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FOREWORD

This document comprises proceedings in the original languages of a Roundtable on Joint Ventures which was held by the Committee on Competition Law and Policy in October 2000.

It is published under the responsibility of the Secretary General of the OECD to bring information on this topic to the attention of a wider audience.

This compilation is one of several published in a series entitled "Competition Policy Roundtables".

PRÉFACE

Ce document rassemble la documentation dans la langue d'origine dans laquelle elle a été soumise, relative à une table ronde sur les entreprises communes, qui s'est tenue en octobre 2000 dans le cadre de la réunion du Comité du droit et de la politique de la concurrence.

Il est publié sous la responsabilité du Secrétaire général de l'OCDE, afin de porter à la connaissance d'un large public les éléments d'information qui ont été réunis à cette occasion.

Cette compilation fait partie de la série intitulée "Les tables rondes sur la politique de la concurrence".

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EXECUTIVE SUMMARY

By the Secretariat

Considering the discussion at the roundtable, the delegate submissions, and the issues paper, a number of key points emerge.

(1) The incidence of joint ventures is increasing especially in sectors where innovation costs and, or competition are increasing.

Joint ventures are perhaps more commonplace in dynamic sectors such as information technology, but they are also found in many traditional sectors, such as natural gas, mining and food distribution. In addition, joint ventures continue to be an important means of tapping local market expertise and thus facilitating foreign direct investment, especially where such investment would be legally blocked without the involvement of local partners (e.g. international airline alliances).

(2) Joint ventures present a wide spectrum in terms of their cost-benefit ratios where costs refer to anti-competitive effects and benefits mean pro-competitive efficiencies. Joint ventures presenting either very low or very high cost-benefit ratios can easily be addressed.

Some joint ventures have few if any anti-competitive effects, while at the same time offering some real efficiency benefits. Included in this category are joint ventures conducting activities parents could not perform individually, and involving no restrictions on the competitive activities of the joint venturers. Good examples of such joint ventures are those set up to reap important economies of scale through common production of inputs accounting for a minor portion of the parents' total costs. Such joint ventures should present no real difficulty for competition authorities. They should simply be left alone or approved as quickly as possible.

At the other end of the spectrum are joint ventures offering no real benefits, but entailing substantial risks to competition. Typically such arrangements involve little in the way of real integration among the parents. Once it has been determined that a joint venture falls into this category, it can be summarily prohibited especially if it is essentially a sham, i.e. a "hard core" cartel masquerading as a joint venture.

(3) Many joint ventures warrant a competition review based on a careful assessment and balancing of pro- and anti-competitive effects.

Assessing a joint venture's pro-competitive effects involves considering various static and dynamic (innovation related) efficiencies. As for anti-competitive effects, assessment would normally begin by examining the terms of a joint venture's founding agreement(s) including: the governance structure adopted; the joint venture's duration; the nature and extent of assets transferred to the joint venture versus those retained by the participants; and, especially, the freedom parents retain to compete with each other and with the joint venture. Any exclusivity clauses tending to raise barriers to entry or expansion facing third parties would also call for serious attention. In cases where competition among the parents or between each of them and the

joint venture will be constrained in some way, the investigation should probably be broadened to include making a formal market definition, estimating concentration levels, and considering the significance of barriers to entry/expansion.

(4) Joint ventures having overall pro-competitive effects should be permitted, but this is not necessarily the case for any anti-competitive restrictions they may contain.

If it has been determined that a joint venture will probably have a net positive effect on consumers, any further review by competition authorities should focus on whether any restrictions on competitive behaviour are reasonably related to the joint venture's efficiencies. What constitutes "reasonably related" is quite properly a somewhat elastic concept linked to the nature of the restriction and general characteristics of the joint venture. For example, a rather direct relationship might be required for a provision in which the parties agree to what would be price fixing or market division if the agreement were a "naked" restraint. Also, an ever more liberal approach might apply the larger the net benefits expected from a joint venture and the better the evidence showing that the parents could not or would not individually conduct the same activity in the absence of the joint venture.

However they approach the "reasonably related" issue, it is important that competition authorities make it clear that they will not engage in wide open, difficult to predict second guessing of business decisions.

(5) Joint ventures, and horizontal agreements more generally, are an area where enforcement guidelines are particularly valuable in terms of enhancing compliance with competition laws. Safe harbours are especially helpful.

The business community considers joint ventures to be one of the most difficult areas of competition law to understand and follow. Business uncertainty will probably increase given that joint ventures are taking new forms; they increasingly involve sharing ideas rather than bricks and mortar. This uncertainty issue is a serious problem given that joint ventures hold enormous potential to produce real economic efficiencies that are becoming more important as global competition increases. Bearing this in mind, countries should give close consideration to adopting or up-dating enforcement guidelines for horizontal agreements in general and joint ventures in particular.

Several existing guidelines offer safe harbours for joint ventures falling below certain market shares. These basically give blanket protection to legitimate, as opposed to sham, joint ventures below a certain market share threshold without implying that those above are subject to blanket prohibition. Safe harbour provisions make sense since the lower its market share, the less likely is a joint venture to have net anti-competitive effects. Market shares are also easy to understand even if they are difficult to calculate.

Some countries have gone further in helping businesses assess the legality of their joint ventures through adopting special statutory regimes applying to them and/or by adopting block exemptions for qualifying joint ventures. Such approaches may involve a certain trade-off between greater business certainty and less freedom to structure joint ventures so as to maximise their net efficiency enhancing potential.

(6) Production joint ventures supplying parents who maintain separate marketing arms require careful assessment to ensure their parents will in fact compete.

Production joint ventures raise the question of how much competition agencies should take comfort from the fact that parents will retain separate marketing and perhaps separate input purchasing functions. About the only generality that can be drawn in regard to such cases is that the greater the percent of costs accounted for by the joint activity, the less comfort should be drawn from the existence of separate marketing arms. In any case, competition agencies should guard against approving production joint ventures which appear to be the first step in a full scale merger which, were it proposed at the outset, would likely be rejected.

(7) *When countries' laws have important differences in procedural and substantive treatments accorded to mergers as opposed to inter-firm agreements, firms may have strong incentives to structure their joint ventures in ways that might be sub-optimal from a straight economic efficiency perspective.*

While few OECD Members' competition statutes provide definitions and special regimes for joint ventures, most do contain clear definitions of mergers and extensive merger review processes. The procedures and substantive tests applying to mergers could differ significantly from what would be applied to a joint venture not qualifying as a merger. This could give parents strong incentives to structure joint ventures so they either do or do not qualify for merger treatment, rather than simply adopting the form expected to be most profitable, i.e. usually the one most conducive to reaping efficiencies through the joint venture. The roundtable illustrated one extreme example of this in connection with a country that in the past did not have any merger review thus giving firms an unusually strong incentive to merge rather than carry on business in a joint venture format.

To focus on a more general set of examples, under European Union competition law and the many laws inspired by it, mergers above a certain size are subject to clearance before they are consummated. This applies as well to joint ventures qualifying for merger treatment (e.g. under the European Union's Merger Control Regulation - MCR - full function joint ventures having a community dimension are treated as mergers). Such clearance or notification is not required for joint ventures excluded from merger review, unless the parties wish to benefit from possible individual exemptions. In addition, the substantive test applied is different, and arguably easier to pass, for mergers (create or strengthen a dominant position) than for joint ventures (prevention, restriction or distortion of competition), although several block exemptions could apply to the latter. It should be noted, however, that although the MCR treats qualifying joint ventures as mergers, Article 81 is still applied to aspects of joint ventures having the object or effect of co-ordinating the competitive behaviour of undertakings that remain independent. Finally, an efficiency "defence" is more readily available for joint ventures than for mergers. It seems fair to assume that all these differences could have a bearing on how individual joint ventures are structured.

In a number of OECD jurisdictions, joint ventures can be subject to both merger review and prohibitions against anti-competitive agreements. Such legal regimes may well reduce the incidence of anti-competitive joint ventures, but they might also deter some pro-competitive joint ventures if they severely complicate the review process.

(8) *European Union competition policy and policies in countries following the European Union example have traditionally been more formalistic and less economic in their approach to joint ventures than has been the case in many other jurisdictions. They may also have been more restrictive as regards joint ventures. Both differences appear to be eroding, however, as reflected in the European Union's new approach to horizontal agreements.*

Because of historical factors having to do with the adoption of merger review provisions, the European Commission and competition authorities enforcing competition laws similar to those found in the European Union, have tended to devote considerable analysis to the form of joint ventures to determine whether they qualify as mergers. In contrast, because of either narrower definitions of what constitutes a merger or less significant differences in treatment accorded to mergers versus horizontal agreements, many other jurisdictions have been able to focus more on analysing the economic effects of joint ventures, and on dealing with the question of how cartel like arrangements within joint ventures should be dealt with.

As evidenced in recent new guidelines and revised block exemptions, there has been an important shift in European competition policy in favour of a more economic, less formalistic approach. This should produce a more consistent, possibly more liberal approach to joint ventures. Over time the changes might also result in greater business certainty as regards the treatment afforded to joint ventures, and thus help ensure that competition laws work to enhance economic welfare.

SYNTHÈSE

par le Secrétariat

Des échanges de vue qui ont eu lieu à l'occasion de la table ronde, des contributions des délégués et du document sur les questions à examiner ressortent les principaux points suivants:

(1) *Les entreprises communes se multiplient, en particulier dans les secteurs où les coûts d'innovation augmentent et/ou où la concurrence s'intensifie.*

Les entreprises communes sont probablement plus communes dans les secteurs en expansion, comme celui des technologies de l'information, mais on en rencontre également dans beaucoup de secteurs traditionnels, comme celui du gaz naturel, des industries extractives et de la distribution de produits alimentaires. Par ailleurs, elles demeurent un moyen fréquemment utilisé d'exploiter les compétences existantes sur les marchés locaux afin de faciliter les investissements directs étrangers, en particulier lorsque ce type d'investissement serait légalement impossible en l'absence de partenaires locaux (c'est notamment pour cette raison que les compagnies aériennes concluent des alliances).

