Joint Ventures and Anti Trust Law

Joint Ventures under Article 81 EC Treaty

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Definition of Joint Ventures under EC Competition Law

- Arrangements from co-operation agreements (e.g. R&D, production or distribution) to merger-like structures
- Commission definition of Joint Ventures as an undertaking which is
  - a separate business entity and
  - jointly controlled by at least two parents
- Types of Joint Ventures
  - Upstream (e.g. R&D activities)
  - Downstream (e.g. marketing, sales)
  - Input (production of goods/services for parents)
  - Output (supply to a downstream market)
  - Mixed forms

Joint Ventures subject to Article 81 EC Treaty

- Full-function Joint Ventures without a Community dimension
  - Autonomous economic entity
  - Operating on a lasting basis
  - Performing all the functions of an autonomous economic entity
  - (Contractual relationships with third parties)
- Partial function Joint Ventures
  - No autonomous economic entity
  - Short or medium term duration (no lasting basis)
  - Not performing all the functions of an autonomous economic entity
  - (Relationship primarily with parents)

Joint Ventures/Article 81 (continued)

- Structural partial function Joint Ventures
  - Significant financial investment by parents
  - Commitment of significant material or (non-)tangible assets
  - Taking over specific functions for parents or
  - Developing new functions for parents and
  - No autonomous market access (R&D, production ...)
  - Fast track notification process
- (Joint ownership without control)
  - Minority stake
  - Philip Morris doctrine
- (Strategic allicance)
  - Arrangement lacking characteristics of a Joint Venture

Secondary Legal Sources under EU Law

- Competition Guidelines for the telecom sector (1991)
- (Joint Venture Notice 1993)
- Block exemption for specialisation agreements (2000)
- Block exemption for R & D agreements (2000)
  Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) (*De minimis* Notice 2001)
- Commission Notice - Guidelines on the applicability of Article 81 to horizontal co-operation agreements (2001)

Substantive Tests under Art 81 EC Treaty

- Provided that a Joint Venture subject to Art 81
  - is more than *de minimis* and
  - has an effect on trade between Member States,
- it is assessed with respect to
  - its <u>establishment</u> as such and
  - any <u>specific restrictions</u> brought about by the Joint Venture
    - Ancillary restrictions directly related to and necessary for the Joint Venture
    - Additional restrictions requiring independent assessment
- Test under Article 81 (1) EC Treaty in general:
  - Does the JV-Agreement have as its object or effect the prevention, restriction or distortion of competition which is appreciable?

Substantive differences between Art 81 and ECMR

- Stricter substantive test than under ECMR
  - "Appreciable" prevention, restriction or distortion of competition as the object or effect of the Joint Venture
    - Thus, no "concentration privilege" (more lenient dominance test for Joint Ventures subject to ECMR)
  - No exemption under Art 81 (3) EC Treaty if Joint Venture makes elimination of competition possible
    - Thus, no consideration of efficiency gains offsetting potential anti-competitive effects (as under ECMR)

Procedural differences between Art 81 and ECMR

- Different timing
  - Fixed timetable under ECMR (one month/extra four months)
  - No maximum duration of procedure under Art 81 EC Treaty
  - Only (non-binding) timetable for structural partial function Joint Ventures (two months; "fast track procedure")
- Different decision-making instruments
  - Non-binding comfort letters
  - Individual exemptions under Art 81 (3) EC Treaty
    - Granted for limited period of time (renewal application necessary)
    - May be withdrawn if conditions of Art 81 (3) are no longer fulfilled
  - Procedural overhaul of Art 81: no *ex-ante* exemption of agreements ⇨ legal uncertainty (but: potential inclusion of partial function production Joint Ventures in ECMR)

Procedural differences (continued)

- Jurisdictional differences
  - No "one-stop shopping" under Art 81 EC Treaty
  - Thus, parallel application of national competition laws (including merger control)
  - But: automatic block exemption for R&D and specialisation agreements whereas <u>every</u> full-function Joint Venture with a Community dimension must be notified under the ECMR.

Development of Assessment

- Prior to 1989 (ECMR), broad application of Art 81 EC Treaty to all Joint Ventures
  - Parents considered at least as potential competitors
  - Therefore, co-operation may restrict competitiveness of the market concerned
  - Ready finding of likelihood of an appreciable effect on competition
  - Narrow scope of block exemptions (specialisation, R&D)
- ECMR (1990)
  - Recognition that exemption under Art 81 (3) is inappropriate for structural change
  - Thus, less burdensome (time, test) analysis of "concentrative Joint Ventures"

Development (continued)

- 1993: Fast-track procedure for structural Joint Ventures, adoption of Joint Venture Notice
- 1997: Amendment of ECMR:
  - Distinction between concentrative and co-operative Joint Ventures abolished.
  - Co-ordinative effects of full-function Joint Ventures assessed under Art 81 EC Treaty within merger control procedure.
- 1998: CFI *European Night Services*
  - Need for an economically realistic approach to application of Art 81 to Joint Ventures
  - Art 81 (1) applies only if "obvious restrictions on competition" prevail
- 2000: Horizontal Co-operation Guidelines, new block exemptions on specialisation and R&D

