looser co-operation for strategic alliances and is becoming increasingly important to many companies, especially in the telecommunications sector where a relatively rapid technical development is taking place.[99] If two companies decide to engage in a strategic alliance R&D project without setting up a joint venture, it usually only involves a mere exchange of expertise and know-how, i.e. the companies will not engage in any concerted research.[100] The Commission has over the years generally taken a rather positive view of R&D agreements and they are one of the few types of horizontal agreements to benefit from a Block Exemption Regulation[101] and various Notices.[102]

The R&D Block Exemption Regulation states that agreements on the joint execution of research work or the joint development of the results of the research, up to but not including the stage of industrial application, generally do not restrict competition and therefore do not fall within the scope of Article 81 (1) of the Treaty.[103] This theoretical stage of R&D, far removed from the exploitation of possible results, includes the implementation of the project, the placing of the contracts and the mere exchange of experience and results for information only.[104] This kind of co-operation in itself does not lead to a reduction of market participants or R&D intensity, but enables the companies to share the know-how they cannot develop on their own.[105]

However, those agreements that do impose restrictions on the parties' freedom to carry out competing R&D projects or on the exploitation of the results of the R&D, may fall within Article 81 (1), since the parties are deprived of their opportunity to gain competitive advantages over the other party.[106] The parties must always be free to engage in other research work outside the joint project and to use its results freely. Where different research sectors of the project are shared out among the parties, each one must have mutual access to the results. Another restriction of competition may be at hand if the parties to the agreement attach certain ancillary provisions with regard to the practical exploitation of the results, particularly if the undertakings agree to manufacture the new product jointly or to share out future production among themselves. There may also be a restraint of competition if the agreement expressly or tacitly excludes the granting of licences to third parties.[107]

In general, the Commission takes the view that the capability of the participating companies to engage independently in any R&D outside the joint project, even without an express statement, will be implicitly limited if the companies are engaged in a R&D project. Each of them will have access to the other party's know-how and business secrets, an area which in R&D related fields usually is usually the only existing competitive advantage of companies. If they are revealed, competition probably will be totally eliminated. This is especially true for those R&D projects that are of crucial importance for the competitive strength of the companies. If a company with a key, or dominant, technology enters into an exclusive R&D co-operation with another company, this will also have an appreciable effect on third parties since these will have restricted access to the necessary technology to compete on the relevant R&D and downstream markets. This foreclosure effect will however only be significant if the degree of remaining actual or potential competition is insufficient.[108]

Most R&D agreements cannot be assessed from the outset as being clearly either restrictive or non-restrictive and have to be analysed in their economic context. This applies especially to co-operation agreements which are set up at a stage rather close to the market launch. However, if the true object of the agreement is not R&D but the creation of a disguised cartel through price fixing, output limitation or market allocation, it will automatically fall under the application of Article 81 (1) and be prohibited as a per se infringement.[109]

Specialisation agreements

Specialisation agreements are like R&D agreements subject to a rather favourable treatment by the Commission and also benefit from a Block Exemption Regulation.[110] These forms of alliances are usually agreed upon on a reciprocal basis where both parties agree to refrain from producing certain but different products and to purchase these products from the other party.[111] They can also be agreed upon on a unilateral basis by virtue of which one party agrees to cease production of a certain product and to purchase it from a competing undertaking, while the competing undertaking agrees to produce and supply those products.[112]

The Specialisation Block Exemption states that specialisation agreements generally contribute to improve the production or distribution of goods, because the undertakings concerned can concentrate on the manufacture of certain products and thus operate more efficiently and supply the products more cheaply.[113] Only those agreements that are indispensable to attain these positive effects can benefit from an exemption.[114] However, those specialisation agreements that have as their object or effect the fixing of prices when selling the products to third parties, the limitation of output or sales or the allocation of markets or customers, may fall within the ambit of Article 81 (1) since they give rise to a renunciation of the parties´ individuality in the production chain in favour of a work division.[115]

In a long-term perspective, a reciprocal specialisation engagement in the production field between actual or potential competitors will inevitably lead to a mutual dependency and that each of the contracting parties will cover its demands from the other contracting party. There is also a great risk of co-ordination of the parties' competitive behaviour as suppliers, i.e. the fixing of prices. In addition, specialisation agreements may also create significant appreciable effect on third parties when these are being foreclosed of supplying a company party to a specialisation agreement.[116]

Specialisation agreements in the production field, like many other sorts of strategic alliances, cannot from the outset be characterised as either clearly restrictive or non-restrictive, but have to be analysed in their economic context. Those agreements, however, which fix the prices for market suppliers of parties, limit output or share markets or customer groups have as their object the restriction of competition and do always fall under Article 81.1 as infringements per se.[117]

Distribution agreements

The third step in the production chain and thus the third form of looser co-operation agreements takes place in the field of sales and distribution of the product. Co-operation in distribution and selling makes it easier for the participating undertakings to enter new markets and avoid various barriers to entry. The Commission takes the view that the undertakings concerned would enter the markets by themselves without the agreement, and thus the number of market participants offering a certain product is diminished.[118]

Article 81 (3)

EC Competition law is a very dynamic field of jurisprudence where the assessment of an individual agreement will not end because it has shown to have as its object or effect the restriction of competition within the common market. One must also look at the agreement's possible pro-competitive aspects and weigh these against the anti-competitive ones in order to find out whether the agreement may fall under the application of Article 81 (3) and thus benefit from an exemption from Article 81 (1). This is especially important for strategic alliances in the telecom sector since this is a market characterised by innovation and progressive, very substantial and rapid changes in the conditions. Exemptions can be granted either by way of an individual exemption or by the application of a block exemption regulation.

Individual exemption

The Commission has a monopoly to grant an individual exemption according to Article 81 (3)[119] , and in order to be eligible for an exemption the strategic alliance needs to be notified to the Commission.[120] Such an exemption can only be granted for a specific period of time and conditions and obligations may be attached thereto.[121]

When balancing the benefits and harms of a particular strategic alliance agreement, the Commission needs to verify whether the four substantive conditions set out in Article 81.3 are satisfied:

(1) The agreement must contribute to improving the production or distribution of goods or to promote technical or economic progress;

(2) consumers must obtain a fair share of the resulting benefits;

(3) the restrictions imposed need to be indispensable to the attainment of the beneficial results;

(4) the parties to the agreement may not be afforded the possibility of eliminating competition in respect of a substantial part of the products in question.

