



INTERNATIONAL  
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# **“THE TREATMENT OF JOINT VENTURES UNDER EU COMPETITION LAW”**

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I hereby declare that the work submitted is mine and that where I have made use of another's work, I have attributed the source(s) according to the Regulations set in the Student's Handbook.

**January 2017**  
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## Abstract

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This dissertation was written as part of the *Master of Laws (LL.M.) in Transnational and European Commercial Law, Mediation, Arbitration and Energy Law* at the International Hellenic University. The ultimate purpose of this paper is to familiarize academics and professionals involved in the fields of law and economy, with the competition law issues, which may emerge from the creation of Joint Ventures in the common market. These alliances constitute successful business decisions, for they are an innovative and effective way to manage risk in uncertain markets, promote knowledge exchange and finally, share the possibly major cost of capital investments. However, it can be argued that, they involve a sacrifice of independence and flexibility, when compared to separate business ventures<sup>1</sup> and the competition issues that they raise can be of utmost importance. Although the European Commission (EC), as well as the national courts, have attempted to develop this policy area, there are still some aspects that raise multiple questions of application.

This work aspires to provide an overview of the framework for assessment of two distinctive types of JVs under EU Competition law, mostly at the stage of their formation. More specifically, this paper firstly defines the notion of Joint Ventures and presents their economic significance in the market. In addition, a distinction is made between cooperative and concentrative Joint Ventures, which are treated in a different way by the European Commission. Furthermore, we focus on concentrative JVs, which can have pivotal effects on competition. Finally, the way the European Union has reacted to these effects is carefully examined and the last chapter is devoted to “spillover effects”, for they are considered to have a great impact on competition and still constitute a major challenge for the European Commission.

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<sup>1</sup> *Vanessa Turner and Francesca Miotto* (2014) “International Joint Ventures: Overcoming Competition Law Hurdles in the EU”, 10 *Competition L. Int’l* 5, p. 5.

The acknowledgement of my supervisor's contribution to this venture cannot pale into insignificance. I feel the necessity to cordially express my gratitude to Dr. Thomas Papadopoulos, who was from the very first moment willing to offer his elaborate guidance and valuable orientation.

**Keywords:** Joint Ventures, EU Competition Law, EUMR, TFEU, Spillover Effects

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## **Preface**

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This dissertation thesis is submitted in partial fulfilment of the requirements of the LL.M. Degree in Transnational and European Commercial Law, Mediation, Arbitration and Energy Law. Due to my profound interest in Commercial and in particular Competition Law, I would like to enrich my knowledge through detecting the effects of Joint Ventures on the internal market and examining the European Union Merger Regulation (EUMR), as well as the competition provisions of the Treaty on the Functioning of the European Union (TFEU).

Although legal research was not an easy task, this dissertation thesis manages to present a most significant issue in a structured way, with the most valuable contribution of my professors at the International Hellenic University, who provided the essential academic knowledge and above all, my thesis supervisor, Prof. Thomas Papadopoulos, whose useful lectures, guidance and assistance assisted me in conducting my research and presenting a structured and satisfying result.

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## **TABLE OF BASIC ABBREVIATIONS**

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JVs	Joint Ventures
TFEU	Treaty on the Functioning of the European Union
EU	European Union
EC	European Commission
M&A	Mergers and Acquisitions
EEA	European Economic Area
MR	Merger Regulation
ECJ	European Court of Justice

## INTRODUCTION

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This dissertation deals with the evergreen topic of Joint Ventures in the field of free competition law within the European Economic Area (EEA). Joint ventures, as business, commercial or industrial<sup>2</sup> arrangements, project themselves with persistence into both business and legal world. The business community regards JVs as one of the most challenging disciplines of competition law, to comprehend and follow.<sup>3</sup> This problematic will possibly augment, because of the fact that JVs tend to take divergent forms and they include not only the sharing of bricks and facilities, but also the exchange of ideas and mutual commitments.

In fact, JVs might probably be characterized as “chameleons”,<sup>4</sup> because they can take different forms with divergent features. In particular, they may be of a temporary or permanent nature, ranging from a loose ad hoc association, created for the accomplishment of a single purpose, to the formation of a long-lasting business establishment, which involves capital investment of unlimited duration. Common grounds of all undertakings which decide to collaborate through the sharing of both human and real assets, is the coordination of *multiple, autonomous players in the market, with view to achieving a certain economic result.*

Whether in the form of loose strategic alliances or formally structured JVs, the economic prospects and pro-competitive potential of such collaborations are enormous; they allow the establishment of functional elements and economies that would not be possible otherwise; only through larger capital and talent aggregations, such as in the case of mergers. Therefore, they give small market players the opportunity to compete effectively against bigger ones. Unlike mergers, competitors

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<sup>2</sup> *Guillaume Rougier-Brierre* (2005) “Joint Ventures processes coming up to speed”, 24 Int'l Fin. L. Rev. 86, p. 1.

<sup>3</sup> *Bruce d. Sokler, Yee Wah Chin and Kathryn e. Walsh* (2004-2005) “A consideration of Dagher and the antitrust standard for joint ventures”, NYU journal of law and business Vol. 1:307, p. 307.

<sup>4</sup> *Peter A. Donovan* (1973-1974) “Joint Ventures”, 43 Antitrust L.J., p. 563.

who decide to create a JV remain competitors in all other business activities. Consequently, *a combination of cooperation and competition is observed*. We could compare competitors' collaboration with the face of *Janus*; due to the fact that the alliance mixes these two elements, it carries within itself the potential of both pro-competitive benefits and anti-competitive dangers.<sup>5</sup>

Given the fact that these creations have massive potential to achieve efficiency gains and become more and more relevant in the competition field, it is absolutely necessary that both the European Authorities and the Member States pay the essential attention to this matter and adopt or update enforcement guidelines for horizontal agreements in general and JVs in particular.<sup>6</sup> In addition, long research and very careful analysis by scholars would produce an adequate conclusion that many important points still await judicial clarification.<sup>7</sup>

*In the interest of time, this paper will focus mainly on the permanent JVs, which have their own autonomous structure and function in the market (the so-called concentrative JVs).* It is true that, the popularity of this kind of joint ventures has considerably increased the recent years, due to major innovation costs and hard competition among undertakings in the market. Due to the fact that these enterprises work constantly on a common business and economic result, but at the same time they remain completely autonomous, there is an issue arising, whether there is *competition or collaboration* between them.

Although competition and cooperation are complementary rather than opposing concepts, the exact relationship between them is difficult to define.<sup>8</sup> Consequently, it is obvious that, the European Competition law has to take into account that JVs have

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<sup>5</sup> *Richard J. Hoskins* (2002) "ANTITRUST ANALYSIS OF JOINT VENTURES AND COMPETITOR COLLABORATIONS: A PRIMER FOR THE CORPORATE LAWYER", 10 U. Miami Bus. L. Rev. 119, pp. 119-120.

<sup>6</sup> "COMPETITION ISSUES IN JOINT VENTURES", Organisation de Coopération et de Développement Economiques Organisation for Economic Cooperation and Development, DAFFE/CLP (2000)33.

<sup>7</sup> *Henry W. Nichols* (1950) "Joint Ventures", 36 Va. L. Rev., p. 425.

<sup>8</sup> *Paul J. De Rosa* (1993) "Cooperative Joint Ventures in European Community Competition Law", 41 Buff. L. Rev. 993, p. 1002.

multiple advantages and benefits for the single market, as long as of course that there is no distortion or even worse, elimination of competition.

## I. THE DEFINITION OF JOINT VENTURES

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The international notion of “Joint Venture” constitutes one of the most challenging issues in the field of competition law. The EC<sup>9</sup> defined JVs as undertakings jointly “controlled by several other undertakings, the parent companies.”<sup>10</sup> Besides, the term “undertaking” is defined by the Merger Regulation<sup>11</sup> as an economic unit with an autonomous power of decision, which benefits from all essential resources, including finance, personnel, production facilities, possibly a distribution network, as well as intellectual property licenses.<sup>12</sup> The manner its capital is held and the rules of administrative supervision, which apply, are entirely irrelevant. It is obvious that the term is broad enough on purpose, in order to include *any pool of resources, with view to operating economic activities,*<sup>13</sup> *irrespective of its legal nature or even the way it is financed.*<sup>14</sup>

The term is indeed very wide, does not lead to safe deductions and includes several forms of cooperation among multiple undertakings, from a loose ad hoc association, created for the accomplishment of a single purpose, to the formation of a long-lasting<sup>15</sup> business establishment, which involves capital investment of unlimited duration. Joint Ventures basically combine the valuable market power and assets of different undertakings, forming a coordination structure, in order to pursue a certain

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<sup>9</sup> Tao Xiong and James Kirkbride (1998) “The European control of joint ventures: an historic opportunity or a mere continuation of existing practice?” *European Law Review*, p. 1.

<sup>10</sup> Commission Notice Regarding the Concentrative and Cooperative Operations Under Council Regulation 4064/89 of 21 December 1989 on the Control of Concentrations Between Undertakings, 1990 O.J. (C203) 10, 10 [hereinafter Commission Notice on Control of Concentrations].

<sup>11</sup> EUMR, Recital 12<sup>th</sup> of the Preamble.

<sup>12</sup> Laurent Nouvel (2002) “The New European Treatment of Joint Ventures: A shift towards a more economic approach”, 2002 *Int'l Bus. L.J.* 511, p. 518.

<sup>13</sup> Korah (1998) “An Introductory Guide to EC Competition Law and Practice”, 6th Ed (Oxford, Hart Publishing, 1997). See also EC, Commission Notice on the Concept of Undertakings Concerned, O.J. C 66/14.

<sup>14</sup> Case C-41/90, Hofner and Elser, [1991] ECR I-1979; Joined Cases C-159/91 and C-160/91, Poucet and Pistre, [1993] ECR I-637-

<sup>15</sup> The Commission considers a five-year period as sufficient to have a lasting structural creation. Commission Notice on the Concept of Full-Function Joint Ventures, O.J.1998, § 15, EC, Commission Decision of 7 October 1996, British Gas Trading Ltd/Group 4 Utility Services, Case IV/M.791, O.J.1996, C 374/8, § 10.

result. *This coordination among businesses and through the creation of JVs, is more organized than a totally occasional agreement, but lacks the consolidation element, which exists in M&A.*<sup>16</sup> Furthermore, JVs allow companies to market and produce on a global basis, which is a unique advantage,<sup>17</sup> as well as allocate the costs<sup>18</sup> and risks of businesses,<sup>19</sup> while expanding the already existing resources, in order to create business interests.

This extremely wide definition of the term has generated many problems as far as competition law is concerned. As a result, much discussion has been conducted about whether JVs ought to be treated as a collusive practice or as a structural issue.<sup>20</sup> Probably JVs should be interpreted in a more restrictive way, so as to limit them as a phenomenon and finally detect and resolve the arising matters. In fact, the most transparent circumstance of the formation of a Joint Venture, is when two or more independent undertakings create a third undertaking, which is subjected to the mutual control of its parents, with view to achieving the economic result that is destined for. In addition, alliances and JVs create value by creating synergies, offering organizational flexibility, overcoming economic obstacles and finally, reducing costs.<sup>21</sup>

*This dissertation, after making clear the distinction among several different kinds of JVs, focuses on the basic JV, which is defined and regulated by the EUMR 139/2004 in Article 3 par. 4 and constitutes a particular and separate kind of concentration, with unique results in the field of competition law. Therefore, Joint Ventures will be defined*

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<sup>16</sup> Regarding Joint Ventures and their status between an occasional coordination and an entire integration among undertakings, see OECD, "Competition and Cooperation in Innovation, OECD Science, Technology and Industry Outlook 2002, page 131; Tyson N. (2007) "Joint Venture Regulation under European Competition Laws: An Update", *ELJ*, Vol.13, No. 3, p. 408; Chen Z., Ross T.W. (2003) "Cooperating upstream while competing downstream: a theory of input joint ventures, *IJIO*, p. 382; Van der Bergh, Camesasca, page 205 where Joint Venture is considered to be a kind of hybrid.

<sup>17</sup> Leslie Nelson (1990) "International Joint Ventures", 2 *Int'l Legal Persp.*, p. 75.

<sup>18</sup> To suggest that the primary motivation for JVs is to raise the necessary capital absolutely signifies a problem in the capital markets, see R Amit, and M Tombak, "The Role of Government in Fostering Knowledge-based Companies: The British Columbia Experience", *Technology-based Entrepreneurship*, D Balkin

<sup>19</sup> William M. Landes (1983) "Harm to Competition: Cartels, Mergers and Joint Ventures", 52 *Antitrust L.J.* 625, p. 630.