Horizontal Co-operation Guidelines

- Apply also to Joint Venture arrangements (not, however, to minority shareholdings, strategic alliances)
- Economically-based approach to assessment of horizontal agreements
  - Market power
  - Market structure
- Categories of co-operation arrangements
  - R&D agreements
  - Production (incl. specialisation) agreements
  - Joint Purchasing agreements
  - Commercialization agreements (marketing, selling, distribution, advertisement)
  - Standardisation agreements (technical or quality standards)
  - Environmental agreements

Assessment in Detail – Formation of Joint Venture

- Key indicators of a restriction on competition
  - Are parents actual or potential competitors in the market of the Joint Venture?
    - Actual competition
    - Low communality of total costs in case of production Joint Venture?
    - Potential competition, real concrete prossibilities for competition within reasonable time frame?
    - The greater the funding required and the risks involved, the less likely are parents potential competitors.
  - Are parents competitors in any related or unrelated markets; may a (full-function) Joint Venture become a competitor of a parent in such other markets? (Spillover or group effect)

Assessment/Formation (continued)

  - The higher the common cost and combined market share of parents in final product market, the greater the risk of spillover effects.
  - Joint Venture-parents: horizontal Joint Ventures, market or product extensions
- May the Joint Venture foreclose any commercial opportunities for others? (Foreclosure effect)
  - Exclusive sharing arrangements between Joint Venture and parents?
  - Market power of parents? Market concentration?
- Is the Joint Venture part of a network of two or more competing Joint Ventures? (Network Effect)
  - Parallel Joint Ventures with same parents
  - Parallel Joint Ventures linking different parents
  - Collective dominance, collusive exchange of information

Appreciable anti-competitive effect of Joint Venture formation

- Is the anti-competitive effect resulting from any of these key factors <u>appreciable</u>?
  - Limitation of competition between the parties <u>and</u> reduction of competition in the market (negative market effects as to prices, output, innovation, product variety or quality; cf Horizontal Merger Guidelines):
    - Nature of agreement:
      - Hard-core restrictions? (price fixing, limitation of output, market sharing)
      - Areas and extent of co-operation, proximity of co-operation to market level
    - Market power
      - Market shares of the parties in the relevant product/geographic market?
      - Insignificant market share of one parent offsets high market share of the other
      - Significant addition of market shares requires assessment of market structure

Appreciable effect (continued)

- Market structure
  - Competitive or concentrated (HerfindahlHirshman-Index)?
  - Barries to entry
  - Strength of buyers?
  - Economic, financial, technological advantages of parents? Vertically integrated?
  - Transparency

Assessment of Specific Restrictions

- Ancillary restrictions
  - Must be subordinate in importance to the main object of the Joint Venture
  - Analysis of nature, duration, subject matter and geographic field of Joint Venture to determine what is necessary
  - Assessment of ancillary restrictions not separatedly from Joint Venture itself
- Examples (1993 Notice)
  - Non-competition of parents for life-time of Joint Venture
  - Obligation on Joint Venture to purchase exclusively from parents
  - Obligation on parents to supply exclusively Joint Venture
  - Exclusive technology or IP license to Joint Venture limited to its field of activity
- Additional (i.e., non-ancillary) restrictions
  - Separate assessment, even if Joint Venture itself is exempt under Art 81 (3)

Exemption under Art 81 (3) EC Treaty

- Joint Ventures covered in substance by the two block exemptions (R&D, production/specialisation)
- Joint Ventures which are in principle covered in substance by one of the two block exemptions but where the market share thresholds provided in the block exemptions are exceeded by the parents
- Joint Ventures outside the scope of the block exemptions

Block Exemptions

- Specialisation (2658/2000); R&D (2659/2000)
- No more clause-based exemptions permitting specified restrictions only
- Broader application of Art 81 (3) EC Treaty to arrangements if
  - Market share of parties is limited
    - 25 % for R&D agreements
    - 20 % for production/specialisation agreements
  - No "hard-core"-restrictions (price fixing, output limitation, market/customer allocation)

Criteria for Exemption under Art 81 (3)

- Efficiencies or economic benefits
  - Development of new/advanced technology products/services or production methods
  - Creation of new industry capacity
  - Provided that effective competition remains from other competitors
- Fair share of benefit to consumers
  - Generally confirmed if effective competition continues on the market
- Indispensability
  - Impossibility for parents to undertake Joint Venture operation separately; e.g. achievement only at a loss (*Ford/Volkswagen*)
  - Less restrictive form of co-operation sufficient (*GEC/Weir; P&O Stena Line*)?
  - Important also for consideration of specific restrictions

Exemption criteria (continued)

- No elimination of competition in respect of substantial part of the products or services (i.e., the market) concerned
  - Refers to elimination of actual rather than potential competition
  - The more significant the efficiencies/benefits, the higher the acceptable degree of competition reduction
  - Effective competition must not be eliminated; i.e., if parties will or are likely to become dominant

Joint Ventures under Austrian Competition Law

- Distinction between concentrative and co-operative Joint Ventures still in place
  - Concentrative Joint Ventures are subject to Austrian merger control if the turnover thresholds of sec 42 Cartel Act are met or exceeded
  - Co-operative Joint Ventures are treated as cartels and are subject to *ex ante* authorization (sec 10 *et seq* Cartel Act) unless they are of a *de minimis* nature

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