T.C.
MARMARA ÜNİVERSİTESİ
AVRUPA TOPLULUĞU ENSTİTÜSÜ
AVRUPA TOPLULUĞU HUKUKU ANABİLİM DALI

APPLICATION OF EUROPEAN COMMUNITY COMPETITION LAW TO JOINT VENTURES

Thesis Submitted in Partial Fulfillment of the Degree in Master of Law

T.C. YÜKSEKÖĞRETİM KURULU
DOKÜMANTASYON MERKEZİ

ÖZLEM ERTEM

T94439

SUPERVISOR: PROF. DR. EROL MANİSALI

ISTANBUL 1999

CONTENTS

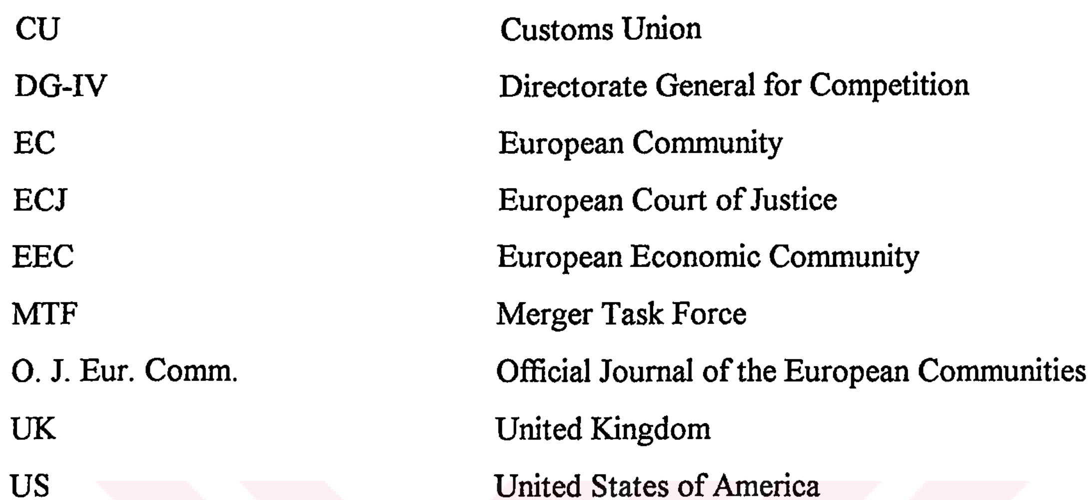
List of Abbreviations
Introduction
1. Definition Of Joint Ventures
2. Motives For Joint Venture Formation
3. Types Of Joint Ventures
    3.1 According To The Business Of The Firms Involved
    3.2 According To The Coordination Of Competitive Behavior
4. The Impact Of Joint Ventures On Competition
5. The Assessment Of Joint Ventures Prior To March 1, 1998
    5.1 Applicable Rules Of The EC Competition Law
        5.1.1 Article 85(1) - Restrictive Practices
        5.1.2 Article 85(2) - Nullity
        5.1.3 Article 85(3) - Exemptions
            5.1.3.1 Non-compete Clauses Under Article 85(3)
        5.1.4 Article 86
        5.1.5 Fines For Violation Of Article 85(1) Or Article 86
        5.1.6 The Business Concentrations Regulation (the "Merger Regulation")
            5.1.6.1 Definition Of A Concentration
            5.1.6.2 Jurisdictional Thresholds
            5.1.6.3 Calculation Of Turnover
            5.1.6.4 The Commission's Appraisal Of Concentrations
            5.1.6.5 Exclusive Jurisdiction Under The Merger Regulation
            5.1.6.6 Continued National Concentration Controls In Certain Cases
            5.1.6.7 Notification And Decision Procedures
    5.2 Joint Ventures Under The EC Competition Law
        5.2.1 Joint Ventures Under The Merger Regulation
            5.2.1.1 Cooperation Versus Concentration Under The Notice
            5.2.1.2 Concentrative Joint Ventures Under The Regulation
        5.2.2 Joint Ventures Not Falling Under The Regulation
            5.2.2.1 A Concentration Where The Thresholds Are Not Met
            5.2.2.2 Joint Ventures Which Are Not Concentrations
        5.2.3 Cooperative Joint Ventures
            5.2.3.1 Cooperative Joint Ventures Under Article 85

5.2.3.1.1 Finding Restrictions Under Article 85(1)
5.2.3.2 Granting Exemptions Under Article 85(3)
5.2.3.2.1 Benefits Of Joint Ventures
5.2.3.2.2 Consumers' Share In Benefits
5.2.3.2.3 Indispensability
5.2.3.2.4 Elimination Of Competition
5.2.3.2.5 Conditions And Length Of Exemptions
5.2.3.3 Cooperative Joint Ventures Under Article 86
6. The Assessment Of Joint Ventures After March 1, 1998
6.1 General
6.2 Changes To The Merger Control Regulation Which Affected Joint Ventures
6.2.1 Procedure
6.2.2 Institutional Changes
6.3 Assessment Of The Changes In The Treatment Of Joint Ventures
6.3.1 Article 22 Requests By Member States
6.4 Issues Raised By Cooperative Full Function Joint Ventures
6.4.1 Technical Issues
6.4.2 Application Of Article 85(3)
6.4.3 Revocation under Article 85(3)
6.4.4 Restrictions Between The Parents Of The Joint Venture
6.4.5 The Relevance Of Turnover For Cooperative Full Function Joint Ventures
7. Some Examples
8. Merger Control Legislation In Turkey
8.1 Relevant Legislation And Enforcement
8.2 Notification of Mergers And Acquisitions
8.3 Mandatory Pre-Notification Of Mergers And Acquisitions
8.4 Failure To Notify Mergers And Acquisitions
8.5 Mergers Which Do Not Create Or Strengthen A Dominant Position
8.6 Mergers Which Create Or Strengthen A Dominant Position
8.7 Filing Deadlines
8.8 Notification Form and Notifying Parties
8.9 Timetable For Clearance And Procedure
8.9.1 The First Phase
8.9.2 The Second Phase
8.9.3 Legal Validity And Suspension Of A Merger
8.9.4 Appraisal Of Mergers And Acquisitions
8.9.5 Powers Of The Board To Revoke Its Clearance Decision
8.9.6 Judicial Review
8.9.7 Publication Of Board Decisions And Business Secrets

9. Conclusion
Bibliography

LIST OF ABBREVIATIONS

CU	Customs Union
DG-IV	Directorate General for Competition
EC	European Community
ECJ	European Court of Justice
EEC	European Economic Community
MTF	Merger Task Force
O. J. Eur. Comm.	Official Journal of the European Communities
UK	United Kingdom
US	United States of America



INTRODUCTION

Joint ventures are a very popular form of enterprise organization. They have a strong effect on industrial policies as they constitute one of the most important categories of collaborative behaviors amongst firms as industrial organizations. One of the most important reasons why such agreements are referred to as a form of organization are their operative advantages, efficiency and reduction of transaction costs.

The relationship between autonomy and the control of the joint venture by its owners influences the effects of joint ventures on competition. Parents supply different kinds of assets such as technology or marketing expertise to the joint venture; which we can call as "the child" and which often represents a balance between different interests and strategies.

The globalization in the markets highlighted the use of joint ventures to carry out foreign investments. Joint ventures are said to depart from specific market failures. (i.e. research joint ventures can be used to spread the risks of investment in the production of knowledge.)

The motivations leading to joint venture agreements can be explained with different assumptions made about firms' behavior and the necessity of engaging in cooperative practices.

The motives of engaging in a joint venture can mainly be to seek capital, to share the risk of a particular project or to enter new markets. Firms mostly aim the maximization of profits. However, the needs of the joint venture is also crucial to the success of the agreement.

Given the costs both in terms of time and money and the delicate nature of acquisitions, some businesses have chosen to enter into joint ventures. A joint venture often offers its partners to share risks and costs while retaining their ownership and management independence. Moreover, joint ventures may permit companies to merge parts of their operations while keeping others separate.

Cases of joint ventures between European companies and American or Japanese companies are on the increase. Joint ventures are a direct means of entry into Europe for Japanese companies.

The aim of this research is to study the assessment of joint ventures in the light of EC Competition Law. I will analyze this subject in two parts:

1. Assessment prior to March 1, 1998; and
2. Assessment after March 1, 1998.

On March 1, 1998 two significant modifications in Regulation 4064/89[1] which hereinafter will be referred to as the Merger Regulation took effect. One of them was the new Community dimension thresholds and the other the submission of cooperative joint ventures to the Merger Regulation.

It is significant to mention that the modifications do not apply to transactions agreed or notified or affected before March 1, 1998, nor to transactions where investigations by national authorities were initiated prior to such date. Therefore, I will try to analyze both eras in the history of assessment of joint ventures.

---

[1] Council Regulation (EEC) No 4064/89 of 21 December 1989 on the Control of Concentrations between Undertakings.

In my research, I will also refer to the assessment of joint ventures in Turkey in the light of the Competition Act No. 4054 and the Communiqué No. 1997/1 on the Mergers and Acquisitions Subject to Approval of the Competition Board.

1. DEFINITION OF JOINT VENTURES

It appears that the nature of joint venture agreements lies somewhere between a contract and a merger. They represent a way to achieve partial ownership and control. Joint ventures are defined as partnerships by which two or more firms create a new legal entity to carry out one or more activities at any stage of production.

Each partner will be making an equity investment in the joint venture in the form of capital, technology, assets or whatever is needed for the joint venture to actively participate in the market. This equity investment will be made observing the below stated conditions:

a. The joint venture must be under "joint control" of the partners;
b. Each partner must make significant contributions to the joint venture;
c. The joint venture must have a separate commercial identity;
d. The joint venture must form a new operating capacity, a new production capacity, new technology, new products or an entrance to a new market.

2. MOTIVES FOR JOINT VENTURE FORMATION

Joint ventures can form the basis and the framework for cooperation in all fields of business activities. Their potential area of application includes, inter alia, the procuring and processing of data, the organization of working systems and procedures, taxation and business consultancy, planning and financing of investment, the implementation of research and development plans, the acquisition and granting of licenses for the use of intellectual property rights, the supply of raw materials or semi-finished products, the manufacture of goods, the provision of services, advertising, distribution and customer service.

Joint ventures can fulfill one or more of the aforementioned tasks. Their activity can be limited in time or be of an unlimited duration. The links that are created between the joint venture partners are important to understand the impact of the joint venture on competition.

Firms go through a benefit-cost analysis before engaging in the joint venture. The resources parents share with the venture affect their bargaining power within the joint venture.

Firms will also go through an evaluation of the following factors:

a. Benefits and needs: Many internal strategic needs may motivate the firms.

b. Strengths: The more strengths a firm possesses, the higher will be its bargaining power in the agreement. The balance of power favors firms which control resources such as capital, technology, personnel or market position that is most desired at a particular time. However, this balance is not always explicit to the outsiders nor can it be measured in the terms of voting power in the board of directors.

c. Market features and the joint venture's needs can also change the characteristics and objectives of the agreement.

If fitted into a long term strategy, the joint venture becomes an instrument through which firms can fulfill their objectives, their needs and strengthen their strategic positions.

Joint ventures are a way of creating internal strengths. They are a method of risk sharing. They are particularly appropriated to undertake projects where great uncertainties are involved as well as costly technological innovations and information acquisition. This is ideal for firms that can not raise sufficient capital. Some resources like technology and distribution networks are not always for sale and joint venture agreements can provide access to them.

Research and development agreements are a window on new technologies and customers. They bring firms and different industries and markets to acquire know-how. This type of joint ventures increase information exchanges.

Joint ventures can be used to pioneer the development of new industries and to enter foreign markets. Joint ventures offer a way to protect current strategic positions against forces that are too strong to be dealt alone by each firm like political or fiscal distortions in foreign or domestic markets. They broaden the scope of action of each partner's firm.

The scarcity of resources can also push firms to engage in joint venture agreements. They may be a means of cooperation in order to explore and exploit natural resources like in oil sector. They can also be used for privatization purposes where the agreement is settled between public and private partners.