(2) *Les ratios coûts-avantages des entreprises communes, où les coûts représentent leurs effets anticoncurrentiels et les avantages correspondent à leurs effets positifs sur la concurrence, présentent une grande diversité. Les entreprises communes qui se caractérisent par des ratios coûts-avantages très faibles ou très élevés ne posent pas de problème particulier.*

Certaines entreprises communes n'ont que peu ou pas d'effets anticoncurrentiels, tout en offrant des avantages réels en termes d'efficience. Appartiennent à cette catégorie les entreprises communes qui exercent des activités que les partenaires les ayant créées ne pourraient mener à bien séparément et qui n'entravent en rien les efforts déployés par ceux-ci sur le front de la compétitivité. Les entreprises communes créées pour réaliser d'importantes économies d'échelle par la production en commun d'intrants représentant une part mineure des coûts totaux des sociétés participantes, en sont un bon exemple. Elles ne sont pas véritablement un problème aux yeux des autorités de la concurrence. Soit ces dernières ne s'en occupent pas, soit elles signifient leur agrément dans les plus brefs délais.

A l'inverse, certaines entreprises communes qui ne procurent aucun avantage réel font peser des risques non négligeables sur la concurrence. Généralement, elles ne correspondent pas à une véritable intégration entre les sociétés participantes. Lorsqu'il a été établi qu'une entreprise commune relève de cette catégorie, celle-ci peut être purement et simplement interdite surtout si elle n'est qu'un stratagème destiné à dissimuler une entente "injustifiable" en la présentant comme une entreprise commune.

(3) *Beaucoup d'entreprises communes doivent faire l'objet d'un examen qui exige une analyse approfondie des effets négatifs et positifs qu'elles peuvent avoir sur la concurrence.*

Évaluer les effets positifs sur la concurrence d'une entreprise commune suppose d'examiner les gains d'efficiences statique et dynamique (liés à l'innovation) qu'elle génère. En ce qui concerne les effets anticoncurrentiels, l'analyse doit normalement commencer par un examen des dispositions de l'accord instituant l'entreprise commune, dont la structure adoptée en matière d'organisation du pouvoir , la durée de l'entreprise commune , la nature et le volume des actifs transférés à l'entreprise commune par rapport à ceux conservés par les participants , et surtout, la marge de manœuvre laissée aux participants pour se faire concurrence entre eux et rivaliser avec l'entreprise commune. Toutes les clauses d'exclusivité ayant pour effet d'élever des obstacles à l'entrée ou d'entraver l'expansion de tierces parties doivent également être étudiées attentivement. Lorsque la concurrence entre les partenaires associés dans une entreprise commune ou entre ces derniers et l'entreprise commune elle-même est entravée d'une manière quelconque, il convient d'élargir le champ des investigations, et notamment de définir précisément le marché, d'estimer la concentration sur ce marché et d'étudier l'incidence des barrières à l'entrée/l'expansion de tierces parties.

(4) Les entreprises communes ayant des effets globalement positifs sur la concurrence devraient être autorisées, mais ce n'est pas toujours le cas car les accords correspondants peuvent néanmoins comporter des dispositions préjudiciables à la concurrence.

S'il est établi qu'une entreprise commune aura probablement un effet positif net pour les consommateurs, les autorités de la concurrence devront poursuivre leur enquête en s'attachant principalement à déterminer si les restrictions à la concurrence qu'elle entraîne sont raisonnablement liées aux gains d'efficience qu'elle autorise. L'expression "raisonnablement liées " est très bien choisie pour ménager une certaine souplesse permettant de tenir compte de la nature des restrictions en question et des caractéristiques globales de l'entreprise commune. Il faudrait par exemple que le lien soit relativement direct pour justifier une disposition par laquelle des parties s'accorderaient sur ce qu'il faudrait considérer comme une entente sur les prix ou une répartition du marché si l'on devait se prononcer sur une affaire de restriction à la concurrence "en tant que telle". Dans le cadre d'une approche encore plus libérale, on pourrait également considérer que plus les bénéfices nets escomptés de l'entreprise commune sont élevés, plus on est fondé à considérer que les partenaires n'auraient pas pu ou pas voulu mener à bien les mêmes activités séparément.

Quelle que soit la manière dont elles abordent la question qui sous-tend l'expression "raisonnablement liées", il faut qu'il soit clair que la tâche des autorités de la concurrence ne doit pas consister à se livrer à des tentatives aléatoires d'interprétations a posteriori des décisions des entreprises.

(5) Les entreprises communes, et les accords de coopération horizontale de façon plus générale, constituent un secteur où les directives en matière d'application sont particulièrement utiles pour améliorer le respect du droit de la concurrence. Les immunités antitrust présentent également un intérêt majeur.

Pour les milieux d'affaires, les entreprises communes constituent l'un des domaines du droit de la concurrence les plus difficiles à cerner et à observer. Et l'incertitude risque de grandir à mesure que de nouvelles formes des entreprises communes se feront jour, sachant que celles-ci auront de moins en moins pour objet de mettre en commun des moyens matériels et viseront de plus en plus à partager de la matière grise. Cette incertitude représente une grave difficulté dans la mesure où les entreprises communes offrent un énorme potentiel pour réaliser d'importants gains d'efficience économique, facteur dont l'importance ne peut que s'accroître avec l'intensification

de la concurrence sur le plan mondial. Sans perdre de vue cet aspect, les pays devraient étudier avec soin comment adopter ou mettre à jour les lignes directrices relatives à l'application du droit de la concurrence aux accords de coopération horizontale en général, et aux entreprises communes en particulier.

Les lignes directrices en vigueur en la matière prévoient souvent des dispositions octroyant une immunité antitrust aux entreprises communes dont la part de marché n'excède pas un certain pourcentage. C'est en principe une manière d'assurer une certaine protection aux entreprises communes légitimes, par opposition aux entreprises communes fictives, en deçà d'un certain seuil, sans pour autant priver du bénéfice de cette protection les entreprises communes représentant une part de marché supérieure à ce seuil. Ce genre de dispositif trouve sa justification dans le fait que plus la part de marché d'une entreprise commune est faible, moins celle-ci risque d'avoir des effets anticoncurrentiels. Les parts de marché sont un critère facile à appréhender même si elles ne sont pas toujours faciles à calculer.

Certains pays sont allés plus loin en aidant les entreprises à évaluer la licéité des entreprises communes qu'elles projettent de former grâce à l'adoption de réglementations spéciales et/ou la mise en place d'exemptions en bloc pour les entreprises communes remplissant certaines conditions. Ces méthodes supposent parfois un arbitrage entre le souci de donner aux entreprises davantage de certitudes et le risque de réduire ainsi la marge de manœuvre dont elles disposent pour choisir la forme d'une entreprise commune la mieux à même de leur permettre de maximiser leur potentiel net d'amélioration de leur efficience.

(6) *Les entreprises communes de production assurant l'approvisionnement de partenaires qui conservent des stratégies commerciales distinctes doivent faire l'objet d'un examen attentif destiné à vérifier que les parties à l'entreprise commune demeurent effectivement en concurrence.*

Les entreprises communes de production soulèvent la question de savoir dans quelle mesure les autorités de la concurrence doivent s'estimer rassurées par le fait que les partenaires associés dans le cadre d'une entreprise commune conservent des fonctions commerciales séparées et peut-être des services d'achat distincts. La seule conclusion générale que l'on peut tirer dans une telle situation est que plus le pourcentage des coûts imputables aux activités communes est élevé, moins il faut tenir compte du fait que les partenaires poursuivent des stratégies commerciales distinctes. Quoiqu'il en soit, les autorités de la concurrence doivent se garder de donner leur agrément à des entreprises communes de production apparaissant comme la première étape d'une fusion à grande échelle qui, si elle était présentée comme telle dès le départ, aurait toutes les chances d'être rejetée.

(7) *Lorsqu'il existe des différences importantes entre les législations nationales dans la manière de traiter, tant sur le fond que sur la forme, les fusions, par opposition aux accords entre entreprises, les entreprises se trouvent parfois fortement incitées à donner à leurs entreprises communes une structure qui n'est pas tout à fait optimale du strict point de vue de l'efficience économique.*

Si peu de pays de l'OCDE prévoient dans leur législation sur la concurrence des définitions et des régimes spéciaux concernant les entreprises communes, la plupart d'entre eux en revanche ont adopté une définition claire de ce qu'est une fusion et des procédures détaillées d'examen des projets de fusions. Les procédures et les critères applicables quant au fond peuvent être très différents de ceux applicables à une entreprise commune ne répondant pas à la définition d'une fusion. Les parties en présence peuvent donc être très tentées de choisir une forme d'une

entreprise commune dans le seul but que celle-ci soit, ou ne soit pas, assimilée à une fusion au lieu d'opter tout simplement pour la forme d'une entreprise commune la plus rentable, c'est-à-dire celle qui offre les meilleures chances de produire des gains d'efficience. La table ronde a permis d'étudier une situation extrême à cet égard, situation observée dans un pays qui, dans le passé, ne soumettait les fusions à aucune procédure d'examen, ce qui incitait indûment les entreprises à fusionner plutôt qu'à entreprendre des activités communes dans le cadre des entreprises communes.

Pour revenir à des exemples moins atypiques, il se trouve qu'en vertu de la législation communautaire en matière de concurrence et des nombreuses législations qui s'en inspirent, les fusions d'une certaine importance sont soumises à autorisation avant d'être effectives. Ceci s'applique aussi bien aux entreprises communes qui relèvent du traitement des fusions (selon le règlement communautaire du contrôle des fusions -MCR- des entreprises communes de plein exercice ayant une dimension communautaire sont traitées comme des fusions). Une telle autorisation ou notification n'est pas obligatoire pour les entreprises communes, exclues du champ d'examen des fusions, à moins que les parties ne souhaitent bénéficier d'éventuelles exemptions. De plus, le critère appliqué, sur le fond, est différent et, on peut le dire, moins sélectif pour les fusions (où il consiste à examiner si la fusion crée ou renforce une position dominante) que pour les entreprises communes (où il s'agit de déterminer si l'opération a pour effet d'empêcher, de restreindre ou de fausser le jeu de la concurrence), même si celles-ci peuvent bénéficier de diverses exemptions en bloc. Il conviendrait cependant de noter que même si le MCR traite certaines entreprises communes comme des fusions, l'article 81 s'applique encore à des aspects des entreprises communes ayant pour objet ou pour effet de coordonner les comportements concurrentiels des entreprises qui demeurent indépendantes. Enfin, il est plus facile d'avancer comme justification la recherche d'efficience dans le cas d'une entreprise commune que dans le cas d'une fusion. Il semble logique de supposer que toutes ces différences peuvent avoir des répercussions sur la forme que peuvent prendre les entreprises communes.

