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# The Treatment of Joint Ventures under E.C. Competition Law

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## Abbreviations

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| AMR | Amending form of the 1989 Merger Regulation |
| E.C. | European Community |
| ECJ | European Court of Justice |
| JV | Joint venture |
| MR | 1989 Merger Regulation |
| U.K | United Kingdom |

CMRL

ELR.

D.J. Hanner.

# 1. Preface

## 1.1 Purpose

JVs have concerned the European Commission for a long time and the treatment of JVs under E.C. competition law has since long been problematic. The assessment of JVs has been and still is a difficult issue. JVs may result in harmful or beneficial effects, they may involve co-operation with or without entry into new markets and they may involve structural changes. The reason why the assessment of JVs is so difficult is that a comprehensive control over JVs does not exist. Instead the Commission uses a selected application of merger controls and the application of article 85 of the E.C. Treaty. Selected application as such has led to a lot of criticism in that it often appears to lack focus.[1]

No specific provisions for the regulation of merger activity are to be found in the E.C. Treaty. This has been the situation since the E.C. Treaty entered into force in 1957. It was not until 1990 that a specific instrument for the regulation of mergers, acquisitions, take-overs and certain JVs entered into force - the MR. The introduction of the MR marked a significant turning point. The MR filled a legal vacuum concerning competition within the E.C. The rules set down by the E.C. Treaty concerning competition, article 85 and article 86, are explicitly limited to restrictive and abusive practice.[2] They make no specific mention about merger activity. Therefore there was a need to provide the E.C. competition law with a specific instrument to deal with concentrations and their impact on competition.[3] However, despite the MR, problems still remained in assessing JVs. The MR did not resolve all difficulties. Only so called concentrative JVs fell under the application of the MR. Co-operative JVs were to be assessed under article 85. Not until 1998 did co-operative JVs have the benefit to fall within the scope of the MR, now in an amended form.[4] Nonetheless, there are still improvements to be made.

The purpose of this essay is to describe the evolution of the assessment of JVs in the E.C. competition law. I will present the development of the assessment of JVs from applying article 85 to all JVs, the gradual approach towards a merger regulation, the adoption of such a regulation, the still remaining deficiencies concerning the evaluation of co-operative JVs, to applying the most recent amendments to the MR. By Commission decisions and ECJ case law, I will illustrate the differences in the assessment, from time to time, of concentrative and co-operative JVs. I will also illustrate the criticism concerning the assessment of JVs and then

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1 Kirkbridge, J., and Xiong, T., *The European Control of Joint Ventures: An Historic Opportunity or a Mere Continuation of Existing Practice?*, in [1998] 23 E.L.Rev., p. 37.

2 These articles are hereinafter referred to as "article 85" and "article 86". It should be noted that, since the introduction of the Treaty of Amsterdam, these provisions are now found under articles 81 and 82 of the E.C. Treaty.

3 Picat, M., and Zachmann, J., *Community Monitoring of Concentration Operations: Evaluation after Two Years' Application of Regulation 4064/89*, in [1993] E.C.L.R. issue 6, p. 240.

4 Craig, P., and de Búrca, G., *EU Law: text, cases and materials*, 2nd edition, Oxford 1998, p. 978f.

mostly concentrate on the development of the assessment of the "structural" co-operative JVs, since these have been the main objective for the criticism. It is interesting to notice that, during several decades, there has been a big difference in treatment of different categories of JVs. At an early stage the Commission made a distinction between so called concentrative and co-operative JVs. Since then, co-operative JVs have been under a much stricter scrutiny than concentrative JVs. Was this difference in treatment appropriate and justifiable? Did it give legal certainty?

The new amendments to the MR have been said to facilitate the assessment of JVs and to give them a more appropriate treatment, especially regarding co-operative JVs. What does the Commission's practice show - is it true? If the answer is yes, has the improvements been made to a sufficient extent? In the last chapter of this essay, I will analyse and examine whether the development of the assessment of the different categories of JVs has made progress. The most important part of the analysis is to see to the new amendments of the assessment of JVs made in 1998 and, in particularly, if these have helped "structural" co-operative JVs to be assessed in a more justifiable way. The question is whether more improvements can be made for the assessment of JVs as a whole.

### 1.2 Limitation

In chapter 3 I will give an overview of the contents of the MR. This is done to facilitate for the reader to survey its content, not to present all the rules in a comprehensive way. I have also chosen to only make a brief presentation of the amendments to the MR, except for article 2 and 3, which specifically are important for explaining the situation concerning the assessment of JVs. It should also be noted that the most significant changes to the MR concern the treatment of JVs and the amendments of the turnover thresholds. I have chosen to leave the latter subject outside this essay, apart from a brief presentation of the rules and some reflections of the effects that the turnover thresholds might have had and may have on the assessment of JVs. This may result in some vacuum but it would be impossible, in an essay such as this, to analyse that subject as well in a comprehensive way.

### 1.3 Method

This essay is based on a variety of sources, such as different books, articles, Commission notices, newsletters, case law and Commission decisions. The presentation of the assessment of merger activities prior to the MR is mainly based on the articles by Zonnekeyn, Pathak and Kirkbridge & Xiong. In general, the articles by Zonnekeyn, Kirkbridge & Xiong, Burnside, Hawk and Ahlbom & Turner have contributed a great deal throughout the essay. Interpretative notices, case law and different Commission decisions have also been very helpful for the presentation and understanding of the legislation and its interpretation such as

it has developed until today. In addition, the Commission's Competition Policy Newsletters have been a good basis for the understanding of the Commission's new approach and policy concerning co-operative JVs.

### 1.4 Outline

After the preface I will in chapter 2 explain the assessment of merger activities, in particular JVs, prior to the MR. In chapter 3, the adoption and the contents of the MR will be described, which will be followed by chapter 4, in which the consequences of the jurisdictional line drawn between concentrative and co-operative JVs will be presented. The differences in theory and practice concerning the assessment of the different categories of JVs will be illustrated. The "structural" co-operative JVs will in particular be observed. In chapter 5, the new amendments to the MR are presented and issues raised by the new jurisdictional line are illustrated. The Commission's most recent practice is highlighted. Finally, I will analyse the evolution of the assessment of JVs and the current situation, point out the deficiencies and propose some alternatives to the current E.C. competition JV law.

### 1.5 The notion JV

Even though it is not an easy task to define a JV, it is nevertheless important to do so at an initial stage. For the purpose of competition law the Commission defines JVs as "undertakings which are jointly controlled by two or more other undertakings which are economically independent of each other." JVs are created for many purposes and may therefore in practice take many different forms that reflect different degrees of integration between the venturers. The different forms can range from a jointly owned subsidiary, a partnership or merely a joint committee to decide resource planning, pricing, market strategy, research and development initiatives etc. A JV may have all the characteristics of a concentration, e.g. the establishment of a JV by two competitors where the competitors transfer their activities in a particular sector to the JV and then permanently withdraw from the relevant market. A JV may be created for the purpose of taking care of the joint research and development of the parent companies. A JV can also be used as an instrument to shade a cartel agreement, e.g. the parent companies set up a joint sales agency to sell both of the parents' products at the same prices. The most common types of JVs are production JVs, research and development JVs, selling and purchasing JVs and specialisation JVs.[5]

The form a JV takes may help to determine which competition-controls that are appropriate. The central issue is yet to determine and balance the pro- and anti-competitive effects of the organisation and its practices. A JV which gives rise to structural changes of the companies concerned may enhance the internal capabilities of the companies, allow sharing of costs and

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5 Kirkbridge, J., and Xiong, T., p. 37f.

risks, increase economies of scale, hence, in general terms, increase competition. JVs may also reduce competition. For example, co-operation between companies through a JV can reduce or eliminate competition that would otherwise exist between them. A market foreclosure may be produced where the result will be an elimination of possibility for third parties to co-operate with the companies concerned. It is the balancing of the pro- and anti-competitive effects that creates difficulties for the competition authorities.[6]

# 2. Historical background of the 1989 Merger Regulation

## 2.1 The lack of merger controls

The lack of regulation of merger activity by Community law created big difficulties during a long period. Article 85 and 86 did not mention anything about merger activity. Nonetheless, article 86, which prohibits any business with a dominant market position from abusing its dominant position, became the primary instrument to reach mergers and acquisitions of sole control. In the Continental Can case[7] the ECJ held that article 86 could be applied to catch mergers by an undertaking and a competitor if one of them was in a dominant position prior to the merger and if the merger strengthened the market power of the undertaking holding a dominant position in a way where the dominant position was abused. However, the application of article 86 was seen as limited. Even with the outcome of the Continental Can case the Commission believed that it lacked sufficient power to control anti-competitive mergers. The Commission thought that it only had the power to prohibit acquisitions resulting in a reinforcement, and not in a creation, of a dominant position if that position was abused. Article 86 was not the most appropriate instrument for merger controls since it lacked a positive clearance procedure. The Commission had no power to force undertakings to notify their mergers in advance and thereby be able to carry out an ex ante merger control.[8] The Commission did not even know whether it had the power to order divestiture after a merger was established.[9]

As early as 1973 the Commission tried to fill the gap in the legislation by proposing a merger regulation that would state a notification procedure and give the Commission the power to control mergers, but the years past without anything happening. Although the member states recognised that some sort of merger regulation was necessary, they did not succeed in unifying themselves on the more detailed provisions. Some member states were not even keen on relinquish their power to control mergers.[10]

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6 Kirkbridge, J., and Xiong, T., p. 38.
7 Case 6/72, Europemballage Corporation & Continental Can Co. Inc. v. Commission [1973] ECR 215.
8 Korah, V., *An introduction guide to EC Competition Law and Practice*, 5th edition, Oxford 1997, p. 237.
9 Korah, V., p. 237.
10 Craig, P., and de Búrca, G., p. 978; Korah, V., p. 237.

In 1987 the ECJ held in the BAT case[11] that article 85 also could be applied in some instances of share acquisition. The ECJ held that the acquisition of a minority shareholding in a competitor which led to control over that company might infringe article 85 if the acquisition as a result restricted competition. The judgement left a very uncertain situation, especially since the traditional view was that article 85(1), which prohibits cartel agreements between businesses, did not apply to agreements concerning the acquisition of ownership and therefore ruled out article 85 as an instrument for merger controls.

The need for a clarification became even more urgent. The European Community needed a merger regulation, not only because of the uncertainties relating to articles 85 and 86, but also because of the impending completion of the single market in 1992. European undertakings wanted to strengthen their positions on the European market with the emergence of the single market. Finally, in 1989 a merger regulation was adopted. The regulation was a political compromise text but at least a regulation had been adopted.[12]

## 2.2 The assessment of JVs

The general view was that JVs had "inherent detrimental effects" to competition. Therefore, to secure that competition in Europe would not be seriously affected by JVs, the Commission concluded, in an initial stage of E.C. competition law, that article 85(1) was clearly applicable to joint arrangements. This conclusion turned out to have severe consequences to JVs.

In article 85(1) it is stated that all agreements between undertakings, decisions by associations of undertakings and concerted practices which may effect trade between member states and which have as their object or effect the prevention, restriction or distortion of competition within the common market, shall be prohibited as incompatible with the common market. The Commission's traditional interpretation of "restriction of competition" in article 85 was wide.[13] With other words, the prohibition test under article 85 was very low. If a JV wanted to benefit some legal certainty it had to be notified to the Commission for an article 85(3) exemption. This was made on Form A/B. Positive arguments for the formation of the JV had to be demonstrated. This was an onerous burden of proof. A JV caught by article 85(1) had to produce certain benefits for consumers and any restrictions on competition had to be indispensable for achieving those benefits. The procedural rules for the application of article 85 can be found in Regulation 17/62.[14] When a notification was made the Commission was not forced to give a decision within any strict time-limit. It could take

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11 Cases 142 and 156/84, British American Tobacco Co. Ltd. and R. J. Reynolds industries Inc. v. Commission [1987] ECR 4487.

12 Picat, M., and Zachmann, J., p. 240.

13 Kirkbridge, J., and Xiong, T., p. 38.

14 Regulation No. 17. First Regulation implementing articles 85 and 86 of the Treaty. [OJ Sp. Ed. 1962, No. 204/62, p. 87] This regulation is hereinafter referred to as "Regulation 17/62".

several months before the parties to a JV received a decision. If the Commission approved the JV it usually gave a comfort letter rather than a formal decision. A comfort letter gave an uncertain legal standing and was not a definitive decision. By contrast, it was time-limited and revocable.[15]

Since the Commission had declared article 85(1) clearly applicable to JVs and the prohibition test under this article was very low, application for individual exemption under article 85(3) became the norm. Having the consequences of an individual exemption in mind, it was not a pleasant situation for those involved in JVs, especially JVs concerning permanent structural changes with beneficial effects on competition. Such JVs wanted to benefit from a once-and-for-all exemption.[16]

Nonetheless, article 85 was not to be applied to mergers and other structural arrangements. This view was taken in the Commission's 1966 memorandum. The Commission stated that "article 85 will not apply to agreements limited to the total or partial acquisition of undertakings or to the redistribution of the ownership of undertakings by means of mergers, or the purchase of shareholdings or assets".[17] The Commission thus accepted the view that JVs that were of a merger-like concentration should fall outside the scope of article 85. Accordingly, the Commission developed the "partial concentration", or "partial merger", test to put some of the JVs outside the scope and control of article 85(1).[18] However, "partial concentrations" were found only in exceptional cases. The test was very demanding in its requirements. A "partial concentration" would be deemed to occur only where:

1) the parents transferred all their business to the JV on a lasting basis;
2) the JV performed all the functions of an economic entity and was free to determine its business policy independently;
3) all the parents irreversibly withdrew from the JVs business; and
4) the arrangement would not lead to co-operation between the parents in other areas.[19]

This was the first time the Commission introduced a distinction between JVs subject to article 85 and JVs to be treated as concentrations, later known as co-operative and concentrative JVs.[20]

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15 Burnside 1993, p. 197; Brown, A., *Distinguishing between Concentrative and Co-operative Joint Ventures: Is it Getting any Easier?*, in [1996] E.C.L.R., p. 241.
16 Kirkbridge, J., and Xiong, T., p. 38.
17 Zonnekeyn, G. A., *The Treatment of Joint Ventures Under the Amended E.C. Merger Regulation*, in [1998] E.C.L.R. Issue 7, p. 414; Kirkbridge, J., and Xiong, T., p. 39.
18 Zonnekeyn, G. A., p. 414; Kirkbridge, J., and Xiong, T., p. 39.
19 Sibree, W., *EEC Merger Control and Joint Ventures*, in [1992] E.L.Rev., p. 93; Kirkbridge, J., and Xiong, T., p. 39.
20 Pathak, A. S., *The EC Commission's Approach to Joint Ventures: A Policy of Contradictions*, in [1991] E.C.L.R. Issue 5, p. 174.

Criticism raised on the distinction between JVs subject to article 85 and JVs to be treated as concentrations. The Commission's new approach created legal uncertainty. Some scholars were of the opinion that the distinction distorted reality because it was based on a misconceived notion of a concentration whose existence was determined by the competitive relationship between the parents prior to the formation of a JV rather than the structure of a JV itself. If the parents were competitors prior to a JV transaction and did not withdraw "irreversibly" from the JVs market, joint control or ownership of assets could never constitute a concentration.[21] The uncertainty that resulted from this new approach grew worse by the Commission's practice of interpreting potential competition in a very broad and unrealistic manner. This was done so that the Commission could bring more JVs within the co-operative category.[22]

The Commission considered the "partial concentration" test in a number of cases. For example in the SHV/Shevron case[23] the Commission categorised a JV as a "partial concentration", i.e. concentrative.

> A distribution JV was created in which the two parents, SHV and Chevron, transferred for 50 years their distribution networks for certain petroleum products and all assets relating thereto to the JV. Both parents ceased to retail the products covered and gave non-compete covenants to that effect. SHV also ceased to do business as an independent wholesale buyer of petroleum products and withdrew from that market. Thus, the parents completely and irreversibly left the JVs market without weakening competition on the markets in related products. Accordingly, the Commission stated that all the conditions for a "partial concentration" were fulfilled and gave a negative clearance.

By contrast, in the De Laval-Stork case[24] the Commission rejected the existence of a "partial concentration".

> The JV, De Laval-Stork, would develop, manufacture and sell steam turbines, compressors and pumps for a period of five years. The Commission concluded that the formation of the JV did not constitute a "partial concentration" because nothing pointed to that the parents had become purely holding companies. De Laval was to continue to make the same products as the JV in a near geographic market and Stork was to continue producing similar products. Both parents would be able to sell their products without passing trough the JV. They did not completely and irreversibly abandon business in the area covered by the JV, as the "partial concentration" test required. The creation of the JV was therefore seen as co-operative.

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21 Pathak, A. S., p. 174f.

22 Kirkbridge, J., and Xiong, T., p. 40.

23 Case No. IV/ 26.872- SHV/Chevron, decision of December 20, 1974.

24 Case No. IV/ 27.093- De Laval-Stork, decision of July 25, 1977.

Although the Commission adopted a "partial concentration" test, it more often than not still subjected entire JV transactions to article 85(1), instead of only subjecting the restrictive agreements. The Commission did not separate between the formation of a JV, that could be beneficial for the market, and the agreements accompanying the formation of a JV, that might restrict competition. The formation of a JV between competitors, actual or potential, created the likelihood of restrictive arrangements even in the absence of particularised agreements or concerted practices. In addition, if the Commission decided to grant an exemption, the decision was often made ad hoc and frequently contradicted other decisions which gave rise to conflicting rules for JV analysis. The Commission was anxious to regulate JVs between parents in the absence of merger control rules but its efforts were not convincing enough. The Commission's unsuccessful endeavour to clarify the analysis of JVs went on.[25]

# 3. The 1989 Merger Regulation

## 3.1 Introduction

In 1989 there was a turning point- the first merger regulation was adopted (the MR)[26] The MR entered into force on September 21, 1990, providing the E.C. for the first time with an adequate instrument for controlling cross-border concentrations. The legislator let certain JVs fall under the scope of the MR and its more favourable treatment of transactions, compared with article 85.