3. TYPES OF JOINT VENTURES

3.1. According To The Business Of The Firms Involved

a. Horizontal Joint Ventures

The venture and the owners are in the same line of activity which results in the owning of a new competitor. Horizontal joint ventures harm competition more because of the possible reduction of competition as a result of the close links existing between parents and the venture. The concentrative effects and the venture's autonomy in relation to its competitors should be evaluated.

b. Vertical Joint Ventures

This kind of joint ventures involve firms with products that are neither substitutes nor inputs for one another which means the parent firms are not competitors. They may not jeopardize competition if their impact is in a particular goods market. Vertical joint ventures may reduce potential competition due to the investment of the financial resources which in turn may increase barriers to entry.

c. Spider's Web Joint Ventures

If joint venture agreements are implemented by more than two firms, the links between the firms are of different types and there is a variety of patterns of cooperation. The impact of spider's web joint ventures on competition is difficult to assess because of the complexity of the resulting network formed by horizontal, vertical and conglomerate relationships. The effects of both vertical and horizontal joint ventures overlap in this case.

3.2 According To The Coordination Of Competitive Behavior

a. Cooperative Joint Ventures

Joint ventures which do not fulfill the criteria of a concentration are cooperative in nature. This applies to:

- Joint ventures, the activities of which are not to be performed on a lasting basis, especially those limited in advance by the parents to a short time period.

- Joint ventures which do not perform all the functions of an autonomous economic entity, especially those charged by their parents simply with the operation of particular functions of an undertaking (partial function joint ventures).

- Joint ventures which perform all the functions of an autonomous economic entity (full function joint ventures) where they give rise to coordination of competitive behavior by the parents in relation to each other or to the joint venture.

b. Concentrative Joint Ventures

These are joint ventures which perform on a long lasting basis all the functions of an autonomous economic entity and which do not give rise to coordination of competitive behavior of the parties.

4. THE IMPACT OF JOINT VENTURES ON COMPETITION

The combination of power and interests and the outcome of the joint venture can change the competitive structure of the market. The integration of owners and joint venture's activities and the intensity of their bonds are important in the determination of the impact of a joint venture on competition. Joint venture's activity may disrupt previous market balances, a new competitor may be created and the links between its parents and the joint venture may distort it from competitive behavior.

The effect of joint ventures on competition can be evaluated by taking several factors into consideration such as:

- The type of the joint venture (whether it is horizontal or vertical).
- The amount and quality of resources shared with the joint venture.
- The operating autonomy of the venture itself.
- Linkages between its parents and the joint venture.

If a joint venture operates upstream from its owners and sells them all of its output, competition is distorted if other firms are prevented from entering the input markets. On the contrary, if the amount of outputs a joint venture sells to outsiders increases, then the need for independence will increase. If a joint venture and its owners are on the same line of activity, then the fear of competition may prevent the owners from optimally sharing resources with the joint venture.

The need for coordination with its owners is a part of the joint venture agreement, but the correct balance of autonomy and control is required for the maintenance of competition. The nature of the benefits that are pursued determines the tightness of the cooperation and the motives of a joint venture. The nature of control over a joint venture is in great part determining the impact of the agreement upon competition and it is certain that strong control is potentially dangerous for competition.

The aggregation of objectives and decision power attained through joint venture formation may promote dominant position abuses. As there is more than one parent and its control is proportional to the resources that are being devoted to the project, more influent owners want to coordinate the joint venture's activity with their own, affecting the joint venture's daily functioning and its competitive behavior. The venture may be forced not to behave competitively because it resents the distorting influence of its owners. Since joint ventures are created to share some activities, the pooling of resources may distort competition harming firms which do not participate in the agreement, by preventing their access to input markets.

Partners to a joint venture agreement may undertake not to compete with one another; to act jointly when negotiating with one another and with buyers. These kind of joint ventures often result in the concentration of buying power and in price control. Abuse of dominant position issue could be raised here, if the final production is linked to the joint venture's capacity and total production results below the level. If information about quality and prices is asymmetrically distributed among final customers and sellers, the sharing of knowledge between the joint venture and its parents may worsen the already existing distortion. Continued operations and information exchanges are necessary for joint venture's success and the sharing of operations and management resources may go beyond what is strictly necessary for the joint venture's functioning. Competition is affected when the joint venture's owners or its competitors are deterred from entering the market because of the joint venture's functioning.

Among the various factors that need to be evaluated, the effects of parents' strategies is important. Their respective histories, market shares, international competitiveness and product types are essential to understand the bargaining power that each parent is going to exert within the venture's behavior. The structural relationship between parents and a joint venture is a determining factor. For example if horizontal links are created as a result of joint agreements, these are more likely to have been caused by concentrative

reasons. The concentrative effect is a primary factor creating possible anti-competitive impact as the parents cease to be current or potential competitors.

Last but not least, the operative autonomy of a joint venture and the scope of its domain specify many of its effects. The stronger the link between the joint venture and its owners, the higher is the potential damage to competition.

The use of joint ventures to enhance the international activities of parent firms in foreign markets can increase competition by opening the industry to international trade.

If we look at research joint ventures as an example, we see that the parties can use the joint venture as a vehicle to slow down the pace of technological innovation as rival firms might benefit an agreement not to compete so vigorously.

The assessment of joint ventures according to EC Competition Law does not depend on the legal form which the parents choose for their cooperation. The applicability of the prohibition of restrictive practices depends, on the contrary, on whether the creation or the activities of a joint venture may affect trade between Member States and have as their object or effect the prevention, restriction or distortion of competition within the Common Market.

The question whether an exemption can be granted to a joint venture will depend, on the one hand, on its overall economic benefits and, on the other hand, on the nature and scope of the restrictions of competition it entails.

In view of the variety of situations which come into consideration, it is impossible to make general comments on the compliance of joint ventures with EC Competition law. For a large proportion of joint ventures, whether or not they fall within the scope of application of the EC Competition Law depends on their particular activity. For other

joint ventures prohibition will occur only if particular legal and factual circumstances coincide, the existence of which must be determined on a case by case basis.

5. THE ASSESSMENT OF JOINT VENTURES PRIOR TO MARCH 1, 1998

5.1 Applicable Rules Of The EC Competition Law

In this section we will have general information regarding the rules of EC Competition Law applicable to joint ventures prior to March 1, 1998.

There are three substantive Competition Law provisions that the Commission may apply to joint venture agreements in the EC or having effect in the EC. Arrangements outside the EC may also be subject to EC Competition Law.

No joint venture arrangement in the EC can be contemplated without consideration of the applicable law and regulations in the particular Member States concerned.

5.1.1 Article 85(1) - Restrictive Practices[2]

This article governs agreements, decisions, and concerted practices that restrict competition. Article 85(1) prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between

---

[2] Article 85 (1) states:
"The following shall be prohibited as incompatible with the Common Market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the Common Market, and in particular those which:
(a) directly or indirectly fix purchase or selling prices or any other trading conditions;
(b) limit or control production, markets, technical development or investment;
(c) share markets or sources of supply;
(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

Member States and which have as their object or effect the prevention, restriction or distortion of competition within the EC.

Therefore, in deciding whether any particular situation falls within Article 85(1), it is necessary to determine:

a. whether there exists an agreement, decision or concerted practice between undertakings;
b. whether such agreement, decision or practice affects trade between Member States; and
c. whether its object or effect is the prevention, restriction or distortion of competition within the EC.

For a transaction to be in the scope of this article, the competition in the Common Market should be distorted in an obvious way.

Both actual and potential competition should be taken into consideration when evaluating the effects of joint ventures. The golden rule is : *Agreements which form a joint venture between actual or potential competitors*[3] *are in the scope of Article 85(1).*

---

[3] To find out whether there is potential competition between the parties, there are a few points we have to take into consideration:

a) The input of the joint venture: Does the investment subject to the joint venture exceed the financial capacity of the parties?
b) Do the parties have the same production technology and tools as the joint venture and do they have the same inputs and the outputs?
c) Is there enough demand for each party to produce separately?
d) Can each party separately carry out the risks?

If the answer to all these questions are positive, this will mean that the parties are potential rivals of each other and they decided to act together although they could have acted on their own.

Examples:

a. Companies producing convertible products: A company producing beds and another company producing tables can be cited as an example. Although the two companies do not

Now I will try to explain each aspect of Article 85 (1):

a. Agreement, Decision Or Concerted Practice Between Undertakings:

As required by Article 85(1) there should be two or more "undertakings" involved. Although the term undertaking is defined nowhere in the Treaty of Rome, it is said to apply to almost any legal natural person carrying on an economic activity of some kind.

The criteria for an agreement is not very strict. A unilateral declaration voluntarily reducing a party's freedom of action may constitute an agreement when done in cooperation with others, whether or not it is a legal contract.

b. Affects Trade Between Member States:

The ECJ has consistently held that for an agreement to affect trade between Member States: "The agreement in question should, on the basis of a collection of objective legal factual elements, allow one to expect, with a sufficient degree of probability, that it would exercise a direct or indirect, actual or potential effect on the trade between Member States." In practice this test is generally met if the agreement in question changes the normal functioning or structure of trade. Article 85(1) does not require proof that agreements, decisions or concerted practices appreciably affect trade, but only that they are capable of affecting trade.

---

produce the same products, they can convert and start producing the same products which proves that the two parties are potential competitors.

b. Two companies producing the same product: One of the companies exports and the other sells its products within the country. The two companies are potential competitors.

c. A company which can not enter the market because of barriers is also a potential competitor.

c. Object Or Effect Of Restricting Competition:

In general intent by itself suffices, regardless of whether actual effects can also be shown. However, the possible effect must be appreciable. In order to guide the parties whether an agreement has appreciable effect, the Commission issued a "Notice Concerning Agreements of Minor Importance" in 1970. Article 85(1) does not apply to agreements that "insignificantly" affect the "market".

A review of the decisions of the ECJ demonstrates that restrictive agreements involving undertakings possessing more than 5% of the relevant market invariably are found to have a significant, or appreciable effect on competition. Thus agreements between large undertakings or in markets where market share is widely distributed among competitors are also deemed to have a significant effect and may fall under article 85(1) even where the market share involved is under 5%.

5.1.2 Article 85(2) - Nullity[4]

Article 85(2) provides that any agreements or decisions prohibited under article 85(1) are "automatically void". The nullity imposed by article 85(2) means that an agreement that controverts Article 85(1) is void and unenforceable between the parties to such agreement.

The nullity imposed by Article 85(2) affects only those provisions or aspects of an agreement or practice that violate Article 85(1). If separable from the nullified provisions under the agreement and applicable substantive law, the other parts of an agreement may continue to be valid.

---

4 Article 85(2) states:
"Any agreements or decisions prohibited pursuant to this Article shall be automatically void."

If an agreement falls within Article 85(1), a number of consequences follow.[5]

- First the Commission may be in a position to impose fines upon each of the participating undertakings.
- Secondly by virtue of Article 85(2), any agreements prohibited pursuant to article 85(1) are automatically void.
- In addition, third parties may sue for damages and/an injunction. Moreover the Commission could require certain modifications to the structure of the joint venture. However, the legal existence of a joint venture company would not be automatically affected.

5.1.3 Article 85(3) - Exemptions[6]

Article 85(3) provides that the Commission may exempt agreements falling under Article 85(1), provided that such agreements have been notified to the Commission and meet certain conditions set forth in Article 85(3).

For the application of Article 85(3) the gain obtained must compensate the loss borne from the restriction of competition. If there is a potential in the transaction that may restrict competition, it will still be governed by Article 85(1).

---

5 Riggs (J. R.) and Giustini (A.), "Joint Ventures Under EEC Competition Law", in The Business Lawyer; (May 1991), Volume 46, p. 856.

6 Article 85(3) states:
"The provisions of paragraph 1 may, however, be declared inapplicable in case of:
- any agreement or category of agreements between undertakings;
- any decision or category of decisions by associations of undertakings;
- any concerted practice or category of concerted practices;
which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question."

The application of the competition rules of the EC is not bound by the legal form chosen by the companies, but is related with the economic reality of their situation.

For the application of Article 85(1) we ask the question of "Could they have done this on their own?". Whereas if the answer to the first question is positive then for the application of Article 85(3) we ask "Could they have reached their targets through a less restrictive way?"

Exemptions under Article 85(3) may be in the form of "block exemptions". An individual exemption may only be granted upon notification to the Commission of the particular agreement involved. However, if an agreement falls within the terms of a block exemption, there is no need to file a notification. There is no block exemption specifically applicable to joint venture agreements.