All four conditions must be met in order to benefit from an individual exemption, i.e. the benefit of the alliance must not only affect the parties involved, but welfare in general. The compliance of the conditions will depend very much on the merits of the particular case.[122]

Contribution to production or distribution or to technical or economic progress

The first condition identifies four different elements that however, due to the complex nature of many commercial arrangements, often overlap each other and will be dealt with as one element.[123]

One of the most dominant features of strategic alliances is the goal of being strategic, i.e. of strengthening the competitiveness of the company by way of co-operation with another company and thus creating synergy effects. When two companies bundle their individual resources in order to complement each other they can realise certain goals which neither party with its own resources and capabilities could reach as effectively, economically, or quickly by themselves. The strategic alliance allows the parties to more efficiently bring a new product or service onto the market more efficiently and therefore contributes to production or technical and economic progress on the market.

The synergy effect created by strategic alliances can also make it easier for the parties to enter new geographical and product markets, leading to sales expansion in new territories or to the enlargement of the supply range by new products. Entering new markets is connected with large financial and technical investments and a strategic co-operation with an incumbent company can avoid the risks of a go-it-alone strategy. The Commission will in general assess these measures favourably since the undertakings in question contribute to a dynamic competition, consolidation of the internal market and a strengthening of the competitiveness of the relevant economic sector. Strategic alliances in Europe can also create synergy effects by means of catching up with foreign competitors, especially from the USA and Japan.[124]

In the *BT/MCI* and *Atlas* cases, which both dealt with strategic alliances for the provision of enhanced and value-added global telecommunications services to large multinational corporations, the Commission considered these services to be very new and to offer new features not available before. The Commission also stated that through the liberalisation process, there was an increasing demand for these services. Both alliances were to use existing national networks and add to these their own switching systems, signalling, databases and software. This approach was considered to have substantial advantages over most existing international services, since these in general provided telecom services over many separated switching systems and thus were incompatible in terms of structure, software, hardware and management systems.[125] Truly seamless communications are more likely to be achieved if there is only one switching system involved. The quality and the availability of advanced telecom services would thus be improved and the alliances would also contribute to the creation of seamless transeuropean networks, which according to Article 154 is one of the aims of the EC Treaty.[126]

In addition, both strategic alliances were considered to improve economic progress by way of allowing the Community's most important companies to achieve levels of telecommunications performance on an international level which prior to the alliances only were available at some national levels. It would enable these firms better to withstand global competition from other parts of the world where advanced telecommunications services already were already widely available and thus improve the general welfare of the European Union.[127] Both ventures would furthermore reduce the cost per channel, allow economies of scale and reduce infrastructure costs in respect of generating larger traffic volumes.[128] Due to the fact that the *Newco* and the *Atlas* alliances through the combination of their technology and expertise were likely to provide new services more quickly, cheaply and of more advanced nature than they could have provided individually, both strategic alliances were held to contribute to the improvement of production or distribution of goods and to the promotion of technical and economic progress according to Article 81 (3).[129]

Fair share to consumers

The second condition requires that the end consumers must be allowed a fair share of the resulting benefit identified under the first condition. The term 'consumer' is widely drawn and covers private individuals purchasing as typical end-users as well as undertakings purchasing in the course of their own trade or business. Generally the transmission of the benefit will depend on the intensity of competition within the relevant market. The more intense the competition, the higher the probability that the benefits will be passed on to the consumer.[130]

The *Newco* and *Atlas* alliances, which both provided services to larger business consumers, contributed to the fact that their consumers would benefit more rapidly from a set of new advanced services than the parents would have been capable of providing separately. In addition, consumers would benefit directly through the provision of a greater product portfolio of developed and new series and lower price resulting from cost savings and operational efficiencies. They would have the advantage of seamless cross-border telecom services throughout the whole world with the stability of always having a single person to contact in case of any kind of difficulties. The Commission was therefore of the opinion that a successful market entry by *Newco* and *Atlas* would increase the level of competition and hence the possibilities of choice available for customers.[131]

A situation where private individuals, the typical end-customers, were to benefit from a strategic alliance in the telecommunications sector was the *Eirpage* decision. The co-operation between Telecom and Motorola contributed, according, to the Commission to the development of telecommunications services in Ireland. Ireland is a country where two-thirds of the population live in sparsely populated rural areas, and *Eirpage* had undertaken to provide a paging system service beyond the more profitable urban areas in which existing paging services hitherto had been concentrated. Fair shares of the benefits were therefore be accrued directly to the end-consumers.[132]

The requirement of allowing consumers a fair share of the resulting benefit has over the years received less consideration than the other criteria of Article 81 (3). In general, the Commission will readily assume that, as long as the market in question is subject to effective competition, the parties will not be able to keep the benefits but will be forced to pass them on further down the line to the consumer.[133]

Indispensability of the restriction

The third condition of Article 81 (3) raises the question whether less restrictive means exist to achieve the desired benefits. The strategic alliance agreement must not give rise to any restrictions of competition which are not absolutely necessary for the positive benefits under the first condition of Article 81 (3). In other words, the benefits could not arise at all, or within the same period of time, to the same extent or with the same degree of probability, in the absence of the strategic alliance agreement.[134]

The assessment of the indispensability prerequisite initially examines the mere creation of the strategic alliance and afterwards the contractual restraints ancillary to the creation. The first question to be answered when assessing the mere creation of the alliance is whether the co-operation is necessary at all, or whether a go-alone strategy would be a better alternative. If the alliance takes the form of an integrated joint venture, one also has to ask whether a looser form of co-operation with a lower level of integration would be more advantageous. Bearing in mind the specific characteristics of strategic alliances in the telecom market, especially the synergy effect, one can in general presume an indispensability of the restrictions.[135]

In *BT/MCI* and *Atlas*, the mere creation of the strategic alliances were held to be indispensable for the parent companies successfully to enter the relevant market and to bring about the benefits of Article 81 (3). The strategic alliances would substantially shorten the time required for the services to be marketed and reduce the costs and risks required to offer such services at a global scale. Finally, *Newco* and *Atlas* were also held to be a means of quickly overcoming the inadequacies currently associated with the provision of the services and features, e.g. one-stop-shop, end-to-end and seamless basis. The Commission also considered the chosen form of a joint venture to be indispensable compared to an individual market entry or a looser form of co-operation in order to provide the relevant telecommunications services.[136]