Dans un certain nombre de pays de l'OCDE, il arrive que les entreprises communes tombent en même temps sous le coup des dispositions relatives à l'examen des fusions et des interdictions frappant les accords anticoncurrentiels. Ces dispositions peuvent effectivement permettre de lutter contre la multiplication des entreprises communes ayant des effets anticoncurrentiels, mais elles peuvent aussi compromettre des initiatives pouvant avoir des effets positifs sur la concurrence si elles compliquent à l'excès le processus d'examen.

(8) *Le droit communautaire de la concurrence et les politiques menées au niveau national sur le modèle de celle de l'Union européenne traduisent depuis toujours une conception plus théorique et moins économique des entreprises communes que celles qui prévalent dans beaucoup d'autres pays. Ils ont également tendance à être plus restrictifs vis-à-vis des entreprises communes. Ces différences semblent toutefois s'estomper peu à peu, ce dont témoigne l'émergence, au niveau communautaire, d'une nouvelle manière d'envisager les accords de coopération horizontale.*

En raison des facteurs historiques qui ont présidé à l'adoption des dispositions régissant l'examen des fusions, la Commission européenne et les autorités de la concurrence chargées d'appliquer les dispositions inspirées de celles en vigueur dans l'Union européenne, ont eu tendance à s'intéresser en priorité, dans leurs analyses, à la forme revêtue par les entreprises communes pour déterminer si elles devaient ou non être considérées comme des fusions. Que ce soit parce qu'ils avaient opté pour une définition plus restrictive de la notion de fusion ou parce que la différence de traitement entre les fusions et les accords de coopération horizontale était moins sensible dans leur législation, un grand nombre d'autres pays ont pour leur part réussi à orienter davantage leur analyse sur les retombées économiques des entreprises communes et sur la question du traitement

à appliquer aux accords assimilables à des ententes conclus dans le cadre d'entreprises communes.

Comme l'attestent les lignes directrices et les révisions des dispositions régissant les exemptions en bloc adoptées récemment, on assiste à un changement de cap notable dans la politique de la concurrence européenne au profit d'une vision plus économique et moins théorique. On peut penser que cette évolution contribuera à imposer une manière plus cohérente, et peut-être plus libérale, de considérer les entreprises communes. Avec le temps, ces changements pourraient en outre réduire l'incertitude qui règne autour du traitement appliqué aux entreprises communes, et contribuer ainsi à faire en sorte que le droit de la concurrence concourt à l'amélioration de la prospérité économique.

ISSUES PAPER

> Downsizing, divestment, mergers, acquisitions - these dominate the headlines. But the greatest change in corporate structure, and in the way business is being conducted may be the largely unreported growth of relationships that are not based on ownership but on partnership*:* joint ventures, minority investments cementing a joint-marketing agreement or an agreement to do joint research; and semi-formal alliances of all sorts. [Drucker (1999, 798)]

1. Introduction

Joint ventures are a competition policy growth area in which complex tradeoffs must be made between pro- and anti-competitive effects, and among various enforcement approaches. Moreover, it is an area where competition officials have come under pressure from the business community and parts of government and academia to clarify and liberalise policy ostensibly in order to improve dynamic efficiency and international competitiveness.

This note is intended to facilitate discussion of joint ventures by sketching out the important issues, posing some questions delegates might wish to explore, and steering the reader to some useful bibliography.

2. Definition

There are many ways in which joint ventures could be defined for competition policy purposes. Here is a small sample:

> ...entities that play a role in the marketplace in their own right and are owned or controlled by two or more persons...that are neither ordinary investors nor commonly controlled. [Werden (1998, 701-702) - footnotes omitted]

> ...an integration of operations between two or more separate firms, in which the following conditions are present: *(1)* the enterprise is under joint control of the parent firms, which are not under related control; *(2*) each parent makes a substantial contribution to the joint enterprise; *(3*) the enterprise exists as a business entity separate from its parents; and *(4)* the joint venture creates significant new enterprise capability in terms of new productive capacity, new technology, a new product, or entry into a new market. [Brodley (1982, 1526) - cited by Werden (1998, 701)]

> In the past - and to some extent, still today - practitioners and business executives have used the term "joint venture" to refer to a separate corporation owned by independent parents. A broader definition includes all cases where firms collaborate in carrying on some activity that each firm might otherwise perform alone. Sometimes the term has been used to refer to virtually any collaboration by competitors, short of merger. These definitions sweep in a vast range of joint activity, from a highly integrated production joint venture, to a loosely integrated marketing network, to a set of ethical rules regarding advertising. [Correia (1998, 738) - footnotes omitted]

For the purposes of this paper, "joint ventures" will be defined as participating firms agreeing by contract or otherwise to combine, other than by merger, significant productive (tangible or intangible) assets, and to do this by going beyond *ad hoc* co-operation. Crucially, they agree to perform a business function rather than simply agreeing to make a business decision in common. Inter-firm agreements that do not qualify as joint ventures will be referred to as "agreements".

Exactly how joint ventures are defined, and in particular how they are distinguished from mergers, could be critical in certain jurisdictions. This is because there could be important procedural differences in how joint ventures (or agreements in general) and mergers are treated.

2.1 Suggested discussion points

1. Please supply any definition of joint venture or strategic alliance, either general or specific to certain activities, contained in your law, regulations (including block exemptions), or policy guidelines. If there is no such definition, please describe how the courts in your jurisdiction define joint ventures. Regardless of where the definition is found, please describe how your jurisdiction distinguishes between joint ventures on the one hand, and agreements or mergers on the other.

2. Do you have any data or, failing that, anecdotal evidence indicating a marked change in the last few years in the incidence of joint ventures? Does any such trend occur across the board or is it concentrated in certain sectors, and if so, which ones? If there is an increasing or decreasing use of joint ventures, what appear(s) to be the underlying cause(s)? How, if at all, are trends in the use of joint ventures related to:

   a. globalisation; or

   b. changes in enforcement policies towards alternative methods of inter-firm collaboration, i.e. other agreements and mergers?

3. Why do firms engage in joint ventures, and how do competition agencies deal with them?

Assuming that firms wish to combine in various ways to obtain greater efficiency and/or market power, why do they choose to do this through a joint venture rather than either a more *ad hoc* arrangement, or a merger? In theory, a joint venture could be mimicked by continuous detailed co-operation in making decisions about the use of resources remaining under the separate control of individual participants. A joint venture could, however, accomplish this with lower transactions and organisation costs. A degree of integration should foster greater commitment and trust than would a mere agreement, hence spare the parties having to fully specify their legal relationship in advance. Compared with a merger, a joint venture might be easier, quicker and cheaper to arrange, and permit a more flexible, hence efficient joining of forces. It could also be less commercially risky and easier to undo than a full-fledged merger.

There are no doubt some cases where participants agree to perform through a joint venture something which would not or even could not be undertaken by each participant acting alone. Except for such cases, joint ventures will involve some loss of actual or potential competition. It follows that an adequate competition policy towards joint ventures should consider both their pro- and anti-competitive effects.

Assessing a joint venture's pro-competitive effects essentially involves considering the static and dynamic efficiencies obtained through co-operation to develop and perhaps produce new products, processes or means of distribution. As for anti-competitive effects, assessment would normally begin by examining the terms of a joint venture's founding agreement(s) including: the governance structure adopted; the joint venture's duration; and the nature and extent of assets transferred to the joint venture versus those retained by the participants. The principal focus of this analysis would be to ascertain the degree to which the participants retain the freedom, ability, and incentive to compete with the joint venture and/or each other. Any exclusivity clauses affecting third parties would also deserve attention. Assuming that inter-party competition will be constrained in some way, the investigation may have to be broadened to include making a formal market definition, estimating concentration levels, and considering the significance of any barriers to entry.

Clearly the above analysis should not apply to a sham joint venture, especially one containing sub-agreements ordinarily subject to summary condemnation and heavy sanctions, i.e. "naked" price fixing, output reductions, or market allocations. Scarce enforcement resources should not be expended assessing what, absent the disguise, is simply a "hard core cartel". The more difficult policy questions are whether and how competition agencies should:

a) improve the transparency and predictability of their joint venture analysis;

b) not only review a joint venture taken as a whole, but also engage in a supplementary examination of any sub-agreement that might have anti-competitive effects taken by itself;

c) work with joint venturers to encourage them to make commitments designed to reduce the risks of anti-competitive effects; and

d) reduce the sanctions applied to anti-competitive sub-agreements found in otherwise legitimate joint ventures.

It is difficult to spell out how a competition agency will analyse arrangements as potentially diverse as joint ventures. Nevertheless, even a general guide could prove helpful to businesses and their advisors and thereby facilitate arrangements benefiting consumers. Without such assistance, firms could understandably hold back from entering some net pro-competitive joint ventures. This is especially true of joint ventures which participants believe must contain sub-agreements that, standing alone, would be viewed as hard core cartels. It is important to draw a clear line between what will and will not be subject to summary condemnation coupled with severe penalties.

Competition review of joint ventures might include two parts. The first part would perform at least a preliminary balancing of the joint venture's pro- and anti-competitive effects. In some cases, this preliminary test would be sufficient to condemn or clear the joint venture. However, in cases where the analysis appeared inconclusive and/or sub-agreements having clear anti-competitive effects were found, part two would apply. Each of the problematic looking sub-agreements would be subject to close scrutiny. For example, the competition agency could ask whether: *a)* the restraint is reasonably connected to the joint venture, and if so; *b)* is it necessary to the achievement of the joint venture's pro-competitive efficiencies? If either of the answers are negative, the restraint, but not the joint venture as a whole, would be prohibited. Such treatment would be especially appropriate for a restraint which, standing *alone*, would be summarily condemned as a hard core cartel. If the sub-agreement is instead reasonably connected to the joint venture and necessary to achieve its pro-competitive efficiencies, the competition agency could accept or reject it depending on its net competitive effect.