To obtain an "individual exemption" or a "negative clearance", one or more of the parties concerned files a "Form A/B" with the Commission. Under Article 2 of Regulation 17 of February 6, 1962 ("Regulation 17"), a negative clearance is a finding by the Commission that a particular agreement or practice does not fall under the prohibitions of Articles 85(1) or 86. Exemptions and negative clearances are both governed by Regulation 17. Parties usually request both a negative clearance and an exemption at the same time to permit the Commission to rule either way.

Once the file is opened, an investigation process by the Commission's staff begins, to determine whether an exemption or negative clearance should be granted.

The Commission may exempt an agreement falling under Article 85(1) provided that such agreement has been notified to the Commission and meets certain conditions set forth in Article 85(3). Notification to the Commission protects against fines and an exemption granted by the Commission ensures the validity of the agreement in question.
If an agreement falls within Article 85(1), a number of consequences follow:

- First, the Commission may be in a position to impose fines upon each of the participating undertakings.
- Secondly, by virtue of Article 85(2), as previously described, any agreements prohibited pursuant to Article 85(1) are automatically void.
- In addition, third parties may be able to sue for damages and/an injunction.

During the investigation process, the Commission has investigatory powers under Article 11 and Article 14 of Regulation 17 to gather further information. Article 11 of the same regulation permits the Commission to obtain "all necessary information from the governments and competent authorities of the Member States and from undertakings and associations of undertakings."

Under Article 11(3) of Regulation 17, the Commission may issue a simple request for information. Undertakings are not under any legal obligation to answer such request. However, in case of failure to answer, the Commission is empowered under Article 11(5) of the same Regulation to make a formal decision requiring such information, and owners and representatives of undertakings are required to furnish it. Requests for information are generally made in writing since they must be copied to the competent authority in the Member State of the undertaking concerned and must state the legal basis for the request as well as the penalties for providing incorrect information. A time limit is usually specified for the answer. In answering a request for information, each party must take into account not only the letter, but also the spirit and purpose of the questions posed.

In addition to its power to request information under Article 11, the Commission has a second investigatory tool under Article 14(1) of Regulation 17. Pursuant to such provision, officials of the Commission are empowered:

a. to examine the books and other business records;

b. to take copies of or extracts from the books and business records;

c. to ask for oral explanations on the spot; and

d. to enter any premises, land and means of transport of undertakings.

In addition, the Commission may make a formal decision ordering an inspection under Article 14(3). Inspections may be notified to the undertaking or may be made on a surprise basis. In practice, however, inspections are not normally made in cases where an application/notification has been filed.

If the Commission intends to grant an exemption or a negative clearance, it is required to publish a summary of the proposed transaction or agreement in question in the O.J. Eur. Comm. before it takes such a formal action on the application/notification. Third parties, notably competitors may therefore comment on the notification or application and object to proposed action thereon by the Commission.

Many parties are concerned about confidentiality in connection with the foregoing Commission investigations and the publication of information. Information acquired can only be used to for the purpose of the relevant request or investigation.[7]
In addition, Article 20(2) prohibits the Commission, competent authorities of Member States and their officials and employees from disclosing such information if it is "of the kind covered by the obligation of professional secrecy." Article 19(3) of the same Regulation states that the publication of the proposed negative clearances and exemptions shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

In general, any undertaking involved in a procedure may have access to the contents of the relevant file. In order to protect the confidentiality of certain information, the Commission specifically excepted the following items from access:

- Documents containing other undertakings' business secrets.

---

7 Article 20(1) of Regulation 17.

- Internal commission documents, such as notes, drafts or other working papers.
- Any other confidential information, such as documents enabling complainants to be identified, where they wish to remain anonymous.
- Information disclosed to the Commission subject to an obligation of confidentiality.

The Commission stated in 18th Report on Competition Policy that confidential documents could include documents beyond those containing business secrets.

There are four possible outcomes of an application for negative clearance/notification for exemption:

1. The Commission may issue a provisional decision according to which it informs the parties that after a preliminary examination, it is of the opinion that, Article 85(1) applies and exemption is not available under Article 85(3).

2. The Commission may commence an enforcement proceeding against the parties which filed the application/notification. Both infringement and notification proceedings involve an investigation by the Commission into the matter in question. In case of an infringement proceeding, the investigation may be followed by an issuance by the Commission of a "Statement of Objections". In such a case, a hearing is conducted at the conclusion of which a decision by the Commission to require the parties to desist and/or to impose fines may be taken.

3. The Commission may issue a formal decision after third parties have been invited to comment on the application/notification through publication in the O.J. Eur. Comm. The formal decision may be in the form of negative clearance finding that there is no ground for action under Article 85(1) or Article 86. Alternatively, if Article 85(1) applies, the decision may take the form of an individual exemption under Article 85(3).

Unfortunately, difficulties often arise because of the limited number of formal decisions which can be made by the Commission each year under Article 85(3) as a practical matter. Delays of many years are therefore common before the Commission acts on a notification for exemption and/or application for negative clearance.

4. Due to such delays, there has developed a fourth and final possible conclusion of proceedings. The Commission and the parties may settle on a "comfort letter" rather than a formal decision on a negative clearance or exemption. A comfort letter is an administrative letter signed by an appropriate official of DG-IV stating that no action will be taken against the agreement or practice in question. Pursuant to notices issued by the Commission, comfort letters are available to close the file on both applications for negative clearance and notifications for exemptions. In fact most cases are resolved by closing the file in this way. Although the Commission is not required to publish the particulars of the agreement in question before issuing a comfort letter, it has stated its intention to do so to increase the declaratory value of the letter by giving third parties an opportunity to comment.

These various possible outcomes all have legal effects for the parties. For example only limited comfort can, in fact, be drawn from a comfort letter. The ECJ has held that a comfort letter does not preclude proceedings in a National Court brought by a private party under Article 85(1).

The effect of a comfort letter may be summarized as follows:[8]

1. The agreement remains notified, so that protection from fines continues under Article 15(5) of Regulation 17;

---

8 Riggs and Giustini, op. cit. p: 861.

2. National Courts and Competition Law officials are not precluded from applying Article 85(1) to the agreement, but may take account of such letter or stay the proceedings in order to give the Commission the opportunity to take a formal decision of exemption; and
3. the Commission itself probably could not, as a practical matter, later renege on the position taken in a comfort letter unless there had been a material change of circumstances or the letter was written on the basis of incorrect information.

With respect to a formal decision granting a negative clearance, such a decision probably does not preclude National Courts or authorities from later questioning the agreement or practice in question under National Competition Law.

The situation with respect to the effect of a formal decision granting exemption under Article 85(3) is an open question. Some authors state that national authorities would be precluded from challenging an agreement that had received an exemption. Others maintain that the issue is still open. The Commission claims that its decision granting exemptions under article 85(3) precludes contrary actions by Member State authorities on contrary grounds.

It should be noted that notification, although it protects during the interim from fines, does not ensure the validity of the agreement in question during the Commission's proceedings. Thus, those parts of a notified agreement falling within the scope of Article 85(1) are void. Parts of the agreement not covered by Article 85(1) that are severable from the rest of the agreement would, however, be enforceable.

5.1.3.1 Non-compete Clauses Under Article 85(3)

In general a "non-compete" clause is a necessity in terms of joint ventures and it is not very realistic to think that the parties of the joint venture can compete with each other as this will weaken the cooperation.

After the termination of the joint venture, the parties should be free to compete with each other and the Commission is inclined to accept the non-compete clause if the term is short. The parties should be free to use the technology of the joint venture, but under some conditions a period of restriction is foreseen. This is related with the product and the conditions upon which the joint venture is established.

For a non-compete clause to be valid after the termination of an agreement, it must be essential, otherwise the agreement will be governed by Article 85/1. Which means the consumer must get a good share from the improvement in production or the distribution of products for the validity.[9]

5.1.4 ARTICLE 86[10]

Article 86 prohibits the abuse of a dominant position in the EC. Three elements must be present for the violation of Article 86:

1. A dominant position held by one or more undertakings in the Common Market or a substantial part thereof;
2. an abuse of that dominant position;
3. an existence of an effect on trade between the Member States.

Now lets examine each of these three factors:

---

9 In "Carbon Gas Technology" case, the Commission accepted the non-compete clause.

10 Article 86 states:

"Any abuse by one or more undertakings of a dominant position within the Common Market or in a substantial part of it shall be prohibited as incompatible with the Common Market in so far as it may affect trade between Member States.
Such abuse may in particular, consist in:
directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
limiting production, markets or technical development to the prejudice of consumers;
applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

1. Dominant Position

The ECJ in Michelin[11] defined a dominant position under Article 86 as "... a position of economic strength enjoyed by an undertaking which enables it to prevent the effective competition being maintained on the relevant market by affording it the power to behave on an appreciable extent independently of its competitors, its customers and ultimately of its consumers."

For determining a dominant position, the relevant market both in terms of products and geography must be determined.

The relevant product market is determined by examining those products that are regarded as reasonable substitutes for each other. The dominant position in the defined product market must exist in a geographical market consisting of the "Common Market" or "a substantial part of the Common Market." Geographical market is the area in which the conditions of competition applying to the product concerned are the same for all traders.

Market share is a highly important factor in determining whether an undertaking has a dominant position on a given market. A review of the ECJ's decisions on dominant position demonstrates that market share below 30% is usually not indicative of a dominant position. Where market share exceeds 40% it is usually considered as indicative of a dominant position.

Dominant position may also arise where several firms jointly control a market. In such cases of oligopoly, the Commission has held that the combined market

---

making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations, which by their nature or according to commercial usage, have no connection with the subject of such contracts."

shares and behavior of more than one firm may be used to determine a collective dominant position.

2. Abuse

A dominant position by itself is not prohibited by Article 86. Instead it is the abuse of such position which is prohibited.

Abuse is the behavior of an undertaking in a dominant position which is such as to weaken the competition and which has the effect of hindering the maintenance of the degree of competition still existing in the market or growth of that competition.

3. An Existence Of An Effect On Trade Between Member States

Please refer to the explanations for Section 5.1.1.(b) relating to the effect on trade between Member States.

5.1.5 Fines For Violation Of Article 85(1) Or Article 86

In situations where conduct violates either Articles 85(1) or 86, the Commission has authority to impose fines under Article 15 of Regulation 17.

Regulation 17 provides that either intentional or negligent conduct may be the basis of fines. Other factors which the Commission and the ECJ have considered in assessing gravity are the harmfulness of the effects and injury to basic EC policies.

---

[11] Michelin v. Commission, 1983 E. Comm. Ct. J. Rep. 3463, 1985 1 Comm. Mkt. L.R.321.

In addition, Article 15(2) of Regulation 17 requires the Commission to consider the duration of infringements.

In any case it must be emphasized that the fines are not of a criminal nature and that the Commission's assessment, although discretionary, is subject to the review of the ECJ in view of the gravity and duration of the violations in question.

With respect to joint ventures, the Regulation has left open the debate over what types of joint ventures will be deemed to be true concentrations subject to its provisions.

5.1.6 The Business Concentrations Regulation (the "Merger Regulation")

Until the adoption of the Merger Regulation Articles 85 and 86 governed within certain limits, joint venture agreements and business concentrations.

The Merger Regulation will be applied by the Commission to concentrations with a "Community dimension" and joint ventures are specifically mentioned in the Regulation as being subject to its provisions if they qualify as concentrations and otherwise meet the jurisdictional thresholds.

5.1.6.1 Definition Of A Concentration

Under Article 3 of the Merger Regulation, a concentration exists either when
(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.

5.1.6.2 Jurisdictional Thresholds

The Merger Regulation is applicable to concentrations with a Community dimension. The Regulation will apply when all of the following thresholds are satisfied:

- The combined aggregate worldwide turnover of all the undertakings concerned is more than ECU 5000 million; and
- 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 Merger Regulation will have an impact on concentrations of companies outside the EC where the thresholds are met. Thus, for example a larger merger within the US or an acquisition by a US company of a non-EC European company or a joint venture organized outside the EC would be reviewed by the Commission if the thresholds apply.