The second step in assessing the indispensability prerequisite of Article 81 (3) is to analyse the contractual restraints ancillary to the mere creation of the strategic alliance. This analysis is quite important, since the success of the strategic alliance often depends on these ancillary provisions and their contribution to the strategic stability of the alliance. A strategic alliance represents a tricky balance between two competitors and can be a rather fragile co-operation due to the diversity of the partners' interests. Both partners remain independent companies after the creation of the strategic alliance and they continue to pursue their individual goals. This moral-hazard-dilemma deals with the fact that both partners initially will look to their own self-interest and that the overall success of the alliance automatically will play a minor role. A strategic alliance contract therefore is designed in a way that both partners will have a long-term interest in the success of the strategic alliance and those contractual provisions supporting this concept will generally be treated as indispensable for the co-operation.[137]

In *BT/MCI* and *Atlas*, the ancillary restriction examined under the indispensability assessment were the exclusive distribution agreements, i.e. a contractual provision stating that each parent of the strategic alliances was appointed as sole distributor of the alliances' products and services in their respective home markets. This exclusive distribution provision was held to be indispensable in both cases because using one such network instead of several was technically easier and allowed more efficient distribution.[138] One argument particularly stressed by the parents in the *BT/MCI* decision in supporting the exclusive arrangement was the protection of the valuable intellectual property rights, not only against outsiders but in particular against the other parent. Appointing the parents as sole distributors would protect their technology against third parties, dividing the distribution market between the parents would protect their technology against each other. The provision would thus give an incentive to contribute more valuable intellectual property rights than otherwise would seem reasonable. The Commission accepted this argument with the exception that the possibility of passive sales always must always be provided, i.e. the possibility for EU customers to address themselves to MCI for the provision of *Newco* products without the intervention of BT.[139]

No elimination of competition

The fourth and last condition of Article 81 (3) requires that the strategic alliance agreement may not afford the parties an opportunity to eliminate competition in respect of a substantial part of the products and services in question. The Commission thus first needs to delineate the relevant market and secondly to consider the market shares of the parties together with other factors such as the type of product or service in question, the number and strength of the remaining competitors, the existence of potential competitors and barriers to entry. The effect on competition between the parents must be put in proportion to the effect on competition in the market as a whole. The more restrictive the co-operation between the parties, the more vigorous competition must be on the market.[140]

The Commission usually gives this condition less consideration compared to the first three, mainly because an assessment of the level of competition will already have been carried out at an earlier stage of the case. Strategic alliances will in general, due to their specific characteristics, not give rise to any elimination concerns. To start with, they only tie the companies in one specific business field and thus the undertakings concerned will remain competitors in all other areas. As a result, there will be no general elimination of competition. Furthermore, most strategic alliances are created in order to penetrate new markets and thus to extend the number of participants in a specific market. This will not lead to any elimination of competition, but on the contrary increase the level of competition on the market.[141]

In *BT/MCI* and *Atlas*, the strategic alliances were held not to afford the parties the possibility of eliminating competition, basically based on the fact that there would be significant third-party competition. *Newco* and *Atlas* themselves would be competitors providing the same set of services and competition would also come from other existing strategic alliances as well as alliances expected to be concluded in the near future.[142] Another point eliminating the concerns of any competition restrictions was the fact that the potential customers were multinational or other big companies which are sophisticated purchasers with the ability to build their own private network solutions or to attract offers from several companies. This bargaining power would, according to the Commission, put intense pressure on margins and strengthen the competition between the different suppliers.[143]

A very serious competition concern in respect of strategic alliances in the telecommunications field however comes from the fact that the parents to the alliance usually own the infrastructure through which the alliance's telecom services are being provided. This may result in discrimination and cross-subsidization to the detriment of other, especially private competitors. The Commission therefore in *BT/MCI* and *Atlas* announced that a fundamental condition that had to be fulfilled in order for the co-operation to be exempted was to ensure equal access for all competitors in terms of availability, quality and price of the leased lines.[144]

In *BT/MCI*, the regulatory environments of the UK and the US were very liberalised[145] and that prohibited both BT and MCI from making any unjust or unreasonable discrimination in the provision of the relevant services, including access to these services by their competitors and foreign correspondents. These regulatory constraints were reflected in the strategic alliance agreement, and together with additional explanations provided by the parties the Commission decided not to take any further actions.[146]

The regulatory situation was different in the *Atlas* decision, where the French and German markets were not as liberalised and where the Commission was particularly concerned with the lack of competition in the infrastructure market. FT and DT among other things controlled both the public voice telephony and public data networks of their home countries.[147] As regards the market for Europe-wide services, at the time of the decision the Commission assumed that the competitive environment would be substantially improved if alternative infrastructures than those of FT and DT were made available and if *Atlas* would give access to their own networks on transparent and non-discriminatory terms. This called for steps to be made by France and Germany in their liberalisation efforts. The combination of these efforts with the European regulatory framework satisfied the Commission for the time being and eliminated any competition restriction concerns.[148]

Block exemption

Article 81 (3) of the EC Treaty expressly provides for the possibility that also a category of agreements may receive an exemption from the prohibition of Article 81 (1). These block exemptions do away with the need for filing individual notifications and are generally aimed at promoting legal certainty and alleviating the burden on the Commission.[149] Since the majority of strategic alliances are concluded on a horizontal basis, the most important block exemptions in this case are those relating to horizontal agreements and in particular the block exemption regulations to categories on R&D and specialization agreements. The Commission's experience over the years has shown that these specified categories of agreements in general fulfil all four conditions of Article 81 (3), provided that they do not contain certain hard-core restrictions.

R&D Block Exemption Regulation

R&D is as already stated a very important field for strategic alliances, especially for those operating in the telecommunications sector, and receives rather favourable treatment from the Commission. Unlike other Block Exemption Regulations, the R&D Regulation was not a response to a problem of mass notifications but an attempt to stimulate more R&D co-operation.[150] Co-operation in R&D is considered generally to promote technical and economical progress by increasing the dissemination of know-how between the parties, by avoiding duplication of R&D work, by stimulating new advances through the exchange of complementary know-how and by rationalising the manufacture of the products or application of the processes arising out of the R&D. Consumers may benefit from an increased volume and effectiveness of R&D through the introduction of new or improved products and services and the reduction of prices.[151]