<sup>20</sup> Craig P., De Burca G. (1991) "EU law: Text, Cases and Materials, Fifth Edition, 2011, p. 1050; Hawk B, "Joint Ventures under EEC law, *FILJ*, Volume 1, Issue 2, Article 3, pp. 303-304.

<sup>21</sup> Olubunmi Faleye, Tiantian Gu and Anand Venkateswaran, "Merger Spillovers in Collaborative Partnerships", August 2015, available at SSRN.com, p. 2.

*as participating undertakings, which agree either by contract or by combining, other than by merger, significant productive (tangible or intangible) assets, and by going beyond ad hoc co-operation.* Most importantly, they agree to perform a business function, rather than simply proceeding to make a business decision in common. In this regard, many issues arise regarding the relationship that exists among the autonomous and separate parent economic entities. This relationship exactly has to be analyzed under the scope of competition law.<sup>22</sup>

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<sup>22</sup> "COMPETITION ISSUES IN JOINT VENTURES", Organisation de Coopération et de Développement Economiques Organisation for Economic Cooperation and Development, DAFFE/CLP (2000) 33.

## II. JOINT VENTURES AS A BUSINESS AND ECONOMIC PHENOMENON

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Joint Ventures are unique economic creations, most challenging indeed, compared to the traditional legal entities of commercial law, mainly due to the fact that the cooperation among actual or potential competitors is naturally opposed to the main goal of stability and certainty in the single market and of having many autonomous and competitive separate economic entities.<sup>23</sup> However, nowadays it is established that Joint Ventures are no more seen and treated as suspicious creations, wishing to threaten economic stability. On the contrary, the effects of the JVs are sometimes so beneficial to consumers and to free competition, that their pure existence is absolutely to the very best economic interests of the European Union.<sup>24</sup>

The Joint Venture's activity may involve the production, trade or the supply of products and services, the research and development and generally may be encountered in every level of production process. The whole idea and concept of such an agreement is found in the coordination of significant real or human resources, in order to achieve the common economic goal under better equipped conditions with greater results, than would be the case, if every undertaking was to pursue it by itself. Due to the fact that businesses share the risk of a new venture and use their common resources,<sup>25</sup> it is far easier for an undertaking to enter the market or engage to new economic activities.<sup>26</sup> In this regard, the efficiency gains achieved by JVs are potentially much greater than those achieved by the individual activity of undertakings separately. Although there are multiple anti-competitive issues emerging from such cooperative activities, it is highly possible that *competition* and *coordination* do not constitute opposing notions; for instance, this occurs in the case of a research and development cooperation, when thanks to this cooperation, new markets are created and eventually

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<sup>23</sup> Tyson N. (2007) "Joint Venture Regulation under European Competition Laws: An Update", *ELJ*, Vol.13, No. 3, p. 408.

<sup>24</sup> Hewitt I. (2005) "Joint Ventures", Third Edition, p.343.

<sup>25</sup> OECD, "Competition and Cooperation in Innovation, OECD Science, Technology and Industry Outlook 2002, page 129, 146.

<sup>26</sup> Prescott D., Swartz S. (ed.) (2010) "Joint Ventures in the international arena", Second Edition, p. 3.

the number of competitors in the relevant markets is appreciably increased.<sup>27</sup> It is worth mentioning that Joint Ventures are mostly popular in dynamic sectors, such as information technology,<sup>28</sup> but can also be encountered in multiple traditional sectors, such as natural gas, mining and food distribution. What is more, JVs constitute an important player in local markets and they facilitate foreign direct investment, notably when such investments would not be legally allowed, without the assistance of local partners.

However, the efficiencies<sup>29</sup> gained by JVs necessitate an ad hoc economic analysis of them,<sup>30</sup> according to the theory of a “more economic approach”.<sup>31</sup> In particular, JVs may contribute to the promotion of competition through divergent ways; mainly through the better allocation of production means (*allocative efficiency*) and the reduction of production costs (*productive efficiency*). With the promotion of a more statical efficiency and through *innovative efficiency*, small and medium-sized businesses are capable of competing the bigger ones, through the so-called “pooling of resources”. Through the creation of a Joint Venture, the coordinating businesses have the possibility to pursue economic activities, which would be probably impossible to achieve otherwise, due to considerable costs or know-how shortage. This way, business risks attached to new ventures are also shared among undertakings.

Consequently, the creation of Joint Ventures does not only assist businesses in battling the extreme costs of conducting certain economic activities, but also promotes the improvement of quality in new different relevant markets (both product and

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<sup>27</sup> OECD, “Competition and Cooperation in Innovation, OECD Science, Technology and Industry Outlook 2002, page 149.

<sup>28</sup> Kadir Ba (2015) “The Substantive Appraisal of Joint Ventures under the EU Merger Control Regime”, European Competition Law Review, p. 1.

<sup>29</sup> Zampa G.L., “The Role of Efficiency under the EU Merger Regulation”, EBOR, 2003, pp. 573 and 610, regarding the treatment of efficiencies in European law; Vogelaar F., “Modernization of EC Competition Law, Economy and Horizontal Cooperation between Undertakings, Intereconomics, Jan/Feb 2002, p. 19 and pp. 26-27 concerning economic progress.

<sup>30</sup> Tyson N. (2007) “Joint Venture Regulation under European Competition Laws: An Update”, ELJ, Vol.13, No. 3, p. 409.

<sup>31</sup> Regarding the ultimate reason to adopt an economic approach in competition policy, see Calcianno F. (2009) European Competition Policy; Design, Implementation and Political Support, p. 75 and following.

geographical),<sup>32</sup> since research, development and innovation are encouraged, thanks to the coordinating action of undertakings.<sup>33</sup> For this reason, the European Commission has treated JVs in a positive way and tends to encourage them, especially in cases of high technological innovation.<sup>34</sup>

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<sup>32</sup> *Soufleros* (2004) "Joint Venture under Corporate and Free Competition Law", pp. 865-866.

<sup>33</sup> *E. Mastromanolis* (2013) "Free Competition Law", p. 351.

<sup>34</sup> *Hawk B* (1991) "Joint Ventures under EEC law, FILJ, Volume 1, Issue 2, Article 3, p. 338.

### **III. JOINT VENTURES UNDER THE SCOPE OF FREE COMPETITION LAW**

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Due to the fact that JVs have been interpreted over the years quite broadly as business creations that cover not only contractual joint ventures, but also equity joint ventures<sup>35</sup>, which are autonomous economic entities, the treatment of JVs under the EU Competition Law is inevitably complicated too. Besides, the hybrid nature of Joint Ventures, which include both cooperative and concentrative elements, explains the reason they cannot be easily classified. As *Jean-Pierre Brill* once successfully stated, *JVs are indeed both cooperative and concentrative in nature at the same time.*<sup>36</sup> However, urged from the necessity to narrow down this extremely interesting term, we have to distinguish as much as possible the two basic types of JVs; the cooperative and the concentrative JVs.<sup>37</sup> The multiplicity of legal texts that exist reflects the difficulty of distinguishing and dealing effectively with the dichotomy of JVs. Therefore, it is preferable to analyze the provisions that currently govern the evaluation of JVs under European Competition law.<sup>38</sup> *The applicable provisions to Joint Ventures are a) Article 101 par.1 and 3 TFEU and b) the Regulation 139/2004 for concentrations.* Whilst Article 101 TFEU focuses its interest on the collusive practices between two at least undertakings, the Regulation is more interested in the structural part of the transaction. The result of this legislative complication is the lack of one and only definition for JVs and the challenge of applying the one or the other provision.

#### **A. COOPERATIVE JOINT VENTURES**

*The cooperative JVs are basically agreements among undertakings, assessed under Article 101 TFEU.* In fact, they are agreements among horizontal (actual or even

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<sup>35</sup> *Hewitt I.* (2005) "Joint Ventures", Third Edition, pp. 68, 89 etc.

<sup>36</sup> *J. P. Brill* (1980) "La filiale commune et la commission de la concurrence", *D. Chron.* 283-292, at 283 ("la filiale commune est à la fois concertation et concentration.").

<sup>37</sup> *Hawk B* (1991) "Joint Ventures under EEC law, *FILJ*, Volume 1, Issue 2, Article 3, p.303 etc.; and comments after the legislative modifications, see *Hewitt I.* "Joint Ventures", Third Edition, 2005, p.344.

<sup>38</sup> *Laurent Nouvel* (2002) "The New European Treatment of Joint Ventures: A shift towards a more economic approach", *Int'l Bus. L.J.* 511 2002, p. 513.

potential)<sup>39</sup> competitors, who collaborate in order to achieve together, with the combination of their means, a specific economic activity. They can be involved in several business activities, from the production to the trade of products and services. One example of this kind of JVs are the so-called *contractual JVs*.<sup>40</sup> Actually, in this case there is not a new economic entity, but instead the undertakings form an alliance<sup>41</sup>, so as to accomplish their established goal, which would be much harder to achieve by one undertaking itself. As for their objective, this can be an alliance for the common production or promotion of the parties' products, or an alliance concerning the allocation of productive ability (quite frequent in airlines and generally in transportations), or even an agreement to exchange technical information and plans of common research and development.<sup>42</sup>

*The characteristics of this particular type of Joint Venture do not exclude ipso facto the structural element.* Beside the afore-mentioned loose contractual alliances, there also exist the so-called *equity Joint Ventures*, which are new economic entities created by the parties to an agreement. Nevertheless, these entities are not autonomous, but on the contrary, they are destined to have a supportive function to the parent undertakings.<sup>43</sup> In this case, we have partial-function JVs, which are indeed separate entities from their parents, but cannot be considered to be functionally autonomous undertakings.

*Cooperative JVs are regulated by the European legislation; in particular, Article 101 TFEU and the Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements<sup>44</sup> govern this*

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<sup>39</sup> COMP/JV.23-Telefonica/Portugal Telecom/Medi Telecom (1999) par. 27, concerning the telecommunication market. The two parent undertakings had already agreed on and notified to the Commission their agreement and cooperation plan, signing at the same time mutual commitments. Due to the previous anti-competitive regime that the two parents had agreed on, their possible coordination would not lead, as a causal link, to the future creation of the JV.

<sup>40</sup> Soufleros (2004) "Joint Venture under Corporate and Free Competition Law", p. 865.

<sup>41</sup> For instance, see case COMP/38.284/D2 (2004) Air France/Alitalia.

<sup>42</sup> Chen Z., Ross T.W. (2003) "Cooperating upstream while competing downstream: a theory of input joint ventures", IJIO, pp. 381-382.

<sup>43</sup> Karidis G. (2004) "European Business and Competition Law", Ant. N. Sakkoulas, pp. 258, 260.

<sup>44</sup> EE C 11 of 14.1.2011, p. 1.

*type of JVs*. The Communication from the Commission mentions<sup>45</sup> that, these Guidelines ought to be applied in almost every type of horizontal co-operation agreements (between competitors), regardless of the level of their concentration, except those agreements that constitute concentrations, satisfying the criteria of the 139/2004 Regulation. Finally, it must be stated that the Communication itself acknowledges the difficulties arising from the different legal regimes applying to full-function JVs and partial-function JVs.<sup>46</sup>

*Furthermore, in order to apply Article 101 TFEU, the cooperative JV must have the potential to affect trade among Member States and to restrict competition in an appreciable level.* In this regard, the Commission Notice-Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty<sup>47</sup> and the De Minimis Notice<sup>4849</sup> are relevant. According to the *De Minimis Notice*, there are certain minimum quantitative thresholds and agreements, which are considered to be of minor importance.<sup>50</sup> The EC “De Minimis Notice” establishes a haven, where JVs between parents, whose shares of relevant markets do not exceed particular thresholds, are not investigated by the European Commission. In fact, the European Commission recently consulted on a proposal to modify the *de Minimis Notice*, in order to reflect the EC's reading of the recent Expedia judgment (case C-226/11 *Expedia Inc v Autoriti de la concurrence and Others* 20131 OJ C 38/6 [2012]), due to the fact that it states that, the concept of a non-appreciable impact on competition does not apply when the agreement under discussion includes a 'by object restriction' (which, on account of its severity, is considered to be *per se* anti-competitive).

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<sup>45</sup> Par. 6 of 2011 Communication.

<sup>46</sup> Par. 21 of 2011 Communication.

<sup>47</sup> Official Journal C 101 of 27.4.2004

<sup>48</sup> Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the TFEU (De Minimis Notice), OJ 22.12.2001, C368/13

<sup>49</sup> “An agreement falls outside the prohibition in Article 101 when it has only an insignificant effect on the markets, taking into account the weak position which the persons concerned have on the market of the product in question” (5/69, *Volk v Vervaecke*).