5.1.6.3 Calculation Of Turnover

As stated by Article 5(1) of the Merger Regulation, aggregate turnover comprises the amounts derived by the acquiring and acquired companies or joint venture partners from the sale of products or the provision of services within the companies' ordinary activities, after deducting sales rebates and value added or other taxes relating to turnover. It excludes inter-company sales between the companies concerned. The turnover of a company in the EC as a whole or in a specific Member State shall be calculated by reference to products sold or services provided to companies or consumers in the EC or the Member State in question as the case may be.

5.1.6.4 The Commission's Appraisal Of Concentrations

The criteria under the Merger Regulation for approving or disapproving a proposed business combination is set forth in Article 2. In considering whether a concentration is compatible with the Common Market, the Commission will essentially take into account the need to protect competition within the Common Market, the interests of consumers, and the development of technical and economic progress.

The Regulation provides in Articles 2(2) and 2(3) that, whether a concentration is compatible with the Common Market and therefore not deserving prohibition by the Commission depends on whether the 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 substantial part of it. [12]

Even when a dominant position exists in the case of a proposed concentration, it appears that the concentration may nevertheless be approved by the Commission. Article 2(1)b incorporates criteria drawn in large part from Article 85(3) of the Treaty of Rome referring to the development of technical and economic progress provided that is to customers' advantage and does not form an obstacle to competition.

These may, therefore allow the Commission, in connection with its evaluation of the compatibility of the concentration with the Common Market, to approve proposed concentrations when the essential interests of the EC are deemed to be improved thereby.

Under Article 8(2) of the Merger Regulation, a decision declaring a concentration compatible with the Common Market shall also cover restrictions directly related and necessary to the implementation of the concentration. The Regulation has thus adopted the economical solution. The Commission will review the transaction leading to a

[12] In United Brands, the ECJ defined a dominant position as " a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being

concentration in its entirety; there will be no parallel proceedings under Regulation 17 to determine the validity of ancillary arrangements. This approach is especially important in the case of joint venture transactions where there are often ancillary agreements between the parties, such as supply, purchasing, non-competition, and licensing arrangements.

5.1.6.5 Exclusive Jurisdiction Under The Merger Regulation

When the Merger Regulation's thresholds are met, the Commission will have exclusive jurisdiction from the standpoint of Competition Law over the proposed concentration. Its decisions will be binding on Member States. The only exceptions to exclusivity rule are:

1. In connection with national security, media control, and where certain banking rules are involved; and
2. where the Commission decides under Article 9, on a Member State's request, that the proposed concentration threatens to create or strengthen a dominant position in a "distinct market" in that Member State so that such Member State's own authorities should have jurisdiction over the proposed concentration.

In addition to limiting to the Commission's jurisdiction over concentrations falling under the Merger Regulation, the Regulation supplants the substantive rules laid down in Articles 85 and 86 with regard to concentrations in general. Article 22(2) provides that Regulation 17, which sets forth the procedural rules used by the Commission to enforce Articles 85 and 86, no longer applies to concentrations. Thus, these Articles of the Treaty of Rome may no longer be applied by the Commission to a concentration, whether or not the concentration in question meets the thresholds of the Regulation.

---

maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.

In the process, these provisions have not been declared in substance inapplicable to concentrations. They remain therefore available, at least in theory, to private parties wishing to challenge a concentration before a National Court, within, of course, their limits of applicability. In addition, the Regulation nowhere excludes the application of Article 89 of the Treaty of Rome. The Commission has indicated that it might use Article 89[13] against concentrations falling under the Regulation's thresholds.

5.1.6.6 Continued National Concentration Controls In Certain Cases

Where a concentration does not meet the thresholds of the Merger Regulation, Member States have their own competition laws relating to business combinations. Article 22(3) of the Regulation permits Member States to call upon the Commission to apply the Regulation to concentrations below the thresholds when their countries are affected. Thus in cases where a proposed business combination does not meet the Regulation's jurisdictional thresholds, either national Competition Law authorities (where existing) or the Commission (where under Article 22(3) it has been so required) will control the proposed business concentration.

5.1.6.7 Notification And Decision Procedures

Since Regulation 17 has been rendered inapplicable to concentrations, much of the Merger Regulation is devoted to complex procedural rules supplanting those of Regulation 17.

---

[13] Article 89 states:
"1. Without prejudice to Article 88, the Commission shall, as soon as it takes up its duties, ensure the application of the principles laid down in Articles 85 and 86. On application by a Member State, or on its own initiative, and in cooperation with the competent authorities in the Member States, who shall give it their assistance, the Commission shall investigate cases of suspected infringement of these principles. If it finds that there has been an infringement, it shall propose appropriate measures to bring it to an end.
2. If the infringement is not brought to an end, the Commission shall record such infringement of the principles in a reasoned decision. The Commission may publish its decision and authorize Member States to take the measures, the conditions and details of which it shall determine, needed to remedy the situation."

In summary, Article 4(1)a requires that concentrations subject to control by the Commission (i.e. meeting the jurisdictional thresholds of the Regulation) be notified to the Commission not more than one week after the first occurrence of "the conclusion of the agreement, or the announcement of the public bid, or the acquisition of a controlling interest." Except where a tender offer is concerned, all the parties to the concentration must join in the notification.

Pursuant to Article 23 of the Regulation, procedural rules have been issued by the Commission in the Procedural Regulation with regard to the form, consent, time limits, and hearings relating to notifications. The Commission's rules provide for the filing of a "Form CO" which will serve the same role under the Regulation as Form A/B, described earlier in connection with applications for negative clearance/notifications for exemption. The form CO requires relatively detailed information on the parties and their turnover, the concentration, the economic sectors and markets concerned.

Under Article 14(1)a, the failure to notify a concentration meeting the thresholds subjects the companies concerned to fines. More importantly, any unnotified community-dimension concentration is "invalid" if not notified and approved expressly or tacitly by the Commission.
During the first three weeks following notification, the proposed concentration may not be put into effect. Companies violating this prohibition are subject to a prohibitive fine of 10% of their aggregate annual turnover.[14]

Under Article 10(1), the Commission must reach a preliminary conclusion on the proposed concentration within one month after it receives a complete notification.

[14] Article 14(2) of the Merger Regulation.

Under Article 6(1)a, if it determines that the concentration does not meet the thresholds of the Regulation, it shall render a decision to that effect. Under Article 6(1)b, if the Commission decides that the concentration does not raise serious doubts as to its compatibility with the Common Market, it shall decide not to oppose it and shall declare that it is compatible with the Common Market.

If the proposed concentration raises serious doubts, the Commission then opens proceedings under Article 6(1)c and an investigation ensues. Various provisions of the Regulation permit extensive investigative rights for the Commission either alone or through Member State authorities.[15]

Within 4 months after such proceedings are initiated, the Commission must arrive at a decision. This 4 month period, provided for in Article 10(3) may be exceptionally suspended where one of the concerned companies has been responsible for the Commission having to request further information. If the Commission fails to issue a decision within such 4 month period, the concentration is deemed approved.

5.2 Joint Ventures Under The EC Competition Law

The answer depends at least initially on whether the joint venture is a concentration within the meaning of Article 3 of the Merger Regulation.

5.2.1 Joint Ventures Under The Merger Regulation

In order to fall under the Merger Regulation, a joint venture must be a concentration under Article 3 thereof. Article 3(2) gives the initial guidance on the question of whether a joint venture is a concentration by attempting to distinguish between concentrative and cooperative joint ventures. It states, in part, that the creation of a joint

---

[15] Articles 11, 12, 13 and 18 of the Regulation provide for the parties and interested third parties to be heard by the Commission before a final decision is taken.

venture performing on a lasting basis all the functions of an autonomous economic entity, which does not give rise to coordination of the competitive behavior of the parties amongst themselves or between them and the joint venture shall constitute a concentration. Conversely, Article 3(2) states "an operation, including the creation of a joint venture, which has as its object or effect the coordination of the competitive behavior of undertakings which remain independent shall not constitute a concentration."

In its Sixth Report on Competition Policy (1976), the Commission stated that Article 85(1) would not normally apply to joint ventures where all the assets of the parent companies were transferred to the joint venture and the parents became holding companies.

Where the transfer was limited to only part of the total business previously pursued independently by the parents, the transfer might in exceptional cases be treated as a partial concentration not subject to Article 85(1).

Such exceptional cases required that the parent companies completely and irreversibly abandon business in the area covered by the joint venture and that the pooling of certain areas of business does not weaken competition in other areas, and particularly in related areas, where the firms involved remain formally independent of each other. Since Article 85(1) was thought not to apply in the foregoing cases, such concentrative joint ventures were only subject to Article 86.

In order to aid in the determination of whether a joint venture is a concentration and thus falls under the Regulation, the Commission has issued a Notice concerning concentrative and cooperative operations under the Regulation. (the "Notice")[16]

---

[16] Commission Notice on the Concentrative and Cooperative Operations under Council Regulation (EEC) No. 4064/89 of 21 December 1989 on the Control of Concentrations between Undertakings, 33 O.J. Eur. Comm. (no. C 203) 10 (1990).

5.2.1.1. Cooperation Versus Concentration Under The Notice

The Notice begins by setting forth the characteristics of a joint venture for the purposes of application of the Merger Regulation.

- First the joint venture must be an undertaking.
- Secondly, the undertaking must be jointly controlled by its parents. While control is broadly defined under Article 3(3) of the Regulation, the concept is limited in the case of joint ventures to joint control.

Thus the first step in determining whether a joint venture arrangement is a concentration under the Merger Regulation is determining whether or not the arrangement is, in fact, a jointly controlled undertaking: If not, for example, because the requirements of joint control are not met or because the joint venture can not said to be an undertaking (but rather is simply a coordination of behavior), then there can not be a concentration, and Articles 85 and 86, not the Regulation, will apply.

If on the other hand, a jointly controlled undertaking exists, then it will only be a concentration governed by the Regulation if the conditions set forth in Article 3 of the Regulation are satisfied.

The Notice divides these conditions in two: one positive and one negative. The positive condition is that the joint venture performs on a lasting basis all the functions of an autonomous economic entity such as acting as an independent supplier and buyer on the market or being able to carry on its activity for an unlimited, or at least for a long time.

The negative condition of Article 3 is that there be no coordination of competitive behavior related to the joint venture. Article 20 of the Notice sets down the general rule: there can be no concentration if, as a result of the agreement to establish the joint

venture or the existence of the joint venture it is reasonably foreseeable that, the competitive behavior of a parent or of the joint venture on the relevant market will be influenced.

There is no risk of coordination where the parents transfer the whole of a certain business to the joint venture and permanently withdraw from the joint venture's market so that they are no longer actual or potential competitors as between themselves or with the joint venture. The concentration is total when the parent companies become holding companies, while it is partial when the joint venture carries on only a part of the activities of its parents.

When the joint venture undertakes new activities on behalf of its parents; in order for no coordination to arise, the parents as between themselves and vis-à-vis the joint venture must not be actual or potential competitors.

The joint venture might enter the parents' respective markets. Here, coordination of behavior is presumed but the joint venture will not fall under Article 3 of the Regulation if this presumption can be rebutted.

In the fourth scenario, the joint venture operates in upstream, downstream or neighboring markets. In the case of upstream or downstream markets, the making or coordinating of sales and purchases between parents and the joint venture is likely to give rise to coordination. If the joint venture operates in a neighboring market, the factors to be considered are whether the products are technically and economically linked, whether they are components of one another or of third product, and whether the parents are potential competitors of the joint venture.

Whereas certain links between parents will not be considered as concentrations:

- As long as the threshold of joint control is not established, it will not give rise to concentrative joint ventures.
- Despite the specific reference thereto in Article 3(1)b of the Merger Regulation, share or asset acquisitions are not necessarily concentrations. For example where the acquisition of part of an undertaking is accompanied by an agreement to link the behavior of the undertakings concerned, there would be no concentration but a joint venture of the kind reviewable under Article 85(1). Where parties jointly acquire an undertaking with a view to its division, the Regulation may or may not apply depending upon the concentrative nature of the transaction.