## 3.2 Definition of a concentration

### 3.2.1 Mergers and acquisitions of sole control

For the MR to be applicable there must exist a concentration. This issue is dealt with in article 3(1) which defines a concentration as a transaction where:

> "(a) two or more previously independent undertakings merge, or
> (b) - one or more persons already controlling at least one undertaking, or
> - one or more undertakings
>
> acquire, whether by purchase of securities or assets, by contract or by any other means, direct or indirect control of the whole or parts of one or more other undertakings."

Article 3(1) must be read in conjunction with article 3(3) which provides:

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25 Pathak, A. S., p. 176ff.

26 Council Regulation (EEC) No. 4064/89 of 21 December 1989 on the control of concentrations between undertakings.

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

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

Article 3(1)(a) covers the case of a full merger, i.e. the formation of one enterprise from undertakings that were previously distinct and separate. Article 3(1)(b) covers cases of change of control. Control may be constituted by law or de facto. A change of control can result in the acquisition of sole control by a person or an undertaking. There is also a possibility for two or more undertakings to acquire joint control over another undertaking. Apparently the MR captured jointly controlled undertakings, i.e. JVs, but the question is, to what extent?

### 3.2.2 Concentrative JVs

Under E.C. competition law JVs were at this time to be classified as concentrative or co-operative. If classifying a JV as concentrative, it was regarded as akin to a concentration and as such would be dealt with under the MR. If classifying a JV as co-operative, the JV was regarded as akin to a co-operation agreement between parties who remained independent and would then fall outside the scope of the MR. The distinction between concentrative and co-operative JVs derives from article 3 of the MR. Article 3(2) extended the notion of a concentration to include concentrative JVs:

"An operation, including the creation of a joint venture, which has as its object or effect the co-ordination of the competitive behaviour of undertakings which remain independent shall not constitute a concentration within the meaning of paragraph 1(b).

The creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity, which does not give rise to co-ordination of the competitive behaviour of the parties amongst themselves or between them and the joint venture, shall constitute a concentration within the meaning of paragraph 1(b)."

The distinction between concentrative and co-operative JVs was elaborated in a guidance notice[27] issued by the Commission after the MR was adopted and prior to its entry into force. The 1990 Notice stated that a JV had to fulfil certain criteria to be considered concentrative.

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[27] Commission Notice regarding the concentrative and co-operative operations under Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, O.J. No L 395, 30.12.1989, p. 1. This Commission Notice is hereinafter referred to as "the 1990 Notice".

As a basic criterion the JV had to be jointly controlled by its parents. Any joint economic activity falling short of this basic definition was not even potentially within the scope of the MR. Joint control existed where two or more undertakings/persons had possibility of exercising, directly or indirectly, decisive influence over another undertaking.[28] "Decisive influence" could be that the parents had to agree on the annual business plan or that the parents had joint control through veto rights. In other words, the parents had to reach agreement on major decisions concerning the JV, which implied possibility of deadlock.[29]

According to article 3(2) concentrative JVs were defined in terms of two main criteria. As a positive criterion it had to perform on a lasting basis all the functions of an autonomous economic entity, i.e. be autonomous/full-function. The narrow interpretation of the criteria of a concentrative JV could quite easily be seen in the 1990 Notice. The JV was only seen as existing on a lasting basis if it was intended and able to carry on its activity for an unlimited period, or at least for a long time.[30] For a JV to be autonomous the 1990 Notice emphasised the decision-making autonomy of the JV, which is rarely enjoyed by a JV in the light of the joint control by the parents to the JV. It is doubtful whether there are any JVs where the parents abandon all influence over commercial policy any more than they would over wholly-owned subsidiaries.[31] However, the Commission stated that it had to be determined whether the JV in question was in a position to exercise its own commercial policy. This required that the JV planned, decided, and acted independently. It had to be free to determine its competitive behaviour autonomously and according to its own economic interests. If the commercial policy of the JV remained in the hands of the parents, the JV should be seen as an instrument of the parents' market interest. Such a situation would usually exist where the JV operated in the market of the parents or where the JV operated in markets neighbouring, or upstream or downstream, of those of the parents.[32]

As a negative criterion, a risk of co-ordination of competitive behaviour of the parents amongst themselves or between them and the JV was not allowed. The 1990 Notice reaffirmed the strictness of the "partial concentration" test. It retained the strict market withdrawal requirement. The Commission stated that where the parents, or one of them, remained active on the JVs market or remained potential competitors of the JV, a co-ordination of competitive behaviour between the parents or between them and the JV had to be presumed. If the presumption was not proven to be wrong, the establishment of the JV was seen as falling outside the scope of the second subparagraph of article 3(2) of the MR. If the JV was operating in a market that was upstream or downstream of that of the parents, the

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[28] The 1990 Notice, paragraph 9.
[29] The 1990 Notice, paragraph 11-12.
[30] The 1990 Notice, paragraph 17. The criterion was not specified any further.
[31] Kirkbridge, J., and Xiong, T., p. 42.
[32] The 1990 Notice, paragraph 18-19.

Commission would in general consider it to be a co-ordination of purchasing or sales policy between the parents where they were competitors on the upstream or downstream market.[33]

Thus, according to the MR a JV had to be jointly controlled by its parents, be autonomous/full-function and there must not be any risk of co-ordination of competitive behaviour between undertakings which remained independent. The latter criterion was directed both towards the JV-parent relationship and the parent-parent relationship. If the JV failed to satisfy these criteria it would be considered as co-operative and thus fall outside the MR. Instead, article 85 and Regulation 17/62 would apply.

An example where the Commission found a JV to be concentrative is the Mitsubishi/UCAR case.[34] This case constitutes the only example where the Commission actually referred to the decision-making autonomy of a JV.

> Mitsubishi purchased a 50% interest in a wholly owned subsidiary of Union Carbide that operated in the carbon business. Accordingly, the company would be jointly owned by Mitsubishi and Union Carbide. In certain matters only, which were related to the need to protect the value of the shareholders' investment, the JV would be required to have the consent of both parents. In all other matters the JV enjoyed complete independence which meant economical independence and responsibility for its own commercial policy. The JV was also set up on a lasting basis. Looking at the risk of coordination, Union Carbide would withdraw from the JV's market. Mitsubishi was still active, although only to a negligible extent, in the JV's product market. Despite the negligible activity of Mitsubishi in the JV's product market, it had to agree to withdraw completely from that market. Thus, even if the Commission applied the presumption of coordination in the 1990 Notice, none of the undertakings concerned could be seen as realistic competitors within the Community. Accordingly, the JV was considered concentrative.

An example where the Commission found a JV to be co-operative is the Eureko case.[35]

> Four insurance companies would create a holding company, Eureko, to which they would contribute all their life and non-life insurance operations outside their own countries. The Commission stated that the JV was co-operative because Eureko would be a vehicle for co-ordination of the parents' competitive behaviour and it was likely to lead to a division of markets. Even though it could be assumed that the insurance market currently could be considered national in scope, the operation was seen as giving rise to co-ordination of the competitive behaviour because, inter alia, the national markets would not remain national. The Commission saw the gradual process of opening of national markets. The steady erosion of national barriers in the insurance market meant that the parents would become

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33 The 1990 Notice, paragraph 33-34.

34 Case No. IV/M. 024- Mitsubishi/UCAR Carbon, decision of January 4, 1991.

35 Case No. IV/M. 207- Eureko, decision of April 27, 1992.

potential competitors, if not also actual competitors, even though they currently operated in different countries and thus different geographical markets. The JV was considered co-operative.

### 3.3 The Community dimension

For a concentration to fall under the MR it must not only fulfil the criteria in article 3. The concentration must also have Community dimension. The Community dimension of a concentration is determined by reference to the turnover thresholds of the undertakings concerned. The turnover thresholds have as their purpose to provide a clear-cut determinant of jurisdiction of the Commission and also to be a relevant criterion for assessing potential incompatibility with the common market.[36] Article 1(2) of the MR prescribes:

> "For the purposes of this Regulation, a concentration has a Community dimension where:
>
> (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than ECU 5000 million; and
> (b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than ECU 250 million,
>
> unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State."

The method of calculating turnover is prescribed in article 5 of the MR and has been explained in a notice. The relevant turnover is that of the "undertakings concerned". This notion was not defined in the MR so merging parties had to rely on the Commission's practice to identify the notion. In the case of a JV the "undertakings concerned" were the parties setting up the JV, i.e. the total turnover of all the parents were included.[37] The Sunrise case was a straightforward application of this principle.[38] Nonetheless, according to a subsequent Commission Notice[39], in which a JV was created by turning a subsidiary under sole control into a JV between the former parent and a third party or where an extra parent was added to an already existing JV, the Commission considered all parents *and* the JV to be "undertakings concerned".[40]

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36 Clough, M., *EC Merger Regulation. A practical guide to the EC merger and acquisition rules*, London 1994, p. 138.
37 Korah, V., p. 239.
38 Case No. IV/M. 176- Sunrise, decision of January 13, 1991.
39 Commission Notice on the notion of undertakings concerned under the Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, O.J. C 385, 31.12.1994, p. 12. This notice is hereinafter referred to as "the Undertakings concerned Notice".
40 The Undertakings concerned Notice, paragraph 23 and 44.

The thresholds provided in article 1(2) may appear confusing. However, they are carefully designed. The ECU 5 billion worldwide turnover threshold reflect the general economic and financial power of the undertakings concerned. The ECU 250 million Community-wide turnover demonstrates significant activity in the Community and the two-thirds threshold is designed to exclude operations which are primarily of a national nature. Thus, article 1(2) includes delimitations vis-à-vis insignificant transactions, third countries and national law.[41]

The levels at which the turnover thresholds were set were exclusively the result of political compromise in the Council and were intended to be transitional pending review in 1993. The MR was meant to apply to significant structural changes with a market impact that went beyond national borders of member states. The Community dimension of a concentration should then ideally be defined on the basis of its effect on the market, i.e. on a qualitative criteria. For reasons of simplicity and legal certainty the Community dimension was instead defined in terms of quantitative thresholds. The turnover thresholds were based on the fiction that the size of the merging undertakings' turnover reflected the economic importance of the transaction and the merger's competitive impact on the common market.[42]

### 3.4 Notification

If a JV is concentrative (i.e. seen as a concentration caught under the MR) and has a Community dimension, it must be notified within strict time-limits on Form CO to the Merger Task Force (MTF), DG IV of the Commission. Article 4 states that the Commission has to be notified not more than one week after the conclusion of the agreement, or the announcement of the public bid, or the acquisition of a controlling interest. The parties were not, according to article 7(1), allowed to put the concentration into effect before, or for three weeks after, notification. In article 7(2) it was stated that this suspension could be prolonged if the Commission found it necessary to initiate a stage II procedure.[43] Article 7 has now a different wording. Article 7(2) is deleted and article 7(1) states instead that a concentration must not be put into effect either before its notification or until it has been declared compatible with the common market pursuant to a decision under article 6(1)(b) or article 8(2) or on the basis of a presumption according to article 10(6). Once the concentration has been notified the Commission is obliged to start an examination.[44]

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41 Kassamali, R. A., *From Fiction To Fallacy: Reviewing the E.C. Merger Regulation's Community-Dimension Thresholds in the Light of Economics and Experience in Merger Control*, in [1996] 21 E.L.Rev. Checklist No. 2, CC 99.

42 Clough, M., p. 138.

43 See explanation in chapter 3.6.

44 See further in chapter 3.6.

### 3.5 Criterion for appraisal by the Commission

Article 2 requires the Commission to conduct an appraisal of concentrations with Community dimension to see whether they are compatible with the common market. The criterion for the appraisal is whether "a concentration [..] creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it." Article 2 is rather preventive than repressive, since it goes further than only controlling abuse of dominant position.[45]

If the Commission comes to the conclusion that the concentration does create or strengthen a dominant position, the Commission shall declare the concentration incompatible with the common market and the concentration can not proceed. It is more common, however, that the parties undertake to hive off some overlapping activities and the Commission may then declare, subject to conditions, that the concentration is compatible with the common market.[46] In article 2(1) it is stated what the Commission has to take into account when conducting its appraisal, e.g. the need to maintain and develop effective competition within the common market in view of the structure of all the markets concerned and the potential or actual competition from undertakings located either within or outwith the Community.

### 3.6 Powers of the Commission

Once the concentration has been notified the Commission can start an examination. The examination is divided into two stages. According to article 6 the Commission must always conduct an examination as soon as a notification is received. At the first stage there are three possible decisions for the Commission to take. It may declare the MR inapplicable to the concentration, it may declare the MR applicable to the concentration but that the concentration is not incompatible with the common market or it may decide that the MR is applicable and that there are serious doubts about the concentration's compatibility with the common market. All the different decisions have to be formal and they are all subject to appeal. Reasons must be given to the decision but the parties may not require lengthy motives because of the time constraints the Commission is under.[47] Decisions according to a stage-I procedure has to be given, as a main rule, within one month of receiving a complete notification.

If the Commission has serious doubts about the concentration's compatibility with the common market it has to initiate a stage II procedure. A formal decision must be made within four months of initiating proceedings. According to article 8 the Commission has, also in the

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[45] Article 2(1) does not only take into account one undertaking's dominant position. In 1992 the Commission decided in the Nestlé/Perrier case that two undertakings can have a collective dominant position. Case No. IV/M. 190- Nestlé/Perrier, decision of July 22, 1992.

[46] Korah, V., p. 240.

[47] Korah, V., p. 246.

stage II procedure, three possible decisions to make. It can declare the concentration compatible with the common market, it can give a decision declaring the concentration incompatible with the common market or it can order to undo an already implemented concentration. Article 8(2) provides that the Commission can attach obligations and conditions to a decision made at stage II. In reality, this has only enabled the Commission to prohibit a few concentrations.[48]

Under the MR the Commission did not have the power to attach obligations or conditions to a decision made at stage I. However, in practice the Commission took the liberty to do this anyway, with the consequence that the undertakings so given were not enforceable.[49] With new amendments to the MR and its article 6, the Commission now has explicit power to attach obligations and conditions even to a decision taken at stage I.

### 3.7 One stop control

The MR makes a division of jurisdiction between Community- and national competition authorities. This makes it possible for all proposed concentrations to be subject to a single clearance procedure. This "one-stop-shop" principle has as an effect that European competitors established in different countries may not have to be subjected to three or more clearance procedures. The MR gives the Commission exclusive competence over concentrations with Community dimension. Article 21(1) states that:

> "Subject to review by the Court of Justice, the Commission shall have the sole jurisdiction to take the decisions provided for in this Regulation."

This is reinforced in article 21(2) which states that:

> "No Member State shall apply its national legislation on competition to any consideration that has a Community dimension."

According to article 22(1) and (2) the assessment of such concentrations is made under the MR. Article 85, 86 and Regulation 17/62 are not applicable[50] and, furthermore, the parties to such concentrations do not have to notify its national authorities.

Thus, the MR intended to institute a "one-stop-shop" principle in the Community. The idea was that either a concentration's effects on competition would be examined at Community

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48 Korah, V., p. 246f.

49 Korah, V., p. 240.

50 Paragraph (1) and (2) in article 22 are replaced by a new article 22(1) and it is added in this article that Regulation 17/62 shall, as an exception apply in relation to JVs that do not have a Community dimension and which have as their object or effect the coordination of the competitive behaviour of undertakings that remain independent.

level by the Commission or at member state level by national competition authorities. Before the MR existed, a concentration could be vetted under two different sets of competition rules, i.e. both under article 85 and 86 and under member state competition laws.[51]

Concentrations, including JVs, falling under the turnover thresholds are concentrations without Community dimension. Community authorities then neither have the authority to apply the MR, nor article 85 or 86. Instead, it is the national authorities' task to apply national legislation. Normally, article 85 and 86 have direct effect which means that they can be applied by national authorities. However, article 22 makes article 85 and 86 disapplicable to concentrations, regardless whether they have Community dimension or not, since the implementing Regulation 17/62 is withdrawn regarding concentrations. In conclusion, article 85 can not be relied on neither at Community level nor at national level with respect to concentrations irrespective of any Community dimension. This in turn means that a concentrative JV may only be investigated either under the scope of the MR or under the scope of national competition laws, depending on whether it has Community dimension. However, co-operative JVs did not benefit from the one-stop-shop principle. Since they never could be considered as concentrations, they could be investigated by the Commission under the scope of article 85 and at the same time be investigated by national authorities under the scope of national rules and article 85.[52]

There are exceptions to the statement in article 21(1) regarding the Commission's sole jurisdiction to take the decisions provided for in the MR. This general principle is not absolute. For example, article 21(2) states that member states may in certain cases ask for referral of cases to a national authority.