In order for a strategic alliance to benefit from the R&D Regulation, all parties must among other things have access to the results of the research and be free independently to exploit the results.[152] If the parties are not competing undertakings, the fulfilment of these conditions will result in an exemption for the duration of the R&D co-operation. Where the parties on the other hand are competing undertakings, the agreement can only benefit from the exemption if the combined market share of the participating undertakings does not exceed 25% of the relevant market for the products capable of being improved or replaced by the contract products.[153] The R&D Block Exemption Regulation also contains a so-called 'black list', a directory of agreements that under no circumstances are covered by the exemption and are considered as restrictions per se. Some examples of these are the restriction of the freedom of the parties to carry out R&D in another field, the limitation of output or sales, the fixing of prices, the prohibition of passive sales or the requirement to make it difficult for users or resellers to obtain the products from other resellers.[154]

Although many strategic alliances take place in the field of R&D, the Block Exemption Regulation only plays a minor role for these forms of co-operation and does not give much assistance to companies seeking an exemption. The greatest barrier is the market share threshold of not more than 25%, a figure that only applies to medium-sized undertakings. Strategic alliances in the telecom market are entered into between large multinational companies often being the former state monopolists and do in most cases exceed a market share of 25%.[155] The second barrier lies in the very comprehensive black list of the Regulation. A strategic alliance agreement which contains any of the per se restrictions of the black list will according to an all-or-nothing principle automatically render the whole co-operation agreement ineligible for an exemption. This is very momentous for strategic alliances since these generally contain contractual provisions that on the one hand are aimed at ensuring the survival and success of the alliance but on the other hand clearly fall under the black list. For example, many strategic alliances contain non-compete provisions, provisions not to enter into similar co-operation agreements with third competitors and provisions that limit the freedom of action after the termination of the co-operation. The Commission has made it clear that these provisions are crucial for the existence and success of strategic alliances in the telecommunications market, but the exemption will have to come from an individual decision and not by application of the Block Exemption Regulation.[156]

Specialisation Block Exemption Regulation

The rationale for the Specialisation Block Exemption Regulation is that these kinds of agreements generally contribute to improving the production or distribution of goods, because the undertakings concerned can concentrate on the manufacture of certain products and thus operate more efficiently and supply the products more cheaply.[157] The Specialisation Block Exemption exempts from the application of Article 81 (1) unilateral and reciprocal specialisation agreements and joint production agreements.[158] This exemption also applies where the parties in the same context accept an exclusive purchase or supply obligation or agree to provide for joint distribution or to appoint a third party distributor.[159] The exemption however only applies on condition that the combined market share of the participating undertakings does not exceed 20% of the relevant market.[160] Unlike the R&D Regulation, the Specialisation Regulation contains a rather short black list. This directory only lists the three most common per se restrictions which are the fixing of prices, the limitation of output or sales and the allocation of markets or customers.[161]

Unfortunately, the Specialisation Block Exemption Regulation generally will meet the same fate as the R&D Regulation and does not play a major role in the exemption progress for strategic alliances. The market share threshold of 20% is even lower than it is for R&D agreements and strategic alliances will in most cases exceed this figure. The earlier versions of the Specialisation Regulation applied only on products, and services were excluded from its application. This was a serious barrier to strategic alliances in the telecommunications market since many of these provide different kinds of services. Today however, the last amended version of the Regulation includes both goods and services under the wording 'product'.[162] The rather short black list in the Specialisation Regulation on the other hand creates rather favourable grounds for exemptions but it is questionable whether this can outweigh the other very strong barriers.[163]

Conclusion

The goal of this working paper has been to assess and analyse the rather vague phenomenon of strategic alliances according to the rules of EC Competition law, especially Article 81 of the EC Treaty. In business management theory the term has become somewhat of a buzzword, often seen as a revolution in corporate behaviour and market organisation and as an answer to an ever-intensifying competition in the global marketplace. Strategic alliances are seen as a way to leverage the resources of an undertaking by joining them with another carefully chosen company. If the undertaking wishes to compete on an international basis, the strategic co-operation with another company is considered to be more or less indispensable to survival. The evolution of the telecommunications market and the Internet has expanded the international market, forcing European companies to concentrate their efforts not only on a national basis but Europe-wide or even global-wide.

Critics in business management theory have raised the question whether it is justifiable to give strategic alliances such immense attention and whether they are not only a pretty circumscription for a co-operation phenomenon that already has existed for quite a long time. Critics in legal theories, especially competition law, have also applied this line of thought and asked whether strategic alliances can be characterised as a new legal occurrence or whether they can be assessed as a classic cartel. If they are looked upon as a new legal phenomenon, it would mean that new guidelines would have to be developed in order to be able to assess them in a competition law context. If they can be subordinated under a classic cartel, the existing legal framework could be applied.

The analysis in this paper has shown that the right answer seems to steer a middle course. Strategic alliances cannot be subordinated under a classic cartel due to the fact that the two forms of co-operation show substantial differences in their subjective intentions. Cartels are created to fix prices, share markets or limit production to the detriment of their competitors, while strategic alliances try to get a competitive step ahead by way of improving their own efficiency, not by destroying opportunities for others. However, the fact that strategic alliances cannot be classified as a cartel does not automatically mean that a new regulatory framework and guidelines have to be developed; the assessment of this paper has shown that the existing framework fits perfectly well when analysing strategic alliances.

However, one of the most important conclusions that can be drawn is that the legal form of a strategic alliance seems to be irrelevant when it comes to analysing it according to the competition rules of the European Union. The Commission's main focus lies on the transaction's possible pro- and anti-competitive effects on the competitive situation on the market. The Commission will make this assessment in relation to joint venture strategic alliances as well as looser forms of alliance co-operation agreements. The results will nevertheless be the same for all kinds of co-operations, with the exception that joint ventures involve a much greater commercial and financial integration of the parent's activities and as a consequence will result in more serious restrictions of competition.

The assessment of strategic alliances under Article 81 of the EC Treaty has shown that there is a general presumption for strategic alliances to fall within the application of Article 81.1. When two at least potential competitors together decide to set up a strategic alliance, the Commission presumes that the parent companies naturally will have an incentive to co-ordinate their competitive behaviour and they will not look upon each other as competitors anymore. The co-operation will also automatically eliminate one market participant, and instead of two undertakings conducting a specific research, there will be only one. The strategic alliance can also have significant foreclosure effects on third parties, in terms of access to essential facilities as well as favouring the alliance's own services over those of other private suppliers. Third parties may also have difficulties in finding partners to co-operate with since two companies committed in an alliance will be less willing to co-operate with a third party in the same field. If the strategic alliance is part of a larger alliance network, this may lead to a quite serious territorial division of the single EC market.