5.2.1.2 Concentrative Joint Ventures Under The Regulation

Once the determination is made that a joint venture is a concentration and assuming that the thresholds for application of the Regulation are met, parties will be required to notify the joint venture to the Commission pursuant to Article 4(1). In such case, no other notifications or filings with regard to Competition Law should in principle be necessary since neither Articles 85(1) or 86 nor Member State Competition Law will be applicable. There are however, two exceptions to this rule:

1. The cases of protection by Member States of "legitimate interests" pursuant to Article 21(3), which enumerates "public security, plurality of the media and prudential rules" as such interests.
2. Under Article 9 of the Merger Regulation, a Member State may request jurisdiction in order to protect competition in a distinct market within that Member State. If the Commission grants this request, it can under Article 9(3) either deal with the problem itself or refer the concentration to the competent Member State authority.

The Commission will examine the joint venture falling under the Merger Regulation pursuant to the substantive rules contained in Article 2 of the Regulation. As noted above in our description of the Merger Regulation, part of this analysis will involve weighing the benefits of the joint venture against the costs under Article 2(1)b pursuant to criteria essentially drawn from the exemption criteria in Article 85(3). At least in the case of joint ventures, it may be expected that prior practice with regard to Article 85(3) will serve as reference point for balancing of cones and pros under Article 2(1)b of the Merger Regulation.

Since Articles 85(1) and 86 have direct effect in Member States, any competitor could challenge the joint venture before National Courts.

5.2.2 Joint Ventures Not Falling Under The Regulation

5.2.2.1 A Concentration Where The Thresholds Are Not Met

The first case arises where a joint venture is indeed a concentration falling within Article 3 of the Merger Regulation but the thresholds for applicability of the Regulation in Article 1(2) are not met. In such a case, the Merger Regulation will not govern the transaction, and the Commission will be unable to apply Articles 85 or 86 to it pursuant to Regulation 17, which has been repealed with regard to concentrations. In principle, then, only Member State authorities, acting under the Competition law, if any, of the various Member States involved, would have jurisdiction.

However, it must be remembered that the Merger Regulation could be applied by the Commission in such a case upon the request of a particular Member State under Article 22(3), and that private parties could attempt actions in National Courts under Article 85(1) or 86, to the extent they are applicable.

5.2.2.2 Joint Ventures Which Are Not Concentrations

The second case of joint ventures not falling under the Regulation is where the joint venture in question is not a concentration within the meaning of Article 3 of the Merger Regulation. In such a case, it will be subject to rules applicable to joint ventures prior to the Merger Regulation: these are Articles 85, 86 and of course any applicable Member State Competition Law.

If the Commission finds that the transaction is not a concentration, the parties will have already taken the first steps under Regulation 17 to request a negative clearance with respect to Article 85(1) or an exemption under Article 85(3).

5.2.3 Cooperative Joint Ventures

The definition of cooperative joint ventures was made in section 3.2.a. A cooperative joint venture does not fall under the Merger Regulation as it is not a concentration. The legality of such joint ventures will be determined on the EC level pursuant to Articles 85 and 86 of the Treaty of Rome. In doing so, parties will very often file applications for negative clearance/notifications for exemption under Regulation 17 in order to protect against fines and ensure the legality and validity of their arrangements under EC Law.

5.2.3.1 Cooperative Joint Ventures Under Article 85

If a joint venture is not deemed to be a concentration falling under the Merger Regulation, it must be evaluated according to provisions of Article 85. In practice, the evaluation of a joint venture under Article 85 involves two steps:

- First, does the joint venture have characteristics that fall under the prohibitions of Article 85(1)?

- Second, if the joint venture does not fall within Article 85(1), is an exemption possible under Article 85(3)?

5.2.3.1.1 Finding Restrictions Under Article 85(1)

Article 85(1) will apply to joint ventures where the parent undertakings are actual or potential competitors in the Common Market. The easiest case is where the partners are competitors. In such a case, a restriction on competition is almost likely to exist.

The general approach of the Commission to determining whether partners are potential competitors has been to determine whether the parties could reasonably be expected to enter into the market on their own in the foreseeable future.

The below questions can be asked in the assessment of potential competition:[17]

a. Input of Joint Venture

Does the investment expenditure involved substantially exceed the financing capacity of each partner? Does each partner have the necessary technical know-how and sources of supply of input products?

b. Production of Joint Venture

Is each partner familiar with the process technology? Does each partner itself produce inputs for or products derived from the joint venture's product and does it have access to the necessary production facilities?

c. Sales By Joint Venture

---

17 Riggs and Giustini, op. cit. p: 890.

Is the actual or potential demand such that it would be feasible for each of the partners to manufacture the product on its own? Does each have access to the necessary distribution channels for the joint venture's product?

d. Risk Factor

Could each partner bear the technical and financial risks associated with the production operations of the joint venture alone?

Once the Commission has determined that the parents are actual or potential competitors, it will be difficult to avoid determination that competition is restricted by the joint venture. There are two kinds of restrictions that may result from a joint venture: express restrictions written into the joint venture agreements, and those restrictions that result or may result naturally from the existence of the joint venture and the relationships of the parent companies with it.

Some possible express restrictions may be:

- A clause in the agreement prohibiting the joint venture from carrying on anything other than specified lines of business without the consent of both parents, or limiting the joint venture to a specific geographical market.
- A clause in the agreement obliging the parents to supply to the joint venture all its requirements of raw materials, components, etc...

Moreover, whether or not each of the above would actually constitute a restriction on competition would depend upon the facts of the joint venture in question.

The Commission has stated that, an express provision restricting competition between the parents or the joint venture is only a formalization of the fact that parent companies will not in general compete with the activities of the joint ventures in which they take substantial stakes.

The Commission will also examine the "spillover" or "group" effect of a joint venture. In other words the fact parties participate in a joint venture arrangement may reduce competition between them in other fields. The Commission has found that an upstream joint venture supplying its parents with materials may restrict competition between the parents in the downstream market for products produced with such materials.

An example:

The Commission has taken an expansive approach in determining the scope of the spillover effect, which may extend to areas totally unrelated to the joint venture if the parents are competitors in such other areas. Such spillover may be express or implied. For example in *GEC/Weir*[18], the parties established a joint venture for the production of sodium calculators.
The parent companies had highly diversified industrial interests. They were competitors in other fields or had overlapping activities.

For instance, GEC and Weir both produced pumps other than sodium calculators. Moreover, in the area of foundry productions and high precision steel castings, Weir was a major producer and supplier and GEC a major user. Noting that senior employees of both companies would be involved in the joint venture and these other activities, the Commission concluded:[19]

"In circumstances such as this case, the existence of a joint venture in one field is likely to provide opportunities and inducements to parent companies, who each have related interests also in other areas, to enlarge their common activities and impair free competition between them in those other areas."

---

18 GEC/Weir, 1978 1 Comm. Mkt. L.R. at D53.
19 Ibid.

Another factor in determining whether a joint venture restricts competition is the effect of the joint venture on the structure of the market and third parties.

In *Vacuum Interrupters No.1*[20] the Commission noted that the joint venture could affect trade between the Member States and alter the structure of competition in the market. Such was the case because there was no firm in the EC producing vacuum interrupters and the combination of two potential producers would perhaps retard the entry of other producers.

In addition, third parties may be affected where two competitors (actual or potential) form a joint venture to produce and distribute a product. Before the joint venture, both parent companies were suppliers of a product. Afterwards, there is only one supplier: the joint venture. Likewise, where the parent companies of a joint venture purchase all their supplies only from the joint venture, the possibility for third parties to supply the parents is reduced.

Finally, in an interesting twist, parties must be on the look-out for restrictions on competition between different independent undertakings having a common parent company.

In *Optical Fibres*, the US glass manufacturer Corning, had developed certain optical fibre technology. Corning established three joint ventures in the EC; one in the UK with BICC, another in Germany with Siemens, and a third in France with Compagnie Financiére pour les Fibres Optiques. Both Siemens and BICC were producers of cable in their respective countries but they did not produce cable made from optical fibres. Although having developed the related technology, Corning also did not produce cable from optical fibres. Siemens and BICC were to be the major purchasers of optical fibre cable from their joint ventures, which together with another Corning joint venture, represented 48% of the total EC production of optical fiber cables.

---

20 1977 1 Comm. Mkt. L.R. at D77.

The Commission found that the individual joint ventures did not restrict competition between Corning and its partners where the partners were not actual competitors in the manufacture of optical fibre cables. In addition, notwithstanding the competitors in the separate markets for optical fibres or optical cables, the Commission also found that third parties were not disadvantaged by the joint venture.

5.2.3.2 Granting Exemptions Under Article 85(3)

Although we have examined Article 85(3) as an applicable rule to EC Competition Law above, it will again be analyzed here in relation with cooperative joint ventures.

Article 85(3) permits exemptions to be granted where four conditions are met:

1. the agreement or practice must contribute to improving the production or distribution of goods or to promoting technical or economic progress;
2. consumers must receive a fair share of the benefits resulting from the joint venture;
3. the restrictions on competition involved must be indispensable to the attainment of the beneficial results; and
4. the parties must not have the possibility of eliminating competition in respect of a substantial part of the products in question.

Where joint ventures have been formed by competitors in order to coordinate their commercial conduct, the Commission has not hesitated to refuse an exemption.

Particular attention will be paid to whether the provisions of the joint venture in question, in subject matter, geographical scope or time, go beyond what is necessary for the creation and operation of the joint venture.

Finally with regard to exemptions under Article 85(3), the Commission has remarked that the duration of exemptions will generally be limited to a relatively brief period (normally between 5 and 10 years). Longer periods may be granted where the objective of cooperation can be attained only in the long term.

5.2.3.2.1 Benefits of Joint Ventures

The introduction of a new product or technology and the restructuring or rationalization of production are the key benefits used most often to justify an Article 85(3) exemption.

Other examples are:

- Specialization and division of work in research and development of new technology designed to produce a useful new product.
- Sharing of know-how and costs in relation to development of improved products; such development had been relatively unsuccessful when done independently by the parties.
- Specialization, sharing of complementary technology and production in a product market, where one party would otherwise have ceased production, and where the parties were to produce a wider range of instruments than before.
- Development, which both parties had ceased to conduct independently, of a new component with technical advantages over existing apparatus, etc...

5.2.3.2.2 Consumers' Share In Benefits

The Commission tends to assume that, in a competitive market, the benefits of a joint venture will be passed along to consumers since the partners will be forced by competition to lower prices or improve services. In addition, the benefit to consumers is found where the joint venture will bring a new product to the market.

5.2.3.2.3 Indispensability

The parties must show that the formation of the joint venture is indispensable in securing benefits shared with consumers.

With regard to the formation of the joint venture, the joint venture is more likely to be considered indispensable where it involves major investment, technology transfer or financial risks associated with a new product.

In addition to analyzing the necessity of the joint venture itself, the Commission will also analyze the various restrictions placed on the parent companies and the joint venture in connection with the joint venture's activities to determine whether such restrictions are indispensable. The Commission has noted that it will pay particular attention to any restrictions that go beyond what is necessary for the creation and operation of the joint venture, and that among such restrictions are non-competition clauses, supply and purchasing restrictions, and restrictions on distribution. It is during the examination of these particulars of a joint venture that the Commission often requests changes or imposes certain conditions in order to reduce anti-competitive effects to the minimum indispensable to attain the objectives of the joint venture arrangement.

A non-competition clause between the parents in the field of the joint venture and between the parents and the joint venture has generally been held to be indispensable. However, it can be argued that the parents probably must remain free i) to supply purchasers what the joint venture cannot supply; and ii) to compete with one another once the joint venture has been terminated.

Exclusive supply obligations may also be acceptable but probably only where they are essential to protect high initial investment in the joint venture and do not unduly affect other purchasers of the product.

Joint distribution and sale have been accepted as indispensable where the market would otherwise be difficult to penetrate; the product involved was so technologically advanced that close technical cooperation with purchasers was necessary; inefficiency would result from the establishment of separate distribution networks; and a simple distribution agreement would not permit necessary investment to be made for the wide range of services required or under the difficult economic circumstances facing the business in question.

Another major element examined for indispensability is the provision of intellectual property rights. The Commission has on occasion approved exclusive licenses to joint ventures. However, it should be noted that the block exemption for patent licenses does not apply to joint ventures, and the Commission has found exclusive license agreements not indispensable to the goals of the joint venture in several cases.