Neither part of the suggested approach would be easy to apply, but the second would be particularly difficult. The problem is how to define "necessary" in this context. A restraint on competition could be absolutely necessary in that the joint venture would be abandoned without it. Or it could be necessary in the sense that it is the least anti-competitive way in which certain pro-competitive effects can be assured. Or, as a kind of middle ground, a restriction could simply make a joint venture more attractive to its participants because it helps ensure commitment and reduces free riding.

Competition agencies could decide to go somewhat beyond the kind of analysis sketched out above. To be specific, they could encourage commitments that would make a joint venture less likely to be anti-competitive. For example, joint venturers could be urged to keep certain assets out of a joint venture, refrain from giving it any marketing functions, and/or licence third parties to use technology or products discovered or perfected by the joint venture.

As for the level of sanctions that should be applied to joint ventures, this too turns out to be a bit complicated. If a joint venture, other than a sham, is found to be anti-competitive at something like what was described above as part one of the analysis, there seems to be little reason for going much beyond prohibiting it. It should probably be treated approximately like a prohibited anti-competitive merger. If instead, during part two of the analysis, anti-competitive sub-agreements are found that are not sufficiently connected to the joint venture, there may be good grounds for subjecting them to the same penalties attaching to the behaviour outside a joint venture context. For example, in the context of a joint venture to produce automobile parts, an agreement to fix the price of refrigerators should presumably be punished as "naked" price fixing. Moving away from this extreme, which is akin to a sham, things get more difficult. If there is some reasonable connection to the joint venture and to the realisation of its pro-competitive efficiencies, but a clause is nevertheless prohibited because of its net anti-competitive effect leniency seems warranted. In specific, a prohibited clause should perhaps benefit from more favourable treatment than would have been meted out to the same type of behaviour outside the joint venture context. Such leniency could be justified on fairness grounds as well as on a desire to avoid a chilling effect on pro-competitive joint ventures.

A desire to avoid a chilling effect seems to have motivated a number of competition agencies to publish enforcement guidelines regarding joint ventures. Some countries have gone considerably further by adopting what amount to special joint venture regimes. There appears to be considerable variation in this domain, but broadly speaking, one or more of the following measures have been used:

a) employing various presumptions and burden shifting provisions to fine tune the treatment accorded to joint ventures;

b) subjecting joint ventures to lower penalties;

c) providing a safe-harbour exemption for joint ventures falling below certain market share thresholds; and

d) providing general (block) exemptions for qualifying joint ventures.

There are a number of permutations possible in the above. For example, explicit joint venture policies could be limited to R & D or production so as to exclude co-operation on marketing functions. In addition, some kind of notice could be required for joint ventures to be eligible for more lenient treatment, and the treatment itself could be either permanent or time limited.

3.1 Suggested discussion points

1. Which, if any, types of competitive restraints are subject to summary condemnation in your jurisdiction, i.e. prohibited without much regard to their pro- or anti-competitive effects? If such arrangements appear as part of a legitimate joint venture, how are they treated?
2. In order to be permitted in a joint venture context, do you require evidence that apparently anti-competitive clauses or sub-agreements are: a) reasonably linked to the joint venture's pro-competitive effects; and b) that they are also somehow necessary to achieve the joint venture's positive impact? If so, please describe the kind of evidence and factors you look for in order to make this determination. Do you insist that any competitive restraints found in a joint venture, represent the least anti-competitive means of attaining its pro-competitive effects? If so, please describe the kind of evidence you look for in order to make that assessment.
3. Do you encourage joint venturers to make commitments designed to ensure that their joint venture does not have a net anti-competitive effect (i.e. commitments intended to reduce anti-competitive effects and/or to enhance offsetting pro-competitive efficiencies)? If so, please cite some representative examples and describe whether such commitments were enforceable or not, plus any steps taken to reduce associated monitoring costs.
4. If your country has an identifiable competition policy applied to "joint ventures" (as you define them), does it apply only if they have a particular legal form (e.g. equity participation in a separate legal entity), or a certain degree of permanence? If that is the case, why is it so?
5. If there has been empirical research tending to show that your joint venture laws and policies are either too liberal or not liberal enough, please identify that research and summarise the findings.
6. Does your agency balance the pro- and anti-competitive effects of a joint venture using a different "surplus" standard than it applies to mergers? For example, you might apply a strict consumers' surplus approach to joint ventures (e.g. cost reductions must be so great that price(s) will fall despite any increase in market power), but a more liberal total surplus approach to mergers [i.e. focus on net changes in the combined total of consumers' plus producers' surplus[1]. Please explain, if pertinent, why two different standards are being applied.
7. Are there plans afoot in your jurisdiction to modify or introduce policies applied to joint ventures? If so, please describe why these changes are being contemplated.
8. Please describe in detail one or more recent joint venture cases that your agency has worked on.

4. International Aspects of Joint Ventures and International Co-operation Among Competition Offices

In terms of frequency and the size of firms involved, international joint ventures appear to be more and more important. Moreover, as globalisation continues, even joint ventures confined to domestic firms could increasingly affect other countries' consumers. Although there is no necessary reason why joint ventures with international effects should be either more or less pro- or anti-competitive than strictly

1. For more description of the difference between the consumers' and total surplus approaches, see Williamson (1988).

domestic joint ventures, they do face some particular problems. The balance of pro- to anti-competitive effects could vary from one country to another, and even where this is not the case, dissimilar competition policies could produce across country variations in treatment accorded to joint ventures having international effects. Complementing this point, competition agencies may experience pressure to give lenient treatment to both domestic and international joint ventures on the grounds that they are needed to assure the international competitiveness of a nation's firms.

Thus, there may be room for soft convergence in laws and enforcement policies as regards joint ventures. There might also be support for measures to co-operate in investigating and devising remedies for joint ventures, especially those having international effects.

4.1 Suggested discussion points

1. Please describe any international joint venture cases you have dealt with where there have been differences in treatments accorded by the competition offices involved. In such cases, would facilitating information exchange or assisting in other jurisdictions' investigations have contributed to more similar resolutions being adopted in each country? Why or why not?
2. Please give examples, if there are any, of your agency co-operating with competition agencies in other jurisdictions on joint venture cases. Whether or not you have had such cases, what do you see as the main costs and benefits of such co-operation?
3. Please present any evidence you may be aware of that across country differences in policies towards joint ventures have prevented companies from making better use of international joint ventures, or have resulted in competitive distortions, i.e. one set of firms has been favoured over another.

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NOTE SUR LES QUESTIONS À EXAMINER

> Le redimensionnement, le désinvestissement, les fusions, les acquisitions – autant d'opérations qui font les grands titres des journaux. Mais l'évolution majeure de la structure des sociétés, et de la manière dont sont conduites leurs activités, est sans doute le développement, moins médiatisé, de relations fondées non pas sur l'actionnariat mais sur le partenariat*:* entreprises communes, prises de participation minoritaires dans le cadre d'un accord conjoint de commercialisation ou d'un accord de recherche en commun et alliances semi-officielles de toutes sortes. [Drucker (1999, 798)]

1. Introduction

La question des entreprises communes est un domaine dans lequel la politique de la concurrence évolue suivant des arbitrages complexes entre effets favorables et effets contraires à la concurrence, et entre les différents moyens d'assurer le respect de la réglementation. Il s'agit par ailleurs d'un domaine où les autorités de la concurrence sont soumises aux pressions du monde des affaires et de certains milieux politiques et universitaires visant à une clarification et à une plus grande ouverture des politiques afin d'améliorer les efficiences dynamiques et la compétitivité internationale.

La présente note vise à faciliter la discussion sur les entreprises communes en présentant les principaux aspects des questions importantes, en évoquant certains points que les délégués pourraient souhaiter approfondir et en orientant le lecteur vers une bibliographie utile.

2. Définition

Il existe de nombreuses manières de définir les entreprises communes dans le cadre de la politique de la concurrence. En voici un petit échantillon:

> ...entités qui jouent un rôle de plein droit sur le marché et sont détenues ou contrôlées par deux personnes au moins...qui ne sont pas des investisseurs ordinaires et ne sont pas non plus sous contrôle commun. [Werden (1998, 701-702) – notes omises]

> ...un ensemble d'opérations entre deux entreprises distinctes au moins, réunissant les conditions suivantes: *(1)* l'entreprise est sous le contrôle conjoint des sociétés-mères, qui ne sont pas sous un contrôle commun; *(2)* chaque société-mère apporte une contribution importante à l'entreprise commune; *(3)* l'entreprise existe en tant qu'entité commerciale distincte de ses sociétés-mères; et *(4)* l'entreprise commune crée de nouvelles capacités importantes telles que nouvelle capacité de production, nouvelles technologies, nouveau produit, ou accès à un nouveau marché. [Brodley (1982, 1526) – cité par Werden (1998, 701)]

> Par le passé – et, dans une certaine mesure encore aujourd'hui – les spécialistes et les dirigeants d'entreprises ont utilisé le terme d'"entreprise commune" pour désigner une entreprise distincte détenue par des sociétés-mères indépendantes. Une définition plus large inclut tous les cas où les

> entreprises collaborent à la réalisation d'une activité que chaque entreprise pourrait par ailleurs réaliser seule. Le terme a parfois été utilisé pour désigner pratiquement toute collaboration entre concurrents, à l'exception des fusions. Ces définitions couvrent une vaste gamme d'activités en commun, de l'entreprise commune de production fortement intégrée à un réseau de commercialisation peu intégré ou à un ensemble de règles d'éthique concernant la publicité. [Correia (1998, 738) – notes omises]

Dans le présent document, le terme "entreprises communes" désigne des entreprises participantes convenant par contrat ou par tout autre moyen de regrouper, autrement que par fusion, des actifs de production importants (corporels ou incorporels) et ce, au-delà d'une coopération ponctuelle. Pour l'essentiel, elles conviennent de réaliser une activité commerciale plutôt que de simplement prendre une décision commerciale en commun. Les accords inter-entreprises qui ne répondent pas à la définition des entreprises communes sont désignés par le terme d' "accords".