# 4. Concentrative-co-operative JVs

## 4.1 Introduction

When the MR was drafted there were certain concerns about where the concentrative-co-operative jurisdictional line would be drawn. On the one hand, the draftsmen wanted to be sure that mergers, acquisitions and other "structural" transactions would not fall outside the MR only because they involved some "co-operative" or cartel risks. On the other hand, a too broad definition of concentrative JVs could have as a result too many arrangements between competitors escaping the stricter substantive, procedural and remedial rules of article 85. The latter thought reflects the same concerns that supported the Commission's narrow definition of a "partial concentration". The concentrative-co-operative distinction adopted most of the elements of the "partial concentration" test, such as the autonomy of the JV ("performing all

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51 Broberg 1998, p. 4f.
52 Broberg 1998, p 5f.

the functions of an autonomous economic entity") and the withdrawal requirement of the parent companies ("must not be any risk of co-ordination").[53]

## 4.2 The consequence of the concentrative-co-operative distinction

The consequence of the distinction between concentrative and co-operative JVs was that a jurisdictional line was drawn between these two categories of JVs. Concentrative JVs, which were subject to the thresholds, fell under the MR and co-operative JVs were still to be examined under article 85 and the Regulation 17/62. The distinction might be seen as easily stated but in practice it could be difficult to apply. Its existence suggested that there should be an identifiable point at which all concentrations could be segregated from all non-concentrations. However, that would be impossible because of the existence of many possible structures and each structure does not have to differ more than marginally from another.[54] The problem that developed from the clear-cut distinction was that once a classification of a given JV was made, it had fundamental consequences for the anti-trust analysis. It determined the need to notify and what notifications that was to be made. It determined the procedure of a notification and the time before obtaining a clearance. It determined the substantive test which would judge whether clearance should be given and the legal nature of the clearance if and when received.[55]

Regarding concentrative JVs notification was required under the MR if the Community dimension was met. As soon as the Commission had received the notification it normally had to come with a decision within one month. If a stage II procedure was initiated the decision had to be given within an additional four months. The proceedings always led to a formal decision. The substantial test had as its task to determine whether a concentration would create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it. If a JV fell under the scope of the MR there was a strong possibility that it would be permitted because there was a presumption that a JV was legal unless there were certain negative aspects and consequences that would result from it. If a clearance was given it was unlimited in time. In addition there was a "one-stop-shop" for agreements under the MR. Neither national concentration control rules nor article 85 could be applicable to the transaction. The Commission had exclusive jurisdiction under the scope of the MR.

Co-operative JVs, on the other hand, fell under the application of article 85 and the assessment thereunder was different. The prohibition test was very low so even if a co-operative JV did not have to be notified, the consequence of the low prohibition test was that the parties had to try to make the JV agreement to be exempted under article 85(3), then with

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53 Hawk 1996, p. 38.
54 Burnside 1993, p. 195.
55 Burnside 1993, p. 195.

a notification as a requirement. Positive arguments in favour of an exemption had to be demonstrated. Thus, a JV was in principle assumed to be illegal unless the parties showed strong proof that it was not.[56] The parties to a transaction had a more onerous burden of proof under article 85(3) than under the MR. Notification under article 85 did not force the Commission to give a decision within any strict time-limit. Any clearance was likely to be in a form of a comfort letter rather than a formal decision. The comfort letter gave an uncertain legal standing and was not a definite decision. In addition there was no "one-stop-shop" for article 85(1) agreements. The transaction could be examined both under article 85 and national competition rules.

### 4.3 The development of the concentrative-co-operative distinction

The 1990 Notice was meant to make it easier to see whether a JV was concentrative or co-operative. However, because of the very narrow interpretation of the criteria for constituting a concentrative JV, the notice appeared to offer little prospect that any JV ever could be concentrative. The consequence of the Commission's policy was that a lot of JVs that actually resulted in permanent or semi-permanent beneficial structural changes, still had to be reviewed under article 85 and Regulation 17/62. This was a little bit inconsistent with the Commission's preliminary intention to improve its policy for JVs.[57] In practice, the Commission soon made a shift in policy-perspective and as a consequence it did not follow the 1990 Notice. The Commission developed the concentrative-co-operative distinction in a way where it interpreted the criterion of autonomy more generously and reduced the strict withdrawal requirement of the parents of the JV. As a result, more JVs could actually benefit from the provisions of the MR.[58]

According to the Commission's practice, it seemed as the criterion of autonomy of a JV would primarily be understood in terms of economic self-sufficiency rather than in terms of decision-making autonomy. If the JV had access to sufficient resources, including staff, finance and assets, tangible or intangible, so it could conduct its business activities on a lasting basis, the Commission in certain cases regarded the JV as an autonomous economic entity. This approach was favourable since the Commission then did not require the parents to abandon all influence over commercial policy in the JV.[59]

In respect of the required withdrawal of all parents from the JV's market, it soon became clear that the Commission entirely overruled certain aspects of the 1990 Notice. A marginal presence of the parents in the JVs market was normally no longer seen as sufficient to give rise to a risk of co-ordination. The Commission adopted a "de minimis test": the parents to a

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[56] Kirkbridge, J., and Xiong, T., p. 46.
[57] Kirkbridge, J., and Xiong, T., p. 42.
[58] Hawk 1996, p. 38.
[59] Kirkbridge, J., and Xiong, T., p. 42f.

JV could compete with the JV in the same market and vice versa, but if that was insignificant it did not give rise to a presumption of co-ordination.[60] An additional step away from the 1990 Notice, in respect of withdrawal of all parents from the JVs market, was the "industrial leadership" doctrine. The conditions that had to be met before the operation would benefit from the doctrine was that all the parents must exit the JVs market, except one, and the non-exiting parent must have a preponderance of the control over the JV and be responsible for the market behaviour of the JV. Thus, the Commission's approach was that where one parent remained a significant competitor in the same market as the JV the operation would still be treated as a concentration if that parent assumed a "leading role" in the management of the JV. The JV would then be deemed to be part of the economic group of the "leading" parent.[61] It was in the Thomson/Pilkington case[62] that the "industrial leadership" doctrine first emerged and the doctrine was confirmed in several subsequent decisions.[63].

Thomson-CSF acquired a 49.99 per cent share in Pilkington Optronics Ltd., formally a wholly-owned subsidiary of Pilkington plc. Thomson-CSF did not withdraw from the optronics market, but Pilkington plc. permanently did and it also gave a covenant that it would not compete with the JV as long as it was a shareholder. Since Pilkington plc. withdrew from the market of the JV with very little prospect of re-entering the market, the Commission found no possibility of co-ordination between the parents. That reasoning contradicted with the 1990 Notice which clearly stated that both parents had to withdraw from the market for there to be no likelihood of co-ordination. The Commission also found it unlikely that there existed a possibility of a vertical coordination. Pilkington plc.'s supply of products to the JV would be minimal and Thomson-CSF would have the main responsibility for the market behaviour of Pilkington Optronics Ltd. The operation was consequently seen as a concentrative JV falling under the scope of the MR.

### 4.4 "Structural" co-operative JVs

As has been shown above, the 1990 Notice had to be treated with caution. From the outset, the Commission's practice was significantly different compared to the guidance that it gave in the 1990 Notice. However, although the Commission developed a less strict interpretation than the 1990 Notice indicated, there were several JVs that did not fulfil the criteria of qualifying as a concentration in the sense of the MR. JVs that was structural in nature , i.e. "structural" co-operative JVs, could still fail to be assessed as concentrative JVs, because of their purpose and/or structure. If they failed, they had to be reviewed under article 85 and Regulation 17/62.

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60 Sibree, W., p. 98; Kirkbridge, J., and Xiong, T., p. 43.

61 Kirkbridge, J., and Xiong, T., p. 43f.

62 Case No. IV/M. 086- Thomson/Pilkington, decision of October 23, 1991.

63 For example Case No. IV/M. 133- Ericsson/Kolbe, decision of January 22, 1992.

By subjecting economically similar transactions to different enforcement rules, the distinction between concentrative-co-operative JVs created strong forum shopping incentives for the parties. They often structured their JVs to be concentrative rather than co-operative in order to gain the benefits of the MR. This was not good in the sense that the concentrative-co-operative distinction deterred formation of desirable JVs. Firms were encouraged to merge their competing operations totally and permanently instead of also being encouraged to engage in operations with limited duration. Similar transactions were treated differently, without any credible economic or legal justification.[64] "Structural" co-operative JVs had to be treated in a more appropriate way. The Commission was forced to re-evaluate the situation. In recognising the imbalance of treatment, the Commission issued some important documents and made other improvements.

### 4.4.1 The "fast-track" procedure

As mentioned above, a concentrative JV would normally be cleared within one month of notification while parties to a co-operative JV often had to wait for months before receiving any approval. To reduce this difference the Commission decided to speed up the treatment of at least the "structural" co-operative JVs.[65] At the end of 1992, the Commission announced that it would implement internally non-binding deadlines whereby "structural" co-operative JVs would benefit from accelerated processing under article 85. In view of this so called "fast-track" procedure a new Form A/B was published in 1994. It referred to the following definition of a "structural" co-operative JV:

> "one that involves an important change in the structure and organisation of the business assets of the parties to the agreement. This may occur because the joint venture takes over or extends existing activities of the parent companies or because it undertakes new activities on their behalf. Such operations are characterised by the commitment of significant financial, material and/or non-tangible assets such as intellectual property rights and know-how."[66]

The new procedural rules specified that the Commission would, after request, apply an accelerated procedure. Within two months of a complete notification of a "structural" co-operative JV the Commission would inform the parties concerned of whether their agreement was compatible with article 85. The Commission would either send a comfort letter or indicate that it had serious concerns. Under these two months, the Commission would publish a short notice in the Official Journal, calling for third-party comments.[67] This procedure had to be seen as favourable compared to the earlier situation where parties could wait several months before getting an answer from the Commission. The negative aspect of the fast-track procedure was that it could result in a more limited availability of information

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64 Hawk 1993, p. 1161ff.
65 Brown, A., p. 241.
66 Zonnekeyn, G. A., p. 417.
67 Brown, A., p. 241.

regarding co-operative JVs. The information was mostly limited to the publication of the short notice in the Official Journal, which could lead to some lack of transparency.[68]

### 4.4.2 The co-operative JV notice

In 1993 the Commission published a notice on co-operative JVs which is still applicable.[69] The co-operative JV Notice applies to all JVs which do not fall within the scope of the application of article 3 of the MR. At the time of publishing, the Commission stated that the co-operative JV Notice would form a counterpart to the 1990 Notice.[70]

The co-operative JV Notice contains a summary of the Commission's previous administrative practice on JVs. In this way the Commission wanted to inform undertakings about the legal and economic criteria that would guide the Commission in the future application of article 85(1) and (3) to co-operative JVs.[71] The co-operative JV Notice also shows an attempt to specify those categories of JVs that the Commission perceived as being compatible with article 85. Thus, the purposes of the co-operative JV Notice are to provide some legal certainty in the area of co-operative JVs and to encourage the setting up of JVs that may have beneficial economic impact on the E.C. market. The co-operative JV Notice recognises that many co-operative JVs have beneficial effects, and provides for them to be encouraged. The treatment of co-operative JVs was less favourable, and as undertakings merged for the purpose of falling under the MR the Commission wanted to restore the balance through the co-operative JV Notice.[72]

The co-operative JV Notice first lists circumstances in which article 85(1) does not apply, e.g. where the parties involved are of minor economic importance.[73] It then follows the two-stage approach inherent in article 85. For cases which are of economic substance the Commission has declared that an economically realistic approach is necessary in the assessment of potential competition.[74] In practice the Commission is reluctant to regard cases of substance as escaping article 85(1). Normally the Commission prefer to view them under article 85(3).

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68 Art, J-V., and Van Liedekerke, D., *Developments in the EC Competition Law in 1995- An overview*, in [1996] C.M.L.Rev., p. 738.

69 Commission Notice concerning the assessment of co-operative joint ventures pursuant to article 85 of the EEC treaty, O.J. C 43, 16.2.1993, p. 2. This Commission Notice is hereinafter referred to as "the co-operative JV Notice"

70 The co-operative JV Notice, paragraph 7.

71 The co-operative JV Notice, paragraph 7.

72 Kirkbridge, J., and Xiong, T., p. 44; Zonnekeyn, G. A., p. 417.

73 The co-operative JV Notice, paragraph 15.

74 The co-operative JV Notice, paragraph 18-20.

Concerning block-exemptions a regulation was issued in conjunction with the co-operative JV Notice.[75] This regulation extends the scope of four block exemptions so that they may protect certain JVs. The block-exemptions for specialisation, and for research and development, are now available in relation to co-operative JVs. The block-exemptions on patent licensing and on know-how licensing can now be relied upon for license agreements between a parent and a JV. Co-operative JVs that fall within one of these block-exemptions do not have to be notified to the Commission for individual exemptions and therefore they escape the procedural inconvenience.[76]

In relation to individual exemptions article 85(3) has to be fulfilled. The Commission states in the co-operative JV Notice that co-operative JVs, performing on a lasting basis all the functions of an autonomous economic entity, often form elements of dynamic competition and therefore deserves a favourable assessment under article 85(3).[77]

### 4.4.3 The new notification form

As a further step to reduce the differences in treatment between "structural" co-operative JVs and concentrative JVs, the Commission issued new versions of the forms for notification. As mentioned above, the Commission introduced in 1994 a new Form A/B for notifications under article 85. The same year it also adopted a new Form CO for concentrations under the MR. These forms required very similar information for JVs of a structural nature, whether they were concentrative or co-operative. The revised Form A/B amended new sections calling for more information where an accelerated treatment was required for "structural" co-operative JVs.[78]

### 4.4.4 The revision of the 1990 Notice

In 1994 the Commission replaced the 1990 Notice with a new notice.[79] The Commission wanted to clarify the distinction between concentrative-co-operative JVs and redraw the dividing-line between these two categories. In practice, the Commission had already to some extent redrawn the dividing line. However, the intention was to significantly widen the amount of JVs which might be concentrative and in this way let more "structural" co-operative JVs fall under the scope of the MR.

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75 Commission Regulation (EEC) 151/93 of 23 December 1992 amending Regs (EEC) 417/85, (EEC) 418/85, (EEC) 2349/84 and (EEC) 556/89 on the application of specialisation agreements, research and development agreements, patent licensing agreements and know-how licensing agreements: OJ 1993 L21/8.

76 Burnside 1993, p. 197.

77 The co-operative JV Notice, p. 64.

78 Zonnekeyn, G. A., p. 417; Brown, A., p. 241.

79 Commission Notice on the distinction between concentrative and co-operative joint ventures under Council Regulation (EEC) No 4064/89 of December 1989 on the control of concentrations between undertakings, O.J. C 385/1 31.12.1994. This notice is hereinafter referred to as "the 1994 Notice".

With the new notice a JV was seen as to be full-function if it operated on a market performing the functions normally carried out by other undertakings operating on the same market. In order to do so the JV had to be economically self-sufficient, which means having sufficient financial and other resources including finance, staff and assets, tangible or intangible, in order to operate a business activity on a lasting basis. This change resulted in that either one or both parents might retain some influence over the JVs activities.[80]

The requirement that there should be no risk of co-ordination was also amended. Vertical co-ordination, i.e. co-ordination between the parents and the JV, became relevant only in so far as it was an instrument for producing or reinforcing the co-ordination between the parents. The 1994 Notice created a presumption that all full-function JVs were to be treated as concentrative unless there was a risk of co-ordination of competitive behaviour between the parents which was likely to result in a restriction of competition within the meaning of article 85(1).[81] The fact that the creation of a JV led to co-ordination of the competitive behaviour of the parents did not prevent the assumption of a concentration where these co-operative elements only were of a minor economic importance relative to the operation as a whole (de minimis rule).[82] Further, it was seen as a modest probability of co-ordination when two or more parents were active in "spill-over" markets.[83] "Spill-over" markets can be non-JV product markets, e.g. vertically upstream or downstream markets, and non-JV geographical markets, e.g. the parents continue to compete in the same product market but in different countries from those in which the JV operates. A situation where it remained a high probability that the Commission would find an unacceptable "risk of co-ordination" was when two or more parents remained substantially active in the same relevant product- and geographic markets in which their JV would operate.[84] Thus, the 1994 Notice indicated that the only factor to cause the JV to be co-operative was the latter.

### 4.5 Examples

The 1994 Notice was applied for the first time in 1995. An example of a JV that fulfilled the criteria in article 3(2) of the MR, interpreted according to the 1994 Notice, is the Akzo/PLV-EPL case[85].

> Akzo transferred 50% of the shares in EPL to PLV pursuant to terms of a share purchase agreement and entered into a JV agreement with PLV. EPL, the JV, was seen as full-function because the parents had given commitments to EPL to provide interim finance to enable it to operate on the market, PLV had transferred intellectual property rights to EPL, EPL was

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80 The 1994 Notice, paragraph 13.
81 The 1994 Notice, paragraph 8 and 17.
82 The 1994 Notice, paragraph 20.
83 The 1994 Notice, paragraph 18.
84 The 1994 Notice, paragraph 20.
85 Case No. IV/M. 1049- Akzo/PLV-EPL, decision of December 4, 1997.

sufficiently independent from its parents concerning business activities and it would have its own staff and management. Looking at the risk of coordination, the Commission concluded that no co-operation would arise between the parents, because Akzo was only active on the relevant market through EPL. As a result of the JV, Akzo would withdraw from the market, as well as from any involvement in upstream or downstream markets.

In characterising the full-function condition, the 1994 Notice focused upon the degree of structural change implemented by the joint control transaction. Classic examples of non full-function JVs were research- and development-only, production-only or sales/marketing-only JVs. In the ATR/British Aerospace case[86] the Commission concluded that the JV was only a single-function JV.

The JV was first notified to the Commission as a concentration, but the JV was cleared through a comfort letter within a period of less than two months after the decision of inapplicability of the MR. The JV agreement envisaged the merger of all new aircraft activities, which would initially be feasibility studies for new aircraft and to integrate immediately the parties' marketing, sales and customer support activities for existing aircraft, and to consider further integration of existing aircraft activities.

The Commission stated that the activities in which the JV would be engaged, in respect of existing aircraft, were not sufficient to give it a full-function nature. The Commission saw the feasibility studies into new aircraft as a determining factor in the future of the JV. It concluded that the JV was not to be full-function as the parties' commitment to the JV was not irreversible before the successful completion and implementation of the feasibility studies for new aircraft and the progression of the parties' existing aircraft activities. The JV would remain nothing more than the sales agent for the existing products of the parents.[87]

Both the 1994 Notice and the Commission's practice indicated that the only situation where there remained a high probability that the Commission would find an unacceptable "risk of coordination" was when two or more parents remained substantially active in the same relevant product and geographic markets as the JV. The JV would then be deemed co-operative. This reasoning is followed in the Hoogovens/Klöckner & Co case.[88]

Hoogovens and Klöckner created a JV which would group the stockholding businesses of the parents in the Netherlands. The JV would consequently be engaged in the stockholding of steel and non-ferrous metals. Both parents would remain active on the same product

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86 Case No. IV/M. 551- ATR/BAe, decision of July 25, 1995.