<sup>50</sup> *Horizontal agreements*: when aggregate market share of the parties is below 10% and *Vertical agreements*: when market share held by each of the parties is below 15%. In case we have mixed horizontal and vertical agreements: market share below 10% and agreements that have a cumulative effect: market share below 5%. Agreements that by their nature restrict competition are considered to always have an appreciable effect on competition (*per se* restrictions).

## B. CONCENTRATIVE JOINT VENTURES

The EUMR applies to any concentration that has, or otherwise is deemed to have, an “EU dimension”. Concentrations may refer to mergers, acquisitions of control or the creation of full-function joint ventures. The EU dimension is a prerequisite that is only fulfilled, when certain thresholds are met.

The European Merger Regulation applies to transactions, which have the element of a concentration,<sup>51</sup> with the necessary condition that the relevant thresholds are reached. *Concentration means that “control of the whole or parts of an undertaking is acquired by one or more other undertakings on a lasting basis”<sup>52</sup>*. In the case of a Joint Venture, the Regulation is to apply when two or more parties acquire joint control of an undertaking. What is more, when we have the formation of a brand-new Joint Venture, *the Merger Regulation applies, only if the JV performs all the functions of an autonomous economic entity (autonomy of means and functions)<sup>53</sup> on a lasting basis (full functionality criterion)*.

The afore-mentioned criterion does not distinguish between JVs, which are created as a “greenfield operation” and JVs, which are formed through the combination of assets, that the parties have contributed and previously owned individually. It is to be mentioned that, this kind of JVs, which are characterized by this full-functionality element, play a most important role in the common market, therefore they had to be regulated by the EUMR.<sup>54</sup>

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<sup>51</sup> *Christian Bergqvist* (2003) “The concept of an autonomous economic entity”, *European Competition Law Review*, p. 1.

<sup>52</sup> EUMR, Art. (1)(b).

<sup>53</sup> Autonomy of strategic decision is not mentioned in the 1998 Notice. Some isolated decisions required that the JV could independently determine its competitive behavior and its strategy. The Pasteur-Meneux decision adopted this approach, stating that the JV limited to the production and sale of vaccines was not independent, since its parents had the possibility to decide on strategic R&D planning. However, this condition was inconsistent with the joint control criterion (EC, Commission Decision of 5 July 1993, *Pasteur Merieux-Merck*, Case IV/ M.285, O.J.1993, C188).

<sup>54</sup> EUMR, Recital 20.

### *i) The Element of Joint Control*

Joint control is a very demanding element to be established. Theoretically, joint control exists, where two or even more undertakings exercise their influence/control over another undertaking<sup>55</sup>. This can possibly include veto rights, which certainly determine the strategic behavior of an enterprise, mostly as far as the adoption of the budget or business plan is concerned, the appointment or removal of directors and senior management, or certain investments.<sup>56</sup>

#### *a) Evidence of joint control*

##### *VETO RIGHTS<sup>57</sup>*

First of all, joint control exists when there are two parent companies, which possess equal voting rights in the JV, or alternatively have the right to appoint an equal number of members to the decision-making bodies of the JV. However, JVs usually have more complicated structures. Indeed, joint control might exist, even where there is no equality between the two parent companies or even when there are more than two parent companies. It is possible that the minority shareholders have rights that let them deny decisions, which can be necessary for the strategic business behavior of the JV.<sup>58</sup>

Although these observations may seem quite clear and also the Consolidated Jurisdictional Notice can provide useful guidance on their interpretation, their application is not always easy. For example, with view to giving rise to joint control, the veto rights at issue must go beyond normal minority protection provisions related to decisions on the essence of the JV, such as increase or decrease in capital. Certainly, the distinction between strategic veto rights and minority protection provisions is not

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<sup>55</sup>Although the possibility of exercising decisive influence is sufficient, it is not essential to strongly indicate that decisive influence is or will be actually exercised, provided that there is an actual possibility to do so.

<sup>56</sup> The Consolidated Jurisdictional Notice mentions that it is not necessary to have all veto rights in order to be a jointly controlling parent. It is absolutely possible for a single veto right to confer joint control, depending on the precise content of the right and the significance that it has in the context of the specific business of the target.

<sup>57</sup> *Adrian Brown*, "Distinguishing between concentrative and cooperative joint ventures: is it getting any easier?" *European Competition Law Review*, 1996, p. 3.

<sup>58</sup> *Case T-2/93 Société Anonyme a Participation Ouvrière Compagnie Nationale Air France v Commission* [1994] ECR 11-323; case IV/M.010 Conagra/Idea [1991].

always evident and the European Commission enjoys an element of discretion on how to assess veto rights in multiple cases.<sup>59</sup>

*b) De facto joint control<sup>60</sup>*

De facto joint control signifies that, although there may be not a single undertaking alone that has the ability to veto important decisions, there may be two or more minority shareholders, who act together and finally manage to veto such decisions. This can be achieved either by agreeing to legally binding agreements or otherwise, by consenting not to vote against each other.<sup>61</sup>

*c) Option rights*

The EC has also found that the potential of one party exercising an option could determine whether this party has control for EUMR purposes, taking into account that the other parties of the JV have interest in the management and the business orientation of the JV, as far as the option-holder's rights are concerned.

*d) Changes in the quality of control*

In the case of Joint Ventures, there may be modifications in their structure that could possibly lead to concentrations. For instance, when a change from sole to joint control or even when a modification of the companies previously exercising joint control takes

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<sup>59</sup> For example, in the case of veto rights over major investments, the analysis depends on the level of investments necessitating approval of both parties and the extent to which investments of the relevant magnitude constitute an essential feature of the target's market (i.e., are part of the ordinary course of business). Where the level of investments necessitating approval of both parties is high, a veto right may constitute a normal minority protection right. If investments do not play a significant role in the JV's business, the significance of the veto will be reduced (Consolidated Jurisdictional Notice, para 71).

<sup>60</sup> *Anshuman Sakle* (May-June 2008) "A study of Joint Ventures under Competition laws in Selected Jurisdictions", Competition Commission of India, p. 13.

<sup>61</sup> The Consolidated Jurisdictional Notice also states (para. 79) that: 'In general, a common interest as financial investors (or creditors) of a company in a return on investment does not constitute a commonality of interests leading to the exercise of de facto joint control.' See, for example, case IV/M.548 Nokia Corporation SP Tyres UK Ltd [1995], where the parties claimed that joint control was established by the strong common interests that they had while not exercising their voting rights to each other. The factors raised showed the existence of common interests were the prior long-term coordination between the parties and their common belief that the success of the JV relied on the synergy formed by using together their competitive strengths. The EC decided that the existence of common interests between the parties was not itself a sufficient ground for the finding of joint control.

place, then these changes might possibly amount to notifiable concentrations.<sup>62</sup>

*e) Passive acquisition of control*

An acquisition of control does not always take place on purpose. It is possible that this happens in a passive way, through actions of third parties. For instance, the acquisition of control may be the result of the inheritance of a shareholder or the result of the exit of a shareholder.

*ii) The Element of Full Functionality*

The element of full functionality entails the principle that a concentration emerges and the EUMR is to apply, when the particular transaction has as a result a permanent change in the market. Therefore, a Joint Venture, in order to amount to a concentration, should operate in a market whilst performing all the basic functions, which are carried out by undertakings acting in the same market. The JV must have an active management in order to cope with the daily obligations of the undertaking, access the essential resources, such as assets, staff and certainly finance, so as to operate properly and autonomously in the market, and finally, to have the aspiration to operate on a lasting basis. On the contrary, when the JV deals with one particular function of its parent companies' business activities, without direct access to the market or without acting autonomously, then it is deemed not to operate in an independent way, therefore it will not be regarded as "full function".<sup>63</sup>

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<sup>62</sup> Where instead the number of jointly controlling shareholders is reduced in the JV, without leading to a modification from joint to sole control, the transaction will normally not lead to a notifiable concentration – Consolidated Jurisdictional Notice, para. 90

<sup>63</sup> In considering the degree to which a JV is economically attached to the parent undertakings, the EC prefers a pragmatic approach and considers that, in their start-up phase, JVs are often unstable creations that may need support in integrating in new or emerging markets. Thus, the EC recognizes that, in the initial phase of its life, the JV may need to depend almost entirely on sales to or purchases from its parent companies. Such dependence will not have an influence on its full-function status, for as long as it does not take place beyond the start-up phase, which as a rule of thumb should generally not exceed three years (Consolidated Jurisdictional Notice, para 97), depending on the particular conditions of the market. Also, the JV might possibly continue to sell to its parents after the initial period, for as long as, regardless of these sales, the JV is supposed to play an active role on the market and can be considered economically independent from an operational point of view (Consolidated jurisdictional Notice, para 98). The relative proportion of sales made to its parents seen with the total production of the JV, and whether such sales are at arms' length will be crucial considerations. The same considerations will apply so as to evaluate the full-function status of outsourcing arrangements, where

Joint Ventures, which have the element of full-functionality but lack the condition of EU dimension, might be subject to national merger control rules. In this case, the European Commission leaves the assessment of any cooperative aspects to the jurisdiction of Member States. The EC has mentioned that, regarding full function JVs, which do not reach the jurisdictional thresholds, articles 101 and 102 TFEU may be applicable, when a prohibition decision would rely on a restriction of competition, resulting from the coordination of parent companies outside the JV (“spillover effect”). The EC guarantees that it would let Member States cope with this situation.<sup>64</sup>

Furthermore, acquisitions of minority shareholdings, which do not have decisive influence and fall outside the scope of EUMR, might still lead to co-ownership of companies evaluated under the national merger control rules of Member States having another test for control, mostly Austria (shareholding of more than 25 per cent acquired), Germany (any acquisition providing the possibility to have an important influence over decision-making and market) and the UK (any acquisition having influence over policy of business).

It is to be stated that the merger control rules both in UK and Germany cover a much broader set of transactions than at European level. However, in the UK notification is voluntary and also in Germany and Austria, notifications demand limited resources. Furthermore, on 5 December 2013 the German Federal Cartel Office published draft guidance on how to apply the 'domestic effects' test under the German merger rules. This is aimed at assisting undertakings to evaluate their transactions and detect whether the transactions have effects in Germany and consequently, whether there is an obligation of notification. The Office has mentioned that this initiative’s goal is to facilitate concentrations that do not affect Germany and avoid bureaucracy.<sup>65</sup>

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an undertaking forms a JV with a service provider, which will carry out functions that were previously dealt with by the undertaking. (Consolidated jurisdictional Notice, para 100).

<sup>64</sup> See Merger Control Law in the European Union - Situation in March 1998, Statements for the Council Minutes on Regulation 1310/97, 67.

<sup>65</sup> *Vanessa Turner and Francesca Miotto* (2014) “International Joint Ventures: Overcoming Competition Law Hurdles in the EU”, Allen & Overy, Brussels, 10 Competition L. Int'l 5 2014, p. 11.

### iii) The Element of EU Dimension

Should it be certified that the JV is indeed a concentration, it is absolutely essential to examine whether or not there is an “EU dimension”. More specifically, the Commission ought to see whether the turnovers of the undertakings concerned in the transaction reach one of the alternative thresholds, which are described in the EUMR.<sup>66</sup> In the particular case of JVs, the relevant undertakings to be thoroughly investigated, so as to apply the jurisdictional thresholds, are those, whose parties exercise joint control over the JV.<sup>67</sup> Therefore, the element of control is significant, so as to determine whether a concentration exists, as well as to discover which undertakings’ revenues ought to be considered for the assessment of the jurisdictional thresholds. It is absolutely not necessary to take into account every shareholder’s turnover. Furthermore, when joint control over a pre-existing business is acquired, then this business will also be examined. Finally, whenever a change in the quality of control takes place, the relevant undertakings are the new shareholders that exercise the control, as well as the JV.

*When a particular transaction does not reach the specific thresholds, it cannot benefit from the certain provisions set out in the EUMR.* In particular, it cannot notify the transaction to the European authorities, but on the contrary has to make the assessment in one or more States.<sup>68</sup> As far as the EU thresholds are concerned, their first set aspires to exclude mergers between small or medium-sized companies and small acquisitions by big companies, as well as acquisitions with non-significant European dimension. The second set is destined to cover those concentrations, which

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<sup>66</sup> The EUMR applies if either: (a) The 'original thresholds' are met: (i) the combined worldwide turnover of the undertakings concerned exceeds 65bn; and (ii) the EU-wide turnover of each of at least two of the undertakings concerned exceeds 6250m; and (iii) it is not the case that each of the undertakings concerned achieves more than two-thirds of its EU-wide turnover within one and the same Member State; or (b) The 'supplemental thresholds' are met: (i) the combined worldwide turnover of the undertakings concerned exceeds 62.5bn; and (ii) the combined turnover of the undertakings concerned in each of at least three Member States of the EU exceeds E100m; and (iii) in each of at least three of the Member States identified in (b) (ii) above, each of at least two of the undertakings concerned has turnover exceeding E25m; and (iv) the EU-wide turnover of each of at least two of the undertakings concerned exceeds E100m; and (v) it is not the case that each of the undertakings concerned achieves more than two-thirds of its EU-wide turnover within one and the same Member State.