Compte tenu des différences importantes dans les procédures de traitement applicables aux entreprises communes (ou aux accords en général) et aux fusions, il peut se révéler difficile dans certaines juridictions de dire exactement combien d'entreprises communes font l'objet d'une définition et en particulier comment elles sont distinguées des fusions.

2.1 Eléments de discussion proposés

1. Indiquez toute définition de l'entreprise commune ou de l'alliance stratégique, générale ou spécifique à certaines activités, figurant dans votre droit, dans votre réglementation (notamment les exemptions globales), ou dans vos programmes d'action. En l'absence d'une telle définition, décrivez la manière dont les tribunaux de votre pays définissent les entreprises communes. Qu'il existe ou non une définition, décrivez la manière dont votre pays établit la distinction entre les entreprises communes, d'une part, et les accords ou fusions, d'autre part.

2. Disposez-vous de données ou, à défaut, avez vous connaissance de faits indiquant une nette évolution de l'incidence des entreprises communes au cours de ces toutes dernières années? Cette tendance est-elle générale ou est-elle concentrée dans certains secteurs et, dans ce cas, lesquels? Si un recours croissant ou décroissant aux entreprises communes est constaté, quelle(s) semble(nt) en être la (les) causes sous-jacente(s)? L'évolution du recours aux entreprises communes est-elle liée, et de quelle manière, à:

3. la mondialisation; ou

4. l'orientation des politiques de mise en application des lois vers de nouvelles méthodes de collaboration inter-entreprises, à savoir autres accords et fusions.

3. Pourquoi les entreprises s'engagent-elles dans l'entreprise commune et comment les autorités de la concurrence affrontent-elles ce phénomène?

En supposant que les entreprises souhaitent se rapprocher de différentes manières pour une plus grande efficience et/ou un plus grand pouvoir sur le marché, pourquoi choisissent-elles de le faire par le biais d'une entreprise commune plutôt qu'au moyen d'un accord plus spécifique ou d'une fusion ? En théorie, une coopération étroite et continue en matière de prise de décisions concernant l'utilisation de ressources qui demeurent sous le contrôle séparé de chacun des participants, pourrait tenir lieu d'entreprise commune. Une entreprise commune pourrait toutefois tenir ce rôle avec des coûts de transaction et

d'organisation moindres. Un certain niveau d'intégration est susceptible de favoriser un plus grand engagement et une plus grande confiance qu'un simple accord, et donc d'éviter aux parties en cause d'avoir à préciser exactement leurs liens juridiques à l'avance. Par rapport à une fusion, une entreprise commune peut être établie plus facilement, plus rapidement et à moindre coût et permettre une conjugaison plus souple, et donc plus efficace, des forces. Elle peut également présenter moins de risques du point de vue commercial et être plus facilement démantelée qu'une fusion à part entière.

Il existe, certes, des cas où les participants conviennent d'entreprendre par le biais d'une entreprise commune des activités qui ne seraient ou ne pourraient pas être entreprises individuellement par chaque participant. A l'exception de ces cas, l'établissement d'une entreprise commune implique une certaine perte de compétitivité réelle ou potentielle. Il s'ensuit qu'une politique adéquate de concurrence à l'égard des entreprises communes doit tenir compte à la fois des effets favorables et contraires à la concurrence.

L'évaluation des effets favorables à la concurrence d'une entreprise commune suppose essentiellement de considérer les efficiences statiques et dynamiques obtenues au travers de la coopération pour développer et éventuellement produire de nouveaux produits, de nouveaux processus ou de nouveaux moyens de distribution. En ce qui concerne les effets contraires à la concurrence, l'évaluation doit normalement commencer par un examen des dispositions portant création d'une entreprise commune, notamment : la structure de gouvernement d'entreprise adoptée, la durée de l'entreprise commune et la nature et le volume des actifs transférés à l'entreprise commune par rapport à ceux conservés par les participants. Le principal objet de cette analyse devrait être de déterminer dans quelle mesure les participants conservent la liberté et la capacité de soutenir la concurrence de l'entreprise commune et/ou la concurrence entre elles et comment ils y sont incités. Toutes les clauses d'exclusivité affectant des tiers méritent également attention. En supposant que la concurrence entre les parties soit limitée de quelque manière, l'analyse devra être élargie pour faire en sorte que soit incluse une définition officielle du marché, une estimation des niveaux de concentration et un examen de l'importance de tout obstacle à l'entrée.

Il va de soi que l'analyse ci-dessus ne doit pas s'appliquer à une entreprise commune fictive, notamment à une entreprise caractérisée par des accords de sous-traitance généralement passibles de condamnations immédiates et de lourdes sanctions, c'est-à-dire des accords de fixation de prix non déguisés, de réduction de la production ou de répartition des marchés. Les maigres ressources dont disposent les autorités de contrôle ne devraient pas être consacrées à l'évaluation de ce qui, au-delà de la façade, ne constitue qu'une simple entente injustifiable. Les questions les plus difficiles en ce qui concerne la politique qui doit être appliquée par les autorités de la concurrence sont de savoir si et de quelle manière elles devraient:

a. améliorer la transparence et la prévisibilité de leur analyse des entreprises communes;

b. examiner non seulement une entreprise commune dans son ensemble, mais aussi se livrer à une investigation complémentaire à la recherche de tout accord de sous-traitance qui pourrait à lui seul avoir des effets anticoncurrentiels ;

c. oeuvrer en collaboration avec les entreprises communes en vue de les encourager à prendre des engagements de réduction des risques liés aux effets anticoncurrentiels ;

d. réduire les sanctions appliquées aux accords de sous-traitance anticoncurrentiels découverts au sein d'entreprises communes par ailleurs légitimes.

Il est difficile d'exposer la manière dont une autorité de la concurrence doit analyser des accords aussi différents potentiellement que les entreprises communes. Néanmoins, des lignes directrices, même

générales, pourraient se révéler utiles aux entreprises et à leurs conseillers, et faciliter ainsi les accords bénéficiant aux consommateurs. A défaut d'une telle assistance, les entreprises pourraient s'abstenir de participer à des entreprises communes pourtant nettement favorables à la concurrence. Ceci vaut particulièrement pour les entreprises communes dont les participants estiment qu'elles pourraient comporter des accords de sous-traitance qui, considérés individuellement, pourraient être vus comme des ententes injustifiables. Il est important d'établir une nette distinction entre ce qui est et ce qui n'est pas passible de condamnations immédiates assorties de sanctions sévères.

L'examen des entreprises communes du point de vue de la concurrence doit comporter deux volets. Le premier doit comporter au moins une évaluation préliminaire des effets de l'entreprise commune favorables et contraires à la concurrence. Dans certains cas, cette analyse préliminaire est suffisante pour condamner ou blanchir l'entreprise commune. Toutefois, dans les cas où l'analyse se révèle peu concluante et/ou des accords de sous-traitance ayant des effets nettement anticoncurrentiels sont découverts, c'est le deuxième volet qui s'applique. Chacun des accords de sous-traitance qui semble poser problème doit être soumis à un examen approfondi. Par exemple, l'autorité de la concurrence peut demander si: *a)* la restriction peut raisonnablement être considérée comme liée à l'entreprise commune et dans ce cas si *b*) elle est nécessaire pour permettre à l'entreprise commune d'obtenir ses efficiences concurrentielles ? Si l'une de ces réponses est négative, la restriction, mais non l'entreprise commune dans son ensemble, doit être interdite. Ce traitement est particulièrement approprié dans le cas d'une restriction qui, considérée individuellement, justifierait l'application d'une condamnation immédiate en tant qu'entente injustifiable. Lorsqu'il existe en revanche des raisons de penser que l'accord de sous-traitance est lié à l'entreprise commune et lui est nécessaire pour obtenir ses efficiences concurrentielles, l'autorité de la concurrence peut l'accepter ou le rejeter en fonction de son effet concurrentiel net.

Aucun des volets de cette démarche n'est facile à appliquer, mais le second est tout particulièrement difficile à mettre en place. Le problème est de savoir comment définir la notion de "nécessaire" dans ce contexte. Une restriction à la concurrence peut être absolument nécessaire dans la mesure où l'entreprise commune n'existerait plus sans elle. Elle peut être également nécessaire en ce sens qu'elle constitue la manière la moins anticoncurrentielle de préserver certains effets favorables à la concurrence. Entre ces deux possibilités, une restriction peut aussi tout simplement rendre une entreprise commune plus attirante pour ses participants du fait qu'elle exige des engagements et réduit les possibilités de parasitisme.

Les autorités de la concurrence peuvent décider d'aller au-delà du type d'analyse ébauché ci-dessus. Elles peuvent notamment encourager des engagements qui rendent une entreprise commune moins susceptible d'être anticoncurrentielle. Par exemple, les participants à une entreprise commune peuvent être exhortés à conserver certains actifs en dehors de l'entreprise commune, à s'abstenir de lui attribuer toute fonction de commercialisation et/ou d'attribuer des licences à des tiers pour l'utilisation de technologies ou de produits découverts ou développés par l'entreprise commune.