87 An interesting part of this transaction was the approach followed by the Commission under article 85(3). The approach was very similar to the substantive test under the MR as it put most of the weight on the last condition for exemption under article 85(3), namely that competition would not be seriously reduced or eliminated through the establishment of the JV. Although the evaluation under article 85(3) was similar to the substantive test under the MR, the outcome of the case was a comfort letter limited to a period of five years.

88 Case no. IV/M. 578- Hoogovens/Klöckner & Co, decision of April 11, 1995.

market as the JV in Belgium and Germany, geographic areas neighbouring the Netherlands. Since there was no trade barriers between the Netherlands and neighbouring countries, the Commission considered Belgium and Germany to be part of a regional geographic market that included the Netherlands. As both the parents were active in the same product- and geographical markets as the JV itself, it was clear that a high probability of coordination of competitive behaviour arised. In addition, the co-operative elements were significant in the relation to the operation as a whole. Accordingly, the notified operation did not constitute a concentration.

The same reasoning was followed in the case of ELF/Enterprise[89], where it was concluded that the JV was co-operative.

> The JV would operate in markets of exploration, production and marketing of crude oil and natural gas. Both the parents would remain active on these markets and they would also operate in the same geographical market as the JV, namely in the UK sector of the North sea. Therefore, the Commission concluded that the JV was co-operative in nature.[90]

The 1994 Notice thus made it clear that if only one parent remained active in the market of the JV, the Commission would normally consider coordination to be excluded. The same effect was considered to be achieved when both parents retained independent activities in the market of the JV but one parent's activities were subject to non compete clauses. The Commission would also normally exclude the possibility of coordination when the parents retained only minor activities in the market of the JV. The Babcock/Siemens/BS Railcare case[91] gives a good illustration of the Commission's policy.

> Siemens and Babcock would create a full-function JV, BS Railcare, which would carry out activities in the rail transportation sector, primarily within the U.K. Siemens would remain independently active in the maintenance and refurbishment of railway vehicles in the U.K. Babcock would transfer all of its maintenance and refurbishment activities in the U.K to the JV, except for a repair and refitting division which would be contractually barred from competing with the JV in the U.K. The Commission found no risk of co-ordination between Siemens and Babcock because only one of the parents, Siemens, would remain active in the JVs market. The JV was deemed concentrative.

Two or more parents which remained direct or substantial competitors in a market sufficiently related or linked to the JV's market, might create a risk of coordination in "spill-over" markets. Nonetheless, the Commission was reluctant to find a risk of coordination in these "spill-over" situations absent of extraordinary circumstances or industries that in general

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89 Case No. IV/M. 088- ELF/Enterprise, decision of July 24, 1991.

90 See also case no. IV/M. 117- Koipe-Tabacalera/Elousa, decision of July 28, 1992.

91 Case No. IV/M. 542- Babcock/Siemens/BS Railcare, decision of June 30, 1995.

require a stricter competition scrutiny, such as telecommunications and Internet.[92] The Philip/Thomson/SAGEM case[93] is a good example of where activities in "spill-over" markets actually led the Commission to conclude that the JV was co-operative.

> Three parents formed a JV to be active in the development, design, and eventually the manufacture and sale of a next-generation product. The current-generation product was manufactured and sold by two of the parents. The Commission stated that the next-generation product was expected to replace the current-generation product, and accordingly, the product would be competing with the current-generation product where the parents were active players. The parents would continue to compete in the current-generation product market. At the same time each parent would in the future purchase its requirements of the next-generation replacement product from the JV. The Commission concluded that the JV was co-operative because the potential for eventual technological replacement meant that the parents and the JV would remain active in the same market and/or in closely related markets. As a result, it was reasonable foreseeable that their competitive behaviour would be coordinated. The MR was not applicable to the transaction and this case was instead investigated under article 85. After an additional four months the Commission issued a comfort letter.

Another case where the Commission also found a risk of coordination in "spill-over" markets was in the Omnitel case.[94]

> A JV was created for the purposes of operating the second GSM mobile telephony network and offering GSM services to subscribers in Italy. The parents were several mobile telecom network operators in other countries in the EU. The Commission held that although each GSM network was legally limited to the territory in which it was licensed, GSM systems were technically compatible throughout Europe, which meant that a customer who subscribed to the services offered by one network could use his phone in other GSM networks in Europe. The Commission based this conclusion on the fact that, inter alia, the existence of "roaming agreements" between different network operators resulted in GSM subscriptions that allowed use of the mobile phone in any European country irrespective of the place of subscription.
>
> The Commission concluded that there was a risk of coordination of competitive behaviour since a number of the parents were active in the same product market as the JV and, although the parents would operate its GSM services in other geographical markets than the JV, there existed an interaction between these areas. There was a growing degree of competition between the different national GSM systems and accordingly between the parents of the JV.

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92 Hawk 1996, p. 56.

93 Case no. IV/M. 293- Philip/Thomson/SAGEM, decision of January 18, 1993.

94 Case No. IV/M. 538- Omnitel, decision of March 27, 1995.

## 4.6 Criticism of the assessment of JVs

Having all the examples described above in mind, the Commission subjected economically similar transactions to very different enforcement rules. To businessmen there was no difference between concentrative and co-operative JVs. Both categories of JVs might involve the formation of a new entity that performed activities more or less independently from their parents. Comparing two cases, e.g. Hoogovens/Klöckner & Co and Babcock/Siemens/BS Railcare, the setting up of a JV brought about a lasting structural change in the markets concerned, but a different treatment was given to the JVs pending on the degree of presence of the parents in the same or neighbouring market.

Thus, despite the widening of the concentrative class of JVs, there still existed transactions which would be unfairly reviewed under article 85 with all negative aspects connected thereto. While all the procedural and legal changes that were introduced might discourage undertakings to go forum shopping and consider co-operative rather than concentrative arrangements, the playing field was still a long way from being level. Co-operative JVs did not obtain equal treatment in a genuine sense, as it in many cases ought to, with concentrative JVs.

As an ideal, criteria used for competition policy-purpose should satisfy certain conditions. As a first condition, undertakings' activities should be assessed according to their effect on competition. This lead to the conclusion that activities with a similar economic effect should be regulated in a similar way. The more severe the impact in competition the greater regulatory restriction should be applied on the activity concerned. As a second condition, the criteria used for competition policy-purpose should be easily identifiable for all parties, both the regulator and the regulated undertakings. These conditions were not seen as fulfilled with the MR's co-operative-concentrative distinction.[95]

The criteria that was used to draw the jurisdictional line was said to be flawed in a number of aspects: they rested on an unsound theory about the competitive harms and benefits of JVs; they failed to operate as a speedy, inexpensive and predictable notification and jurisdictional test; they tended to corrupt substantive analysis; and they unnecessarily promoted forum shopping and restructuring of private transactions. The fact that an exclusive jurisdictional line should be drawn between the MR and article 85 did not seem to be disputed. Instead the dispute was focused on whether the existing dividing line was drawn in the appropriate place.[96]

There was expressed doubts whether the concentrative-co-operative distinction had enough of industrial or economic rationale to justify the great difference in procedural and substantive

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[95] Ahlbom, C., and Turner, V., *Expanding success? Reform of the E.C. Merger Regulation*, in [1998] E.C.L.R. Issue 4, p. 260.
[96] Hawk 1993, p. 1155f.

treatment and thereby to put co-operative JVs to be revised under the stricter rules of article 85 and Regulation 17/62. In reality there is no corresponding dividing line between different types of JVs. They exist in varying shades of grey. JVs are the "bounding link" between transactions that have only structural aspects and transactions that have only behavioural aspects. All transactions involving an acquisition or transfer of joint control will frequently have both structural and behavioural aspects. All such agreements between competitors, actual or potential, therefore fall somewhere along a spectrum of mergers-JVs-cartels.[97]

The principal rationale to subject JVs, that failed to satisfy the full-function condition or the risk of co-ordination, to the stricter enforcement provisions of article 85 appears to have been two-folded. Firstly, the opinion seemed to be that co-operative JVs created greater risk of competitive harm and fewer opportunities for competitive benefits than full mergers and acquisitions. Secondly, these "worse" transactions could only be properly regulated under the stricter enforcement regime of article 85.[98] In reality, almost all JVs falling within the co-operative category, in particular those with only a limited duration or only partial contribution of their parents' operations, present lower risk of competitive harm than full mergers and acquisitions involving the same parties. A full merger totally and permanently eliminates competition between the parties, as opposed to many co-operative JVs that may preserve some degree of competition between the parents in the JV's market and that may break up at some later date. Most JVs also have equivalent opportunities for competitive benefits as full mergers and acquisitions involving the same parties. The exception is "shams", i.e. cartels dressed up as JVs. The distinction between co-operative and concentrative JVs was therefore, according to the critics, seen as having some fundamental defects. Transactions with a similar economic effect were not regulated in a similar way, without any credible legal or economic justification. By applying stricter rules to co-operative JVs, the distinction also deterred formation of desirable JVs which led to less competitive market structures. Companies were encouraged by law to merge their competing operations completely under unlimited time instead of merging in limited duration- or partial-function JVs.[99]

In determining the jurisdictional scope, the procedure was unspeedy, expensive and unpredictable. The concentrative-co-operative distinction led the Commission to assess substantive criteria for drawing the jurisdictional line. The jurisdictional analysis would often turn on substantive issues such as market definition, competitive overlaps and possibilities for co-ordination. The Commission had to complete a great part of its assessment of the merits of the JV as the first step in the regulatory process, in order to decide on the preliminary jurisdictional issue. This use of substantive criteria for jurisdictional purposes generated significant costs and consumed a lot of the Commission's time. The parties to a transaction could never in a satisfactory way predict the outcome of the Commission's decision, whether seeing the JV as co-operative or concentrative. The second condition of

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97 Hawk 1996, p. 35.
98 Hawk 1993, p. 1157.
99 Hawk 1993, p. 1157ff.

competition policy was that the criteria used for such policy-purpose should be easily identifiable, but that condition was not fulfilled, since the Commission had to assess substantive criteria when drawing the jurisdictional line.[100]

As previously mentioned, the difference in treatment created incentives to go forum shopping. If one see it from the undertakings' point of view this was an understandable reaction. However, it contradicts the core principle of market economy, namely that private transactions should not be altered by government regulations unless there is a public interest justifying regulatory intervention. No public interest was served by the strategy of forum shopping that arised from the legal complexities created by the concentrative-co-operative distinction.[101]

There are and were many benefits for undertakings to let their JVs fall under the MR rather than under article 85. One of the primary benefits and justification of the MR is its one-stop-shop control that represents legal certainty and quick decisions. The only way for a co-operative JV to benefit from the one-stop-shop control was to structure the JV to be concentrative. However, the JV also had to meet the Community dimension, determined by reference of quantitative turnover thresholds. Since the thresholds were set very high, the parties to a concentration with significant cross-border effects falling below the thresholds could be forced to make multiple notifications to different member states. The multiple notifications resulted in several costs for merging companies, including the uncertainty of whether notification was necessary, having to await decisions from several member states that might be conflicting and the costs involved in filing multiple notifications.[102] Therefore, undertakings could make the operation to meet the thresholds by including additional undertakings, which could be taken into account when calculating the thresholds. This kind of forum-shopping was made possible by the Commission's interpretation of the notion "undertakings concerned".[103] It is said that the purpose of the Commission to interpret the notion in the way it did, was to expand the jurisdictional scope of the MR and thereby including more operations to benefit from the one-stop-shop principle. This was made on the expense of simplicity and clarity of the jurisdictional analysis that was intended to be created when adopting bright line quantitative turnover thresholds.[104] Forum shopping in the manner described above was likely to be available relatively often.

As long as the only way to benefit from the one-stop-shop principle was to structure undertakings to be concentrative and to meet the turnover thresholds, firms would choose transactions that might create a higher risk of competitive harm. The Commission's interpretations did not make the legal situation clear and certain. A better choice would have

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100 Hawk 1993, p. 1163f.
101 Hawk 1993, p. 1163.
102 Kassamali, CC 105.
103 Broberg 1998, p. 241f.
104 Broberg 1998, p. 246f.

been to include co-operative JVs under the MR and to reduce the Community dimension or to alter Regulation 17/62 to be more lenient, instead of creating artificial interpretations of what needed to be fulfilled for applying the MR. In this way the Community would encourage companies to choose the form in which they wanted to form their JV without having the more beneficial rules in mind.

Another important reflection is that the Commission has throughout the E.C. competition law defined jurisdictional boundaries on the basis of effect on the common market. Under article 85 the Commission investigates JVs that may have an effect on trade between member states in a substantial part of the common market. These criteria catch not only cross-border transactions but also operations within a single member state that may have effect on trade to or between other member states. This was not the case under the MR. Under the MR the Commission was not necessarily given jurisdiction on the basis of the effect on the common market.[105] The quantitative turnover thresholds were said to be only a poor reflection of real Community dimension. Concentrations could meet the thresholds without producing appreciable effects on the common market and concentrations could have appreciable effect on the common market but still not meet the turnover thresholds.[106] For example, a JV might fail to be assessed under the MR only because of the two-thirds rule in article 1, i.e. each of the parties achieves more than two-thirds of their Community-wide turnover within one member state.

The jurisdictional line in itself was not justified if looking at the criteria ideally used for competition policy-purpose. It was difficult to understand that the formation of a JV, which possessed characteristics of a merger, was to be examined under the more strict rules that regulated cartels, i.e. article 85. Of course it can not be forgotten that many JVs clearly fell into the concentrative or co-operative category, but in a lot of cases the classification remained far from being straightforward. From an economic point of view, the E.C. competition policy assessment of JVs were seen as leading to awkward results. As a jurisdictional test, the distinction between concentrative-co-operative transactions was unsatisfactory. It was not seen as giving enough legal certainty or economic justification.

### 4.7 The 1996 Green Paper

As mentioned above, the application of the distinction between concentrative-co-operative JVs caused many problems, but also created a discrimination between examination either under the MR or article 85. It was specifically difficult to defend the discrimination concerning "structural" co-operative JVs, since these had effects on the market structure similar to those caused by concentrative JVs.[107]

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105 Kassamali, R. A., CC 98.
106 Kassamali, R. A., CC 100ff; Broberg 1998, p. 248ff.
107 Broberg 1996, p. 292.

Since the adoption of the 1990 Notice the development had been to extend the concentrative class. The Commission took one step further on January 31, 1996. In a Green Paper[108] the Commission stated its concerns about the differences in the treatment between concentrative JVs and "structural" co-operative JVs. It expressed that "structural" co-operative JVs involved a significant change in the structure of the companies concerned and that they might have similar effects on the market structure as concentrative JVs. Nevertheless they were subject to different regimes. The Commission concluded that it existed a need for changing this situation.[109]

The Green Paper contained five possible options, three procedural and two substantive and procedural options.[110] The procedural options were:

1) to create new procedures for the treatment of co-operative full-function JVs by means of a new regulation, in order to simplify procedures and provide for fast decisions and legal certainty;
2) to make co-operative full-function JVs subject to procedures of the MR, leaving the two substantive tests separate;
3) to extend the scope of Commission block-exemption regulations dealing with horisontal co-operation (and adopt a new one for areas not covered by the existing regulations) to cover co-operative full-function JVs. The advantages of the block-exemption regulations would be available up to a certain market share. Those JVs not covered by the automatic exemption could be subject to a non-opposition procedure.

In all these options the substantive test under article 85 would remain applicable to co-operative JVs. These options were nevertheless seen as contributing to the removal of uncertainty, but the Commission believed that the two options that included both procedural and substantive changes would "offer the most comprehensive and harmonised treatment of concentrative and co-operative JVs".[111] These options were:

1) to extend article 3(2) of the MR to all co-operative full-function JVs, or
2) to extend the scope of the MR to all JVs, whether full-function or not, except shams.[112]

The Green Paper subsequently led to a recommendation and a proposal for the amendment of the MR. The Commission proposed to abandon the "risk of co-ordination" element and instead recognise all full-function JVs as concentrative and let them be subject to jurisdiction

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108 Community Merger Control- Green Paper on the Review of the Merger Regulation, COM(96) 19 final, Brussels, 31 January 1996.
109 COM(96) 19 final, paragraph 100.
110 COM(96) 19 final, paragraph 108-109.
111 COM(96) 19 final, paragraph 121.
112 COM(96) 19 final, paragraph 109.

under the MR.[113] This proposal extended the benefits of the review under the MR to an even wider class of JVs but the discrimination between the different types of JVs would still remain. The effect of the proposal would only be to move the actual line of demarcation.[114]

# 5. The 1997 Amending Regulation

## 5.1 Introduction

The European Council approved the Commission's proposal. On June 30, 1997, the Council adopted Regulation (EC) No. 1310/97, amending the MR, which entered into force on March 1, 1998.[115] The most significant amendments to the MR were the new turnover thresholds and the different treatment of joint ventures.[116] As a consequence of the amendments to the MR the Commission adopted a new implementing regulation, incorporating a new Form CO for the notification of concentrations, and new versions of interpretative notices.

## 5.2 Extra thresholds for determining Community dimension

New thresholds have been introduced in article 1 which means that more transactions are able to fall under the scope of the AMR. The new thresholds have been introduced to include transactions under the MR which have significant impact in several member states but would not have satisfied the previous turnover thresholds. As a consequence the Commission has been given broader jurisdiction and the new thresholds limit the need for multiple notifications. Under the new rules in article 1, a concentration which does not meet the "old" thresholds will nevertheless have a Community dimension where:

> "(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than ECU 2 500 million;
> (b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than ECU 100 million;
> (c) in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than ECU 25 million; and
> (d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than ECU 100 million;
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> unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State."