<sup>67</sup> *Vanessa Turner and Francesca Miotto* (2014) “International Joint Ventures: Overcoming Competition Law Hurdles in the EU”, Allen & Overy, Brussels, 10 Competition L. Int'l 5 2014, p. 13.

<sup>68</sup> EUMR, Recital 8; “The European Commission has exclusive competence over concentrations with EU dimension (the 'one-stop- shop' principle) and Member State authorities may not apply national merger control rules to such operations.”

do not have an EU dimension under the first set of thresholds, but could have a severe effect in at least three Member States, and would actually require notification under national competition law of these Member States. These thresholds were introduced through an amendment to the EUMR, with view to adding even more transactions to its scope and therefore benefit from the “one-stop-shop” principle.

On the other hand, the “two-thirds rule” intends to exclude the transactions, where each of the relevant undertakings achieves more than two-thirds of its EU-wide turnover in one Member State, from the European Commission’s competency. What is more, a system of referrals exists, which offers the possibility to reallocate cases between the EC and the Member States upon request and under certain conditions.<sup>69</sup>

One most interesting observation that ought to be mentioned and explained, is that, due to the fact that EU jurisdictional thresholds concern only turnovers and there is no interest for undertakings’ effects in the single/common market, it is possible that situations are included, where all parents are non-European and the JV has no activities in Europe.<sup>70</sup> Such situations ought to be taken into account and probably be notified, despite the fact that they can be candidates for treatment under the simplified procedure. This procedure, in the case of JVs, must be followed, when a JV has no actual activities within the European economic area.<sup>71</sup>

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<sup>69</sup> See Commission Notice on Case Referral in respect of concentrations [2005] OJ C 56/2. See, for example, case COMP/M.6321 *Buitenfood/AD Van Geloven Holding/JV* [2012]; case COMP/M.6525 *SESA/DISA/SAE/JV* [2012].

<sup>70</sup> IV/JV.4-ORANGE/VIAG (1998), par. 30. IV/JV.9-Telia/Sonera/Motorola/UAB Omnitel (1998), par. 29.

<sup>71</sup> On 5 December 2013, the EC adopted a number of measures, in order to facilitate procedures for reviewing concentrations under the EU Merger Regulation. With effect from 1 January 2014, a notification of a JV may be in order when (i) the JV’s EEA turnover and/or the EEA turnover of the contributed activities is less than E 100m (depending on the most recent audited accounts); and (ii) the total value of the EEA assets transferred to the JV is less than 6100m. Where the assets transferred produce turnover at the time of notification, then neither the value of the assets nor that of the annual turnover may exceed E100m - Commission Notice of 5 December 2013 on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004 [2013] OJ L 336, 1-36, para 5(a). In addition, see the case of the acquisition of joint control, simplified notification possibilities where the transaction has no or very limited impact on the single market. However, the EC retains a wide discretion to revert from the simplified procedure to the normal assessment procedure in a number of situations, including for JVs, which, whilst they meet the turnover threshold, are expected to generate a turnover significantly in excess of 6100m in the following three years. The 'simplification package' further introduces a 'super-simplified notification' for JVs that are active entirely outside the EEA. In such cases, companies only need to present their economic activities, and provide the turnover elements, which are essential to establish that the EU dimension thresholds are indeed met.

## IV. THE EFFECTS OF CONCENTRATIVE JVs TO FREE COMPETITION

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### A. SIGNIFICANT IMPEDIMENT OF EFFECTIVE COMPETITION (ARTICLE 2 PAR.3 EUMR)

In order to detect possible anti-competitive consequences from the creation of a concentrative JV, the Commission assesses whether there is a possibility to impede effective competition, in particular as a result of the creation or strengthening of a dominant position (*SIEC test*).<sup>72</sup> As a significant change to the previous regime, the old substantive merger test, which relied on the creation of dominance, was eventually replaced by a significant impediment to effective competition (“SIEC”) test.<sup>73</sup> Furthermore, guidelines on the examination both of horizontal mergers<sup>74</sup> and non-horizontal mergers<sup>75</sup> were adopted in 2004 and 2008, respectively. The actual test for determining whether a concentration is compatible with the internal market is in Article 2(1) - (3) of Regulation 139/2004, which should be read in parallel with Article 2(4).

It must be noted that the purpose of the competition law is to increase productive efficiency. Competition is most important to consumer welfare through this purpose. Without competition rules, products and services will not be produced or offered efficiently, which signifies that economic and social resources will be absorbed in the undertakings, leaving almost nothing to fulfil other social needs. As a result, consumers will not benefit from lower prices and better quality. However, with free competition, efficiency and consumer welfare are certainly benefited.<sup>76</sup>

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<sup>72</sup> Article 2 par.3 of Regulation 139/2004.

<sup>73</sup> Gerwin Van Gerven, Melissa Gotlieb (2015) “Data Gathering and Analysis: The Anatomy of a Merger Investigation in Europe”, Fordham International Law Journal, Volume 39, Issue 1, Article 1

<sup>74</sup> Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings, 2004 O.J. C 31/5

<sup>75</sup> Guidelines on the Assessment of Non-Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings, 2008 O.J. C 265/6

<sup>76</sup> Richard J. Hoskins, “Antitrust Analysis of Joint Ventures and Competitor Collaborations: A Primer for The Corporate Lawyer”, 10 U. Miami Bus. L. Rev. 119 2002, p. 120.

Apart from the SIEC test, the Commission ought to evaluate the possibility, whether the creation of a JV as a concentration will cause *non-coordinated or unilateral effects*.<sup>77</sup> These effects are caused in case there is a reduction in the number of competitors in the relevant market, owing to the concentration. The concentrative JV may raise the prices, regardless of the other competitors' reaction. As a result, the rest of the undertakings, not being involved in the concentration, will probably raise their prices too.<sup>78</sup> This is due to the fact that there must be several players in the market, so as to have effective competition. In this case, the products/services offered to the consumers will have better quality, and competitive undertakings will probably have a greater motivation to improve their effectiveness.

On the other hand, *coordinated effects* signify the existence of some sort of coordination with other undertakings. In particular, we investigate the relationship and the collaboration that emerges between the JV and its competitors. In order to have such coordination, there must be a common purpose and common elements, such as similar market shares, activity in the same relevant product and geographical market and so on.<sup>79</sup>

## **B. COORDINATION OF THE COMPETITIVE BEHAVIOR OF UNDERTAKINGS (ARTICLE 2 PAR.4 EUMR)**

*After the assessment of the afore-mentioned elements, the Commission investigates whether there is a possibility to have coordination between the parties of the JV.*<sup>80</sup> The reason of this investigation is that, JVs are complicated creations, as they include the agreement between parent undertakings. The parent undertakings, which are

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<sup>77</sup> Ritter L., Braun D., "European Competition Law: A practitioner's guide", 3<sup>rd</sup> Edition, 2004, p. 569.

<sup>78</sup> Tzouganatos D., « Oligopoly and joint dominant position under free competition law", 2004, pp.110-111.

<sup>79</sup> Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004/C 31/03), par. 40-60.

<sup>80</sup> In case 294/IV/2006 ANTENNA TV A.E.-GRUNER+JAHR AG & CO KG, the Hellenic Competition Commission focused on the competitive structure of the market and on the existence of strong competitors, in order to decide that there is not a possibility of coordination between the parent undertakings. A particular element that was taken into consideration was the fact that the companies provided to the Competition Commission separate, absolutely confidential documents, which were not to be revealed to the other party of the concentration.

completely functionally and structurally autonomous, may easily facilitate the coordination of their activities, through their constant cooperation, whilst trying to accomplish their commercial goal through the JV. The element that has to be closely observed is that, there might be coordination in the concentration itself, among the parties that have agreed on the creation of the JV.<sup>81</sup>

Consequently, the non-coordinated and the coordinated effects that already have been mentioned are evaluated in the same way, as in all kinds of concentrations. In fact, from the creation of a JV, there may exist a single dominant position (when market shares of all parties to the JV are assessed) or joint dominant position (when we have the parties to the JV and third competitors). *However, the most interesting part is the coordination of the parent undertakings taking part in the concentration and the fact that, at the same time they preserve their independence.* Due to the fact that they collaborate so as to achieve their particular purpose, there is the possibility that they also expand their collaboration in other fields too. This phenomenon is known as “spillover effects or cooperative effects”. The analysis of this phenomenon will be extensively presented in the next chapter.

### **C. THE REAL EFFECT OF ANTI-COMPETITIVE CONSEQUENCES**

Anti-competitive effects could also emerge in cases when parent undertakings and JVs operate at the same level of production or distribution chain (*horizontal agreements* between competitors), therefore it is highly possible that they coordinate their activity and probably restrict competition between them. Classic examples of horizontal agreements restricting competition are a) price fixing, which basically destroys competition and b) market sharing: territorial allocation of the market, restriction of production and customer allocation.

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<sup>81</sup> For instance, see case C-179/12 P, where the European Court of Justice dismissed the appeal brought against the judgment of the General Court in Dow Chemical Co v European Commission (T-77/08) by which the General Court upheld Commission Decision C (2007) 5910 final, where the Commission fined the applicant for participating in a single and continuing agreement and/or concerted practice in the chloroprene rubber sector. As a parent company, Dow could be regarded to be liable and was also fined by the Commission for the competition infringements of its 50/50 joint venture.

However, there might be vertical agreements between parent undertakings and JVs, that need to be examined carefully, so as to see if they are valid and compatible with European Competition law. Vertical agreements are agreements entered into between undertakings, each of which operates at a different level of production or distribution chain. Prominent examples of vertical agreements<sup>82</sup> are a) territorial restrictions (restriction on exports-restriction of parallel trade, restriction on passive sales), b) Resale Price Maintenance (RPM)<sup>83</sup> and c) customer allocation. For instance, these effects are highly possible to appear when we have restrictions for third undertakings that operate in the same level as the parent undertakings and they need the JV as a supplier or distributor.<sup>84</sup> Finally, the creation of several JVs between the same parent undertakings may have the so-called “network effects”,<sup>85</sup> which may lead to a geographical allocation of markets.<sup>86</sup> There is a different treatment between horizontal and vertical agreements; *since vertical agreements are not made between competitors, they are not prima facie anti-competitive as a coordination of competitors*. A prominent example of horizontal agreements is Price fixing<sup>88</sup>.

Price Fixing is an agreement to fix prices and is by its very nature a restriction of competition. It also includes both direct and indirect price fixing, i.e. an agreement relating to any part of the price. It also includes both express agreements and concerted practices. The definition of price fixing is given in the Dyestuffs Case<sup>89</sup>: *“Although every producer is free to change his prices, taking into account in so doing the present or foreseeable conduct of his competitors, nevertheless it is contrary to the rules on competition contained in the Treaty for a producer to cooperate with his*

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<sup>82</sup> Bellamy & Child (2008) “European Community Law of Competition”, 6<sup>th</sup> Edition, p. 567 etc.

<sup>83</sup> Alberto Pera & Vito Auricchio (March 2015) “Consumer Welfare, Standard of Proof and The Objectives of Competition Policy”, The Objectives of Competition Policy, ECJ VOL. I NO. I, p. 155.

<sup>84</sup> See relevant case COMP/M.3141-CEMENTBOUW/ENCI/joint venture (2003) par. 18 and case COMP/M.3101-ACCOR/HILTON/SIX CONTINENTS/JV (2003) par.19.

<sup>85</sup> See case IV/30.320-fiber optics (1986), par. 48, 52, 53 and 57.

<sup>86</sup> Bellamy & Child (2008) “European Community Law of Competition”, 6<sup>th</sup> Edition, p. 560 and 569 etc.

<sup>87</sup> William M. Landes (1983) “Harm to Competition: Cartels, Mergers and Joint Ventures”, 52 Antitrust L.J. 625 1983, p. 628.

<sup>88</sup> Some examples of prohibited price-fixing are the following: jointly setting prices at specific levels, jointly observing list prices, jointly agreeing on the rate, time and place of price increases, jointly agreeing on an essential part of the price, jointly settling purchase prices and jointly prohibiting trade discounts in excess of a certain percentage.

<sup>89</sup> Case 48/69 ICI Ltd v EC Commission.