En ce qui concerne le niveau des sanctions qui devraient être appliquées aux entreprises communes, le problème semble un peu compliqué. Si une entreprise commune, autre qu'une entreprise fictive, se révèle être anticoncurrentielle à un stade correspondant au premier volet de l'analyse ci-dessus, il semble qu'il y ait peu de motif de lui infliger une autre peine que l'interdiction. Elle sera alors traitée plus ou moins comme une fusion anticoncurrentielle interdite. Si en revanche, au stade du second volet de l'analyse, sont découverts des accords de sous-traitance anticoncurrentiels qui ne sont pas suffisamment liés à l'entreprise commune, il peut exister de bons motifs pour les soumettre aux mêmes sanctions que celles applicables à des comportements observés autrement que dans le contexte des entreprises communes. Par exemple, dans le contexte d'une entreprise commune constituée en vue de la production de pièces automobiles, un accord de fixation du prix des réfrigérateurs sera probablement sanctionné en tant qu'accord de fixation des prix non déguisé. En dehors de ce cas extrême, qui s'apparente à une activité

fictive, les choses deviennent plus compliquées. S'il existe un lien raisonnable avec l'entreprise commune et avec la réalisation de ses efficiences concurrentielles mais qu'une clause est néanmoins interdite en raison de ses effets nettement anticoncurrentiels, l'indulgence est pratiquement assurée. En l'espèce, une clause interdite peut peut-être bénéficier d'un traitement plus favorable que celui qui aurait été réservé au même type de comportement en dehors du contexte de l'entreprise commune. Cette indulgence peut être justifiée par des motifs d'équité ainsi que par un souci d'éviter un effet paralysant sur des entreprises communes concurrentielles.

Le souci d'éviter cet effet paralysant semble avoir motivé un certain nombre d'autorités de la concurrence à publier des directives en matière d'application des dispositions relatives aux entreprises communes. Certains pays sont allés beaucoup plus loin en adoptant ce qui revient à des régimes spéciaux applicables aux entreprises communes. Il semble exister des différences considérables dans ce domaine, mais de manière générale une ou plusieurs des mesures suivantes ont été utilisées:

a. recours à diverses dispositions en matière de présomption et de répercussion de la charge pour ajuster le traitement appliqué aux entreprises communes ;

b. application de sanctions moins sévères aux entreprises communes ;

c. octroi d'une immunité antitrust (" safe harbour") aux entreprises communes en dessous de certains seuils de parts de marché ; et

d. octroi d'exemptions générales (de groupe) pour les entreprises communes répondant aux critères fixés.

Ces mesures font l'objet d'un certain nombre de variantes. Par exemple, les mesures applicables aux entreprises communes peuvent être limitées à la R&D ou à la production de manière à exclure la coopération dans le domaine des fonctions de commercialisation. En outre, certaines formes de notification peuvent être exigées pour que les entreprises communes puissent bénéficier d'un traitement plus indulgent et le traitement lui-même peut être soit appliqué de manière permanente soit limité dans le temps.

3.1 Éléments de discussion proposés

1. Quels sont éventuellement les types de restriction à la concurrence qui sont dans votre pays passibles de condamnation immédiate, c'est-à-dire interdits quels que soient leurs effets favorables ou contraires à la concurrence ? Si ces arrangements entrent dans le cadre d'une entreprise commune légitime, comment sont-ils traités ?

2. Pour qu'ils soient autorisés dans le contexte d'une entreprise commune, exigez-vous la preuve que des clauses ou des accords de sous-traitance apparemment anticoncurrentiels sont: *a)* raisonnablement liés aux efficiences concurrentielles de l'entreprise commune; et *b)* qu'ils sont d'une certaine manière nécessaire à l'impact positif de l'entreprise commune ? Dans ce cas, décrivez le type de preuves et d'éléments que vous recherchez afin de pouvoir vous déterminer. Insistez-vous sur le fait que toute restriction à la concurrence existant dans une entreprise commune doit constituer le moyen le moins anticoncurrentiel d'atteindre des effets favorables à la concurrence ? Si oui, décrivez le type de preuves que vous recherchez en vue d'effectuer cette évaluation.

3. Encouragez-vous les entreprises communes à prendre des engagements en vue d'améliorer la nature concurrentielle de l'entreprise ? Si oui, citez quelques exemples représentatifs et

précisez si ces engagements ont pu être appliqués ou non, en décrivant toute mesure éventuellement prise pour réduire les coûts de surveillance liés à celle-ci.

4. S'il existe dans votre pays une politique de la concurrence spécifiquement applicable aux "entreprises communes" (suivant la définition que vous en donnez), celle-ci ne s'applique-t-elle qu'à une forme juridique donnée (par exemple participation au capital d'une entité légale distincte), ou à un certain niveau de stabilité ? Si tel est le cas, pourquoi en est-il ainsi ?

5. Si des travaux empiriques ont tendu à montrer que les lois et les politiques applicables aux entreprises communes dans votre pays sont soit trop soit pas assez libérales, citez ces travaux en en résumant les conclusions.

6. Votre autorité de la concurrence évalue-t-elle les effets favorables et contraires à la concurrence dans une entreprise commune à partir d'un critère de rente différent de celui qu'elle applique aux fusions ? Par exemple, elle pourrait appliquer aux entreprises communes un critère strict de rente du consommateur (par exemple les réductions de coûts doivent être telles que les prix ne peuvent que baisser en dépit de tout accroissement éventuel du pouvoir de marché), mais une approche plus libérale de la rente totale pour les fusions (consistant à s'attacher aux variations nettes de la rente totale combinée pour les consommateurs et pour les producteurs)[1]. Expliquez le cas échéant la raison pour laquelle deux critères différents sont appliqués.

7. Existe-t-il des projets en cours dans votre pays pour modifier ou introduire des mesures spécifiques aux entreprises communes ? Si oui, précisez la raison pour laquelle ces modifications sont envisagées.

8. Décrivez en détail un ou plusieurs cas récents de création d'entreprises communes sur lesquels vos autorités ont eu à intervenir.

4. Aspects internationaux des entreprises communes et coopération internationale entre autorités de la concurrence

Compte tenu du nombre et de la taille des entreprises concernées, les entreprises communes internationales revêtent de plus en plus d'importance. De plus le développement de la mondialisation fait que même les entreprises communes confinées à l'intérieur des frontières pourraient de plus en plus affecter la consommation dans les autres pays. Bien qu'il n'existe aucune raison précise pour que les entreprises communes dont les effets se font sentir au niveau international soient plus ou moins favorables ou contraires à la concurrence que des entreprises communes à caractère strictement national, elles doivent réellement faire face à des problèmes particuliers. L'équilibre entre les effets favorables et contraires à la concurrence peut varier d'un pays à l'autre et, même lorsque ce n'est pas le cas, des politiques de concurrence différentes peuvent entraîner des différences dans le traitement appliqué par les pays aux entreprises communes ayant des effets au niveau international. Les autorités de la concurrence peuvent en outre subir des pressions pour appliquer un traitement favorable aux entreprises communes tant nationales qu'internationales au motif qu'elles sont nécessaires pour garantir la compétitivité internationale des entreprises du pays.

1. Pour une description plus détaillée de la différence d'approche entre rente pour les consommateurs et rente totale, voir Williamson (1988).

Ainsi, il existe un terrain favorable à une convergence progressive des législations et des politiques de mise en application de celles-ci en ce qui concerne les entreprises communes. Des mesures pourraient également être prises pour favoriser une coopération dans le domaine de la recherche et de la mise au point de dispositifs applicables aux entreprises communes, en particulier celles ayant des effets au niveau international.

4.1 Éléments de discussion proposés

1. Décrivez tous les cas d'entreprises communes internationales dont vous avez été saisis et dans lesquels vous avez constaté des différences de traitement de la part des autorités de concurrence concernées Dans ces cas, des mesures facilitant l'échange d'informations ou prévoyant une assistance à d'autres pays en matière d'investigation auraient-elles contribué à l'adoption de décisions plus uniformes entre les différents pays ? Pourquoi ou pourquoi pas ?

2. Donnez des exemples, le cas échéant, de coopération de vos autorités avec les autorités de la concurrence d'autres pays en matière d'entreprises communes. Que vous ayez ou non été dans ce cas, quels sont pour vous les principaux coûts et avantages d'une telle coopération

3. Donnez tous les exemples dont vous pourriez avoir connaissance et qui tendraient à prouver que les différentes politiques appliquées par les pays aux entreprises communes ont empêché les entreprises de faire un meilleur usage des entreprises communes à caractère international, ou se sont traduites par des distorsions de concurrence, c'est-à-dire qu'un groupe d'entreprises a été favorisé par rapport à un autre.

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AUSTRALIA

1. Definition

1.1 Australia's competition legislation

Australia's national competition statute, the *Trade Practices Act 1974* (TPA), covers joint ventures regulated by contract, and joint ventures defined by incorporation as well as effectively lifting the 'corporate veil' of an incorporated joint venture to encapsulate the purpose for incorporation.

Joint ventures are expressly defined under the TPA[1] to provide that any reference in the TPA to a joint venture refers to … 'an activity in trade or commerce:

(i) carried on jointly by two or more persons, whether or not in partnership; or

(ii) carried on by a body corporate formed by two or more persons for the purpose of enabling those persons to carry on that activity jointly by means of their joint control, or by means of their ownership of shares in the capital, of that body corporate'.

The definition also provides that the memorandum and articles of association or other constituting documents of the body corporate formed for the purpose of joint venture activities will be regarded as a contract, arrangement or understanding made for the purposes of the joint venture.

Reflecting the quite limited 'special treatment' of joint ventures under the TPA, there is no case law under the TPA relating to the definition of joint ventures. .

1.2 Comparing mergers and joint ventures

The literature indicates that joint ventures should be distinguished from mergers because they generally involve less commitment than a merger. 'In a merger, two or more companies combine all of their assets to create a new entity. In a joint venture, two or more companies combine less than *all* of their assets to create a new entity'[2]. Kitch[3] considers that a joint venture lies on a continuum between a cartel or 'naked price fix' and a single firm, so it involves less restraint than a merger and more benefits than a naked price fix. Since joint ventures involve less restraint than a merger, there is a consensus of opinion that they should be treated more leniently than a merger by antitrust authorities. Shapiro and Willig[4] argue that '[t]o the extent that the production joint venture preserves the assets, the ability and the incentives of the parents to compete independently of one another and of the production joint venture, the venture will be recognised to pose less of a threat to competition than would a full merger of the parents'.

Joint ventures have therefore been viewed more favourably by legislators and antitrust authorities because they allow for the continued existence of the parents and potentially continued competition

between the parents; and in comparison with a merger, joint venture agreements are more easily modified or dismantled at a later date.