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113 Burnside 1996, p. 373.
114 Broberg 1996, p. 292.
115 The combined application of these regulations will hereinafter be referred to as "the AMR"
116 Ahlbom, C., and Turner, V., p. 249.

There is a new notice on the calculation of turnover that reflects the fact that new thresholds have been introduced. The Notice on the notion Undertakings concerned has been changed in the matter of the treatment of a single parent subsidiary.[117] The Commission considers that when one or more undertakings acquire joint control of a single parent subsidiary while the former parent remains, the subsidiary is not an "undertaking concerned".[118]

## 5.3 New assessment of JVs

### 5.3.1 Introduction

Article 3(2) of the AMR extends the definition of JVs which fall under the regulation. This was done by removing the negative criterion relating to the co-ordination of competitive behaviour between independent undertakings. The new rules do not differentiate between concentrative-co-operative JVs for the purpose of jurisdiction under the AMR. A JV is now seen as a concentration under article 3(2) provided that it is full-function. The fact that there is potential co-ordination between the parents no longer prevents the regulation to be applicable.[119]

Full-function JVs are defined as JVs that are performing on a lasting basis all the functions of an autonomous economic entity.[120] There is a new Commission Notice[121] on full-function JVs which give guidance on the interpretation of article 3(2) (as last amended). This full-function Notice replaces the 1994 Notice. It states that a JV, which satisfy the criteria of performing on a lasting basis all the functions of an autonomous economic entity, bring about a lasting change in the structure of the undertakings concerned.[122] To be full-function a JV must operate on a market, performing the functions normally carried out by undertakings operating on the same market. In order to do so the JV must have a management dedicated to its day-to-day operations and access to sufficient resources including finance, staff and assets, tangible and intangible, in order to conduct on a lasting basis its business activities within the area provided for in the JV agreement.[123]

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117 Commission Notice on the concept of undertakings concerned under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings, O.J. C 66, 2.3.1998, p.14. This notice is hereinafter referred to as "the new Undertakings concerned Notice".

118 The new Undertakings concerned Notice, paragraph 23.

119 Craig, P., and de Búrca, G., p. 985.

120 I will from here on use the notion "concentrative full-function JV" for full-function JVs without risk of co-ordination and "co-operative full-function JVs" for full-function JVs with a risk of co-ordination.

121 Commission Notice on the concept of full-function joint ventures under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings, O.J. C 66, 2.3.1998, p. 1, hereinafter referred to as "the full-function Notice".

122 The full-function Notice, paragraph 11.

123 The full-function Notice, paragraph 12.

Of course, full-function JVs should be under the joint control of their parents. In another notice[124] the Commission has set out in detail the principles for determining joint control. The acquisition of joint control can be established on a legal or a de facto basis. According to the concentration Notice, there exists a joint control if the parents must reach agreement on major decisions concerning the JV. Two or more undertakings or persons must have the possibility of exercising "decisive influence" over another undertaking. "Decisive influence" normally means the power to block action which determine the strategic commercial behaviour of a company. Joint control is characterised by the possibility of a deadlock situation resulting from the power of two or more parents to reject proposed strategic decisions. The result of this is that the parents must reach a common understanding in determining the commercial policy of the JV. The clearest form of joint control exists where only two undertakings share equally the voting rights in the JV, but joint control may also exist where minority shareholders have additional rights which allow them to veto decisions which are essential for the commercial behaviour of the JV. These veto rights must be related to strategic decisions on the business policy in order to protect minority shareholders' financial interests as investors in the JV.[125]

### 5.3.2 The procedural effects of the amendments

Since the amendments to the MR, all full-function JVs with a Community dimension are subject to the procedures of the AMR. The procedures of Regulation 17/62 are therefore no longer applicable to co-operative full-function JVs. This results in several procedural advantages for the parties to a co-operative JV, such as:

1) There is a time-limit for a Commission decision. A decision has to be taken within one month after notification, but if the Commission decides to open a stage II investigation the time-limit is extended to five months.[126] For a structural not full-function JV the time-limit will still be two months, but this is a non-binding time-limit.

2) Clearance under the AMR is permanent. Only in exceptional cases the clearance can, according to article 6 and 8 in the AMR, be revoked. Under article 85(3) exemptions are only granted for a fixed period pursuant to article 8 of Regulation 17/62.[127]

3) Under the AMR the "one-stop shop" principle applies.

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[124] Commission Notice on the concept of a concentration under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings, O.J. C 66, 2.3.1998, p. 5, hereinafter referred to as "the concentration Notice".

[125] The concentration Notice, paragraph 18-22.

[126] In some circumstances the stage I investigation can be extended to six weeks.

[127] Article 8 in the Regulation 17/62 provides that: "A decision in application of article 85(3) of the Treaty shall be issued for a specific period and conditions and obligations may be attached thereto."

Another consequence of the application of the AMR to co-operative full-function JVs is that notification of such JVs are mandatory and they can not be implemented before clearance is obtained from the Commission. This is not the case under article 85.

### 5.3.3 The substantive effects of the amendments

In parallel with the extension of the scope of the AMR, an "article 85-type analysis" has been incorporated. Full-function JVs are now subject to the AMR's substantive test of dominance[128] except that the issue of co-ordination is assessed, within the context of the same procedure, under article 85(1) and (3) with a view to establish whether the operation is compatible with the common market.[129] Thus, the incorporation of the "article 85-type analysis" into the AMR means that any effects on competition resulting from the co-ordination of the parents' activities other than through the JV, known as "spill-over" effects, are assessed under article 85(1) and (3) while the operation's concentrative effects are assessed under the AMR's dominance test.

In article 2(4) of the AMR it is stated:

> "To the extent that the creation of a JV constituting a concentration pursuant to Article 3 has as its object or effect the co-ordination of the competitive behaviour of undertakings that remain independent[130], such co-ordination shall be appraised in accordance with the criteria of Article 85(1) and (3) of the Treaty, with a view to establish whether or not the operation is compatible with the common market."

In making the appraisal of the "spill-over" effects, the Commission shall take into account in particular:

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

An interesting point of view is that recital 5 to the AMR is to some extent more explicit and appear to go further than article 2(4) itself:

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128 i.e. the test of creating or strengthening a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part thereof.

129 The full-function Notice, paragraph 16.

130 i.e. co-operative full-function JVs.

"whereas, in addition to the dominance test set out in article 2 of that Regulation, it should be provided that the Commission apply the criteria of article 85(1) and (3) of the Treaty to such joint ventures, to the extent that their creation has as its direct consequence an appreciable restriction of competition between undertakings that remain independent; whereas, if the effects of such joint ventures on the market are primarily structural, article 85(1) does not as a general rule apply; whereas article 85(1) may apply if two or more parent companies remain active in the market of the joint venture, or, possibly, if the creation of the joint venture has as its object or effect the prevention, restriction or distortion of competition between the parents in upstream, downstream, or neighbouring markets".[131]

According to footnote 3 of the full-function Notice the Commission intends to provide guidance on the application of article 2(4) of the AMR. Pending the adoption of such guidance, interested parties are referred to the principles set out in paragraph 18-20 of the 1994 Notice.

### 5.4 The practical consequences of the AMR

The described amendments have some practical consequences. To begin with, the distinction between full-function and non full-function JVs determine the jurisdictional line for JVs and the applicability of either Regulation 17/62 or the AMR. The traditional distinction between co-operative and concentrative JVs does no longer decide which procedural rules that are applicable. As long as the JVs are full-function the AMR and its procedural rules must apply. However, the distinction will play a role in deciding what set of substantive rules that apply, i.e. if only the dominance test is applicable or if the test of article 85(1) shall be applied as well.

Concentrative full-function JVs with a Community dimension are only subject to the dominance test of the AMR. Co-operative full-function JVs with a Community dimension are reviewed under the dominance test of the AMR, even though there is an exemption to this rule. The co-operative elements are to be evaluated in accordance with article 85(1) and (3). The first task for the Commission is to decide whether the co-operative aspects are contrary to article 85(1). If the answer to this question is affirmative, the Commission has to see if there is a possibility for an exemption under article 85(3). It is important to notice that the decision is not supposed to take form of a formal exemption pursuant to Regulation 17/62. Instead it shall be part of a decision declaring the JV compatible with the common market pursuant to article 6(1)(b) or article 8(2) of the AMR. Even if the concentrative elements of the transaction do not in themselves give rise to competition concerns, there is a chance that a merger is prohibited where the co-operative aspects can not be exempted according to article 85(3).[132]

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131 Underlining added.

132 Zonnekeyn, G. A., p. 419.

Looking at the second part of article 2(4) and recital 5 they both focus on the risk of co-ordination between the parents rather than the risk of co-ordination between the parents and the JV. Opposite to article 2(4), recital 5 indicates that the Commission may apply a different analysis with respect to, on the one hand, the "spill-over" effects that stems from the creation of a JV between parents which remain active in the JV's market, and on the other hand, the "spill-over" effects that results from the creation of a JV between parents which retain activities in markets which are downstream or upstream from that of the JV or in adjacent markets. Even though the Commission must do a different analysis, it seems like it has to do a balancing act between the positive aspects of the creation of a JV against the negative aspects of co-ordination of behaviour between the parents.[133] Article 2(4) shows that the Commission has to take particular account of the forth element of article 85(3), which is the extent of which competition is not eliminated.

An interesting aspect is that recital 5 mentions that, in certain circumstances, article 85(1) does not apply. This is not stated in article 2(4), but recital 5 states that if the effects of the creation of the JV are primarily structural, article 85(1) does not as a general rule apply. This seems to mean that the Commission may first do an analysis of the JV to determine if, despite the existence of some "spill-over" effects, the core of the transaction aims at bringing about a lasting change in the structure of the undertakings concerned and not a co-ordination of the competitive behaviour of the parent companies. If the result of this analysis is in affirmative the Commission would only do an appraisal of the JV under the dominance test to the whole transaction, i.e. including the "spill-over" effects. If the transaction is not seen as essentially structural, the dominance test and article 85(1) will apply. The question is whether recital 5 is too far-reaching in this respect since the Commission's practice before the AMR was to apply article 85(1) to "structural" co-operative JVs and then clear them under article 85(3), instead of making article 85(1) totally inapplicable.[134]

Full-function JVs with no Community dimension remain subject to national merger controls. To the extent that co-operative full-function JVs below the thresholds and partial-function JVs affect trade between member states they may also in the future be assessed under the rules of Regulation 17/62. The Commission has stated that it will continue its efforts to decentralise the application of article 85 and it wants the national authorities to apply article 85 together with the application of national merger control legislation.[135] The Commission refers to its notice on co-operation between national competition authorities and the Commission.[136] It is noteworthy that, according to article 22 of the AMR, the concentrative aspects of a co-operative full-function JV with no Community dimension can be referred to

133 Zonnekeyn, G. A., p. 419.
134 Zonnekeyn, G. A., p. 419f.
135 Statements for the Council Minutes, Brussels, June 20 1997, paragraph 4.
136 Commission Notice on co-operation between national competition authorities and the Commission in handling cases falling within the scope of article 85 or 86 of the EC Treaty, O.J. C 313/3, October 15, 1997.

the Commission by the member states. It is also noteworthy that partial-function JVs still may subject themselves to the "fast-track" procedure.

Now when also co-operative full-function JVs fall under the AMR the Commission has had to do some institutional changes. Where an article 2(4) issue is established before notification, the case will be treated by the appropriate sectorial unit in DG IV. The case is then given a special file number-JV 1, 2 etc. Where an article 2(4) issue becomes apparent later in the procedure, the case will continue to be dealt with by the MTF.[137] If the MTF believes that there is a possibility that article 2(4) may apply to a JV, it will invite an official from the corresponding article 85/86 Directorate to participate in the appraisal of the case. As soon as it is determined that the JV is co-operative full-function, the relevant article 85/86 Directorate will take care of the whole case. Article 85 officials will then apply article 2(4) to the parent-parent relationship, but they will also apply the dominance test to the concentration itself.[138]

### 5.5 Issues raised by the co-operative full-function JVs[139]

The widening of the scope of the MR, in including co-operative full-function JVs and adding an "article 85-type analysis", has been said to raise certain technical questions. The answers to these questions depend on how the Commission will apply article 85 criteria under the scope of the AMR. So far, there is no guidance from the Commission on the application of article 2(4). It is said that the "article 85-type analysis" seems to be applied in the same way as under article 85 proper and this view is strengthened by pointing at the wording of article 2(4) and article 8(3) of the AMR, and the wording of the full-function Notice. This view is also assumed below.

One issue concerns the assessment of a co-operative full-function JV. The relationship between the parents of such a JV is to be assessed under the article 85(1) and (3)-type test. As restrictions between the parents directly result from the JV the article 85(3)-type test should apply to the JV itself. Then the questions to answer are:

1) Does the JV contribute to improving the production or distribution of goods or to promoting technical or economic progress?
2) Does it allow consumers a fair share of the resulting benefits?
3) Does the JV impose on the parents only those restrictions which are indispensable to the attainment of those objects?

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137 Emberger, G., and Pitkänen, T., *Recent developments and important decisions*, in [1999] 2 Competition Policy newsletter, p. 27.
138 Ahlbom, C., and Turner, V., p. 252.
139 Ahlbom, C., and Turner, V., p. 257ff.

4) Does the JV not afford the parents the possibility of eliminating competition in the respect of a substantial part of the products in question?

The second and the third tests are said to maybe cause problems. If one first look at the second test, the parents and the JV are not necessarily operating on the same markets. If they do not, the benefits of the JV may fall on one group of consumers while the burden of a competition restriction between the parents may fall on another group of consumers. The question then is whether and to what extent welfare transfers between the different groups of consumers are acceptable. If instead looking at the third test, there are some concerns that there will be a difficulty or impossibility to prove that the anticipated efficiency-gains can not be achieved by another structural means but by the JV. Maybe the Commission will not give these two tests a lot of weight and the problem will then not exist. As is stated in article 2(4), the forth element in article 85(3) is to be taken into account "in particular", which indicates that this is the part that the Commission will lay stress on.

Another issue concerns the possibility of revocation. Article 85 proper contains a behavioural control and this article is therefore of a continuous nature. Exemptions are time-limited and can be revoked. This is totally opposite to merger controls which are one-off controls of structural change. The "article 85-type analysis" is a behavioural control but at the same time it is necessarily connected to structural change. The AMR does not foresee a time-limited exemption or a power of revocation. However, the Commission has apparently taken the view that it has the power to revoke an article 85(3)-type exemption in cases where the co-ordination of the competitive behaviour of the parent companies affords them the possibility of eliminating competition in respect of a substantial part of the products or services in question. The Commission has also stated that in exercising its power to revoke an exemption, it will take into account the time lapsed since the exemption was granted, the effect of a revocation on the investment made by the parties and the nature of the JV as an on-going concern.[140] This power is seen as based on general legal principles.

The question is whether there exist such general legal principles to justify the view that the Commission has the power to revoke a decision in relation to article 85(3)-type exemptions granted under the AMR. Such a revocation does not fit in with the wording of the AMR, because the legal basis for revocation of an article 85(3) decision is Regulation 17/62, which is disapplied to concentrations falling within the scope of the AMR. The legal certainty is said to be reduced under the AMR along with a possibility of revocation.

There is an additional issue concerning the "article 85-type analysis". The amendments to the MR of a separate "article 85-type analysis" is seen as leading to an arbitrary creation of jurisdictional borders of the assessment of different restrictions between the JVs parents. This opinion derives from the fact that restrictions between parents that are arrangements constituting the concentration are to be assessed under an "article 85-type analysis" within the

[140] Statements for the Council Minutes, Brussels, June 20, 1997, paragraph 2.

scope of the AMR, while restrictions between parents that are directly related and necessary to the implementation of a concentration[141] are to be assessed under the dominance test and restrictions, other than the above mentioned, are to be assessed under article 85 proper. The different restrictions are thus to be assessed under different procedures and substantive tests and the question is whether this is defensible and the most appropriate alternative. It is seen as logical that the restrictions closely related to a concentration should be subject to the same standard as the concentration itself. In that case it may also be logical that restrictions caused by the concentration itself would be subject to the same substantive test as the formation of the concentration, but instead the "article 85-type analysis" is applicable.

It has been suggested that the discriminatory treatment could be solved by placing less weight on the second and third elements of the "article 85-type analysis", i.e. the elements which place a stricter standard for restrictions resulting from the concentration. If concentrating on the forth test instead, i.e. the elimination of competition, this would make the assessment of the restrictions of competition among parents to a JV, caused by the concentration itself, subject to less strict standard. This would also be more appropriate because the forth test is similar to the dominance test and thus it would not be such a big difference between the substantive test concerning restrictions between the parents directly related and necessary to the concentration and restrictions caused by the concentration itself.

There is also another issue to observe. Although co-operative full-function JVs now fall under the scope of the AMR, there still remains a big difference in treatment between these and concentrative JVs. The application of article 85 proper is excluded for all concentrative JVs, but this is not the case for co-operative full-function JVs. A true "one-stop shop" is only available for co-operative full-function JVs with Community dimension. Co-operative full-function JVs with no Community dimension can be reviewed both under article 85 proper and be subject to national merger control laws.[142] As mentioned above, the Commission favours a decentralised application of article 85 together with the application of national law. If the Commission thus makes as its policy not to apply article 85 to co-operative full-function JVs with no Community dimension both concentrative and co-operative JVs would be assessed under national merger control legislation if no Community dimension.

An issue that should not be forgotten is that the extension of the scope of the MR to certain JVs that was previously assessed under article 85 has extended the Commission's competence. The reason is that the AMR is universally applicable while the application of article 85 is sectorially limited. The consequence is that sectors that previously were excluded through the implementing rules of article 85 would now come under the scope of the AMR. For example, the implementing rules of article 85 do not apply in certain areas of the transport sector, but under the AMR there are no such limits. On the one hand, some member

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141 For example non-competition clauses, licenses of industrial and commercial property rights and of know-how and purchase and supply agreements.