*competitors, in any way whatsoever, in order to determine a coordinated course of action relating to a price increase and to ensure its success by prior elimination of all uncertainty as to each other's conduct regarding the essential elements of that action, such as the amount, subject-matter, date and place of the increases."*

#### **D. THE EFFECTS OF CONTRACTUAL RESTRICTIONS**

This kind of restrictions may be closely related to the agreements establishing a Joint Venture and may be so crucial to the founding parties, that the parties would not proceed to any business activity if it was not for them. These restrictions may be harmful to competition and can vary from supply arrangements to restrictive covenants and so on. Therefore, the EUMR attempted to mitigate the effects of these restrictions and the clearance decisions include also "restrictions directly related and necessary to the implementation of the concentration",<sup>90</sup> on the condition that they respect the principle of proportionality (*ancillary restraints*). *In order to justify an ancillary restriction, it has to be proportionate; its duration, product and geographic scope must be only the absolutely necessary, that the JV requires.* Restrictions, which are not justified as ancillary, will be evaluated under Article 101 TFEU. Restrictions that do not qualify as ancillary do not benefit from block exemption regulations and therefore, the parties have to consider if there is a chance to meet the individual exemption criteria of Article 101(3).

#### **E. PRO-COMPETITIVE EFFECTS TO COMPETITION**

The most difficult tasks of competition authorities are the following:

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<sup>90</sup> EUMR Art 6(1) (b), Art 8(1) and (2) and Recital 21. See Commission Notice on restrictions directly related and necessary to concentrations (Notice on ancillary restraints) [2005] OJ C 56/24, 24 for guidance on the meaning of restrictions directly related and necessary to the implementation of a JV. In short, a restriction will be *directly related* to the establishment of the JV where it is economically connected to it and is intended to allow a smooth transition to the changed company structure after the concentration (Notice on ancillary restraints, para 12). A restriction will be *necessary to the implementation* of the JV if, in its absence, the JV would be impossible or considerably more difficult to implement, that is could only be implemented under more uncertain conditions, at substantially higher cost, over an appreciably longer period or with significantly less probability of success (Notice on ancillary restraints, para 13).

- To conduct effectively their thorough investigation and explain extensively the reasons for their conclusions;
- To make profound research of JVs as a whole, and engage in an additional examination of any existing sub-agreement, which has the potential to produce anti-competitive effects;
- To attempt to discuss competition issues that may emerge with the parties to the JV and incite them to make long-lasting commitments against anti-competitive effects;
- To limit the sanctions that apply to anti-competitive sub-agreements, detected in legitimate JVs.

Without any doubt, it is very challenging to accomplish these demanding tasks, due to the fact that Joint Ventures have complex structural elements. However, it is possible that even a general guidance might be helpful to undertakings and their counselors and consequently in favor of promoting harmless arrangements, offering multiple benefits to both the economic market and consumers.<sup>91</sup> It is absolutely rational that, without this guidance, businesses would be reluctant to commence a new venture, which ultimately could be extremely beneficial to the economy of a country. It is ultimately crucial to define exactly and without any doubt, what is and what is not legal.<sup>92</sup>

To be more specific as far as competition review of JVs is concerned; this ought to include two basic parts. *The first and foremost part should be a preliminary balancing of the joint ventures' "costs" and "benefits"*. In certain cases, the result is easy to be established. Nevertheless, there are cases, when the review appears to be difficult in the first place and further examination is appropriate. Each of the sub-agreements that may be included in the formation of a JV should be closely scrutinized. For instance, the competition agency could pose some clarifying questions; whether the restraints

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<sup>91</sup> See *Chang, Evans and Schmalensee* (2002) "Has The Consumer Harm Standard Lost Its Teeth", MIT Working Paper No 4263-02; *PLJoskow*, "Transaction Cost Economics, Antitrust Rules, and Remedies" (2002) 18 *Journal of Law, Economics & Organization* 95.

<sup>92</sup> "COMPETITION ISSUES IN JOINT VENTURES", Organisation de Coopération et de Développement Economiques Organisation for Economic Co-operation and Development, DAF/CLP (2000) 33

are connected to the JV and if they are important to the JV's pro-competitive efficiencies.<sup>93</sup> Should one of the questions are responded negatively, then the particular restraint must be prohibited. Otherwise, should the sub-agreement is connected to the JV and is essential in order to accomplish its pro-competitive efficiencies, the competition committee can accept or reject it, depending on the net competitive effect.<sup>94</sup>

Both parts are difficult to be applied effectively, with the latter part being the most challenging. The real challenge is to clarify what is "necessary" and what is not. A restraint in competition should not generally be acceptable, except the JV would not actually be formed without it. Alternatively, a restriction would make a JV more attractive to its participants, for it assists in ensuring commitment.

For instance, a recent case that was examined in summer 2016 is the following:<sup>95</sup>

The European Commission has recently dealt with the proposed creation of a joint venture in the Netherlands, by the mobile telecom operator *Vodafone* and the cable company *Liberty Global*. The Commission has examined this proposal under the EUMR and has reached a conditional decision. The Commission focused its concern on the fact that this proposed JV would vanish the benefits and advantages brought to the Dutch telecoms market by Vodafone's market entry. Due to the fact that there was not an intention of merging, Vodafone had indeed the power to turn into a strong competitor, in the field of fixed line and fixed-mobile multiple play services to consumers. The Commission, convinced by the divestment proposed by Vodafone to divest its retail consumer fixed line business in the Netherlands, actually decided to clear this telecom merger in Phase I. Commissioner in charge of competition policy Margrethe Vestager actually stated that the telecoms market is very important to the digital society and she pleasantly welcomed the formation of the JV between Vodafone

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<sup>93</sup> *Alberto Pera & Vito Auricchio* (March 2015) "Consumer Welfare, Standard of Proof and The Objectives of Competition Policy", *The Objectives of Competition Policy*, ECJ Vol. I No. I, P. 154

<sup>94</sup> "COMPETITION ISSUES IN JOINT VENTURES", *Organisation de Coopération et de Développement Economiques Organisation for Economic Co-operation and Development*, DAFE/CLP (2000) 33

<sup>95</sup> European Commission - Press release, Mergers: Commission clears Vodafone/Liberty Global telecoms joint venture, subject to conditions; rejects referral request by Dutch competition authority, Brussels, 3 August 2016

and Liberty Global in the Netherlands. The belief that better services will be provided to Dutch consumers was considered to be of utmost importance.

Finally, it is worth to be mentioned that, in the early 1970s in the US, following the interesting legal and economic analysis that was carried out at the University of Chicago, an idea was established concerning competitive arrangements. More specifically, competitive arrangements were to be evaluated, in relation to their effects on the market and their ability to offer benefits.<sup>96</sup> In this regard, Richard Posner supported the idea that, competitive restraints should be assessed according to their effects on consumer welfare, i.e., on whether they led to a reduction in output or a deterioration of products' quality.<sup>97</sup> In fact, he was absolutely in favor of a price theory, which basically suggests that, *if an agreement among undertakings or even a certain practice leads to an improvement in consumer welfare, then this might be taken as a prima facie evidence that it is pro-competitive*. This was concluded on the grounds that it promotes efficiency in the use of resources and certainly in any case, competition must still exist in the market, in order to have efficiency gains for the consumers.

## F. COMMITMENTS AND SANCTIONS

*Consequently, it is to be mentioned that competition agencies could (and should) encourage commitments, which might help a JV be less likely to be anti-competitive.*<sup>98</sup>

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<sup>96</sup> Among the most influential works, see *R Bork*, *The Antitrust Paradox* (Basic Books, 1978); *GJ Stigler*, *The Organization of Industry*, (Chicago, IL, University of Chicago Press, 1968).

<sup>97</sup> See *R Posner*, "The Social Cost of Monopoly" (1975) 83 *Journal of Political Economy* 807, p. 27; *WM Landes and R Posner*, "Market Power in Antitrust Cases" [1981] *Harvard Law Review* 937; *R Posner*, *Antitrust Law* (Chicago, IL, University of Chicago Press, 1976). For an opinion about the effects on competition policy on consumer welfare, see *RW Crandall and C Winston*, "Does Antitrust Policy Improve Consumer Welfare? Assessing the Evidence" (2003) 17 *Journal of Economic Perspectives* 3.

<sup>98</sup> Case *COMP/M.3101-ACCOR/HILTON/SIX CONTINENTS/JV* (2003), where the JV was actually the distributor of the hotel services offered by the parents (bookings etc.). The competition issue concerned the information exchange that would take place, due to the fact the JV would receive and use information of all cooperating undertakings. This would probably lead to an abuse of the information exchanged on behalf of the parent undertakings, for they could use this data in order to control the seek and demand and fix their prices accordingly, especially in markets where they enjoyed a high market share. However, this doubts were relieved, due to the firewalls and confidentiality obligations that the parties included in the JV agreement and were engaged to.

For instance, it could be advisable that certain assets stay out of the JV. As far as the sanctions are concerned, this matter can present a lot of difficulties. If a JV is found to be anti-competitive at something in particular, then there should exist severe reasons to prohibit it. It would probably be treated like an anti-competitive merger.

On the other hand, should anti-competitive sub-agreements are found, which are not connected to the JV, there might be a possibility to subject them to the same sanctions, suitable for behaviors outside a JV context. If there is some rational connection to the JV, and also pro-competitive efficiencies do exist, but a clause is prohibited owing to its net anti-competitive effect, then leniency is justified.

In fact, a prohibited clause should probably benefit from more favorable treatment, than would have been the case for the same type of behavior, outside the JV context. Such leniency is justified on fairness grounds. Many competition agencies have published enforcement guidelines regarding JVs, where they propose the application of certain measures, such as giving general block exemptions<sup>99</sup> for JVs that qualify or imposing more lenient sanctions.

*In order to assess the formation of a Joint Venture and evaluate its effects in the market, we ought to consider the anti-competitive (costs) and the pro-competitive (benefits) efficiencies.* JVs that present an extremely low or on the contrary, very high cost-benefit ratio, are more easily examined. However, the case is usually more difficult to assess. For instance, some JVs have multiple anti-competitive effects, whereas at the same time they offer considerable benefits. Such kind of JVs will not probably catch the competition authorities' attention; thus, they will normally be approved.

On the other hand, there are some joint ventures, which not only have no benefits, but also, they threaten to distort competition. In fact, there is no actual integration among

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<sup>99</sup> *Robert Lane* (2007) "Competition law", *International & Comparative Law Quarterly*, p. 3

the parent undertakings, but often a cartel is hidden behind the creation of a JV. Therefore, in this case, a competition review is essential, so as to carefully assess both the pro, and the anti-competitive effects. The assessment should definitely include the examination of a joint venture's founding agreement, the governance structure, the JV's duration, the nature and extent of assets transferred to the JV and finally the possibility parent companies have to compete with each other and with the JV. Furthermore, any clauses aspiring to raise barriers to entry or expansion of third parties should also be investigated. The investigation should be complete and include a formal market definition, concentration levels and so on.

It should also be mentioned that, JVs with pro-competitive effects are generally permitted,<sup>100</sup> other than the cases, when they contain serious anti-competitive restrictions. Normally in these cases, it is to be examined whether these restrictions on competitive behavior are reasonably related to the JV's efficiencies. However, the concept of "reasonably related" is quite broad and therefore difficult to be defined.

## **G. SAFE HARBOR PROVISIONS**

There are many guidelines, which offer safe harbor provisions for those joint ventures, which have low market shares. These provisions basically offer protection to legitimate joint ventures below a specific market share threshold. *In fact, the rule is that the lower the market share is, the less likely is a joint venture to present anti-competitive effects.* Furthermore, with view to assisting joint ventures in assessing whether they are legal or not, certain countries have adopted special statutory regimes, or block exemptions provisions. However, it has been observed that, these initiatives may prevent joint ventures from structuring themselves as they wish.

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<sup>100</sup> See, for instance, decision *COMP/M.3099-Areva/Urenco/ETC JV* (2004), par. 242, where the Commission took into account the pro-competitive efficiencies that emerged from the JV, so as to approve its creation. More specifically, the Commission concluded that the concentration would lead to technology exchange and Areva would be more competitive, than it was before, when it operated with less developed methods (gas diffusion plant). The competition related doubts that were raised were entirely vanished, due to the commitments submitted by the parties.

## **V. THE EUROPEAN UNION APPROACH TO JOINT VENTURES**

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The competition policy of the European Union has been most formalistic, regarding its perception for joint ventures. In fact, it has been restrictive. The European Commission is most interested in competition matters and has devoted much time and effort, so as to assess JVs and their structure, as well as whether they qualify as mergers. On the contrary, there are many jurisdictions, which have mainly focused on the economic aspects and effects in the market. They concentrate on more practical aspects, attempting to evaluate the entire effect of the JV integrating in the market.