The case law of the Commission intensifies the view that strategic alliances in the telecommunications sector fall within the application of Article 81 (2). In the *BT/MCI* decision, which can be seen as a landmark case concerning strategic alliances in the telecommunications sector, the two parents BT and MCI were considered to be at least potential competitors because both of them could have entered the relevant market on their own. BT and MCI were very large multinational companies who would continue to be active on the market of the venture by means of subsidiaries, activities in international organisations and intellectual property rights. This approach resulted in the conclusion that the strategic alliance created was not the only objective means for BT and MCI to enter and stay in the market and thus fell under the application of Article 81 (1). The *IPSP* alliance was held not to restrict competition to an appreciable extent since the parent companies were not actual or potential competitors. This was mainly based on the fact that the parent companies, in contrast to the parents in the other Commission decisions, prior to the creation of the strategic alliance were not incumbent telecom operators, but engaged in other markets such as financing and high-tech. Unlike *Newco*, a new market participant and competitor was introduced in the telecommunications market and there was no risk of competitive co-ordination between the parents in their original markets.

However, the Commission determined in the BT/MCI case that one had to look upon this kind of venture rather favourably and that *Newco* satisfied all four conditions for receiving an individual exemption. The alliance was exempted for a period of seven years from the date the notification was complete. All strategic alliances examined by the Commission and mentioned in this paper were actually exempted from the application of Article 81 (1) and thus a general assumption can also be established from this ruling. The Commission especially emphasised the fact that the strategic alliances intended to offer new global services with features that were responses to the growing demands of large multinational corporations. This was seen as an immense opportunity to strengthen the position of European companies on the global market and to be able better to withstand competition from Asia and the US. Further, the creation of strategic alliances allows the companies to create synergy effects which the Commission considered could not have been created if the companies continued to operate on their own. This will inevitably lead to the formation of new market participants and a more competitive market. Generally, the possible benefits of strategic co-operation in the telecom sector may lead to cost reduction and cheaper offerings to the advantage of consumers, a general improvement of public infrastructure and a European-wide standardisation of legislative matters.

The assessment of strategic alliances in the telecommunications sector in the context of Block Exemption Regulation has led to the conclusion that strategic alliances, due to their specific characteristics, only play a minor role in this matter, especially those Regulations concerning R&D and Specialisation. Strategic alliances generally involve a co-operation between rather large multinational undertakings and will thus exceed the market share thresholds set out by the R&D and Specialisation agreements. Furthermore, the contractual agreements characterising strategic alliances, such as non-compete provisions and other provisions that limit the freedom of action in different ways, will fall under the Regulation's black lists and render them non applicable. The greatest barrier, however, comes from the fact that the telecommunications sector is a rather new market that only has been developing since full liberalisation took place in 1998. This means that there is great legal uncertainty about how the various Block Exemption Regulations are to be applied on this market. Companies entering into strategic alliances in the telecom sector therefore are still forced to file an application for individual exemption if they want to be on the safe side and not jeopardise the existence of their alliance. It is simply too risky to rely on a Block Exemption Regulation, since a possible future decision by the Commission that the Regulation is inapplicable would annul the whole strategic alliance agreement and lead to the imposition of heavy fines on the parties.[164]

The *BT/MCI* case gives a pretty clear picture and guidance as to how the Competition rules should be applied in similar situations in the future, especially on how the Commission will apply the rather tricky balance between Article 81 (1) and 81 (3). On the one hand, enterprises must be allowed to adjust to the dramatically changing structures of the telecom market evolving out of liberalisation, de-monopolisation and convergence with the media sector. Clearly, innovative services at low prices can only be achieved through economies of scale and scope. At the same time, however, the Commission must aim to counter work and avoid any foreclosure which would slow down the development of the market if it would allow to progress unchecked. The liberalisation progress must not be undermined by any anticompetitive behaviour of the biggest players, a situation that would move the liberalisation progress back to position zero again.

This paper has shown that the European Union and in particular the Commission face some interesting challenges which are being satisfactorily met at present but will need a very great deal of attention in the future. One challenge is to ensure an open structure in the telecommunications field, a second one to define the relationship between the application of

EU Competition law and specific legislation established to regulate the telecom sector. Another challenge is the global nature of strategic alliances in the telecom market, which not only calls for consistency between decisions of national and Community authorities, but also between authorities in the EU and other parts of the world, such as the US. Indeed, the Commission is in close and daily contact with the Antitrust division of the US Department of Justice and over the past decade two competition law enforcement co-operation agreements between the EU and the US have been concluded.[165]

The most important challenge however is the double task, on the one hand, to allow a restructuring of the telecom market in order to make the development of the information society possible, and on the other hand to make sure that markets are not closed off before they have even opened or come into existence.

Endnotes

1 Council Regulation (EEC) No. 4064/89 of 21 December 1989 on the control of concentrations between undertakings (hereinafter referred to as the Merger Regulation).

2 Fiebig, André, *Strategische Allianzen und ihre Herausforderung an das Wettbewerbsrecht der Europäischen Union*, Frankfurt 1996, p.16.

3 Fiebig, pp. 16 – 17.

4 Castellot, Miguel Angel Pena, "The application of the competition rules in the telecommunication sector: Strategic alliances", *EC Competition Policy Newsletter*, Volume 1, Issue 4, 1995, p. 2.

5 Ibid.

6 Ibid.

7 Dicken, Peter, *Global Shift: The internationalisation of economic activity*, 2nd edition, London, 1992, p. 213.

8 Commission Decision 94/579/EC *BT/MCI* (hereafter referred to as the BT/MCI case).

9 BT/MCI, Recital 17.

10 Fiebig, p. 217.

11 Vyas, Shelburn, Rogers, "An analysis of strategic alliances: forms, functions and framework", *Journal of Business and Industrial Marketing*, Volume 10, Issue 3, 1995, p. 49.

12 Fiebig, pp. 28 – 39; Götz, Gero, *Strategische Alliansen: die Beurteilung einer modernen Form der Unternehmenskooperation nach deutschem und europäischem Kartellrecht*, Baden-Baden, 1996, p. 30.

13 Fiebig, pp. 34 – 36; Bengtsson, Holmquist, Larsson, *Strategiska allianser: från marknadsmisslyckande till lärande samarbete*, Malmö, 1998, pp. 24 – 25; Vyas et al., p. 47.

14 Merger Regulation, Rec. 22.

15 Fiebig, p. 41.

16 Castellot p. 2.

17 Garai, Gabor, "Leveraging the rewards of Strategic Alliances", *Journal of Business Strategy*, March-April 1999, p. 41; Fiebig, pp. 51 – 51; Bengtsson et al., p. 47.