A reasonable rule of thumb is that if the joint venture parents would be allowed to merge, then there should be little concern about the parents forming a joint venture.[5] However there are two minor caveats to this rule. Kitch[6] notes that there may be overlapping joint ventures within an industry and that these would need to be considered when analysing either the effect of a merger or of a new joint venture. Nye[7] points out that if a joint venture leads to less cost reduction than a merger then a merger may actually lead to less of an increase in price than a joint venture. In this second case, if a merger was more efficient from the parents' perspective and a proposed merger would pass the scrutiny of Australia's competition regulator, the Australian Competition & Consumer Commission (ACCC) then, all other things being equal, it would be rational for the firms to merge rather than form a joint venture.

1.3 Incidence of joint ventures

Anecdotally it is perceived that the incidence of joint ventures in Australia has increased over recent years.

Joint ventures are said to be particularly attractive to firms in highly dynamic industries, such as energy, health, information technology and financial services. Australian experience also points to a wide use of collaborative arrangements, such as tolling and co-production agreements in many traditional, so called "old economy" sectors. Food processing, cement, quarrying and building materials sectors provide examples of these types of ventures.

There is growing usage in the e-commerce environment. It is expected that alliances and collaborations in the e-commerce "new economy" will become increasingly widespread. Many of the alliances being contemplated and established are at the instigation of traditional companies facing increased competitive pressure and seeing alliances based on Internet platforms as a major cost saving opportunity.

2. Treatment of joint ventures

2.1 Competitive restraints on joint venture activity

Joint ventures are treated differently under the TPA to other potentially anticompetitive arrangements between firms. While price fixing[8] is generally *per se* illegal under the TPA, some joint venture price fixing is not *per se* illegal.

This arises because subsection 45A(2) excepts some pricing activities of joint ventures from *per se* illegality. These activities are contracts, arrangements or understandings for the purposes of a joint venture to the extent that they relate to:

a) the joint supply by 2 or more parties to the joint venture, or the supply by all the parties to the joint venture in proportion to their interests in the joint venture, of goods jointly produced by all the parties in pursuance of the joint venture;

b) the joint supply by 2 or more of the parties to the joint venture of services in pursuance of the joint venture, or the supply by all the parties to the joint venture in proportion to their

interests in the joint venture of services in pursuance of, and made available as a result of, the joint venture; or

c) in the case of a joint venture carried on by a body corporate:

(i) the supply by that body corporate of goods produced by it in pursuance of the joint venture; or

(ii) the supply by that body corporate of services in pursuance of the joint venture, not being services supplied on behalf of the body corporate by a shareholder or a related body corporate.

The overall effect of s 45A(2) is that where joint venture parties enter contracts, arrangements or understandings which fix the price for supply of goods or services from the joint venture, they are not deemed illegal *per se* under section 45A(1). However the effect of such joint venture activities continues to be regulated by section 45 which prohibits contracts, arrangements or understandings which have the effect of substantially lessening competition.

Parties to an incorporated joint venture are not treated as favourably under s 45A(2)(c) as are parties to a contractual joint production agreement under s 45A(2)(a) and (b). This is by virtue of the fact that shareholders in a joint venture company receive no immunity from section 45A(1) where they acquire goods from the joint venture company and seek to fix the price of re-supply between themselves. In contrast, joint venture parties who have jointly agreed to produce goods may also agree to set the price at which they will individually re-supply those goods.

However, section 4J completely lifts the 'corporate veil' to examine the motivation of the shareholders for incorporation, and thus allow some scope for examining the competition effects of establishing such an enterprise. Section 45A(2)(c) reduces this intrusion somewhat by allowing that the price set by the joint venture company for goods and services it supplies will not be regarded as per se price fixing (although these activities can be outlawed if they are found to substantially lessen competition). As far as the resupplying activities of the shareholders are concerned, this is a completely separate business activity from the production and supply arrangements engaged in by the joint venture company, and must therefore come under separate scrutiny. The way around this application of section 45(2) is for the shareholders in the joint venture company to form a separate joint venture partnership for re-supply of goods and services produced by the company.

2.2 Evaluation of joint venture arrangements

Joint ventures are otherwise subject to the normal operation of the TPA and if they are likely to contravene the TPA, they may be authorised by the ACCC where it can be established that they result in a net public benefit. Both of the issues described in the paper are factors that the ACCC would take into consideration during its consideration of any application for an authorisation. Moreover, if the same benefits from the joint venture could be achieved through less anti-competitive means, the ACCC has the power to impose conditions when granting authorisation. The benefits from the arrangement must also be 'public' benefits that directly accrue from the activity or arrangement in question. Other factors that the ACCC may consider in deciding whether to grant authorisation include:

- fostering business efficiency, especially when this results in improved international competitiveness;

- industry rationalisation resulting in more efficient allocation of resources and in lower or contained unit production costs;

- expansion of employment or prevention of unemployment in efficient industries or employment growth in particular regions;

- promotion of industry cost savings resulting in contained or lower prices at all levels in the supply chain;

- promotion of competition in industry;

- promotion of equitable dealings in the market;

- growth in export markets;

- development of import replacements;

- economic development, for example of natural resources through encouraging exploration, research and capital investment;

- assistance to efficient small business, for example guidance on costing and pricing or marketing initiatives which promote competitiveness;

- industrial harmony;

- improvement in the quality and safety of goods and services and expansion of consumer choice; and

- supply of better information to consumers and business to permit informed choices in their dealings.

The competition issues that would be considered include:

- Concentration, import competition, barriers to entry, countervailing power, supply elasticities of parties, market demand elasticity etc.

- Both unilateral and the co-ordinated effects of the joint venture.

- Need to consider the counter factual: would the joint venture partner(s) have entered/left the market in the absence of the joint venture? This will alter the effect on output and competition. The answer seems likely to differ in markets which are static, declining or growing and according to whether technology and minimum efficient scale requirements are changing.

2.3 Conditions placed on joint ventures

The ACCC has the power to accept court enforceable undertakings in relation to conduct or activity that might otherwise be anti-competitive. Such undertakings may be given by the parties involved to remove the ACCC's concerns about the behaviour such that it is no longer considered to be in breach of the TPA. In accepting s 87B undertakings, the ACCC strongly favours the acceptance of structural, as

opposed to behavioural, undertakings. Structural undertakings are easier to establish at the outset, are easier to monitor and in any event may often require less or no monitoring after the fact.

2.4 Empirical research

No empirical research is known to have been conducted in Australia to determine or discuss whether Australia's joint venture laws and policies are too liberal or not liberal enough.

2.5 Measuring the benefits of joint ventures versus mergers

In the authorisation procedure under the TPA – where public benefits are weighed against anti-competitive detriments – the ACCC uses the same 'surplus' test for both mergers and joint ventures. In order for either type of conduct to be authorised, and therefore exempt from the trade practices legislation, a net consumer surplus must be demonstrated.

2.6 The future of joint venture regulation in Australia

There are no plans in Australia to change the laws or policies relating to joint ventures.

3. Case Study examples

3.1 Mobil/Caltex

In August 1998 the ACCC considered a joint venture between Mobil Oil Australia Limited and Shell Australia Limited which proposed a joint venture of the refining assets of Mobil and Shell and a new company to be jointly owned by the two petroleum manufacturers.

In October 1998 the ACCC advised the parties that its preliminary view was that the proposed joint venture was likely to result in a substantial lessening of competition. Four key areas of concern were identified by the ACCC.

- Efficiencies – the joint venture parties claimed that the arrangement was motivated solely by anticipated efficiencies. The ACCC was cautious to ensure that the extent of these efficiencies were not overstated by the parties.

- Concentration – the market for the supply of refined petroleum products in Australia is limited to four manufacturers in competition with imports. This competition is further reduced if markets are identified according to States or regions. Accordingly, any joint venture between two of the manufacturers is likely to have an effect on competition at the refinery level and downstream in wholesale and retail markets. In particular, the ACCC was concerned that the joint venture would have foreclosed existing competition at the refinery level and would have significantly enhanced the scope for the refinery partners to engage in conscious parallelism and co-ordinated behaviour in downstream markets.

- Import competition – while petroleum imports to Australia have increased over recent years, the ACCC questioned whether imports were likely to remain a threat in the future. At the time of the proposal imports only represented 3 per cent of the market.

- Market dynamics – if the joint venture were to proceed it was expected that the two remaining refiners, BP and Ampol/Caltex, would have entered into a similar joint refining venture, taking the number of refining operators in Australia from four to two.

In January 1999 the parties announced that the joint venture would not proceed. In addition to the problems (and therefore delays) raised by the ACCC, Mobil further indicated that its world-wide merger with Exxon would have overlapped with the proposed Australian joint venture and created too many regulatory problems.

3.2 CSR/Mackay Refined Sugars

The ACCC considered a joint venture by CSR and Mackay Refined Sugars (MRS) in 1997. The two companies proposed to enter into a joint venture, encompassing their combined sugar refining, distribution and marketing assets, which would effectively reduce the number of refiners from four to three. The ACCC had refused to grant authorisation to an earlier proposed joint venture in 1993 at a time when imports were not considered to be an effective competitive constraint due to the existence of a $A 55 per tonne tariff on raw and refined sugar imports.

In 1997, the ACCC identified a number of significant changes which had occurred in the sugar refining industry since 1993. In particular, the tariff was to be eliminated from 1 July 1997 and there had also been a significant increase in world and regional refining capacity. This was considered likely to result in an increased threat of imports into Australia. The ACCC concluded that the proposed joint venture was unlikely to substantially lessen competition in the relevant market for the supply of refined sugar and thus granted the authorisation.

3.3 Elders/Wesfarmers Dalgety

In 1997 the ACCC also considered a proposal to establish a joint venture in the wool industry. The proposal involved the two largest wool broking firms in Australia, Elders and Wesfarmers Dalgety, setting up an entity called Global Wool designed to operate as a full range provider of merchanting and marketing services to the wool industry. The ACCC notified the parties that it was concerned that the venture may lead to a substantial lessening of competition due to a lack of potential or actual competition capable of constraining the exercise of market power by Global Wool through its substantial share of the Australian wool clip. The parties to the venture later announced that the proposal would not proceed due to commercial considerations.