5.2.3.2.4 Elimination of Competition

The fourth and final condition for an exemption under Article 85(3) is that the agreement or practice under consideration does not afford the parties the possibility of eliminating competition in a substantial part of the products in question. If the combined market share of the parties in a material EC market is small and there are other strong competitors in the market, the Commission is likely to find that a joint venture will not eliminate competition in a substantial part of the market. On the other hand, where the market involved is an oligopolistic market and the parties control a significant share of the market, the Commission has found that competition may be affected and has refused to grant an exemption.

5.2.3.2.5 Conditions And Length Of Exemptions

An exemption granted under Article 85(3) may be subject to certain conditions and will likely be valid only for a certain period of time. The Commission formally considers that the duration of the exemption will normally last from 5 to 10 years, whereas some exemptions have been granted for periods from 5 to 15 years. Where the exemption has exceeded 10 years, the Commission has emphasized that the longer period was necessary given the amount of investment involved, the time necessary to ensure an adequate return on capital, and the problems of introducing a new product to the market.

With regard to conditions and obligations in connection with exemptions under Article 85(3), the Commission often asks the parties to report any changes in their arrangements or in the activities of the joint venture, as well as any collaboration of the parties in fields outside that of the joint venture.

5.2.3.3 Cooperative Joint Ventures Under Article 86

The vast majority of joint ventures analyzed by the Commission have been examined under Article 85(1) and not under Article 86, as the Commission has traditionally considered that a joint venture was a total concentration or a partial concentration meeting certain exceptional requirements. Presently, however, pursuant to the Merger Regulation, concentrative joint ventures will be governed either by the Merger Regulation (if its thresholds are met) or by the Competition Law of Member States.

Thus it appears that Article 86's application to joint ventures has been supplanted by the Merger Regulation. Article 86 was traditionally limited to concentrative joint ventures and cooperative joint ventures falling outside the Merger Regulation are, by definition, not a concentration, and therefore - if past practice is a guide- Article 86 should not be applied to such a non-concentrative joint venture.

6. THE ASSESSMENT OF JOINT VENTURES AFTER MARCH 1, 1998

6.1 General

On June 30, 1997 the Council adopted Regulation (EC) No. 1310/97 (the "amending Regulation") which entered into force on March 1, 1998 and which significantly amended the Merger Regulation. Regulation 1310/97 introduced two major modifications: the new Community dimension thresholds in order to limit the need for multiple notifications at a national level and the submission of cooperative joint ventures to the Merger Regulation.

6.2 Changes To The Merger Control Regulation Which Affected Joint Ventures

Under the pre-existing rules, the Merger Regulation applied to only those joint ventures which are deemed concentrative; those that perform on a lasting basis all the functions of an autonomous economic entity and which do not give rise to coordination of competitive behavior of parties. Cooperative joint ventures were not considered mergers for these purposes and thus were assessed under the provisions of Article 85 of the Treaty of Rome.

Drawing distinctions between cooperative and concentrative joint ventures has not always been straightforward and difficulties have arisen in this context. Subsequently; in its Green Paper on the review of the Merger Regulation, the Commission justified the proposed changes as follows:

"A large part of industry as well as a number of Member States expressed considerable concern about the differences in treatment between concentrative joint ventures and

cooperative joint ventures of a structural nature. It is said that both kinds of operations are similar in terms of their effects on market structure. They are, however, currently subject to different regimes. This situation is widely regarded as unsatisfactory especially to the extent that there are differences in the deadlines for assessment and the degree of legal certainty afforded to companies."

Beginning March 1, 1998, the position was simplified. All joint ventures which meet the thresholds stated in the Merger Regulation are subject to control within the Merger Regulation provided that the joint venture performs all the functions of an economic entity. The distinction between concentration and cooperation is removed.

The amendments to the Merger Regulation took effect from March 1, 1998. It is very significant to mention that these changes do not apply to transactions agreed or notified or effected before that date, nor to transactions where investigations by national authorities were initiated prior to March 1, 1998.

Under the new rules and procedures, when the joint venture is cooperative it will be assessed under the criteria of Article 85 in addition to the assessment of the Merger Regulation that is based on finding of whether the transaction creates or strengthens a dominant position. When the MTF concludes that the joint venture does not meet the requirements of Article 85(3), the joint venture will be declared incompatible with the Common Market.

In order to implement these changes to the Merger Regulation the Commission has adopted a new Implementing Regulation on March 1, 1998.[21] The new Implementing Regulation entered into force on March 2, 1998.

---

[21] Commission Regulation No 447/98 of March 1, 1998 on the Notifications, Time Limits and Hearings Provided for in Council Regulation (EEC) No 4064/89 on the Control of

Amendments to the Merger Regulation also required changes to the Commission's explanatory notices. The Notice on Joint Ventures is one of the most affected.[22] The Full-Function Notice on joint ventures reflects the fact that the distinction between concentrative and cooperative joint ventures has ceased to determine the applicability of the Merger Regulation. Jurisdiction will now be determined by applying the criterion of full functionality, on which further guidance has been given. Under the amending Regulation, all full-function joint ventures with a Community dimension will qualify as a concentration within the meaning of the Merger Regulation (a "positive test").[23] The fact that there is potential coordination between the parents will no longer prevent the application of the Merger Regulation.

From March 1, 1998 all joint ventures will be regarded as concentrations within the meaning of the Merger Regulation, including those giving rise to a risk of coordination. Where such joint venture has Community dimension, Article 85 will be applied to any coordination risk but within the procedure and timetable of the Merger Regulation.

The Merger Regulation now applies to all full-function joint ventures fulfilling the turnover thresholds. The Merger Regulation covers "concentrations" with Community dimension. In order to constitute a "concentration", a joint venture had to *previously* satisfy four conditions:

1. The parents must have joint control;
2. it must perform all the functions of an autonomous economic entity;
3. it must be established on a "long lasting basis"; and

Concentrations between Undertakings, OJ L 61, 2. 3. 1998; replacing Commission Regulation (EC) 3384/94 of 21 December, 1989, OJ L 377, 31.12.1994.

[22] Commission Notice on the Concept of Full Function Joint Ventures under Council Regulation (EEC) No 4064/89 on the Control of Concentrations between Undertakings (the "Full-Function Notice"), which replaces the 1994 Interface Notice.

[23] The Full-Function Notice provides that to be "full-function" a joint venture must operate on a market, performing the functions normally carried out by undertakings operating on the same market. In order to do so, the joint venture must have a management dedicated to its day-to-day operations and access to sufficient resources including finance, staff, and assets

4. there must be no "coordination" of competitive behavior of undertakings which remain independent.[24]

Joint ventures which satisfy the first three conditions are considered as full-function. The fourth condition has now been abolished as a result of the changes, thus bringing all full function joint ventures having Community dimension within the scope of the Merger Regulation.

In parallel with the extension of its scope, an Article 85-type analysis has been incorporated into the Merger Regulation. Full function joint ventures will not only be subject to the familiar dominance test[25], but the effect of the joint venture on the relationships between the joint venture's parents will also be assessed according to Article 85(1) criteria.[26] The Amending Regulation states that a joint venture may be caught by Article 85(1), namely where "two or more parent companies retain a significant extent activities in the same market as the joint venture or in a market which is downstream or upstream from that of the joint venture or in a neighboring market closely related to this market."

Where the joint venture has as its object or effect the coordination of competitive behavior of parent companies (i.e. cooperative full function joint-ventures), it will be necessary to show that Article 85(3) criteria is satisfied. In assessing joint ventures

---

(tangible and non-tangible) in order to conduct on a lasting basis its business activities within the area provided for the joint venture agreement.

[24] Ahlborn (C) and Turner (V), "Expanding Success? Reform of the EC Merger Regulation." in European Competition Law Review, 1998 Vol. 19, pp. 249 et seq.

[25] Article 2(2) of the Merger Regulation states:
"A concentration which does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the Common Market or in a substantial part of it shall be declared compatible with the Common Market."

[26] Article 2(4) of the Merger Regulation states:
"To the extent that the creation of a joint venture constituting a concentration pursuant to Article 3 has as its object or effect the coordination of the competitive behavior of undertakings that remain independent, such coordination shall be appraised in accordance with the criteria of Article 85(1) and 85(3) of the Treaty, with a view to establishing whether or not the operation is compatible with the Common Market."

under Article 85(3), the amended Merger Regulation requires the Commission to take particular account of the final criterion. i.e. whether the coordination leads to the risk of eliminating competition in respect of a substantial part of the products or services in question.

6.2.1 Procedure

Parties will thus be able to benefit from the following procedural advantages:

a. Time-limit for a Commission Decision:

This presented a useful practical benefit for the notification of joint ventures: Prior to March 1, 1998, notifications for exemption under Article 85(3) were made under the procedures set out in Regulation 17/62. This Regulation imposes no time limit on the European Commission to adopt a decision to exempt an agreement. Under the amended Merger Regulation the Commission has a maximum of 4 months to implement a full investigation and adopt a final decision. Within one month of notification it must make a decision to open a full investigation or rule that the merger is compatible with the Merger Regulation.

The Commission had been offering similar treatment for notification of cooperative joint ventures on a non-binding, administrative basis. The Commission informed the parties in writing within two months from the date of the complete notification whether or not the agreement concerned gives rise to serious doubts as to its compatibility with the EC Competition rules.

The amendments mean that all full-function joint ventures with a Community dimension will be subject to the procedures of the Merger Regulation and nor to the procedure laid down in Regulation 17/62.

b. Duration of Clearance:

Under Article 85(3) of the Treaty of Rome, exemptions were only granted for a fixed time period pursuant to Article 8 of Regulation 17/62.

Under the Merger Regulation, clearance is permanent but could be revoked in "exceptional" cases if the parent companies could eliminate competition.

c. Involvement of Member States:

Under the Merger Regulation, the "one-stop shop" principle applies. It will no longer be necessary in order to know where to file, to first determine whether the joint venture is cooperative or concentrative.

However the application of the Merger Regulation to cooperative joint ventures implies:

1. that the notification of such joint ventures is now also mandatory; and
2. that such joint ventures can no longer be implemented before obtaining clearance from the Commission, as opposed to the situation under Regulation 17/62.

6.2.2 Institutional Changes

These changes to the merger rules will entail a number of organizational changes within DG-IV. This applies in particular to joint ventures which may have cooperative aspects which will be handled directly by the relevant sectoral unit within DG-IV, thereby optimizing the use of resources and expertise.

The Commission has decided to deal with cooperative full function joint ventures within the following institutional framework:

Where there is a distinct possibility that Article 2(4) may apply to a joint venture, the MTF will invite an official from the corresponding Article 85/86 Directorate to participate in the assessment of the case. Once it is confirmed that the joint venture is indeed a cooperative full function joint venture, the whole case will be transferred to the relevant Article 85 Directorate.

This means that, as far as cooperative full function joint ventures are concerned, Article 85 Officials will not apply Article 2(4) to the parent/parent relationship but also the dominance test to the concentration itself. In doing so they will be assisted by a case handler from the MTF.

6.3 Assessment Of The Changes In The Treatment Of Joint Ventures

Companies may now be less keen to structure their transactions in such a way that they will not be regarded as "cooperative" as long as they meet the full function criteria. The transactions now falling into the category of cooperative full function joint ventures may in the past have been regarded "concentrative" by the Commission or structured as concentrative joint ventures by their parents.

Consequently, the Commission estimates additional cases under the amended Merger Regulation.

Full-function joint ventures with a Community dimension will now be subject to the Merger Regulation's substantive test of dominance except that the issue of coordination will be assessed within the context of the same procedure; under Article 85(1) and (3) of the Treaty of Rome with a view to establish whether or not the operation is compatible with the Common Market. Article 2(4) of the Amending Regulation provides:

"To the extent that the creation of a joint venture constituting a concentration pursuant to Article 3 has as its object or effect the coordination of the competitive behavior of undertakings that remain independent, such coordination shall be appraised in accordance with the criteria of Article 85(1) and (3) of the Treaty, with a view to establishing whether or not the operation is compatible with the Common Market."

Article 2(4) also provides that, in appraising the coordination in accordance with Article 85(1) and (3) of the Treaty of Rome, the Commission shall take into account in particular whether two or more parent companies retain to a significant extent activities in the same market as the joint venture or in a market which is downstream or upstream from that of the joint venture or in a neighboring market closely related in this market and whether the coordination which is the direct consequence of the creation of the joint venture affords the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products or services in question.