18 Fiebig, p. 50.

19 Bengtsson et al., p. 28.

20 Vyas et al., pp. 49 – 50; Bengtsson et al., p. 28.

21 Vyas et al., p. 50; Bengtsson et al., p. 29.

22 Vyas et al., p. 54.

23 Rai, Borah, Ramaprasad, "Critical success factors for Strategic Alliances in the information technology industry: an empirical study", *Decision Sciences*, Volume 27, Issue 1, 1996, p. 142.

24 Rai et al., p. 142; Whipple, Frankel, "Strategic Alliances Success Factors", *Journal of Supply Chain Management*, Volume 36, Issue 3, p. 28; Svernlöv, Carl, *Internationella joint ventures: samriskföretag*, Stockholm, 1997, pp. 23 – 32.

25 Whipple et al., pp. 24 – 25.

26 Rai et al., p. 142; Whipple et al., p. 27; Svernlöv, pp. 36 – 37.

27 Rai et al., p. 144; Vyas et al., p. 56.

28 Garai, p. 41.

29 Hagedoorn, Sadowski, "The transition from strategic technology alliances to mergers and acquisitions: an explanatory study", *Journal of Management Studies*, Volume 36, Issue 1, 1999, p. 87.

30 Pons, Jean Francois, *The application of competition and anti-trust policy in media and telecommunications in the European Union*, Speech held at the International Bar Association, Vancouver, 14/09/1998.

31 Green Paper on the development of the common market for telecommunications services and equipment, COM (87) 290, 1987.

32 Ungerer, Herbert, *Identifying how national authorities and the European Union will regulate liberalised telecom*, Speech held at the Investing in European telecoms conference.

33 These directives are as follows: Commission Directive (EEC) 90/388 on competition in the markets for telecommunications services (1990) OJ L192/10 (the Services Directive);

Commission Directive (EEC) 94/46 amending Directive (EEC) 90/388 in particular with regard to satellite communications (1994) OJ L268/15 (the Satellites Directive);

Commission Directive (EC) 95/51 amending Directive (EEC) 90/388 with regard to the abolition of the restrictions on the use of cable television networks for the provision of already liberalised telecommunications services (1995) OJ L256/49 (the Cable TV Directive);

Commission Directive (EC) 96/2 amending Directive (EEC) 90/388 with regard to mobile and personal communications (1996) OJ L20/59 (the Mobile Directive);

Commission Directive (EC) 96/19 amending Directive (EEC) 90/388 with regard to the implementation of full competition in the telecommunications market (1996) OJ L74/13 (the Full Competition Directive).

34 These directives are as follows: Directive (EC) 97/13 on a common framework for authorisations and individual licences in the field of telecommunications services (1997) OJ L117/15;

Directive (EC) 97/33 on interconnection in telecommunications with regard to ensuring universal service and interoperability through application of the principles of ONP (1997) OJ L199/32;

Council Directive (EEC) 90/387 on the establishment of the internal market for telecommunications services through the implementation of ONP (1990) OJ L192/1, amended by Directive (EC) 97/51 for the purpose of adaptation to a competitive environment in telecommunications (1997) OJ L295/23;

Council Directive (EEC) 92/44 on the application of ONP to leased lines (1992) OJ L165, amended by Directive (EC) 97/51 for the purpose of adaptation to a competitive environment in telecommunications (1997) OJ L295/23;

Directive (EC) 98/10 on the application of ONP to voice telephony and on universal service for telecommunications in a competitive environment (1998) OJ L 101/24;

Directive (EC) 97/66 concerning the processing of personal data and the protection of privacy in the telecommunications sector (1998) OJ L24/1.

35 Council Directive 90/387 on the establishment of the internal market for telecommunications services through the implementation of open network provision (1999) OJ L192/1, Art. 1 (1).

36 Ungerer, Herbert, *Competition in the European Telecommunications Market*, Speech held at the Management Symposium of Telecom Market Europe 2001, Brussels, 29/01/2001.

37 Stehman, Oliver, *Network Competition for European Telecommunications*, New York, 1995, p. 3.

38 Stehman, p. 10

39 Castellot, p. 3; BT/MCI, Recital 7.

40 Castellot, p. 3; Stehman, pp. 12 – 37.

41 Schaub, Alexander, "Competition policy in the Telecoms sector", *EC Competition Policy Newsletter*, Volume 2, Issue 1, 1996, p. 4; Styliadou, Melpomeni, "Applying EC competition law to alliances in the telecommunications sector", *Telecommunications Policy*, Volume 21, Issue 1, 1997, p. 47.

42 Styliadou, p. 48.

43 Council Regulation (EEC) No. 17 of 6 February 1962 implementing Articles 85 and 86 of the Treaty.

44 See footnote 8.

45 BT/MCI, Recital 1.

46 BT/MCI, Recital 2; the acquisition of 20% of BT in MCI will not be examined further in this thesis.

47 BT/MCI, Recital 6.

48 BT/MCI, Recitals 5 and 15.

49 BT/MCI, Recital 17.

50 BT/MCI, Recital 25.

51 BT/MCI, Recital 26.

52 BT/MCI, Recital 27.

53 BT/MCI, Recital 32.

54 Commission Decision 96/546/EC *Atlas* (hereafter referred to as the Atlas decision).

55 Atlas, Recital 1.

56 Atlas, Recital 5.

57 Atlas, Recitals 8 – 11.

58 Atlas, Recitals 12 – 15.

59 Atlas, Recital 21.

60 Commission Decision 94/895/EC *International Private Satellite Partners* (hereafter referred to as the IPSP decision).

61 IPSP, Recital 1.

62 IPSP, Recitals 2 – 9, 19.

63 IPSP, Recitals 10 and 17.

64 IPSP, Recital 22.

65 Commission Decision 91/562/EEC *Eirpage* (hereafter referred to as the Eirpage decision).

66 Eirpage, Recitals 1 and 2.

67 T-7/89 SA Hercules Chemicals NV v Commission; Faull et al., p. 70.

68 Faull et al., p. 70.

69 Fiebig, pp. 82 – 83.

70 Commission Decision 94/322/EC *Exxon/Shell*.

71 56/65 Société Technique Minière v Maschinenbau Ulm GmbH, Recitals 249 and 250.