142 The same applies to partial-function JVs.

states did not accept this increase of power of the Commission and on the other hand, the Commission wanted the AMR to remain universally applicable. As a consequence, the Commission had to compromise and therefore the it has stated that the AMR does not apply to consortia in the liner trade sector.[143]

Apart from the technical issues described above, the question is whether the amendments introduced in the AMR will improve the assessment of JVs and be more in accordance with economical competition policy purpose.

The jurisdictional line has moved further. Through the AMR there now exists a new dual dividing line:

-full-function/non full-function borderline, and
-co-operation borderline for the assessment of the relationship between the parents.

In general, the amendments to the MR, in including co-operative full-function JVs, seem to be welcomed. The previous situation has improved in the sense that the new borderlines are easier as a concept. The same procedures apply to all full-function JVs even though different substantive tests are applicable.[144]

Looking at the procedural perspective, the amendments seem only welcomed, at least by the industry. The amendment to include co-operative full-function JVs rescue these transactions from being subject to the procedures under article 85. They now benefit from the much more efficient procedural framework and the time-limits of the AMR. Thus, activities with similar economic effects benefit from the same procedural rules. Nevertheless, it is said that procedural improvements could have been achieved by changing Regulation 17/62. Since additional important transactions are taken outside article 85, the incentive to make procedural reforms of the control under article 85 reduces. In addition, there is a view that since the analysis of co-operative full-function JVs is carried out by the Article 85/86 Directorate, non full-function JVs are expected to be dealt with at an even slower speed than before.

Looking at the substantive perspective, the amendments to the MR are not seen as only improving the situation of the assessment of JVs. The new full-function borderline for the JV itself is welcomed to some extent. No difference in the assessment of full-function concentrative and co-operative JVs is made, but there are some aspects which are not that welcomed. The full-function criterion existed already under the previous system. This criterion is now the only jurisdictional borderline for JVs. According to the Commission, the rationale for the full-function criterion is that it separates structural transactions from non-structural . There are disagreements to this point of view. It is said that the concept of full-function is only loosely related to "structure" in any meaningful economic sense, because a

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143 Statements for the Council Minutes, Brussels, June 20, 1997, paragraph 3.
144 Zonnekeyn, G. A., p. 420f.; Ahlbom, C., and Turner, V., p. 260.

JV can for example involve structural change and big investments, but at the same time be limited to a single function. In such a case the JV would not be classified as full-function. Therefore it is argued that it would be unlikely that the full-function borderline is better than the previously concentrative/co-operative borderline. This view indicates that the new full-function borderline makes it easier to identify whether JVs fall under the AMR or not. Nevertheless, the new jurisdictional line has still to some extent discriminatory effects regarding some categories of JVs but the question is if the remaining discrimination can be totally avoided.

Concerning the co-operation borderline for the assessment of the relationship between the parents, it is expressed that the incorporation of an "article 85-type analysis" for restrictions between parents may lead to a different treatment of different types of restrictions. This is not justified on any objective grounds. It is said that only if the article 85-type analysis is brought closer to the dominance test the over all effect of the new JV analysis will be beneficial.

## 5.6 Application of the new article 2(4) of the AMR

### 5.6.1 Introduction

The changes to the assessment of JVs and the introduction of a behavioural "article 85-type analysis" are expected to raise complex legal issues. Whether, and to what extent, they are going to have a practical relevance will probably largely depend on the definition of "risk of co-ordination". As previously explained, this criterion distinguished full-function JVs to be assessed either under article 85 or under the MR. In the 1994 Notice the Commission indicated that, in principle, a high probability of co-ordination only existed where two or more parents remained substantially active in the JVs market. However, under exceptional circumstances, it was said to be a risk of co-ordination where at least two parents operated in "spill-over" markets of the JV. Thus, the only JVs that change jurisdiction from article 85 to the AMR are co-operative full-function JVs in the situations described above. The Commission anticipated 20-30 cases of co-operative full-function JVs per year under the AMR.[145]

Article 2(4) applies to all JVs constituting a concentration within the meaning of article 3 but only to the extent that they have as their object or effect the coordination of the competitive behaviour of the parents to a JV. In 1998, 13 of the 76 JV-cases decided under the AMR required an analysis under article 2(4). This year, so far, seven JV-cases decided under the AMR has necessitated an analysis under article 2(4). Most of the operations since March 1998 have been concentrated in the telecommunications and Internet areas.[146] Concerning the telecommunications sector, the explanation is that this market is subject to enormous regulatory and technological change. Since January 1, 1998, the telecommunications market

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145 Ahlbom, C., and Turner, V., p. 253.

146 Twentyeighth Report on Competition Policy, p. 60

is liberalised in most of the EU and the development of new technology enables previously separate markets to converge. Enterprises can combine some of their activities in order to offer new "packages" of services to their customers across national borders. The rapid change in the telecommunications sector is likely to lead to frequent examinations of possible article 2(4) effects. The same applies to the Internet sector. Different Internet markets are closely related, which is a consequence of the nature of the technology. Companies have and will form JVs to share their different skills in technology and this will consequently lead to examination of possible "spill-over" effects.[147]

### 5.6.2 Examples

The first case in which article 2(4) was applied was in the Internet field. This case helped to establish the Commission methodology in handling article 2(4) issues and is therefore described more in detail.

In this case a Swedish and a Norwegian telecommunications operator and a Norwegian publishing and broadcasting company formed a JV to provide Internet gateway services and to offer web site production services.[148] Internet gateway services are designed to facilitate for users of the Internet to access content more easily. Gateways are essentially a kind of web site hosting several different services. The gateway service provider or other third parties may provide this content. The content may be free of charge to the user (then normally financed by advertising) or the user has to pay for access to the content itself (paid-for content). The Commission found that the supply of gateway services did not appear to constitute a market in themselves but could be taken into account in the examination of the markets for paid-for content and Internet advertising. These two markets were thus relevant for the purposes of dominance as well as the market for production of web sites. The Commission concluded that the formation of the JV was not seen as creating or strengthening a dominant position since the parents had relatively small shares in the relevant markets. In addition, the market of Internet advertising was considered as a rapidly growing market.

Then the Commission looked at the possible risk of coordination. Pursuant to article 2(4), a JV having as its object or effect the coordination of the competitive behaviour of its parents has to be appraised in accordance with the criteria of article 85(1) and (3). In order to establish a restriction in competition, it is necessary that the co-ordination of the parents' competitive behaviour is likely and appreciable and that it results from the creation of the JV. Candidate markets for co-ordination are those on which the JV and at least two parents are active, or closely related neighbouring markets where at least two parents remain active. In this case the market for web site production was candidate market for coordination since

147 Denness, J., *Application of the new Article 2(4) of the Merger Regulation- a review of the first ten cases*, in [1998] 3 Competition Policy Newsletter, p. 32.
148 Case No. IV/JV.1- Telia/Telenor/Schibsted, decision of May 27, 1998.

the JV and two parents, Telia and Telenor, were present on that market. The dial-up Internet access market was also seen as a candidate market for coordination. This market is provided by Internet service providers who charge subscriptions to customers. Telia and Telenor provided dial-up Internet access to users. Since access to Internet is a necessary prerequisite for the use of any Internet services this product market must be considered as an upstream market, closely related to the JV's markets.

Thus, in the Commission's assessment under article 2(4), it had two distinct situations to assess. Looking at the web site production market the Commission concluded that even if the parents were to coordinate their activities on that market it could not lead to an appreciable restriction of competition. The combined market shares of the parents and the JV did not exceed 10% even on the narrowest possible and most unfavourable geographic market definition to the parties. Then looking at the dial-up Internet access market, the Commission concluded that there was no likelihood of co-ordination between the parents on that market either. The Commission found this market characterised by high growth, relatively low barriers to entry and price sensitivity. Although the parents held substantial market shares of 25-40% and 10-25% respectively, the market shares of the parents were of limited significance on such a growing market. In addition, the likelihood of coordination was reduced further by the relative size of the markets on which the JV would be active compared with the size of the dial-up Internet access market, i.e. the article 2(4) market. The article 2(4) market was substantially larger than the JV's markets. The Commission concluded that the notified operation did not raise any doubts as to its compatibility with the common market, since there was no likelihood that the parents would coordinate their activities.

Another Internet case examined under article 2(4) is the case of @Home Benelux B.V.[149]

A JV was created between @Home, a US based Internet service provider, and two cable and telecommunications companies, Edon and Palet Kabelcom, based in the Netherlands. The JV would provide dial-up Internet access, Internet advertising and paid-for content. When assessing the risk of coordination of competitive behaviour pursuant to article 2(4), the candidate markets for coordination was Internet advertising, since Edon would remain active on the same market as the JV and the other parents were seen as to be potential competitors on this market through own web sites, and paid-for content where all three parents and the JV was seen as potential competitors. Besides the traditional telephone network, alternative means of accessing the Internet, such as cable systems, exists. The provision of these alternative means can be considered as constituting a market closely related to that of the dial-up Internet access market. Since Edon and Palet Kabelcom were present on the market for network distribution services, providing cable networks, that market was also considered as a candidate market.

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[149] Case No. IV/JV. 11- @Home Benelux B.V., decision of September 15, 1998.

The Commission concluded that the possibility of coordination between the parents on all the candidate markets for coordination was small because, inter alia, the market shares of the parents were relatively small. On the market for network distribution services, the JV was not to be the main customer for the network distribution services provided by Edon and Palet Kabelcom and the parents' infrastructure were only to a small extent used for dial-up Internet access service (less than 5% of the total number of their cable subscribers). Therefore this service would not create economically meaningful incentives for coordination in network distribution services. Thus, even though there was to be a likelihood of coordination between the parents of any of the relevant markets, there would be no appreciable restriction of competition.

If then looking at the telecommunications sector, the first case decided in this field was the ENEL/FT/DT case.[150]

France Télécom (FT) and Deutsche Telekom (DT), both providers of GSM mobile services in their respective home countries and to a small extent in Italy, and an Italian electricity and telecommunications operator, ENEL, created a JV. The JV would use the telecommunications network of ENEL, which would be leased to the JV, and operate fixed line telecommunications and mobile telephony services in Italy.

The JV would operate a mobile telecommunications network using the DCS 1800 standard which differed from the GSM 900 standard used by FT and DT. The Commission did not state whether the relevant product market was the DCS 1800 system or the mobile telecommunications services in a whole, notwithstanding the standard used, and left the definition of the relevant product market open. The Commission considered that there was an increasing trend towards a European market for mobile telephony services and that the relevant geographical market might be European. Depending on the definition of the relevant geographical market chosen, FT and DT would be either actual competitors to the JV or at least active in a neighbouring market closely related to the Italian market. The Commission concluded that the possibility that the creation of the JV would entail a risk of coordination between DT and FT appeared remote, because the market shares of the parents were rather modest. The market shares of the parents on the Italian market would virtually be nil and less than 15% on the European market.

The Commission also looked at the likelihood of coordination of fixed line telephony in France and Germany, since FT and DT were active in these markets respectively and both held a strong position in their markets. Therefore they could be regarded as potential competitors to each other. However, despite possibilities to expand its operations since the liberalisation of the telecommunications sector, FT had only expanded to Germany to an insignificant degree and the same applied to DT. The Commission concluded that the

150 Case No. IV/JV. 2-ENEL/FT/DT, decision of June 6, 1998.

absence of the parents from each other's markets was a deliberate decision and was not as a result of the creation of the JV.

In the VIAG/Orange UK case[151] the Commission also looked at the parents activities in the mobile telephony market.

A JV was created between OOH, a holding company of mobile network participants, and VIAG that had business in the area of telecommunications. The JV was granted by the federal government of Switzerland a licence to build and operate a DCS 1800 telecommunications network in Switzerland. Potential article 2(4) markets were only closely related markets, within the EU, to the JV's market since the Commission was not competent to take any position on competition on the Swiss market. Both OOH and VIAG were active, to a different extent, on the Austrian and the German mobile telephony markets and these markets could therefore be considered as candidate markets for coordination. In Austria, both the parents were engaged on mobile telephony markets through their shareholdings in a company, Connect Austria. However, the Commission did not consider this leading to a coordination among the parents which would be due to the creation of the JV in Switzerland. Connect Austria itself was not yet active on the market and the shareholding was prior to the creation of the JV. In Germany VIAG was not yet active and OOH was only active to a negligible extent. Therefore no coordination was likely on either of the closely related markets.

In two decisions involving Telia and Sonera in Lithuania the Commission once again investigated a JV that was formed outside the EU where the dominance markets also were wholly or mainly outside the EU. However the Commission had to investigate the possible risk of coordination between the parents on markets within the EU.

In the case of Telia/Sonera/Lietuvos Telekomas[152] Swedish Telia and Finnish Sonera, both providers of a wide range of telecommunications services in- and outside national boundaries, acquired a 60 % interest in a Lithuanian State owned telecommunications company, Lietuvos Telekomas (LT). LT operated only in Lithuania and provided fixed line telephony. It had also been granted a GSM and a DCS licence but it had not prior to the operation started to provide mobile telephony services. Both Telia and Sonera were active, to a different extent, on the Swedish and the Finnish fixed line telephony markets which were closely related to the Lithuanian market. Therefore, these markets could be considered as candidate markets for coordination. As to mobile telephony, both parents were - depending on the definition of the relevant geographical market chosen - either actual or at least potential competitors on markets which could be considered as neighbouring markets closely related to the Lithuanian market.

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151 Case NO. IV/JV. 4- VIAG/Orange, decision of August 11, 1998.

152 Case no. IV/JV. 7- Telia/Sonera/Lietuvos Telekomas, decision of August 14, 1998.

> Both parents taken together had a very significant share of the fixed telephony market in Sweden and Finland respectively (more than 60% on either market). However, the size of the fixed line telephony market in Lithuania was small compared to the markets in Sweden and Finland. Therefore, the Commission concluded that there was no likelihood that the acquisition of control over LT would lead to a coordination of competitive behaviour of the parents on the above mentioned markets. Considering the mobile telephony market as European in scope, the market shares of LT and the parents together would be small (below 10 %). The acquisition of control over LT would therefore not likely lead to coordination of competitive behaviour on that market. If considering the product market as being national in scope, neither Telia nor Sonera would be active on the markets of the other company to a noticeable degree. The size of the telecommunications market in Lithuania was very small compared to the markets in Sweden and Finland and a possible share in that market of Telia and Sonera (through LT) was even more limited. The Commission therefore concluded that there was no likelihood of coordination on these markets either.

The conclusion that there was no likelihood of coordination on the mobile telephony market was not affected even when Telia and Sonera acquired a 55% interest in another Lithuanian telecommunications operator, Omnitel, providing mobile telephony services in Lithuania.[153] The Commission made exactly the same conclusion in this case as in the Telia/Sonera/Lietuvos Telekomas case. No coordination was likely on any market irrespective geographical market chosen.

In the PanAgora/DG Bank case[154] the Commission made an investigation of article 2(4) effects in the field of asset management services.

> PanAgora and DG Bank created a JV which would provide asset management services to institutions in Germany, Austria, Switzerland and countries of Eastern Europe. Looking at the possibility of co-ordination of competitive behaviour of the parents, the Commission stated that, depending on the relevant geographic market chosen, the parents were either actual or potential competitors to the JV on the asset management services market. If the relevant geographical market was global, the parent would be competing on the same market as the JV. If the geographical market was national, the parents would be active on the same market as far as Switzerland was concerned and on a neighbouring market as far as the other countries were concerned. The Commission's investigations revealed that the market for asset management services was very competitive in the countries where the JV would be active and the market shares of the parents were found relatively small. No specific barriers to entry were found. Given the parties' market position, it was not likely that there would be any incentive for them to co-ordinate their competitive behaviour. Therefore, the setting up of the JV would not lead to any coordination of the parents' competitive behaviour in the relevant market.

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153 Case No. IV/JV. 9- Telia/Sonera/Mororola/Omnitel, decision of August 18, 1998.

154 Case No. IV/JV. 14- PanAgora/DG Bank, decision of November 26, 1998.

In the NC/Canal+/CDPQ/BankAmerica case remedies had to be adopted to settle article 2(4) concerns.[155]

In this case the "spill-over" effects were found on a market upstream from the JV. Canal+, a French company active in, inter alia, pay-TV broadcasting and cable distribution of TV services, owned a company that operated pay-TV in France. Canal+ wanted new shareholders to subscribe to a capital increase in that company. BankAmerica and CDPQ agreed to invest in the company and acquired 37% of the shares. The JV would, after the acquisition, continue to operate on the pay-TV market in France. Neither BankAmerica nor CDPQ were present on that market, but Canal+ was through the JV. However, all the parents were present on the Spanish pay-TV market (the same product market as the JV but in a neighbouring geographical market) and the market for wholesaling of TV-rights in Spain (upstream market from that of the JV). BankAmerica and CDPQ had controlling interests in Cableuropa which was seen as a future significant competitor to Canal+'s very strong market position in the Spanish pay-TV market. Cableuropa was also a buyer of pay-TV rights from Canal+. Accordingly, these markets were considered candidate markets for coordination.

The Commission stated that there were strong indications that Canal+ might have a dominant position on the Spanish pay-TV market as well as on the market for wholesaling of TV-rights in Spain. These two markets were also seen as highly concentrated. Nevertheless, the Commission did not conclude a risk of horizontal coordination between Canal+ and Cableuropa as a result of the creation of the JV. Although Canal+ and Cableuropa were both TV operators in Spain, and as such, in direct competition, and given the Spanish market's characteristics, the Commission concluded that the companies would still have incentives to compete in that market. Inter alia, Cableuropa was a new entrant in the pay-TV market and needed to get as many subscribers as possible in the start-up period, thus rendering a horizontal coordination with Canal+ on price unlikely.