The practical consequences of these amendments are the following:

a. The distinction between full-function and non-full function joint ventures will continue to determine the applicability of either Regulation 17/62 or the EC Merger Regulation.

b. Although the traditional distinction between cooperative and concentrative effects stemming from the creation of a joint venture will no longer play a role in deciding what procedural rules must apply, i.e. the Merger Regulation or Regulation 17/62, the distinction will *de facto* continue to play a role in order to decide what set of substantive rules, i.e. the dominance test only or also the test of Article 85(1) of the Treaty of Rome, will apply to the joint venture:

i. Full-function joint ventures with a Community dimension and no cooperative effects will be subject to the dominance test of the Merger Regulation (i.e. the

test of "creation or strengthening of a dominant position as a result of which effective competition would be significantly impeded in the Common Market or in a substantial part thereof").[27]

ii. Full-function joint ventures with a Community dimension and cooperative effects will also be subject to the dominance test of the Merger Regulation except for the cooperative elements which will be appraised under Article 85(1) and (3) of the Treaty of Rome. The Commission has to decide first if the co-operative aspects are contrary to Article 85(1) of the Treaty of Rome, and in the affirmative, whether there is a possibility for an exemption under Article 85(3) of the Treaty. It is possible that a merger is prohibited where the cooperative aspects cannot be exempted according to Article 85(3) of the Treaty even though the concentrative elements of the transaction do not in themselves give rise to competition concerns.

In any case it seems that the Commission will have to balance the positive aspects of the creation of a joint venture against the negative aspects of coordination of behavior between the parents.

It is also worth mentioning that if the effects of the creation of a joint venture are primarily structural, Article 85(1) of the Treaty of Rome does not as a general rule apply. The statement seems to suggest that the Commission may first carry out a threshold analysis of the notified joint venture to determine whether the core of the transaction is essentially structural, i.e. aims at bringing about a lasting change in the structure of the undertakings concerned and not a coordination of the competitive behavior of the parent companies. If this is the case, the Commission would only apply the dominance test to the transaction as a whole including the identified spill-over effects. If this is not the case, i.e. if the notified joint venture has both structural and

---

[27] Article 2(3) of the Merger Regulation.

behavioral effects then both Article 85(1) of the Treaty of Rome and the dominance test would apply.

c. Full-function joint ventures with no Community dimension and no cooperative effects will remain subject to national Merger Control Laws.

d. Full-function joint ventures with no Community dimension but with cooperative effects will be subject to Article 85(1) and (3) of the Treaty of Rome. One should take into consideration, however that the concentrative aspects of such joint ventures may be referred to the Commission by the Member States pursuant to Article 22 of the Merger Regulation.

e. Not full-function cooperative joint ventures will be subject to Article 85(1) and (3) of the Treaty of Rome.

f. Not full-function, non-structural cooperative joint ventures will be subject to Article 85(1) and (3) of the Treaty of Rome.

6.3.1 Article 22 Requests By Member States

Where a concentration without Community dimension threatens to create or strengthen a dominant position as a result of which competition would be significantly impeded within the territory of more than one Member State, the amended Merger Regulation now gives those Member States the opportunity to make joint request to the Commission to assess the transaction under the dominance test and to adopt a decision under Article 8(2), (3) and/or (4) as appropriate.

6.4 Issues Raised By Cooperative Full Function Joint Ventures

6.4.1 Technical Issues

The extension of the Merger Regulation to cooperative full-function joint ventures and the application of the Article 85-type analysis raises a number of technical issues. Many of the issues will depend on how the Commission is going to apply Article 85 criteria in the context of Merger Regulation. The wording of the amended Merger Regulation and the Notice on Full Function Joint Ventures suggests that the Article 85-type criteria is to be applied in the same way as under Article 85 proper.

6.4.2 Application Of Article 85(3)

All full function joint ventures (satisfying the turnover thresholds) will be subject to the Merger Regulation. While a full function joint venture itself will be assessed under the dominance test, the relationship between the joint venture's parents will be subject to Article 85(1)-type test. Joint ventures whose "object or effect is the coordination of the competitive behavior of undertakings which is likely to result in a restriction of competition within the meaning of Article 85(1)" are cooperative joint ventures as stated above. Those without coordination object or effect are concentrative joint ventures. This however means that, by definition, the parent relationship of all cooperative full function joint ventures will be subject to standard four-tier test of Article 85(3). As restrictions between the joint venture parents directly result from the joint venture, the Article 85(3) tests set out below should apply to the joint venture itself:[28]

1. Does the joint venture 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 joint venture impose on the parents only those restrictions which are indispensable to the attainment of those objects?

---

[28] Ahlborn and Turner, op.cit. pp. 257,258.

4. Does the joint venture not afford the parents the possibility of eliminating competition in respect of a substantial part of the products in question?

6.4.3 Revocation under Article 85(3)

Exemptions under Article 85(3) are limited in time and may be revoked. The Merger Regulation does not foresee either an exemption limited in time or a power of revocation. The new Article 85-type analysis under the Merger Regulation tries to be both.

However, the Commission apparently takes the view that where competition is eliminated after the creation of a joint venture, the Commission is entitled to revoke an Article 85(3)-type exemption on the basis of general legal principles. Revocation will be a possibility, at least in exceptional circumstances. In deciding whether to revoke an exemption, the Commission will take into account:

a. the time elapsed since granting the exemption;
b. the effect of such revocation on investments made by the parties; and
c. the effect of the revocation on the business of the joint venture.

The legal basis for revocation of an Article 85(3) decision is Article 8 of the Regulation 17/62 which is specifically not applied to concentrations falling within the scope of the Merger Regulation.

6.4.4 Restrictions Between The Parents Of The Joint Venture

Restrictions between parents that are arrangements constituting the concentration will be assessed under an Article 85-type analysis, albeit within the framework of the Merger Regulation. (e.g. spill-over effects).

Restrictions between parents that are ancillary to the concentration (i.e. directly related and necessary to the implementation) will be assessed as part of the concentration itself under the dominance test (e.g. non-compete obligations of the parents with respect to the joint venture's business).

Restrictions between parents not falling under the two stated above (e.g. long term supply arrangements between the parents and the joint venture) will be assessed under Article 85 proper without any time limits for clearance, unlike under the two above.

Restrictions closely related to a concentration should be subject to the same standard as the concentration itself (i.e. the dominance test). The introduction of the Article 85-type analysis to cooperative full-function joint ventures could in theory destroy this logic: now restrictions of competition among parents to a joint venture caused by the concentration itself will be subject to the Article 85 criteria, restrictions closely related will be subject to the dominance test, while restrictions loosely related or unrelated to the concentration, will again be subject to Article 85 criteria.

The problem of discriminatory treatment could (and in practice may well) be solved by placing less emphasis on those elements of the Article 85-type analysis which establish a stricter standard for restrictions directly resulting from the concentration.

6.4.6 The Relevance Of Turnover For Cooperative Full Function Joint Ventures

Concentrative and full-function cooperative joint ventures will still be subject to different treatment in one important respect: while the application

of Article 85 is excluded for all concentrative joint ventures, a true one-stop shop is only available for cooperative full-function joint ventures with Community dimension.[29] Those cooperative full function joint ventures lacking that dimension will not only be subject to national competition controls but will also remain apparently, fully subject to Article 85 review. There is some suggestion that the Commission will come forward with a statement that it will not seek to apply Article 85 to cooperative full-function joint ventures which lack Community dimension, but failure to disapply the implementing rules of Article 85 to such deals means that Article 85(2) nullity will continue to hang over these joint venture agreements unless they have been exempted. Furthermore, application of Article 85 by national competition authorities is also a possibility. Companies may therefore be well advised to notify in such cases, whatever the Commission's stated enforcement policy.

---

29 Article 22 (1) of the Merger Regulation states:
"This Regulation alone shall apply to concentrations as defined in Article 3, and Regulations No.17, (EEC) No. 1017/68, (EEC) No. 4056/86 and (EEC) No. 3975/87 shall not apply, except in relation to joint ventures that do not have a Community dimension and which have as their object or effect the coordination of the competitive behavior of undertakings that remain independent."

7. SOME EXAMPLES

In the first 10 months of 1998 since the amendments to the Merger Regulation took effect, 26 of the 76 joint venture cases decided under the Regulation necessitated some analysis under Article 2(4). The most detailed analyses have been made in cases within the telecommunications and the internet areas. Remedies to settle Article 2(4) concerns have been adopted in one case decided so far, which was *Canal+/ CDPQ/ BankAmerica*[30]. In one other case; *BT/AT&T* the Commission decided to open a second phase investigation.

- In *Canal+/CDPQ/BankAmerica,* the spill-over effects were found on a market upstream from the joint venture. The joint venture itself concerned pay-TV in France; but competition problems were found to result in the market for the wholesaling of TV rights in Spain. In Spain, Canal+ had strong or dominant positions on the pay-TV market as well as on the upstream market for content. The notified transaction was found, through the balance of power in the joint venture, to give Canal+ a strong incentive to favor Cableuropa (controlled by CDPQ and BankAmerica) in the sale of Spanish pay-TV rights. The remedies adopted are designed to eliminate the possibility of discrimination against other competitors on the Spanish pay-TV market.

  The case shows the potential use of Article 2(4). Firstly, the notified transaction did not create or strengthen the dominant position of Canal+ as such. Rather it gave rise to a situation where the company's commercial incentives would change so that there would be an increased risk of discrimination against other pay-TV operators in Spain. It created a direct link between Canal+ and the notified transaction which provided incentives to behave in a potentially anti-competitive way. Secondly, the remedy sets a benchmark for the future conduct of Canal+ on the Spanish market for

[30] Case No. IV/M 1327.

pay-TV content, but leaves the notified transaction structurally unchanged. In the absence of Article 2(4), this remedy would have been difficult to accept under the Merger Regulation.

- The Commission decided to open detailed inquiry into a proposed joint venture between British Telecom and the US firm AT&T, two of the world's largest telecommunications operators. The joint venture will provide a broad range of telecommunications services to multinational corporate customers as well as international carrier services to other carriers. The Commission decided to carry out a second-phase inquiry into the effects of the venture on several global telecommunications markets and also some in the UK. Subsequent to its preliminary inquiry, the Commission expressed concerns in the following areas: the parties' combined market position on the markets for the provision of global telecommunications services to large multinational companies and the international carrier services. The effect of the creation of the joint venture leading to the possible creation or strengthening of a dominant position for certain telecommunications services in the UK and the possible coordination effects of the proposed joint venture in the UK between ACC, a wholly-owned subsidiary of AT&T, and between BT and Telewest, in which AT&T through TCI will have a jointly controlling stake. The final decision is expected.

8. MERGER CONTROL LEGISLATION IN TURKEY

The increasing number of merger cases has inspired the emergence of new national merger control legislation worldwide. The case of new merger control law in Turkey is also the result of the CU with the EU, which entered into force on January 1, 1996. The CU ensures that to a significant extent, Turkey will experience economic integration with the single market. It also enables the integration of a considerable part of the *acquis communautaire* relating to the functioning of the CU by Turkey, including the competition policy of the EU.

In this context, Turkey passed the Act on the Protection of Competition, Law No: 4054 on December 7, 1994, which entered into force on December 13, 1994 (the "Competition Act"). The Turkish Competition Authority (the "Competition Authority") has completed the establishment of its organizational structure on November 5, 1997, and has a public legal personality with administrative and financial autonomy. It is composed of a Directorate, a Competition Board (the "Board") and Service Departments.

8.1 Relevant Legislation And Enforcement

Merger control legislation in Turkey has been modeled after the EC Merger Control Regulation.

The basic provisions relating to merger control, including those on fines, are provided in the Competition Act, but more detailed provisions are laid down in "Communiqué No. 1997/1 on the Mergers and Acquisitions Subject to Approval of the Competition Board" (the "Communiqué"). The Communiqué serves as a kind of implementing regulation. It provides the substantive and practical procedural rules regarding the notification of mergers and their appraisal in Turkey. As regards notification deadlines, these are

provided in an additional implementing regulation, "Communiqué No. 1997/6 on Rights and Obligations of Undertakings and Associations of Undertakings Arising from the Competition Act No. 4054 Following the Establishment of the Competition Board" ("Communiqué No. 6").

The enforcement body for Turkish merger control is the Board. The Board is the most important organ of the Competition Authority, with the power to implement the necessary measures for the preservation of competition pursuant to the Competition Act.