72 Notice concerning the assessment of co-operative joint ventures pursuant to Article 85 of the EEC Treaty, Article 18; Faull et al. (1999) p. 356.

73 Commission Notice concerning the assessment of co-operative joint ventures, Article 19.

74 Commission Notice concerning the assessment of co-operative joint ventures, Article 20; Faull et al., p. 358.

75 Commission Notice on the concept of full-function joint ventures, Article 3.

76 Commission Notice on the concept of full-function joint ventures, Article 9.

77 The Merger Regulation was amended by Council Regulation (EC) No 1310/97.

78 Commission Notice on the distinction between concentrative and co-operative joint ventures, Article 7.

79 Commission Notice concerning the concept of full-function joint ventures, Article 7.

80 Commission Notice concerning the concept of full-function joint ventures, Article 16.

81 Zonnekeyn, Geert A, "The treatment of joint ventures under the amended E.C. Merger Regulation", *ECLR*, Issue 7, 1998, p. 414.

82 BT/MCI, Recital 41; Styliadou, p. 51.

83 BT/MCI, Recital 37.

84 IPSP, Recital 55.

85 IPSP, Recital 29.

86 IPSP, Recital 58.

87 Fiebig, p. 88; Faull et al., pp. 354 – 361.

88 Faull et al., pp. 361 – 362.

89 BT/MCI, Recital 43.

90 Faull et al., p. 92.

91 Faull et al., p. 93.

92 C 26/76 Metro Grossmärkte GmbH & Co KG v Cartier.

93 BT/MCI, Recital 46; Atlas, Recital 42.

94 IPSP, Recital 62.

95 Notice concerning the assessment of co-operative joint ventures, Article 24; Guttermann, Alan, *Innovation and Competition Policy*, London, 1997, p. 352.

96 Notice concerning the assessment of co-operative joint ventures, Article 25.

97 Eirpage, Recital 12.

98 Notice concerning the assessment of co-operative joint ventures, Article 27; Guttermann, p. 354.

99 Fiebig, p. 101.

100 Fiebig, p. 57.

101 Commission Regulation (EC) No 2659/2000 on the application of Article 81 (3) to categories of R&D (from now on referred to as Regulation 2659/2000).

102 Faull et al., p. 372

103 Regulation 2569/2000, Recital 3.

104 Notice concerning agreements, decisions and concerted practices in the field of co-operation between enterprises, Article 4.

105 Fiebig, p. 102.

106 Regulation 2569/2000, Recital 3.

107 Notice concerning agreements, decisions and concerted practices in the field of co-operation between enterprises, Articles 4 – 5.

108 Fiebig, p. 104; Faull et al., p. 381.

109 Guidelines on the applicability of Article 81 to horizontal co-operation agreements, Articles 59 – 60.

110 Commission Regulation (EC) No 2658/2000 on the application of Article 81 (3) to categories of specialisation agreements (from now on referred to as Regulation 2658/2000).

111 Regulation 2658/2000, Article 1 a; Fiebig, p. 105.

112 Regulation 2658/2000, Article 1 b.

113 Regulation 2658/2000, Article. 8.

114 Regulation 2658/2000, Article 14.

115 Regulation 2658/2000, Article 5 (1).

116 Fiebig, pp. 106 – 10.

117 Guidelines on the applicability of Article 81 to horizontal co-operation agreements, Articles 90 and 91.

118 Fiebig, pp. 59-61, 108.

119 Council Regulation (EEC) No. 17/62 of 6 February implementing Articles 85 and 86 of the Treaty, Article 9 (1); This analysis is based on the version of Regulation No. 17 which existed prior to its new adaptation.

120 Regulation 17/62, Article 4 (1).

121 Regulation 17/62, Article 8 (1).

122 Faull et al., p. 103.

123 Faull et al., pp. 103 – 104.

124 Notice concerning the assessment of co-operative joint ventures, Article 55; Fiebig, pp. 139 – 144.

125 BT/MCI, Recital 53; Atlas, Recital 48.

126 Styliadou, p. 51.

127 BT/MCI, Recital 53; Atlas, Recital 50.

128 BT/MCI, Recital 53; Atlas, Recital 52.

129 BT/MCI, Recital 53; Atlas, Recital 48 – 52.

130 Faull et al., p. 110.

131 BT/MCI, Recital 55; Atlas, Recitals 53 and 54.

132 Eirpage, Recital 14.

133 Faull et al., p. 111; Van Bael, Bellis, *Competition Law of the European Community*, Oxfordshire, 1994, p. 60.

134 Faull et al., p.112.

135 Fiebig, pp. 145 – 150.

136 BT/MCI, Recital 58; Atlas, Recital 56.

137 Fiebig, pp. 151 – 155.

138 BT/MCI, Recital 59; Atlas, Recitals 57 and 58.

139 BT/MCI, Recitals 59 and 60.

140 Faull et al., pp. 114 – 115.

141 Fiebig, pp. 164-166.

142 BT/MCI, Recital 56; Atlas, Recital 62.

143 BT/MCI, Recital 56; Atlas, Recital 67.

144 Castellot, p. 7.

145 Styliadou, p. 53.

146 BT/MCI, Recital 57.

147 Styliadou, pp. 53 – 54.

148 Atlas, Recitals 62 – 65.

149 Van Bael et al., p. 66.

150 Faull et al., p. 382.

151 Regulation 2659/2000, Recitals 10 and 11.

152 Regulation 2659/2000, Article 3.

153 Regulation 2659/2000, Article 4.

154 Regulation 2659/2000, Article 5.

155 Fiebig, pp. 130 and 131.

156 Fiebig, pp. 132 – 134.

157 Regulation 2658/2000, Recital 8.

158 Regulation 2658/2000, Article 1.

159 Regulation 2658/2000, Article 3.

160 Regulation 2658/2000, Article 4.

161 Regulation 2658/2000, Article 5.

162 Regulation 2658/2000, Article 2 (4).

163 Fiebig, pp. 130 – 136.

164 Fiebig, pp. 134 – 136.

165 See further Monti, Mario, *The EU view on global competition forum*, Speech held at the ABA meetings, Washington, 29/03/2001.

Bibliography

Literature and Articles

Bengtsson, Lars; Holmquist, Mikael; Larsson, Rikard (1998) *Från marknadsmisslyckande till lärande samarbete*, Malmö: Liber Ekonomi.

Castellot, Miguel A.P. (1995) ”The application of the competition rules in the Telecommunications sector: Strategic alliances”, i *EC Competition Policy Newsletter*, Volume 1, Issue 4.