Despite the fact that the EU has preserved this approach for several time, recent guidelines and revised block exemptions have shown a different perspective in favor of a more economic view of the matter.<sup>101</sup> This provokes a less formalistic approach and the development of a practical mentality, which embraces free competition, combined with financial welfare.<sup>102</sup>

### **A. THE CASE WHERE THE MERGER REGULATION IS APPLICABLE**

The questions of whether EU law applies to a Joint Venture, which exact legal regime and who will decide on the legality of a Joint Venture depend on factors, which are already designated by the European Commission. The economic resources of the JV, combined with the structure of the cooperation define this matter. Therefore, where a JV reaches the turnover thresholds of the EU Merger Regulation<sup>103</sup> (EUMR) and is structured in such a way as to fall within its scope, the EC will have sole jurisdiction to decide on the legality of a JV and it must not be implemented until it has been notified to and cleared by the European Commission<sup>104</sup>.

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<sup>101</sup> *Alberto Pera & Vito Auricchio* (March 2015) "Consumer Welfare, Standard of Proof and The Objectives of Competition Policy", *The Objectives of Competition Policy*, ECJ Vol. I No. I, p. 158.

<sup>102</sup> "COMPETITION ISSUES IN JOINT VENTURES", *Organisation de Coopération et de Développement Economiques, Organisation for Economic Co-operation and Development, DAFPE/CLP (2000) 33*

<sup>103</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L 24/1.

<sup>104</sup> EUMR, Art 7(1) 'A concentration with a Community [now EU] dimension as defined in Article 1, or which is to be examined by the Commission pursuant to Article 4(5), shall not be implemented either

### i) Jurisdiction

The EUMR enumerates the conditions, under which the European Commission or the National Competition Authorities (NCAs) have jurisdiction over concentrations. *Generally speaking, the rule is that concentrations with EU dimension are to be examined by the Commission, whilst those, which do not have EU dimension, are to be investigated by the NCAs, following their national merger control rules.* However, there is an exception to this general rule; for there are procedures, under which parties have pre-notification contacts with the authorities, in order to reallocate jurisdiction between the Commission and the NCAs. Furthermore, post-notification procedures also exist, where the cases are reallocated between those two, and in fact, in some specific circumstances, Member States are allowed to apply their domestic laws to concentrations that have EU dimension.

### ii) Mandatory Notification and Waiting Period

*Concentrations, which fall under the EUMR must be notified to the Commission and are not to be implemented, until the Commission investigates them and decides their compatibility with the single market.* The implementing Regulation describes the forms to be completed, when concentrations are being notified to the Commission.<sup>105</sup> The European Commission has also promulgated multiple Notices, in order to clarify how the Merger Regulation is applied.

According to the EUMR, parties should notify about the creation of their Joint Ventures any time,<sup>106</sup> after the conclusion of the relevant agreement or on showing the

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before its notification or until it has been declared compatible with the common market pursuant to a decision under Articles 6(1) (b), 8(1) or 8(2), or on the basis of a presumption according to Article 10(6)'. Breach of this provision can be sanctioned by fines of up to ten per cent of the parties' worldwide turnover (see EUMR, Art 14(2)).

<sup>105</sup> Commission Regulation (EC) 802/2004 (OJ 2004 L133/1, 30.4.2004), as amended by Commission Reg. (EC) 1033/2008 (OJ 2008 L279/3, 22.10.2008) and Commission Implementing Reg. (EU) 1269/2013 (OJ 2013 L336/1, 14.12.2013).

<sup>106</sup> Under the EUMR, when the Commission receives a notification, it publishes a summary of the case in question, in order to receive third party comments. It is clear that the Commission has decided to follow this procedural rule, when it receives notifications in cooperative cases. This was done for the first time in the *Carlsberg-Tetley* case ((1992) O.J. C97/21).

intention to do so.<sup>107</sup> Before the actual notification, the JV might pass the pre-notification stage. After the notification, the EC is going to rule upon the compatibility to European law in 25 working days, for cases that are easy to decide and go through Phase I. However, should any remedies be asked for, another 10 days can be given. Phase II, for more demanding cases (two to three percent of cases)<sup>108</sup>, may last from 90 to 125 working days. After the expiration of these deadlines, which are meant to give time, so as to check the legality of new JVs, these will be normally implemented, unless they are banned, for being opposed to competition rules. Joint Ventures outside the scope of the EUMR are not to be notified in EU level, but may be subject to national law.

### iii) Commission Investigations

It has already been mentioned that, concentrations notified under the Merger Regulation are thoroughly examined by the European Commission, with view to concluding whether they are compatible with the internal market or not. When a concentration is formally notified, in the majority of cases, the investigation ends within “Phase I” time period of 25 working days. In case the Commission proceeds to a “Phase II” investigation, this can take a further six months.<sup>109</sup>

## **B. THE CASE WHERE THE MERGER REGULATION IS NOT APPLICABLE**

*In case a JV does not fulfill the necessary elements, in order for the Merger Regulation to be applicable, it should be examined under national law and under Article 101 of the Treaty on the Functioning of the European Union<sup>110</sup> (TFEU), which applies to agreements between undertakings<sup>111</sup>, that restrict/distort competition. Article 101*

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<sup>107</sup> See EUMR, Art. 4(1)

<sup>108</sup> *Andrew Renshaw and Jan Blockx* (Summer/Fall 2013) “Judicial Review of Mergers in the EU”, THE ANTITRUST BULLETIN: Vol. 58, Nos. 2 & 3, 495

<sup>109</sup> *Slaughter and May* (Summer 2016) “The EU Merger Regulation, An overview of the European merger control rules”

<sup>110</sup> Treaty on the Functioning of the European Union [2012] OJ C 326, 26 October 2012.

<sup>111</sup> The term 'undertaking' refers to a business with a market presence, to which a market turnover can be clearly attributed (Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (Consolidated Jurisdictional Notice) [2008] OJ C 95/1, para 24).

TFEU requires parties to self-assess their Joint Ventures, instead of prior notification to the European Commission. Both the European Commission and the national competition authorities can consider JVs under this provision and take enforcement action, when necessary. As a consequence, when the parties decide to cooperate, they have to be fully aware of these vital procedural distinctions.

When a JV is not jointly controlled or does not meet the criterion of full-functionality and instead is a partial JV with no sufficient structure and durable effects, this specific Article may apply.<sup>112</sup> Article 101 TFEU requires that, not only the Joint Ventures' arrangements restrict competition in the common market by object or effect, but also, they affect trade among Member States. The second requirement is meant to limit the scope of this particular Article and exclude agreements, which have an effect only in one Member State, or even outside the European Union. Where the competition authorities of the Member States or national courts apply national competition law to agreements or practices, which may affect trade between Member States, they are required by Regulation 1/2003 to apply Art 101 (and Art 102) TFEU. Art 3(2) of the Regulation 1/2003 does not allow stricter national laws than Art 101 TFEU to be applicable. There is a Commission Notice about Guidelines on the effect on trade concept contained in Arts 101 and 102 TFEU) [2004] OJ C 101/81 (Guidelines on the effect on trade). In particular, trade concerns every cross-border activity and the effect needs only to be possible, indirect and is found, where it influences the pattern of trade.

#### *j) The Assessment Under ARTICLE 101 TFEU*

With view to determine whether an agreement distorts competition, it is crucial that we first *define the relevant market*, where the anti-competitive effects take place. In particular, the definition of the relevant market is most important in anti-competitive agreements, in a possible abuse of a dominant position and in merger reviews. It is necessary to assess the market power and market share of undertakings, which

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<sup>112</sup> *Vanessa Turner and Francesca Miotto* (2014) "International Joint Ventures: Overcoming Competition Law Hurdles in the EU", Allen & Overy, Brussels, 10 Competition L. Int'l 5 2014, p. 15.

through certain practices have the ability to distort and restrict competition.<sup>113</sup> As far as mergers are concerned, these are only examined in the case of permanent coordination of undertakings. Whereas market definition helps analyse agreements' effects on competition<sup>114</sup>, it is not indispensable for detecting a competition infringement, if an agreement is liable to affect trade within EU.<sup>115</sup> This is actually the case with cartels, which constitute *per se* infringements.

Definition of the relevant market is indispensable in merger reviews, although it can prove to be a very difficult venture requiring voluminous data and comprehensive market investigation. The concepts of relevant products and relevant geographic markets are complicated enough to be defined but unfortunately, without them the proper economic analysis would be impossible. In a nutshell, the relevant product or service market includes all products or services, which are considered to be interchangeable or substitutable by consumers, taking into account their characteristics, prices and intended use.<sup>116</sup> In addition, the relevant geographic market is the area, where the undertakings concerned, are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas, due to the fact that the conditions of competition are appreciably different in those areas. *It is obvious that the determination of the relevant market is a task, which requires the thorough examination of each case separately and very carefully, depending on the nature of the competition issues examined.*

What is more, regarding relevant product markets, the methodology used to define relevant markets is the same in all antitrust areas but the relevant timeline varies. In merger review cases, the authorities focus on likely future situations, capable of distorting competition rules. Finally, there are many decisive factors to delineate the relevant geographic market. For instance, the significant price differences between

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<sup>113</sup> I Kokkoris (2005) "The concept of Market Definition and the SSNIP Test in the Merger Appraisal", ECLR 209.

<sup>114</sup> T-25/99, Roberts.

<sup>115</sup> T-374/94, *European Night Services*.

<sup>116</sup> DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS COMPETITION COMMITTEE, ROUNDTABLE ON MARKET DEFINITION, Note by the Delegation of the European Union, DAF/COMP/WD (2012)28.

different geographic areas, the significant transport costs or the basic demand characteristics and views of customers and competitors, in particular consumer preferences and habits are only few of the multiple determinant factors. To sum up, in the case of the formation of a new Joint Venture, the markets are really difficult to determine, because the analysis must be broad enough, in order to cover all *potential relevant markets*.

Regarding Article 101, it must be noted that it consists of two steps. The first step, under Article 101(1), is to assess whether an agreement between undertakings, which is capable of affecting trade between Member States, has an anti-competitive object or actual or potential<sup>117</sup> restrictive effects on competition. The second step, under Article 101(3), which only concerns anti-competitive agreements within the scope of Article 101(1), examines whether there are pro-competitive effects, which justify the negative effects on competition.<sup>118</sup> The difficult task to determine the restrictive and pro-competitive effects is strictly done, within the framework of Article 101(3).<sup>119</sup> When the pro-competitive effects cannot justify a restriction of competition, Article 101(2) demands that the agreement must be automatically void. The parties may be also subject to fines.

It ought to be mentioned that, the analysis of horizontal co-operation agreements (among competitors) has many common features with the analysis of horizontal mergers pertaining to the potential restrictive effects, in particular as far as JVs are concerned. Sometimes it is very difficult to distinguish between full-function JVs, which are examined under the EUMR, and non full-function JVs, which are assessed under Article 101. Their effects can be very similar.<sup>120</sup>

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<sup>117</sup> Article 101(1) prohibits both actual and potential anti-competitive effects; see for example *Case C-7/95 P, John Deere*, [1998] ECR I-3111, paragraph 77; *Case C-238/05, Asnef-Equifax*, [2006] ECR I-11125, paragraph 50.

<sup>118</sup> See *Joined Cases C-501/06 P and others, GlaxoSmithKline*, [2009] ECR I-9291, paragraph 95.

<sup>119</sup> See *Case T-65/98, Van den Bergh Foods*, [2003] ECR II-4653, paragraph 107; *Case T-112/99, Métropole télévision (M6) and others*, [2001] ECR II-2459, paragraph 74; *Case T-328/03, O2*, [2006] ECR II-1231, paragraphs 69 et seq., where the General Court held that it is only in the exact framework of Article 101(3) that the pro- and anti-competitive aspects of a restriction may be assessed.

<sup>120</sup> Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, (Text with EEA relevance), (2011/C 11/01)

Joint Ventures' parties to cooperative agreements must self-assess the legality of their cooperation. Should the EC take a formal decision, this will probably be to find that the JV is not satisfying the legality criteria<sup>121</sup> or otherwise, the parties to agreements that are under legality examination, may alter their cooperation, in order to comply with the European law, without facing the consequences of an illegality decision.<sup>122</sup>

ii) Basic Principles for Assessment Under ARTICLE 101(1) TFEU

To begin with, Article 101(1) prohibits agreements, whose object or effect is to restrict<sup>123</sup> competition. Restrictions of competition by object are those restrictions that have the power to restrict competition by their nature. For instance, price fixing or geographic/customer allocation. An exception is made only for production JVs, which necessarily include agreement on output.<sup>124</sup> It is very crucial to point out that, once an anti-competitive object has been found, it is absolutely not necessary to assess the actual or potential effects of an agreement.