However, the Commission saw a likely vertical coordination between Canal+ and the other parents as a result of the creation of the JV. The JV was the second biggest cable operator in France. Cableuropa, i.e. BankAmerica and CDPQ, were and would continue in the future to co-finance the cable interests of Canal+ in France via the JV. Cableuropa was consequently seen as having a very significant and real power to retaliate against Canal+ in France if it was not given favourable conditions in the sale of Spanish pay-TV rights. The Commission concluded that, as a result of the JV, Canal+ had a strong incentive to favour Cableuropa in its supply arrangements. This could lead to a situation in which there would be discrimination with regard to other players in the pay-TV market in Spain. Canal+ had to submit undertakings to the Commission in order to remove the competitive concerns raised by the operation. It had to agree that any negotiations with Spanish cable operators had to be conducted in a fair and non-discriminatory manner consistent with EU- and Spanish

155 Case No. IV/M. 1327- NC/Canal+/CDPQ/BankAmerica, decision of December 3, 1998.

competition laws. Following the undertakings the Commission concluded that the operation no longer raised serious doubts within the meaning of article 6(1)(c) of the AMR and therefore the operation was compatible with the common market.

This case shows the potential use of article 2(4). First to observe is that the formation of the JV did not create or strengthen the dominant position of Canal+ as such. Instead, the transaction created a situation where Canal+'s commercial incentives would change in a way that enhanced the risk of discrimination against other pay-TV operators in Spain. It created a direct link between Canal+ and the creation of the JV which gave incentives to behave in a potentially anti-competitive way. Next to observe is that the remedy directs the future behaviour of Canal+ on the Spanish market for wholesale of TV-rights but at the same time the formation of the JV was structurally unchanged.[156]

The potential use of article 2(4) is also shown in the case of Fujitsu/Siemens.[157]

A JV was created to be active in the development, manufacture, distribution, marketing and sale of desktop PCs, laptops, workstations, servers and storage systems. The JV would rely on the parents, Siemens and Fujitsu, for servicing and after sales maintenance of the computers. None of the JV's markets were candidate markets for coordination but both parents would remain active in several upstream or downstream markets. Both parents would, inter alia, remain active in the financial workstations market. This market was held a market vertically related to the JV's market for manufacture of personal computers, where workstations are one category. Accordingly, the financial workstations market was considered a candidate market for coordination. In making the assessment whether co-operation between the parents in the JV might have the effect to give rise to coordination in the candidate market, the Commission considered the structure of the candidate market, the parties' shares of sales in the candidate market, the structure of the candidate market and the structural change resulting from the creation of the JV to be relevant.

The financial workstations market exhibited several structural characteristics which made coordination between the parents in the market likely. The market was highly concentrated with the parents and one other company accounting for a share of sales of 20-40% and 30-40% respectively in the EEA. The remaining competitors all had market shares not exceeding 10%. The technology for financial workstations was seen as relatively mature, as the technology needed to operate financial workstations tended to be standard personal computer-based technology. Furthermore, the coordination between the parents would be appreciable since the parents would, seen together, be the second biggest competitor of the financial workstations market and any coordination between the parents appeared to cause the elimination of competition in respect of a substantial part of the financial workstations market. Coordination between the parents would also have an effect on trade between

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156 Kemp, J., p. 42f.

157 Case No. IV/JV. 22- Fujitsu/Siemens, decision of September 30, 1999.

member states. Both parents were EEA-wide operators in financial workstations. Any alteration of their competitive behaviour would have an effect on intra-Community trade on that market.

As the Commission raised concerns about the risk of coordination between the parents, Siemens offered a remedy in order to remove the competitive concerns raised by the operation with regard to the Community-wide financial workstations market. It undertook to divest a part of its business, which removed the incentives to coordinate its behaviour with that of Fujitsu.

Only in one case, so far, a second-phase examination has been opened. This occurred in the BT/AT &T case.[158]

The Commission investigated possible coordination effects of the proposed JV between British Telecom (BT) and AT&T, a US firm. These firms are two of the world's largest telecommunications operators. BT's principal activity is the supply of telecommunications services and equipment in the UK. AT&T is the largest US long distance telecommunications operator but is also active outside national boundaries, notably in UK where it operated a group of wholly-owned subsidiaries including AT&T Comms UK and ACC Long Distance UK. The JV would provide a range of telecommunications services to multinational corporate customers and also provide international carrier services to other carriers. In the Commission's first-phase investigation, it expressed concerns, inter alia, of the possible coordination effects of the JV in the UK between ACC, BT and Telewest, in which AT&T held a 22% stake and regarding the distribution of AT&T/Unisource services in the UK. Accordingly, the Commission opened a second-phase investigation.

The Commission raised concerns that the JV could lead to the coordination of the competitive behaviour of the parties. In order to remove the competition concerns, AT&T offered to divest ACC UK and committed itself to the creation of a greater structural separation between AT&T and Telewest. AT&T also committed itself to give another distributor the possibility to distribute AUCS services (a JV between AT&T and Unisource that offered global telecommunications services) in the UK, as AT&T would be wound up. Subject to full compliance with all these undertakings, the Commission declared the operation compatible with the common market, according to article 8(2) in the AMR.

In the case of Skandia/Storebrand/Pohjola[159] the Commission examined article 2(4) concerns in a totally different area than described above, namely in the insurance field.

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158 Case No. IV/JV. 15- BT/AT &T, decision of March 30, 1999. This decision is still not accessible to the public. I have got the information about the case from secondary sources; Emberger, G., and Pitkänen, T., p. 30; Kemp, J., p. 43. The decision is therefore not described in a fully complete way.

159 Case No. IV/JV 21- Skandia/Storebrand/Pohjola, decision of August 17 1999.

A JV was created between Skandia, Storebrand and Pohjola. The parents transferred their non-life insurance activities to the JV, established in Sweden. After the completion of the operation, the parents would take care of the life insurance sector in Sweden, Norway and Finland. The JV would provide non-life insurance products in the same countries. As the life insurance market is a neighbouring market with regard to the non-life insurance market, and all the parents would operate in that market, it was considered a candidate market for coordination. The Commission looked at whether the parents together or separately had sufficient market power to make coordination worthwhile. It came to the conclusion that the life insurance sector had low barriers to entry and the parents had competitors of comparable size in each of the three countries in question. Accordingly, the conditions of existing competition and the rather high possibility of new entry showed that there was no likelihood for the parents to have market power to make coordination of competitive behaviour worthwhile. In any event, the Commission stated that it was necessary to examine whether the establishment of the JV would give the parents the means of coordination. For this purpose, the Commission examined the parents' distribution channels for life and non-life products. The Commission came to the conclusion that there was no reason to believe that the JV would have as its object or effect the coordination of the competitive behaviour of the parents such as to restrict competition to an appreciable degree.

The Commission's decisions described above, which have included an examination of article 2(4) effects, show some common themes. The relative size of the market assessed for dominance purposes and the market assessed for the risk of coordination, in other words the JV's market and the article 2(4) market, has been important in assessing the likelihood of coordination. The risk of coordination is smaller if the JV's market is significantly smaller than the article 2(4) market. See for example in the case of Telia/Telenor/Shibsted and the cases concerning Telia and Sonera in Lithuania. However, this is not a sufficient condition in concluding that there is no likelihood of coordination between the parents. It is also necessary to look at the nature of the markets themselves, e.g. the structure of the candidate markets, the market shares of the parents compared with other competitors, and the structural change resulting from the creation of the JV. The Fujitsu/Siemens case is a good example of what the Commission consider in its examination. The nature of existing links between the parents is also relevant for the determination of causality between the notified operation and the article 2(4) effects, but existing links prior to the operation do not automatically imply that there are no effects.[160] In the VIAG/Orange UK case the Commission considered the existing link between the parents prior to the operation as a reason of not finding a likelihood of coordination, but there were also other criteria that made the Commission conclude that no coordination existed.

However, none of the cases decided by the Commission since March 1998 have given any guidelines on how an article 85(3)-analysis will be assessed. Cases which can not be resolved by a first-phase decision are those which will define the Commission's policy on the

160 Twentyeighth Report on Competition Policy, p. 60; Kemp, J., p. 43.

application of article 2(4). So far, only one case has raised concerns about coordination which could not be resolved in the first phase of the AMR procedure. This case is not accessible to the public which naturally makes it hard to outline any policy at all. In the future, further second-phase decisions will help to define the Commission's policy and solve the question concerning an article 85(3)- analysis.

# 6. Analysis and conclusion

The assessment of JVs in the E.C. has during the last decades gradually changed. There are certain criteria that should be satisfied to fulfil the competition policy-purpose. Have these criteria been fulfilled for the purpose of the assessment of JVs? If the answer is negative, what can still be improved?

The formation of a JV possesses characteristics of a merger/concentration. A JV transaction where two parents integrate their assets in a particular business-sector is like a merger between the two parents. Since the parents remain independent undertakings, it is not a full merger, though. However, a partial merger presents less risks of competitive harm than a full merger, it is less restrictive and at the same time it gives equivalent opportunities for competitive benefits as a full merger. It is important to remember that the JV transaction in form of a partial merger results in structural change of the parents activities and at the same time it may introduce a new entity that can compete on the market. A concentration is, as a general rule, permitted as long as it does not create or strengthen a dominant position to an extent that effective competition would be significantly impeded. From this, it would be natural that a partial merger, in the shape of a JV, should be treated in the same way as a full merger.

Article 85 has as its objective to preserve the right of freedom to trade. It controls cartel agreements and prohibits "restriction of competition", i.e. restrictions on the freedom of action of companies adversely affecting competition. Until recently, such restrictions were normally seen as per se illegal under article 85(1) and the parties to an operation falling under this article had an onerous burden to prove that there was sufficient efficiency resulting from the restrictions that would benefit consumers. The Commission's traditional interpretation of "restriction of competition" was very broad and therefore an application for an individual exemption under article 85(3) therefore became a norm.

Ever since the E.C. Treaty entered into force, no specific provisions for the regulation of JVs are to be found in the Treaty. However, JVs were at an early stage seen as having "inherent detrimental effects" to competition and needed to be controlled with severity. Therefore it was decided that all JVs should be assessed under the scope of article 85. This decision was not well-founded. Application of article 85, with its behaviour control, to entire JV transactions with structural aspects creates a distorted situation. The application of the article to the

formation of JV transactions results in prohibition of desirable and efficient transactions which should as a general rule be permitted. If any, only the elements in a JV transaction restricting competition, i.e. the restrictions between the parents directly resulting from the concentration, should fall under article 85. Thus, it is important to distinguish between the structural aspects and the behavioural aspects of a JV. The different aspects of a JV have different impact on competition and should be treated in proportion to the harm they cause on competition.

The Commission understood that all JVs could not possibly have detrimental effects and that article 85 was not an appropriate instrument for all JVs. Accordingly, in the mid-sixties, the Commission developed the "partial concentration" test according to which some JVs would fall outside the scope of article 85 and would be treated as mergers/concentrations. However, the distinction between JVs still subjected to article 85 and JVs that would be treated as mergers/concentrations was based on a misconceived notion of concentration. The existence of a concentration was determined by the competitive relationship between the parents prior to the formation of the JV rather than by the structure of the JV itself. Thus, the Commission still did not make a difference in its assessment between the formation of the JV and the restrictions between the parents directly resulting from the concentration. A JV did not escape from the application of article 85 because of its structural effects, which are normally beneficial for competition. In addition, the conditions in the "partial concentration" test were too difficult to fulfil. Thus, most JVs remained subject to article 85 and were seen as co-operative.

With the introduction of the MR, the distinction between concentrative-co-operative JVs was introduced and this formed a jurisdictional line. Co-operative JVs were subject to the stricter control under article 85 and the proceedings of Regulation 17/62, while concentrative JVs fell under the scope of the MR. For a JV to be concentrative it had to be jointly controlled by its parents, be autonomous/full-function and there must not be any risk of co-ordination of competitive behaviour of undertakings which remained independent. The existence of the distinction between co-operative and concentrative JVs suggested an easy identification between JVs treated as concentrations or non-concentrations. However, such an identification is impossible because there exists a wide spectra of possible structures and each possibility does not have to differ more than marginally from another structure. Thus, to try to have a clear-cut distinction between article 85 and the MR with the co-operative/concentrative distinction as a jurisdictional line was not and is not an appropriate solution.

Nonetheless, the adoption of the MR made some improvements in the assessment of JVs, although not in a genuine sense. Some JVs were accepted as beneficial and as such they were treated in a more favourable way than under article 85. However, the co-operative-concentrative distinction had only replaced the "partial concentration" test. The assessment of JVs was actually still the same. This means that the distinction between co-operative and

concentrative JVs was still based on the misconceived notion of concentration that the existence of a concentration was determined by the competitive relationship between the parents prior to the formation of the JV. The formation of a JV by parents who contribute substantial resources to the JV does not, in and of itself, restrict competition within the meaning of article 85, even in cases where the parents remain in the market of the JV. In addition, the criterion that a JV had to have decision-making autonomy was not appropriate. A JV should be able to benefit from the more beneficial treatment despite a lack of decision-making autonomy. As the practice of the Commission shows, there was hardly no JVs that actually fulfilled that criterion.

It was not many JVs that could benefit from the provisions under the MR, because hardly no JV could fulfil the criteria for being concentrative. JVs could have structural aspects, be so called "structural" co-operative JVs, but still failed to be assessed as concentrative because of their purpose and/or structure. Since there was an essential difference both in procedural and substantive treatment of co-operative and concentrative JVs, undertakings that wanted to avoid being treated under the scope of article 85 formed the JV in a way that made the MR applicable. They often chose to merge their competing operations totally and permanently instead of engaging in partial function or JVs limited in duration that actually had less marked impact on competition. Activities with similar economic effects should be regulated in a similar way. However, as long as the formation of JVs are treated differently, because some of them also involve restrictions between the parents resulting from the creation of the JV, it is not possible. The MR did not resolve the problem that the structural and behavioural aspects of a JV must be separated and assessed differently.

In practice, the Commission interpreted the notion of concentrative JVs in a more beneficial way. It developed some improvements in the assessment concerning "structural" co-operative JVs, which resulted in a widening of the concentrative class of JVs. In the 1994 Notice the Commission indicated that the only situation where the Commission would find an unacceptable risk of coordination of competitive behaviour was when two or more parents remained active in the same product- and geographical market as the JV. The Commission would also find an unacceptable risk of coordination when two or more parents were active in "spill-over" markets, but then only under extraordinary circumstances and/or regarding industries that normally required a stricter competition scrutiny.

The telecommunication sector was an industry which in general was considered to require a stricter investigation. Accordingly, for example, if two parents created a JV operating in the mobile telephony market and the parents were active in the same product market but in a different geographic market as the JV the JV would be investigated under article 85. The Omnitel case is a good example of the Commission's policy. However, in this case the Commission stated that although GSM network was legally limited to the territory in which it was licensed, GSM systems were technically compatible throughout Europe. From this followed that technology could enable previously separate markets to converge. This would

give telecom operators incentives to combine some of their activities in order to offer new "packages" of services on the European market. This situation made it important to assess such anticipated JV transactions in an appropriate way. In the way the MR was formed and as the 1994 Notice indicated, these kinds of JVs would be assessed, in its entirety, under the scope of article 85, with a distorted situation as a consequence. New entities would be created and existing companies would be structurally changed. This is beneficial for competition and should be assessed accordingly. The criterion of risk of coordination of competitive behaviour should not be an obstacle to assess JVs in an appropriate way under the most appropriate set of rules.

In 1998 the MR was amended. The AMR included co-operative full-function JVs under its scope. The criterion relating to the risk of co-ordination between independent undertakings was withdrawn from the jurisdictional test. The new rules do not differentiate between co-operative and concentrative JVs for the purpose of jurisdiction. Instead it is the distinction between full-function and non full-function JVs that determines the jurisdictional line.[161] The AMR is applicable to all full-function JVs and the fact that there exists potential co-ordination between the parents no longer prevents the application of the regulation. JVs that now benefit from being regulated under the AMR are defined as JVs that are performing on a lasting basis all the functions of an autonomous economic entity. If these criteria are fulfilled, the JV is seen as bringing about a lasting change in the structure of the undertakings concerned.

It is satisfactory that the old co-operative/concentrative distinction no more works as a jurisdictional line. The old distinction resulted in dissimilar treatment, both in procedure and in substance, to activities with similar economic effects. By including co-operative full-function JVs under the AMR companies do not have the same incentives to structure their JVs to be concentrative. In addition, also in the case of Community dimension, companies no longer have the same incentives to structure their JVs to meet the turnover thresholds. New turnover thresholds have been introduced under the AMR, with an effect that more transactions are able to fulfil the turnover thresholds and thereby benefit from the AMR. Moreover, the Commission does not need to create artificial interpretations of what is to be fulfilled for applying the MR. The 1994 Notice has been replaced and the Undertakings concerned Notice states that when one or more undertakings acquire joint control of a single parent subsidiary, while the former parent remains, the subsidiary is not an "undertaking concerned".

The new jurisdictional line seems easier as a concept. All full-function JVs now fall under the same procedural framework, although different substantive tests apply. However, it has been argued that the same procedural result could have been fulfilled without including co-operative full-function JVs under the scope of the AMR. Improvements could instead have been achieved by changing Regulation 17/62. This argument is not well-reasoned. If the

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161 All full-function JVs also have to have a Community dimension for falling under the scope of the AMR. This requirement is assumed to be fulfilled in the following analysis.

suggested change instead was made, the legislator would still distinguish between co-operative full-function- and concentrative JVs, in the sense that co-operative full-function JVs would be regulated under the stricter article 85. No progress in the assessment of JVs would be reached, since also the substantive test in article 85 would still be applicable to the co-operative full-function JVs in their entirety. Co-operative JVs do not necessarily have to be more harmful than concentrative JVs and they may give equivalent opportunities for competitive benefits as concentrative JVs. If one puts co-operative JVs under a different regulation than concentrative JVs, it would indicate that co-operative JVs in its entirety shall be considered as having more severe impact on competition than concentrative JVs and that they therefore require greater regulatory restriction. Even if choosing to form the procedural rules in the same way as under the AMR, it would show a misleading view that co-operative JVs still must be treated under the framework of cartel rules. The same would apply if the procedural rules of the AMR, but not the substantive test, would apply to co-operative full-function JVs. In my view, it is much better to try to erase the co-operative/concentrative distinction as much as possible. If not, it will only cause confusion.