Dicken, Peter (1992) *Global Shift: the internationalisation of economic activity*, 2nd edition, London: Paul Chapman Publishing ltd.

Enis, Ben M; Cox, Keith K; Mokwa, Michael P (ed.) (1995) *Marketing classics: a selection of influential articles*, 8th edition, Boston: Prentice Hall.

Faull, Jonathan; Nikpay, Ali (ed.) (1999) *The EC law of Competition*, Oxford: Oxford University Press.

Fiebig, André (1996) *Strategische Allianzen und Ihre Herausforderung an das Wettbewerbsrecht der Europäischen Union*, Frankfurt: Peter Lang Verlag.

Garai, Gabor (1999) „Leveraging the rewards of strategic alliances“, i *Journal of Business Strategy*, March – April.

Guttermann, Alan S. (1997) *Innovation and Competition Policy*, London: Kluwer Law International.

Götz, Gero (1996) *Strategische Allianzen: die Beurteilung einer modernen Form der Unternehmenskooperation nach deutschem und europäischem Kartellrecht*, Baden-Baden: Nomos Verlagsgesellschaft.

Hagedorn, John; Sadowski, Bert (1999) „The transition from strategic technology alliances to mergers and acquisitions: an explanatory study”, i *Journal of Management Studies*, Volume 36, Issue 1.

Rai, Arun; Borah, Santanu; Ramaprasad, Arkalgud (1996) “Critical success factors for strategic alliances in the information technology industry: an empirical study”, I *Decision Sciences*, Volume 27, Issue 1.

Schaub, Alexander (1996) “Competition Policy in the telecom sector”, I *EC Competition Policy Newsletter,* Volume 2, Issue 1.

Scherer, Joachim (1995) *Telecommunications law in Europe*, 3rd edition, London: Kluwer Law International.

Stehman, Oliver (1995) *Network Competition for European Telecommunications*, New York: Oxford University Press.

Styliadou, Melpomeni (1997) “Applying EC competition policy in the telecom sector”, i *Telecommunications Policy*, Volume 21, Issue 1.

Svernlöv, Carl (1997) *Internationella joint ventures: samriskföretag*, Stockholm: Norstedts Juridik.

Van Bael, Ivo; Bellis, Jean Francois (1994) *Competition Law of the European Union*, 3rd edition, Oxfordshire: CCH Editions ltd.

Vyas, Niren; Shelburn, William; Rogers, Dennis (1995) "An analysis of strategic alliances: forms, functions and framework", i *Journal of Business & Industrial Marketing*, Volume 10, Issue 2.

Whipple, Judith; Frankel, Robert (2000) "Strategic alliances success factors", i *Journal of Supply Management*, Volume 36, Issue 3.

Zonnekeyn, Geert A. (1998) "The treatment of joint ventures under the amended E.C. Merger Regulation", i *European Competition Law Review*, Issue 7.

Speeches

Monti, Mario, *The EU views on Global Competition Forum*, Speech held at the ABA meetings, Washington, 29/03/2001.

Pons, Jean Francois, *The application of competition and anti-trust policy in media and telecommunications in the European Union*, Speech held at the International Bar Association, Vancouver, 14/09/1998.

Ungerer, Herbert, *Competition in the European telecommunications market*, Speech held at the Management Symposium of Telecom Market Europe 2001, Brussels, 29/01/2001.

Ungerer, Herbert, *Identifying how national authorities and the European Union will regulate liberalised telecom*, Speech held at the Investing in European Telecoms Conference, London, 14/2/1995.

Official documents

Regulations

Council Regulation (EEC) No. 17 of 6 February 1962 implementing Articles 85 and 86 of the Treaty, OJ (1962) 13/204.

Council Regulation (EEC) No. 4064/89 of 21 December 1989 on the control of concentrations between undertakings, OJ (1989) L 395/27.

Commission Regulation (EC) No. 2659/2000 of 29 November 2000 on the application of Article 81 (3) of the Treaty to categories of research and development, OJ (2000) L 304/7.

Commission Regulation (EC) No. 2658/2000 of 29 November 2000 on the application of Article 81 (3) of the Treaty to categories of specialisation agreements, OJ (2000) L 304/3.

Notices

Commission Notice on the concept of full-function joint ventures under Council Regulation (EEC) No. 4046/89 on the control of concentrations between undertakings, OJ (1998) C 066/1, 02.03.1998.

Commission Notice on the distinction between concentrative and co-operative joint ventures under Council Regulation (EEC) No. 4064/89 on the control of concentrations between undertakings, OJ (1994) C 385/1, 31.12. 1994.

Notice concerning agreements, decisions, and concerted practices in the field of co-operation between enterprises, OJ (1968) C 75/3, 29.07.1968.

Notice concerning the assessment of co-operative joint ventures pursuant to Article 85 of the EEC Treaty, OJ (1993) C 43/2, 16.02.1993.

Policy documents

Green Paper on the development of the common market for telecommunications services and equipment, COM (87) 290, 1987.

Commission Guidelines on the application of EEC Competition rules in the telecommunications sector, OJ (1991) C 233/2, 06.09.1991.

Commission Notice – Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements, OJ (2001) C 3/2, 06.01.2001.

Table of Cases

Commission decisions

Commission Decision (96/546/EC) of 17 July 1996 relating to a proceeding under Articles 85 of the EC Treaty and Article 53 of the EEA Agreement, IV/35.337, *Atlas*, OJ (1996) L 239/23.

Commission Decision (94/579/EC) of 27 July 1994 relating to a proceeding pursuant to Article 85 of the EC Treaty and Articles 53 of the EEA Agreement, IV/34.857, *BT/MCI*, OJ (1994) L 223/36.

Commission Decision (91/562/EEC) of 18 October 1991 relating to a proceeding pursuant to Articles 85 of the EEC Treaty, IV/32.737, *Eirpage*, OJ (1991) L 306/22.

Commission Decision (94/895/EC) of 15 December 1994 relating to a proceeding pursuant to Article 85 of the EC Treaty and Article 53 of the EEA Agreement, IV/34.768, *International Private Satellite Partners*, OJ (1994) L 354/75.

ECJ Judgements

Case 26/76, Metro-SB-Grossmärkte GmbH & Co KG v Cartier (1977) ECR 1903.

Case T-7/89, SA Hercules Chemicals NV v Commission (1991) ECR II-1715.

Case 56/76, Société Technique Minière v Maschinenbau Ulm GmbH (1996) ECR 235.