On the other hand, should a horizontal cooperation agreement does not restrict competition by object, it ought to be assessed whether it has appreciable restrictive effects on competition. Due attention must be paid to both actual and potential affects. Therefore, the particular agreement must have at least likely anti-competitive effects. For an agreement to have restrictive effects within the meaning of Article 101(1), it must have an actual or likely appreciable impact on at least one of the parameters of competition on the market, such as price, product quality, product variety or innovation.<sup>125</sup> These adverse effects can impede competition either between

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<sup>121</sup> See, for example, case COMP/C2/38.698 *International Confederation of Societies of Authors and Composers (CISAC)* [2008]. On 12 April 2013, the general court partially annulled on appeal the EC's decision finding that contracts between CISAC and 21 of its collecting society member associations infringed Art 101(1) TFEU (case T-442/08 *CISAC v Commission* [2013]).

<sup>122</sup> See, for example, case COMP/C-2/37.214 *Joint selling of the media rights to the German Bundesliga* [2005]; Case COMP/38.173 *joint selling of the media rights to the FA Premier League* [2006]; case COMP/AT.39595 *Continental/ United/Lufthansa/Air Canada* [2013]; case COMP/39.596 *BA/AA/IB* [2010].

<sup>123</sup> The term "restriction of competition" includes both prevention and distortion of competition.

<sup>124</sup> *Vanessa Turner and Francesca Miotto* (2014) "International Joint Ventures: Overcoming Competition Law Hurdles in the EU", Allen & Overy, Brussels, 10 *Competition L. Int'l* 5 2014, p. 24.

<sup>125</sup> Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, (Text with EEA relevance), (2011/C 11/01)

the parties to the agreement, or between any of them and third parties. The agreement must reduce parties' decision-making independence, owing to obligations included in the agreement, that regulate the market conduct of at least one of the parties, or otherwise by influencing the market conduct of at least one of the parties, by simply provoking a change to its motivation.<sup>126</sup>

Horizontal cooperation agreements between competitors, which could not accomplish their purpose in an autonomous way and on their own, do not normally raise competition concerns under Article 101(1), unless of course they could pursue their activities with less severe restrictions. The elements of the agreement to be examined are mainly the field and the particular purpose of the agreement, the relationship between the parties and many more. These factors somehow restrict the competition problems that possibly emerge. The agreements may distort competition in many ways, so the research has to focus its assessment in certain fields.

For instance, the agreements may restrict the right of the parties to compete against each other or even third parties as autonomous economic factors or as parties to different agreements. What is more, the parties may be requested to contribute their assets or even the agreement may influence the parties' interest, so that their decision-making is deliberately limited. This way, the parties to the agreement would not compete anymore and additionally, they would probably find it appealing to proceed to anti-competitive activities, such as price increases. Analysis of further factors is also very crucial in this regard, in order to assess these agreements, for example market elements.

A horizontal cooperation agreement might also include the revelation of commercially vital information and strengthen the level of the parties' coordination. This way, the parties may coordinate their market behaviour more easily and combine their activities in the specific area of cooperation to an appreciable extent; for instance, when they jointly manufacture a significant product. Consequently, such an agreement is able to limit the decision-making ability and facilitate the coordination between

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<sup>126</sup> Horizontal Guidelines, para 27.

parties, which aspire to reach even higher profits through this kind of practices.

Furthermore, it has already been mentioned that, the EUMR is not to be applied, when the acquisition of minority shareholdings fall short of decisive influence. These cases may be within the scope of Article 101 TFEU, when there would probably be cooperation between/among competitors<sup>127</sup>, or might be examined under Article 102 TFEU, in cases when there is an abuse of dominant position by the acquiring shareholder.<sup>128</sup>

### iii) Basic Principles for Assessment Under ARTICLE 101(3) TFEU

Article 101(3) is basically the evaluation of the pro-competitive effects of restrictive agreements. This Article is meant to potentially justify an Article 101(1) infringement. The burden of proof under Article 101(3) belongs to the undertaking, which claims there is a lawful exception. Consequently, the undertaking must present evidence so as to convince the Commission that the agreement is very likely to have pro-competitive effects.

There are four conditions, which must be fulfilled cumulatively, in order for Article 101(3) to apply. Regarding JVs, these conditions require that:

- The JV promotes the improvement of the production and distribution of goods and contributes to economic and technical progress;
- The efficiency gains cannot possibly be achieved by less severe restrictions;
- Consumers benefit appreciably from the efficiency gains and they are at least compensated for the indispensable restrictions; and
- The JV does not allow the parties to eliminate competition regarding a part of the products or services provided.

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<sup>127</sup> Joined cases 142 and 156/84 *British America Tobacco Company Ltd and RJReynolds Industries, Inc v Commission of the European Communities* [1987] ECR 04487; case IV/34.410 *Olivetti-Digital* [1994] OJ L 309/24; case IV/35.617 *Phoenix/GlobalOne* [1996] OJ L 239/57.

<sup>128</sup> Case IV/33.440 *Warner-Lambert/Gillette and Others* and case IV/33.486 *BIC/Gilette and Others* OJ L 116/21 [1993].

When these four conditions are satisfied cumulatively, then the JV is supposed to have a neutral net effect on competition. Pro-competitive effects are then supposed to justify the restrictive effects on competition.

### **C. EUMR & ARTICLE 101 TFEU: ADVANTAGES AND DISADVANTAGES**

Joint Ventures, which meet the necessary criteria and are investigated under the EUMR, have the opportunity to acquire the benefits from *one-stop-shop clearance*<sup>129</sup>, without being obliged to cope with the considerable costs and administrative burden of separate notification obligations in EU Member States and with the inevitable risk of different decisions. This provides JVs with legal certainty and the belief that the European Commission conducts its work in a fair and objective way. Besides, the European Commission makes decisions on compatibility with the EU competition law within a certain time period, which usually is no longer than 25 working days from the notification date.<sup>130</sup>

On the contrary, since 2004, parties to an agreement are not able to notify to the EC under Article 101 TFEU and are obliged to proceed to *self-assessment*. Nevertheless, the EC is competent to take an exemption decision or guidance letter, should there are public interest reasons. Furthermore, the European Commission has promulgated guidelines<sup>131</sup>, so as to assist the parties to agreements in their assessment and has also offered the possibility of block exemptions provisions, which apply to horizontal

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<sup>129</sup> EUMR, Recital 8

<sup>130</sup> However, according to Judy Mackenzie and Stuart Alec Burnside, (“Joint Venture analysis: the latest chapter”, European Competition Law Review, 1995, p. 2) the parties are obliged to abstain from any activity for two months before the Commission gives a preliminary view (and it will only do this in the case of ‘structural’ joint ventures). A comfort letter may be issued at this time. Nevertheless, this offers only some legal security. Alternatively, the Commission may give notice of intention to grant within a set period an exemption under Article 85(3) or a warning letter that the Commission intends to open a full investigation into the agreement, both of which mean that the parties may have to wait for a long period of time, even years, before receiving a binding decision (see for example *Philips/Osram* where almost three years elapsed between notification and decision);

<sup>131</sup> Commission Guidelines on the applicability of Art 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements [2011] OJ C 11/1 (Horizontal Guidelines); Guidelines on the application of Article 81(3) [now 101(3) TFEU] of the Treaty OJ C 101, 27 April 2004, 97-118.

cooperation agreements<sup>132</sup> and provide businesses with legal certainty.

What is more, it ought to be mentioned that, the *EUMR clearance decision* has no expiry date and also, is not influenced by changes in market conditions. The decision can only be affected, when it comes to incorrect information or when the parties are not following the decision's obligations. However, should any alterations take place regarding the quality of control of a JV, this undoubtedly requires new notification.<sup>133</sup>

Some possible disadvantages of applying the EUMR are the following; first of all, the Regulation is *very strictly applied* by the European Commission and no action is permitted before clearance. Therefore, it is obvious that, the *standstill obligation* is most crucial for the EC.<sup>134</sup> Consequently, in cases when time is very significant as to the formation of Joint Ventures, the inevitable procedure of the EUMR can be detrimental to the best interests of Joint Ventures. Finally, during the investigation procedures, *disclosure of classified elements* can possibly raise antitrust considerations. This can be particularly challenging for businesses, taking into account the fact that, the European Commission's (December 2013) modification of notification procedures demands even more substantial document revelation in every single case, including those treated under the simplified procedure.<sup>135</sup>

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<sup>132</sup> Commission Regulation (EU) No 1217/2010 of 14 December 2010 on the application of Art 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements (R&D Block Exemption Regulation) [2010] OJ L 335/36; Commission Regulation (EU) No 1218/2010 of 14 December 2010 on the application of Art 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialization agreements (Specialization Block Exemption Regulation) [2010] OJ L 335/43.

<sup>133</sup> Consolidated Jurisdictional Notice, para 107.

<sup>134</sup> A derogation from the standstill obligation under Art 7(1) EUMR may be granted by the EC in limited circumstances: EUMR, Art 7(3): 'The Commission may, on request, grant a derogation from the obligations imposed in paragraphs 1 or 2. The request to grant a derogation must be reasoned. In deciding on the request, the Commission shall take into account inter alia the effects of the suspension on one or more undertakings concerned by the concentration or on a third party and the threat to competition posed by the concentration. Such a derogation may be made subject to conditions and obligations in order to ensure conditions of effective competition. A derogation may be applied for and granted at any time, be it before notification or after the transaction.'

<sup>135</sup> *Vanessa Turner and Francesca Miotto* (2014) "International Joint Ventures: Overcoming Competition Law Hurdles in the EU", Allen & Overy, Brussels, 10 Competition L. Int'l 5 2014, p. 17.

## VI. SPILLOVER EFFECTS

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### A. ECONOMIC ASPECTS AND SIGNIFICANCE OF THE PHENOMENON

The creation of a concentrative JV has the potential to produce many serious effects in the internal market, this is why the European Commission tries to deal with them effectively. A brand-new player enters the market and influences the economic situation of the relevant market. The main particularity of the JV, in relation to any other concentration, is that, it has at least *two* parent undertakings.<sup>136</sup> This has a great impact on competition, because the JV constitutes the result of collaboration between two commercially and functionally independent undertakings, which may be competitors. Their commercial relationship is not temporary, due to the fact that they have decided to establish together a new undertaking.

It ought to be mentioned that, the parties to a JV are supposed to remain competitors outside the scope of the functional and economic aspects of the JV. Competitors normally do not communicate with each other their future plans and business intentions and certainly they do not reveal information about prices or marketing. However, should they do communicate, various consequences may arise.

On the other hand, as far as JV issues are concerned, parties may and are expected to communicate and plan jointly their commercial activities. But how can we be assured that joint venturers work for the purposes of the JV, without providing sensitive information to each other and having a collusive conduct? One way to achieve this, is to ensure that different personnel is working for the goals of the JV. There has to be a firewall between the JV with its own personnel, in separate facilities and the still-competing parent undertakings. There must also be organizational and functional

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<sup>136</sup> This is exactly the particular feature of the JV, compared to any subsidiary company, which belongs to the exclusive control of the parent. Subsidiaries, together with the parent companies, constitute a single economic unit, whereas the JV does not belong to the parent undertakings. The parents actually share their assets and have joint control over the JV. In the case of a single economic unit, the European case law treats internal activities as sole actions and not collusion (see for example case C-73/95, *Viho Europe BV v Commission*). Therefore, such activities are evaluated under Article 102 and not under Article 101 TFEU.

firewalls in reality and not only theoretically. There must exist some boundaries, in order to avoid *spillover effects*.<sup>137</sup>

Consequently, JVs have certainly great potential to offer multiple benefits for the market, but they are also able to cause competition problems. Free competition law regards cooperation between competitors as suspicious and Article 101 TFEU is basically a prohibition and exceptionally acceptable. In any case, the collaboration between competitors has several effects. Despite the multiple benefits that can obviously and without any doubt arise, the autonomous activities of the market players must be ensured because even the mere fact that, two (previously) competitors have decided to collaborate leads to the conclusion that, ideal and transparent competition will not exist anymore. Just the fact that they probably share sensitive information may distort competition. *As a consequence, it is highly possible that, the cooperation between undertakings through the JV in one field might have as a result the restriction of competition in other fields.* If there is indeed anti-competitive coordination between the parents, then the creation of the JV was the event that caused this result.<sup>138</sup> It is then to be assessed, whether the creation of the JV can by itself lead to the coordination of the behavior of the parties that restricts competition.<sup>139</sup> There is apparently a greater danger, when the parents are actual or potential competitors. In this case, the administration of the JV, which is elected by the parents, will tend to plan its activities, taking into account the interests of the parent undertakings, creating anti-competitive effects in their relationship.<sup>140</sup>

Such a restriction of competition, provoked by the mere creation of the JV, constitutes an anti-competitive side effect<sup>141</sup> that extends in several fields, where the parent undertakings operate (“spillover effect”<sup>142</sup>). The economic aspect and explanation of

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<sup>137</sup> Richard J. Hoskins (2002) “Antitrust Analysis of Joint Ventures and Competitor Collaborations: A Primer for The Corporate Lawyer”, 10 U. Miami Bus. L. Rev. 119, pp. 119-122-123.