8.2 Notification of Mergers And Acquisitions

Article 2 of the Communiqué specifies those transactions that are deemed to be notifiable mergers or acquisitions (also collectively referred to as "mergers").

A merger arises in the following three situations:

1. the merger of two or more independent undertakings;
2. the control or acquisition by a person or an undertaking, of parts of the assets or securities of another undertaking or through other means conferring rights to manage that undertaking ;
3. the creation of a joint venture performing all the functions of an autonomous economic entity with its own labor force and assets and which does not have as its object or effect the restriction of competition among the parties or between them and the joint venture.

Control is defined in accordance with EC merger control. It is constituted by rights, contracts or any other means which either separately or in combination, in fact or in law, confer the possibility of exercising decisive influence on an undertaking, in particular by:

i. ownership or the right to use all or part of the assets of an undertaking; or

ii. rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking.

Control is acquired by persons or undertakings that:

i. are holders of the rights or entitled to rights under a contract; or

ii. while not being holders of such rights or entitled to such rights under a contract, have the power in fact to exercise those rights.

It is believed that as with EC merger control, internal restructuring within a group of companies is not considered a notifiable merger.

As regards joint ventures, the Communiqué does not yet reflect the recent modification of the EC merger control regime relating to the review of cooperative full-function joint ventures under the Merger Regulation since March 1, 1998 and it is not yet clear how the Board will assess joint ventures under Article 2(c) of the Communiqué, more particularly with respect to the risk of coordination.

The Communiqué also lists, in Article 3, the operations which are not considered to be notifiable mergers.

8.3 Mandatory Pre-Notification Of Mergers And Acquisitions

The Communiqué provides for the mandatory pre-notification of mergers and acquisitions when one of the following two thresholds is met:

i. the combined total market share of the undertakings concerned exceeds 25% of the relevant product market in the whole or part of Turkey; or

ii. the combined total turnover of the undertakings concerned exceeds 25 trillion Turkish Lira.

With regard to the market share test, the Communiqué defines the "relevant product market" and the "relevant geographic market" essentially on the basis of the same criteria as provided in EC merger control. The Communiqué explicitly mentions "demand-side substitutability" in its definition of the relevant product market. As to the definition of the relevant geographic market, the Communiqué refers to an area where conditions of competition are sufficiently homogeneous, and which can easily be distinguished from neighboring geographic areas because, in particular; conditions of competition are appreciably different in those areas.

With respect to the second threshold, the Communiqué defines the turnover as net sales achieved in the last financial year. As under EC merger control, it is computed on a group basis and excludes intra-group sales, and the concept of a group is also defined in the same way.[31]

Where the transaction consists of the acquisition of parts of an undertaking, only the turnover of the acquired part must be taken into account with regard to the seller.

Foreign mergers will have to be notified whenever they fall under either of the two thresholds.

8.4 Failure To Notify Mergers And Acquisitions

In the event that the parties fail to notify a merger or an acquisition, the Board shall investigate the merger or the acquisition *ex officio* when, by any means, it is informed of such transaction, and it shall take measures according to whether or not the merger creates or strengthens a dominant position.

8.5 Mergers Which Do Not Create Or Strengthen A Dominant Position

[31] As with EC merger control, all the companies within a group .(parent companies, subsidiaries, etc.) constitute a single economic entity.

If the parties fail to notify a merger or an acquisition that does not create or strengthen a dominant position in the whole or in a substantial part of Turkey, the Board shall impose on the undertakings concerned procedural fines. Unlike EC Law, the Board can also impose fines on individuals.

In fact, in addition to the above mentioned procedural fines that are imposed on the undertaking as a legal entity, the Board can impose procedural fines on the individual members of the management organs of these undertakings.

8.6 Mergers Which Create Or Strengthen A Dominant Position

If a merger or acquisition creates or strengthens a dominant position in the whole or in a substantial part of Turkey as a result of which competition is significantly impeded, the Board has the power to impose the above-mentioned procedural fines on the undertakings and on the persons who are members of their management organs. The Board shall also impose substantive fines for material breach of the merger control rules. Such fines can amount to a maximum 10% of the previous year's turnover of the undertakings concerned. No personal fines are imposed on the individual members of the management organs of the undertakings concerned for material breaches.

The Board will also prohibit the transaction concerned and take any appropriate measure in order to restore the competitive situation existing prior to the consummation of the transaction. Article 11(b) of the Competition Act provides that the Board shall decide on the following:

a. termination of the transaction;

b. reversal of all that occurred unlawfully;

c. return of all shares and assets if possible to the former owners (the conditions and time periods of which are specified by the Board) or their transfer to third parties;

d. until the return to the former owners or to the third parties, the acquirers shall not be entitled to take part in the management of the undertaking concerned; and

e. initiation of any other appropriate measure.

8.7 Filing Deadlines

Communiqué No. 6 provides that a notification must be filed before the transaction is consummated. It specifies that a notification should be submitted "(...) at an appropriate time (preferably 30 days) before the closing".

8.8 Notification Form and Notifying Parties

The notification is made by supplying the information requested in form annexed to the Communiqué. Although the Communiqué does not specify, the notification form must be submitted in Turkish or be translated into Turkish.

The form is composed of 7 sections requesting information, in particular, on the parties and their market shares, the transaction, the relevant product and geographic markets, and the parties' customers, suppliers and competitors. It also requests information on "affected" product markets, although no definition of an "affected" market is provided.

Notification must be submitted jointly by the parties to the transaction. The Communiqué, however, provides that a notification submitted by one of the parties is also valid. The Communiqué does not specify whether this applies indistinctly in case of a merger, an acquisition of joint control or an acquisition of sole control. When a notification is filed by one of the parties, that party must inform the other concerned party or parties.

Notifications must be comprised of correct and complete information, and all changes in information must be submitted to the Board without delay. The provision of incorrect or misleading information can lead to the imposition of fines.

A notification will become effective on the date it is received by the Board or, if the information is incomplete or incorrect, the date on which the complete and correct information is received by the Board.

Notifications, to be submitted in 20 copies, can be filed only to the headquarters of the Competition Authority, which is situated in Ankara. Notifications submitted to other offices of the Authority (e.g. in Istanbul) are not valid. The time-limit for the appraisal of the transaction starts the day after notification is received by the Board.

8.9 Timetable For Clearance And Procedure

A merger can be cleared at the earliest within 15 days from the notification (within the first phase) and, in principle, at the latest within six and a half months from notification, if a second phase is opened.

8.9.1 The First Phase

After having made a preliminary examination within 15 days of a valid notification of a merger, one of the following may occur:

a. the Board approves the merger;
b. the Board initiates an investigation and opens a second phase; or
c. the Board does not react.

Where the Board does not react, the merger is deemed to be tacitly approved after 30 days following notification.

8.9.2 The Second Phase

In the event that the Board decides to initiate a second phase, it will communicate its preliminary objections on the merger to the parties. The Board will also notify them that the merger cannot be implemented until the date of the final decision, and it may also request the parties to take any measure that it deems appropriate.

During this second phase procedure, the Board may request all necessary information from the parties, their customers, their competitors and suppliers and other interested parties and may invite them to hearings.

The Board may impose fines if incorrect or misleading information is supplied in response to its requests as well as periodic penalty payments for practices that are aimed at preventing Board investigations carried out in the premises of the parties.

All persons having a sufficient legitimate interest in the merger may request to be heard before the Board.

This procedure lasts 6 months and may be extended once by the Board for a further 6 month period. At the end of the second phase, the Board can either approve the merger, prohibit it or approve it subject to conditions.

8.9.3 Legal Validity And Suspension Of A Merger

The Communiqué and the Competition Act state that mergers and acquisitions are not legally valid until an explicit or tacit decision of the Board is taken at the end of a preliminary investigation conducted by the Board in the first phase or until the date of the final decision of the Board following the opening of the second phase.

8.9.4 Appraisal of Mergers and Acquisitions

The substantive test of the EC Merger Control Regulation is also applied in Turkey. Mergers and acquisitions will be prohibited if they create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the whole or a substantial part of Turkey.

In making its appraisal, the Board will, in particular, take into account the market position of the undertakings concerned, their economic and financial power, the alternatives available to suppliers and users, the barriers to entry and the actual and potential competition from local and foreign undertakings.

As mentioned above, the Board may permit a merger subject to compliance by the parties with certain conditions.

8.9.5 Powers Of The Board To Revoke Its Clearance Decision

The Board may revoke its clearance decision in the following cases:

a. If the clearance decision is based on incorrect or misleading information; or
b. if the parties do not comply with the conditions the Board has attached to its decision.

8.9.6 Judicial Review

All decisions (including those relating to fines and periodic penalty payments) taken by the Board can be appealed to the Council of State. The Competition Act states that the appeal must be lodged within a specified period of time, which is not provided for. However, in this case, in the absence of any specification, the 60 days general appeal principle provided in the Turkish procedural law is applicable. The Board decision shall become final if no action has been taken within this specified time period.

8.9.7 Publication Of Board Decisions And Business Secrets

The Competition Act generally provides that Board decisions are to be published in the Turkish Official Journal once they become final. These decisions will not disclose the business secrets of the parties.

9. CONCLUSION

The amendments to the Merger Regulation rescue certain economically important transactions (i.e. cooperative full function joint ventures) from the procedure of Article 85 with its open ended investigations and legal uncertainty, and allow them to benefit from the efficient procedural framework and tight timetables of the Merger Regulation.

The two main amendments to the Merger Regulation, namely the introduction of additional lower turnover thresholds and the new definition of concentrations to cover cooperative full function joint ventures, are a significant extension of the scope of the Merger Regulation, reflecting its success both in relation to a multitude of national merger controls and to control under Article 85 of the Treaty of Rome.

It is expected to have additional number of cases falling under the Merger Regulation (instead of Article 85) and companies will benefit from the administrative and legal cost savings as a result of these changes.

A large number of transactions will benefit from the new turnover thresholds, cutting companies' administrative and legal costs and reducing regulatory uncertainty.

The new distinction to determine the scope of the Merger Regulation (full-function joint venture) seems easier as a concept. The competition law assessment of all full-function joint ventures will now be carried out under the same procedure, although different substantive tests will apply.

However, it will take a certain amount of relevant cases to be able to assess how the mix of substantive tests will work. Hopefully, the Commission services will be adequately staffed to cope with an expected increase in notifications of cooperative joint ventures which are now mandatory.

The ultimate success of the amendments will nonetheless depend on the ability of all entities concerned to ensure its clear and consistent application.

Although the amendments to the EC Merger Regulation have not been reflected in the Merger Legislation in Turkey yet, the assessment of joint ventures according to the current rules remains to be seen as more applications are made to the Competition Board.

BIBLIOGRAPHY

Commission of the European Communities The Impact of Joint Ventures on Competition (The Case of Petrochemical Industry in the EEC), Luxembourg, Office for Official Publications of the European Communities, 1991.

Crotti F. R. and Kasman M. "Turkey's New Merger Control Legislation", European Competition Law Review, Volume 19, Issue 6, July 1998.

Goyder, D.G. EC Competition Law, Oxford, Clarendon Press, 1998.

Grayston J. "EU Megamerger Approval Process Set to Improve", The National Law Journal in Focus, October 27, 1997.

İneci B. Avrupa Ekonomik Topluluğu Rekabet Kuralları Çerçevesinde Müşterek Teşebbüsler, İktisadi Kalkınma Vakfi Yayınları, Nisan 1988.

Kemp J. "Mergers-Recent Developments and Important Decisions", Competition Policy Newsletter, No. 1, February 1999.

Öz G. "Competition Law and Practice in Turkey", European Competition Law Review, Volume 20, Issue 3, March 1999.

Riggs J.H. and Giustini A. "Joint Ventures under EEC Competition Law" The Business Lawyer, Volume 46, No.3, May 1991.

Schmidt G. "The New Merger Rules Have Entered into Force", Competition Policy Newsletter, No. 2, June 1998.

Zonnekeyn G.A. "The Treatment of Joint Ventures under the Amended EC Merger Regulation", European Competition Law Review, Volume 19, Issue 7, August 1998.

T.C. YÜKSEKÖĞRETİM KURULU
DOKÜMANTASYON MERKEZİ