In addition, even if more transactions are excluded from article 85, this does not have to reduce the incentive to make procedural reforms of the control under article 85. The transactions that still are investigated under article 85 also need to benefit from improved procedural rules.

All full-function JVs are now subject to the substantive test of dominance under the AMR, with exception for the issue of co-ordination. That issue is assessed, within the context of the procedural rules under the AMR, under article 85(1) and (3) with a view to establish whether the operation is compatible with the common market. Thus, the full function JVs' concentrative effects are assessed under the AMR's dominance test and the "spill-over" effects are assessed under article 85. As one can see, the distinction between co-operative and concentrative JVs will still play a role in deciding what set of substantive rules that apply. Naturally there must be some kind of difference in the assessment of the concentrative- and the "spill-over" effects of a JV, since they may have different impact on competition. The question is rather how the difference in the assessment will be framed.

In recital 5 of the AMR it is stated that in certain circumstances article 85(1) shall not apply to "spill-over" effects. This is not reinforced in article 2(4) of the AMR. However, recital 5 states that if the effects of the creation of the JV are primarily structural, article 85(1) will not as a general rule apply. Then the Commission will only do an appraisal of the JV under the dominance test to the whole transaction, including the "spill-over" effects. It has been said that recital 5 is too far-reaching since the Commission's practice, before the AMR was adopted, was to apply article 85(1) to "structural" co-operative JVs and clear them under article 85(3), instead of not applying article 85 at all. This argument is not well-founded. "Structural" co-operative JVs did not fall under the MR because of the misleading view that JVs with co-operative effects had to be harmful and therefore be treated under the stricter

rules of article 85. By letting these JVs fall under the AMR, one has taken one step further and showed that they are not as harmful as previously thought. Why, then, would it be impossible to take one step further and assess these JVs, if primarily structural, in the same way as the full-function concentrative JVs? Such an assessment would wipe out some of the detrimental clear-cut distinction between co-operative and concentrative JVs. The Commission's practice to clear JVs under article 85(3) rather than not applying article 85 at all is somehow a roundabout. The result will be the same, i.e. a decision declaring the JV to be compatible with the common market.

Following the above line of argument, the co-operative full-function JVs, which are not seen as primarily structural, are the JVs that will be reviewed both under the dominance test and article 85. The question then is how to apply the article 85-type analysis to these JVs. The Commission's recent practice shows some common themes. The relative size of the JV's market and the article 2(4) market has been important in assessing the likelihood of coordination. The risk of coordination is smaller if the JV's market is significantly smaller than the article 2(4) market. However, this is not a sufficient condition in concluding that there is no likelihood of coordination between the parents. It is also necessary to look at the nature of the markets themselves. The nature of existing links between the parents is also relevant for the determination of causality between the notified operation and the article 2(4) effects, but existing links prior to the operation do not automatically imply that there are no effects.

Since the AMR entered into force, the Commission has in most of its decisions not found any appreciable risk of coordination. So far, only three cases have raised article 2(4) concerns. For example, in the NC/Canal+/CDPQ/BankAmerica case the potential use of article 2(4) was shown. The parties were given the chance to commit undertakings in order to remove article 2(4) concerns and thereby to have the JV declared compatible with the common market. The new jurisdictional borderline and the introduction of article 2(4) make it possible for JVs to be approved with a formal decision, despite "spill-over" effects. If article 2(4) had not existed the remedies adopted in some cases had been difficult to accept under the MR. The new rules make it possible to direct the future behaviour of parents to a JV and at the same time leave the formation of the JV structurally unchanged. Judging by the Commission's practice, the Commission will rather make the parents commit undertakings in order to settle article 2(4) concerns than to declare that the JV does not fulfil the criteria laid down in article 85(3). Only in one case so far has the Commission opened a second phase investigation because of its serious doubts about the JV's compatibility with the common market.

There is no Commission notice that give guidelines on the application of article 2(4) of the AMR. Second-phase decisions will help to define the Commission's policy and solve the question concerning an article 85-type analysis, but since there is only one such case decided there is no actual Commission policy yet to rely on. However, it is not possible that the article 85(3)-type analysis is to be applied in the same way as under article 85 proper. Firstly,

in article 2(4) it is stated that, in making the appraisal of the "spill-over" effects, the Commission shall take into account in particular the possibility of eliminating competition in respect of a substantial part of the products or services in question, i.e. the forth condition of article 85(3). This condition is similar to the dominance test under the AMR. The wording of article 2(4) then indicates that the article 85-type analysis is meant to be more similar to the dominance test than to the stricter substantive test under article 85 proper.

Secondly, it would be wiser to have the different substantive tests as similar as possible, but still with some stricter assessment of the spill-over effects. Otherwise it would have been useless to include full-function JVs under the AMR. If the article 85-type analysis would be applied in the same way as article 85 proper, it would have been sufficient to only improve the procedural rules connected to article 85, let co-operative JVs still be investigated under article 85 proper and then, under article 85(3), make a balancing-act between the positive and negative aspects of the "structural" co-operative JV. The rationale of including full-function co-operative JVs under the AMR must have been to let them benefit totally from a more lenient assessment.

Thirdly, the article 85(3)-type analysis can not possibly be applied in the same way as under article 85 proper, because that would result in too different assessments concerning the different kinds of restrictions between parents to a JV. It would mean that restrictions between parents which are arrangements constituting the concentration (i.e. the "spill-over" effects) are to be assessed totally different compared to restrictions between parents that are directly related and necessary to the implementation of a concentration (i.e. ancillary restrictions). The latter category of restrictions are to be assessed under the dominance test, while the former restrictions would be assessed according to article 85 proper, in the same way as restrictions not falling under any of those categories ("other restrictions"). The only difference between the "spill-over" effects and the "other restrictions" would be that the spill-over effects would be assessed under the scope of the AMR and the "other restrictions" under the scope of article 85. The most logical would instead be that the "spill-over" effects and the ancillary restrictions should be treated in a similar way. Therefore it is more natural to conclude that the assessment under the article 85-type test should be similar to the dominance test rather than to be the same as under article 85 proper.

Finally, exemptions under article 85 proper are revocable. The Commission has stated that the same possibilities of revocation as exists under this article will exist under an article 85(3)-type exemption. I disagree, since the legal certainty under the AMR would then be reduced. In article 8 of the AMR revocation is justified only under extraordinary circumstances. These possibilities should be the only ones available, since merger controls should be one-off controls.

Although co-operative full-function JVs now fall under the scope of the AMR there still remains a big difference in treatment between these and concentrative JVs. Concentrative JVs

never fall under the scope of article 85 irrespective Community dimension, while co-operative full-function JVs without Community dimension do. This means that not all co-operative full-function JVs benefit from the one-stop-shop-principle. Although the Commission favours a decentralised application of article 85, it does not change the fact that article 85 still is applicable to co-operative full-function JVs. National authorities may apply article 85. A solution to make these JVs to benefit from the one-stop control would be to change the turnover thresholds to be qualitative instead of being quantitative. The turnover thresholds would then not be a poor reflection of real Community dimension. Co-operative full-function JVs that produce appreciable effects on the common market would then be treated under the AMR. If a full-function JV does not have appreciable effects on the common market they do not fall under the article 85 either. Instead, only national competition rules would apply.

In addition, there is another deficiency under the AMR that must be observed. As the AMR is formed today, all full-function JVs may be included under its scope. Some of the "structural" co-operative JVs are thereby "rescued" from article 85. However, to the extent that partial-function "structural" co-operative JVs affect trade between member states they are still reviewed under article 85. At least they benefit from the "fast-track" procedure, but this is not enough, since they are still subject to the substantive test under article 85. All concentrative JVs are always excluded from falling under article 85, irrespective of them being full-function. It is then not justifiable to still let "structural" co-operative JVs fall under article 85. What made the legislator think that the full-function criterion would be the most appropriate criterion for drawing the jurisdictional line? According to the Commission, the rationale for the full-function criterion is that it separates structural transactions from non-structural transactions. That is not true. "Structural" JVs may still exist even if they do not fulfil the criterion of full-function. Although a JV is single function it may involve structural changes and large investments.

It would be much better to extend the scope of the AMR to all JVs, whether full-function or not, except shams. This suggestion was one of the Commission's options in its Green Paper. In my opinion, it is a misjudgement not to choose that option. If the Commission had made that choice, the assessment of JVs would once and for all be based on real economic objectives and on legal certainty. The confusing co-operative/concentrative distinction would in principle disappear, except for when assessing the relationship between the parents. The activities of a JV would be assessed according to their effect on competition. Activities with a similar economic effect would be regulated in a similar way (i.e. all JVs with concentrative aspects would benefit from the rules of the AMR). The spill-over effects would be treated somewhat differently, which is in accordance with the view that the more severe the impact on competition, the greater regulatory restriction applied on the activity concerned.

However, the criteria used for competition policy-purpose should also be easily identifiable for all parties, both the regulator and the regulated undertakings. If withdrawing the full-

function criterion as a jurisdictional line and instead letting all JVs benefit from the AMR, shams excepted, it may create some problems of identifying the JVs that still would be investigated under article 85. It may result in time consuming investigations. Nevertheless, it would be better that all JVs with structural aspects have the opportunity to be treated under the scope of the AMR than to leave the current situation unchanged where some JVs with structural aspects still are treated differently without any economic or legal justification.

Thus, the best solution for an appropriate assessment would be to include all JVs under the scope of the AMR, except shams. If only looking at the current situation, the AMR will only be beneficial with an appropriate interpretation of the article 85-type analysis. If the article 85-type analysis is meant to be the same as under article 85 proper, improvements could instead have been made outside the scope of the AMR.

# Bibliography


## Treaty

European Community Treaty, article 85 and 86.

## Regulations

Council Regulation (EEC) No 4069/89 of 21 December 1989 on the control of concentrations between undertakings.

Council Regulation (EC) No 1310/97 of 30 June 1997 amending Regulation (EEC) No 4064/89 on the control of concentration between undertakings.

Regulation No 17. First Regulation implementing articles 85 and 86 of the Treaty. (OJ Sp. Ed. 1962, No. 204/62, p. 87.

## Interpretative notices

Commission Notice regarding the concentrative and co-operative operations under Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, O.J. No L 395, 30.12.1989, p. 1.

Commission Notice concerning the assessment of co-operative joint ventures pursuant to article 85 of the EEC Treaty, O.J. C 43, 16.2.1993, p. 2.

Commission Notice on the distinction between concentrative and co-operative joint ventures under Council Regulation (EEC) No 4064/89 of December 1989 on the control of concentrations between undertakings, O.J. C 385/1 31.12.1994.

Commission Notice on the notion of undertakings concerned under the Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, O.J. C 385, 31.12.1994, p. 12.

Commission Notice on the concept of full-function joint ventures under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings, O.J. C 66, 2.3.1998, p. 1.

Commission Notice on the concept of a concentration under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings, O.J. C 66, 2.3.1998, p. 5.

Commission Notice on the concept of undertakings concerned under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings, O.J. C 66, 2.3.1998, p.14.

**Green Paper**

Community Merger Control- Green Paper on the Review of the Merger Regulation, COM(96) 19 final, Brussels, 31 January 1996.

**Decisions**

Case No. IV/ 26.872- SHV/Chevron, decision of December 20, 1974.
Case No. IV/ 27.093- De Laval-Stork, decision of July 25, 1977.
Case No. IV/M. 024- Mitsubishi/UCAR Carbon, decision of January 4, 1991.
Case No. IV/M. 176- Sunrise, decision of January 13, 1991.
Case No. IV/M. 088- ELF/Enterprise, decision of July 24, 1991.
Case No. IV/M. 086- Thomson/Pilkington, decision of October 23, 1991.
Case No. IV/M. 207- Eureko, decision of April 27, 1992.
Case No. IV/M. 190-Nestlé/Perrier, decision of July 22, 1992.
Case No. IV/M. 293- Philip/Thomson/SAGEM, decision of January 18, 1993.
Case No. IV/M. 538- Omnitel, decision of March 27, 1995.
Case No. IV/M. 578- Hoogovens/Klöckner & Co, decision of April 11, 1995.
Case No. IV/M. 542- Babcock/Siemens/BS Railcare, decision of June 30, 1995.
Case No. IV/M. 551- ATR/BAe, decision of July 25, 1995.
Case No. IV/M. 1049- Akzo/PLV-EPL, decision of December 4, 1997.
Case No. IV/JV. 1- Telia/Telenor/Schibsted, decision of May 27, 1998.
Case No. IV/JV. 2-ENEL/FT/DT, decision of June 6, 1998.
Case No. IV/JV. 4- VIAG/Orange, decision of August 11, 1998.
Case No. IV/JV. 7- Telia/Sonera/Lietuvos Telekomas, decision of August 14, 1998.
Case No. IV/JV. 9- Telia/Sonera/Mororola/Omnitel, decision of August 18, 1998.
Case No. IV/JV. 11- @Home Benelux B.V., decision of September 15, 1998.
Case No. IV/JV. 14- PanAgora/DG Bank, decision of November 26, 1998.
Case No. IV/M. 1327- NC/Canal+/CDPQ/BankAmerica, decision of December 3, 1998.
Case No. IV/JV. 15- BT/AT &T, decision of March 30, 1999.
Case No. IV/JV 21- Skandia/Storebrand/Pohjola, decision of August 17 1999.
Case No. IV/JV. 22- Fujitsu/Siemens, decision of September 30, 1999.

**Table of cases**

Case 6/72, Europemballage Corporation & Continental Can Co. Inc. v. Commission [1973] ECR 215.
Cases 142 and 156/84, British American Tobacco Co. Ltd. and R. J. Reynolds industries Inc. v. Commission [1987] ECR 4487.

## Books

Broberg, M. P., *The European Commission's Jurisdiction to Scrutinise Mergers*, The Hague 1998, [Broberg 1998].
Clough, M., *EC Merger Regulation. A practical guide to the EC merger and acquisition rules*, London 1994.
Craig, P., and de Búrca, G., *EU Law: text, cases and materials*, 2nd edition, Oxford 1998.
Hawk, B., and Huser, H., *European Community Merger Control: A practitioner's Guide*, The Hague 1996, [Hawk 1996].
Korah, V., *An introduction guide to EC Competition Law and Practice*, 5th edition, Oxford 1997.

## Articles

Ahlbom, C., and Turner, V., *Expanding success? Reform of the E.C. Merger Regulation*, in [1998] E.C.L.R. Issue 4, p. 249-262.
Art, J-V., and Van Liedekerke, D., *Developments in the EC Competition Law in 1995- An overview*, in [1996] C.M.L.Rev., p. 738-749.
Broberg, M. P., *The EC Commission's Green Paper on the Review of the Merger Regulation*, in [1996] E.C.L.R. Issue 5, p. 289-294, [Broberg 1996].
Brown, A., *Distinguishing between Concentrative and Co-operative Joint Ventures: Is it Getting any Easier?*, in [1996] E.C.L.R., p. 240-249.
Burnside, A., *Concentrative vs Cooperative: Joint Ventures Under the EC Merger Regulation and Article 85 EEC*, in [1993] Eur.Bus.L.Rev., p. 195-198, [Burnside 1993].
Burnside, A., *Dance of the Veils? Reform of the EC Merger Regulation*, in [1996] E.C.L.R. Issue 7, p. 371-374, [Burnside 1996].
Denness, J., *Application of the new Article 2(4) of the Merger Regulation- a review of the first ten cases*, in [1998] 3 Competition Policy Newsletter, p. 30-32.
Emberger, G., and Pitkänen, T., *Recent developments and important decisions*, in [1999] 2 Competition Policy newsletter, p. 27-33.
Hawk, B., and Huser, H., *A Bright Line Shareholding Test to End the Nightmare under the EEC Merger Regulation*, in [1993] 30 E.C.L.R., p. 1155-1183, [Hawk 1993].
Kassamali, R. A., *From Fiction To Fallacy: Reviewing the E.C. Merger Regulation's Community-Dimension Thresholds in the Light of Economics and Experience in Merger Control*, in [1996] 21 E.L.Rev. Checklist No. 2, CC/89-CC/114.
Kemp, J., *Recent Developments and Important Decisions*, in [1999] 1 Competition Policy Newsletter, p. 40-44.
Kirkbridge, J., and Xiong, T., *The European Control of Joint Ventures: An Historic Opportunity or a Mere Continuation of Existing Practice?*, in [1998] 23 E.L.Rev., p. 37-49.
Pathak, A. S., *The EC Commission's Approach to Joint Ventures: A Policy of Contradictions*, in [1991] E.C.L.R. Issue 5, p. 171-183.

Picat, M., and Zachmann, J., *Community Monitoring of Concentration Operations: Evaluation after Two Years' Application of Regulation 4064/89, in* [1993] E.C.L.R. issue 6, p. 240-255
Sibree, W., *EEC Merger Control and Joint Ventures*, in [1992] E.L.Rev., p. 91-104.
Schmidt, G., *Recent developments, The new merger rules have entered into force*, in [1998] 2 Competition Policy Newsletter, p. 61-64.
Snelders, R., *Developments in E.C. Merger Control in 1996*, in [1997] 22 E.L.Rev. Checklist No. 2, CC/75-CC/89.
Snelders, R., *Developments in E.C. Merger Control in 1995*, in [1996] 21 E.L.Rev. Checklist No. 2, CC/66-CC/88.
Zonnekeyn, G. A., *The Treatment of Joint Ventures Under the Amended E.C. Merger Regulation*, in [1998] E.C.L.R. Issue 7, p. 414-421.

**Miscellaneous**

Twentyeighth Report on Competition Policy, p. 47-61.
Statements for the Council Minutes, Brussels, June 20 1997.