<sup>138</sup> Marsia N. Vitali (2015) “Joint Ventures: The cooperation between multiple undertakings in Competition Law”, Nomiki Vivliothiki S.A., p. 31.

<sup>139</sup> Ritter L. et al. (1991) “EEC Competition Law. A practitioner’s guide”, p. 396.

<sup>140</sup> Ritter L. et al. (1991) “EEC Competition Law. A practitioner’s guide”, p. 396.

<sup>141</sup> Sotiropoulos G. (1998) “The Joint Venture under free competition protection law”, European Commercial Law, p. 749.

<sup>142</sup> Bellamy & Child (2008) “European Community Law of Competition”, 6<sup>th</sup> Edition, p. 773.

the phenomenon is that, when the controlling undertakings produce the same or similar products with the JV, then the competition between the participating parties in the relevant product market is affected by the joint control; for instance, when the controlling undertakings define the prices of the JV's products, then they will probably take into account their own prices for their own products, and they will come up with a price agreement. This effect is inherent or direct<sup>143</sup> consequence of the joint control that exists in JV between horizontal competitors, as there is a structural link that connects them and facilitates their coordination. This is why spillover effects are assessed together with the whole transaction, under the Regulation for concentrations.<sup>144</sup>

The significance of spillover effects cannot be doubted, as the phenomenon can have tremendous consequences. Besides, there is a possibility to have even greater consequences between the undertakings that cooperate, than through their cooperation for the establishment of the JV.<sup>145</sup> For this reason, all relevant product and geographical markets, where the undertakings operate, must be defined, so as to see whether there is a possibility to have cooperation there too.<sup>146</sup> The cooperation through the functions of the JV may be limited, but the consequences from the cooperation in other fields may be enormous.

## **B. TREATMENT OF THE PHENOMENON**

The Commission insists on the notions of probability, possibility and on the risk of coordination, instead of trying to prove that the coordination is the object or effect of the JV's creation. This is regarded as reasonable, given the fact that we have a prior

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<sup>143</sup> Ritter L., Braun D. (2004) "European Competition Law: A practitioner's guide", 3<sup>rd</sup> Edition, p. 616.

<sup>144</sup> Ritter L., Braun D., (2004) "European Competition Law: A practitioner's guide", 3<sup>rd</sup> Edition, p. 615-616.

<sup>145</sup> E. Mastromanolis (2013) "Free Competition Law", p. 351

<sup>146</sup> The legislator demands that, when a JV is regarded to be a concentration, the undertakings must disclose beforehand, through the CO form, all elements that are capable of leading to a coordination, i.e. the relevant markets they operate, the economic activities they are engaged into etc. (see Implementing Regulation 1269/2013, Section 10 of Annex I: "Cooperative effects of a joint venture", for the application of Article 2 par.4 of the Regulation for concentrations.

assessment and future predictions.<sup>147</sup> Therefore, the legislator has preferred a prior assessment of the possibility of coordination between the parent undertakings, so as to prevent it, if possible, from happening. The prevention is certainly preferable, in comparison with the repressive measures of Article 101 TFEU, when competition has already been distorted. However, due to the fact that the possibility of coordination between competitors is always possible, Article 101 is always possible to be applied. Therefore, the legislator chose to include Article 2 par. 4 and 5 in the Regulation for concentrations, which mentions exactly the afore-mentioned comments.

The Commission takes into serious consideration certain elements, which may lead to the conclusion that there is coordination of the competitive behavior between independent undertakings. In particular, the EC takes into account the possibility that two at least parent undertakings operate their activities in the same or similar relevant market with the JV and the possibility that the coordination which exists from the creation of the JV provides the participating undertakings with the ability to eliminate competition for a considerable part of these products/services.

Consequently, in order to conclude that we have indeed restriction of competition, according to Article 101 par.1 TFEU, it is absolutely indispensable that the coordination of the competitive behavior of the parent undertakings is possible, considerable and is a result of the JV's creation, either as its object or as its consequence.<sup>148</sup>

### **C. EUROPEAN COMMISSION'S APPROACH**

When a full-function JV has as its object or effect the coordination of the competitive conduct of the parent undertakings, then Article 2(4) EUMR imposes the obligation to assess this behavior under the elements of Article 101(1) and (3), as part of the merger control assessment. However, it must be mentioned that, the potential of coordinating commercial behavior by the parties emerges and happens only when at least two

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<sup>147</sup> *Navarro et al.*, p. 56-57.

<sup>148</sup> *Marsia N. Vitali* (2015) "Joint Ventures: The cooperation between multiple undertakings in Competition Law", *Nomiki Vivliothiki S.A.*, p. 34.

parent companies are engaged in important activities in the same or related markets as the JV. In addition, coordinated behavior<sup>149</sup> may arise, when these companies are potential competitors in the markets in question.<sup>150</sup> Should there is no actual evidence that the object of the JV is indeed to facilitate the collaboration among parents, it is crucial that it is examined whether such collaboration is the direct and likely effect of the creation of the JV. Such antitrust collaboration exists particularly, when there is exchange of useful information<sup>151</sup>, entry market barriers for other competitors<sup>152</sup> or discriminatory treatment of third parties.<sup>153</sup> It must be examined in this regard, whether the parties have in fact the possibility as well as the motivation needed so as to coordinate. The necessary analysis will concentrate on parties' market power in relevant markets and the structure of these markets. There must be of course a causal link between the JV and this collaboration.

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<sup>149</sup> Although coordinated effects as a result of collective dominance and coordinated effects between JV parents are subject to two different tests (SIEC and Art 101 TFEU), in practice, the same facts are often relevant to both so that the two analyses often coexist.

<sup>150</sup> Case COMP/JV.28 *Sydkraft/LEWIHansa Energy Trading* [1999], para 27.

<sup>151</sup> See, for example, case COMP/M.4760 *Amadeus/Sabre/JV*, para 25; case COMP/M.5154 *CASC/JV* [2008], para 25. By all means, it is not advisable to prohibit any information exchange. The Commission has stated that the content and the nature of information transmitted is very crucial, while deciding whether there is an infringement. The Commission pays considerable attention to the role of information that is transmitted among undertakings and that can be clearly concluded through several judgments. Both in these rulings, and in other more theoretical approaches, many arguments exist, that enforce the idea of the antitrust effects of information exchange and the due consideration that must be paid on behalf of the competition authorities. The afore-mentioned observations do not signify that every sing exchange of information is per se prohibited. An analysis is absolutely necessary, in order to evaluate the effects of this exchange and detect any impediments to existing competition. With view to establishing a more transparent idea, exchange of information raises competition concerns, when it contains data concerning customers, sales or pricing. Once exchanged, information, such as market shares and terms of sales also have the ability to inhibit competition. Finally, it is most crucial that the parties to a JV do not exchange sensitive information, which goes beyond what is necessary for the accomplishment of the efficiency gains. For instance, an exchange of detailed data concerning certain persons is not considered to be necessary for the particular purpose of benchmarking and this may be regarded as an attempt to pursue a collusive effect.

<sup>152</sup> OECD roundtable on 'Competition Issues in JVs', OECD, DAFFE/CLP (2000) 33, 129.

<sup>153</sup> See case IV/M.1327 - *NC/Canal+/CDPQ/BankAmerica* [1998], paras 33-38. In this case, the activities of the new JV, called NCH, included the distribution of cable TV grids in France. The concentration included the transfer of 37% of shares to the JV, from Canal+ to BankAmerica and CDPQ, which were regarded as one parent undertaking by the Commission's decision. The Commission considered possibility of coordination between the two parents in the relevant market. After a thorough and cumbersome investigation of the horizontal and vertical relationships between the parents and third businesses, the Commission reached the conclusion that, the one undertaking would become the inevitable collaborator of the other in the Spanish geographical market, because this was considered to be a reasonable economic conduct. This would lead to particular treatment, with exclusive distribution agreements and to vertical coordination between the parent companies.

First of all, the Commission defines the relevant market, where the parent undertakings operate. Furthermore, it assesses whether the coordination is appreciable and whether it gives the parent undertakings the possibility to eliminate competition for a great part of the products or services. It is worth to be mentioned that the element of significance should exist in any case, in order for the Commission to evaluate the case. What is more, the Commission investigates whether there is a casual link between the coordination of the parents and the formation of the JV. After the assessment of the afore-mentioned elements, the Commission proceeds to a further thorough investigation to find the motives of the parent undertakings. In this regard, it should be mentioned that each case has its own facts with its own particularity and consequently, the Commission takes them into serious consideration.

## VI. CONCLUSION

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Thorough analysis of Joint Ventures, as alliances with unique features and multiple effects in the common market, could lead to certain conclusions in relation to competition law.

First of all, it is established that, although JVs have been closely observed through the years, *their exact definition does not exist*. In fact, there can be *different types of JVs*, ranging from a loose association, created in order to achieve a single goal, to the formation of a long-lasting<sup>154</sup> business establishment, which involves capital investment of unlimited duration. The attachment to the parent founding undertakings can also vary; in certain cases, the JV that is created is completely autonomous. Should the JV meet the criteria of the EUMR, it is regarded as concentrative and must be governed by the provisions of the Regulation. Furthermore, the creation of a concentrative Joint Venture can have *both benefits and negative effects to competition*. For this reason, the Commission usually conducts a benefit and cost analysis, with view to defining the impact that the JV has on the market, and decides whether the efficiency gains could possibly justify minor restriction of competition.

What is more, the new economic entities that emerge in the single market necessitate without a doubt a structured coordination between the parent undertakings, so as to fulfill their economic activities. The economic result of the JV could not be accomplished without the cooperation between parent entities. However, there are some boundaries that must be imposed, in order to prevent *spillover effects*, which were previously examined extensively. The risk of having spillover effects is even greater, when the independent parent undertakings are operating in the same or

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<sup>154</sup> The Commission considers a five-year period as sufficient to have a lasting structural creation. Commission Notice on the Concept of Full-Function Joint Ventures, O.J.1998, § 15, EC, Commission Decision of 7 October 1996, *British Gas Trading Ltd/Group 4 Utility Services*, Case IV/M.791, O.J.1996, C 374/8, § 10.

similar fields in the market. It is crucial that, the parent undertakings should not be allowed to exchange sensitive information that goes beyond the scope of the common activity purposes or let the same people work for the purposes of both the JV and the parent companies. It is very difficult to predict and prevent such kind of coordination between parent companies. However, the competition authorities must conduct a thorough economic investigation, in order to eliminate spillover effects and at the same time, preserve the economic benefits of the JVs.

In fact, due to the approach that the EC has adopted, it is preferable to make undertakings accept certain *commitments*, instead of prohibiting the whole venture. The EC struggles to preserve the pro-competitive efficiencies that new economic entities create, in favor of the consumers and the common market. Finally, it is worth mentioning that the EC is obviously keen on the *more economic approach theory* ("*economic balance sheet analysis*")<sup>155</sup> <sup>156</sup> and tends to deal with each case separately (effects-based approach).<sup>157</sup> Consequently, a careful observation of the so far approach of the EC is necessary, with view to comprehending its rationale and being capable of reaching certain conclusions.<sup>158</sup>

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<sup>155</sup> The approach of Article 2 par.4 of the Reg. 139/2004 is more economically realistic than the approach of Article 101 TFEU, according to the rulings of the Commission, *Jones A., Sufrin B.*, "EU Competition Law. Text, cases and Materials", 2014, p. 1242.

<sup>156</sup> At the EU level, this change towards a mainly economic evaluation of practices has been particularly important in the field of agreements, where originally formal analysis was more entrenched. Already in the 1970s, the Court of Justice of the European Communities (ECJ) resorted to a substantial evaluation of agreements. For example, in *Metro v Deutsche Grammophon*," the appraisal of the beneficial economic effects of a distribution system prompted the ECJ to consider the agreement legitimate and, as such, outside the scope of Article 81 of the Treaty establishing the European Communities, notwithstanding some restrictive effects on pricing. In *Nungesser v Commission, I Pronuptia v Schillgallis and De Limitis v Henninger Brau* the ECJ reached the same conclusion.

<sup>157</sup> *Blanco L.O., De Pablo A.L.* (2012) "Expert economic evidence and effects-based assessments in competition law cases", *Merola M., Derenne J.* (ed.), *The Role of the Court of Justice of the European Union in Competition Law Cases*, Global Competition Law Center Annual Conference Series, p. 305 etc.

<sup>158</sup> *Cook J., Kerse C.* (2000) "EC Merger Control", 3th Edition, Sweet and Maxwell, p. 164.

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