3.4 Electric Lamp Manufacturers (Australia) Pty Ltd[9]

Electric Lamp Manufacturers (Australia) Pty Ltd (ELMA) applied for authorisation of agreements for the joint manufacture of lamps in Australia, and notification of associated exclusive dealing arrangements.

The co-production agreement for which ELMA sought authorisation involved: agreement on the types of lamps to be produced; purchasing and selling arrangements; and setting the prices for the sale of lamps by ELMA.

The exclusive dealing arrangement which ELMA had notified the Trade Practices Commission (TPC),[10] provided that the joint venture parties would form a partnership for the sale of ELMA's surplus manufacturing capacity to third party domestic customers.

The TPC accepted that the joint venture delivered significant cost savings and production efficiency by allowing the exploitation of economies of scale not achievable by the parties independently in smaller manufacturing plants. The TPC considered that the effect of the joint venture manufacture of lamps was not substantial, due to effective competition between the joint venture parties at distribution level, and competition from independent imports in Australia.

One element of the joint manufacturing agreement required that ELMA obtain all its production inputs from Phillips and GEC (two of the joint venture parties). The TPC did not authorise this provision of the agreement as there as there was no definable public benefit and had a substantial anti-competitive effect by restricting the opportunity for competitors to supply ELMA with machinery, equipment and materials.

The TPC considered that overall, given the existence of import competition, forcing the joint venture parties to independently distribute lamps to third parties may deny them capacity to meet import competition. It also determined that import competition was effective.

3.5 Pasminco Ltd, Australian Mining and Smelting Ltd[11]

In the Pasminco authorisation decision the TPC was asked to approve the establishment of a jointly owned zinc and lead production entity to be owned initially 50-50 by CRA and North. The applicants proposed, however, that the companies would maintain independent marketing arms. The TPC approved the acquisition, but at the same time recognised that a monopoly at the production level could lead to a monopoly at the marketing level, despite the independence proposed by the applicants, but was not prepared to make its determination conditional on maintenance of specific marketing arrangements.

The TPC recognised several public benefits arising from the joint venture, including enhanced international competitiveness, rationalisation efficiencies, reduction of operating costs in a mature market through increased concentration and more integrated production.

The TPC however considered that the joint venture would substantially lessen competition in the market for the supply of zinc, and that some users may suffer detriment notwithstanding the commitment to separate marketing by the two joint venturers. It noted that the arrangement would lead to a monopoly at production level, and hence may do so at the marketing level. Imports of zinc may influence the maximum price which the parties may set, but generally small users are unable to access imports, their availability fluctuates, and the availability of imports is unlikely to pose a serious check on the joint venture in individual circumstances.

The TPC recognised that the situation raised the desirability of some form of price control to be imposed on the joint venture. However it did not consider that there was any remedy available which could effectively constrain the joint venture, and thus would be a token gesture. However the joint venture's supply terms provided some incentive to the parent companies marketing arms to compete. Each parent was not to supply zinc direct to consumers. The TPC considered that these arms length dealings may operate to benefit the domestic market, and that any collusion between the joint venturers in this regard could be examined for breach of the TPA. Notwithstanding the concerns raised, the TPC ultimately granted authorisation to the merger, concluding that in all the circumstances it was satisfied that the proposed acquisition would result, or be likely to result, in such a benefit to the public that it should be allowed to take place.

3.6 Gas

Co-ordinated marketing of gas by joint venture partners is presently common practice in the Australian gas industry. This may be attributed to the fact that gas markets in Australia operate as 'contract' or 'project' markets, where gas is only produced to meet specific and often long-term contractual obligations. Such a market structure may create practical problems which currently make separate marketing not feasible.

On 29 July 1998, the ACCC approved an application for authorisation submitted by the North West Shelf Project in Western Australia. The applicants had sought an authorisation to enable parties involved to discuss and agree together the common terms and conditions, including price and methods for marketing and selling the gas produced by the project (co-ordinated marketing). While recognising that co-ordinated marketing may act as a barrier to entry to the gas market, the ACCC found that separate marketing was not currently viable in an environment of few producers and buyers; a predominance of long term contracts; and the absence of spot and secondary markets.

Notwithstanding the decision to authorise the North West Shelf project, the ACCC is aware of the ongoing evolution of gas markets in Australia and has identified a list of market features which are present in other gas markets where separate marketing is the norm. These include:

- a large number of customers creating a diverse gas demand profile;
- a number of competitive suppliers;
- a range of transportation options creating a pipeline grid;
- storage close to demand centres;
- brokers/aggregators providing supply and/or demand aggregation services as well as bundled supply packages;
- gas-related financial markets; and
- significant short term and spot markets.

Clearly, where possible, separate marketing is more competitive than joint marketing and is to be preferred. By creating price competition between as many suppliers of gas as possible, separate marketing should result in lower prices and more choices for consumers and users of gas.

The ACCC is also currently considering an application for authorisation for a joint marketing arrangement by Papua New Guinea gas producers to market gas in Queensland, Australia.

NOTES

1. Section 4J.

2. Berstein, L. (1965) "Comments on 'Joint ventures in light of recent antitrust developments: joint ventures in the chemical industry', *Antitrust Bulletin*, 10, p 25.

3. Kitch, E. (1985) "The antitrust economics of joint ventures", *Antitrust Law Journal*, 53, p 957.

4. Shapiro, C. and Willig, R. (1990) "On the antitrust treatment of production joint ventures", *International Journal of Industrial Organization*, 4, pp 141 – 153.

5. King, S. 'Short of a merger: the competitive effects of horizontal joint ventures and vertical supply contracts' *Competition & Consumer Law Journal 6(3) April 1999, p 237.*

6. Kitch, op.cit., note 10.

7. Nye, W. (1992) "Can a joint venture lessen competition more than a merger?", *Economic Letters*, 40, pp 487-489.

8. As well as third line forcing (s 47(6)) and resale price maintenance (s 48)

9. 1982 ATPR (Com.) 50-033.

10 The TPC ceased to exist in November 1995 when its functions were taken up by the ACCC.

11. 1988 ATPR (Com.) 50-082.

CZECH REPUBLIC

1. Definition

1.1 Please supply any definition of joint venture or strategic alliance, either general or specific to certain activities, contained in your law, regulations (including block exemptions), or policy guidelines. If there is no such definition, please describe how the courts in your jurisdiction define joint ventures. Regardless of where the definition is found, please describe how your jurisdiction distinguishes between joint ventures on the one hand, and agreements or mergers on the other.

The protection of economic competition in the Czech Republic is governed by the Act No. 63/1991 Coll. on the Protection of Economic Competition, as amended by Acts No. 495/1992 Coll. and No.286/1993 Coll. (hereinafter only "Act"). The Act governs all three competition law domains, namely agreements distorting competition, abuse of dominant position and control of concentrations between undertakings. Setting up a joint venture as a form of concentration within the scope of acquisitions is also the object of the statute. The Office for Protection of Economic Competition (hereinafter only "Office") defines a joint venture as a company which is jointly controlled by several competitors. When applying competition law, the Office distinguishes between two types of joint venture:

- co-operative joint ventures whose aim is co-ordinating competitive behaviour of the parent undertakings that otherwise remain independent. These joint ventures are evaluated by the Office according to the regulations on agreements distorting competition;

- concentrative joint ventures which, on a permanent basis, perform all the functions of an independent economic unit and do not establish co-ordination between parent companies themselves and the joint venture. These joint ventures are evaluated as concentrations between undertakings within the meaning of the Act.

1.2 Do you have any data or, failing that, anecdotal evidence indicating a marked change in the last few years in the incidence of joint ventures? Does any such trend occur across the board or is it concentrated in certain sectors, and if so, which ones? If there is an increasing or decreasing use of joint ventures, what appear(s) to be the underlying cause(s)? How, if at all, are trends in the use of joint ventures related to:

- globalisation; or

- changes in enforcement policies towards alternative methods of inter-firm collaboration, i.e. other agreements and mergers?

On the basis of its proceedings the Office can state that establishing joint ventures is especially characteristic of fast growing areas requiring initial capital. The main reason for establishing joint ventures

is the fact that foreign companies are trying to enter the Czech market and Czech competitors are trying to get the necessary know-how (especially in the field of information technology and electronics) and improve their competitiveness on foreign markets (especially in the field of electronics, engineering and consumer industry). The following can be named as illustrative examples:

- establishing a concentrative joint venture in the field of information technologies – providing access to the Internet (the firm Contactel was set up by •eské radiokomunikace and Tele Denmark in 1999);

- establishing a concentrative joint venture in the field of electronics – transportation control systems (Eltodo was set up by Eltodo and Siemens in 1999);

- establishing a concentrative joint venture in the field of engineering – turbine production (ABB Alstom Power NV was set up by ABB and ALSTOM in 1999);

- establishing a co-operative joint venture in paper industry – waste paper management (joint venture called EURO WASTE a.s. was set up by AssiDoman Packaging Sturovo, a.s., Norske Skog Stetí a.s., AssinDoman Sepap a.s. and Papírny Bela a.s.).

2. Why do firms engage in joint ventures, and how do competition agencies deal with them?

2.1 Which, if any, types of competitive restraints are subject to summary condemnation in your jurisdiction, i.e. prohibited without much regard to their pro- or anti-competitive effects? If such arrangements appear as part of a legitimate joint venture, how are they treated?

As stated above, in its proceedings the Office distinguishes between concentrative and co-operative joint ventures.

Establishing a joint venture falls under the general prohibition of agreements distorting competition (Article 3, par. 1 of the Act) provided it results in co-ordinating the behaviour between parent companies or between these companies and the joint venture. The danger of anti-competitive effects of such joint venture will be most imminent in a situation where parent companies are real or potential competitors.

When assessing co-operative joint ventures the Office evaluates the negative impact on competition on one hand, and at the same time pro-competitive effects of the agreement in question on the other. In its analysis the Office considers the respective provisions of the agreement (e.g. obligations not to compete by the parent companies) and aims at preventing these agreements from having unfair restrictions of competition. The restraint on competition can only be such that is necessary for the establishment and proper functioning of the joint venture.

Generally it can be said that provisions on market division or price fixing are prohibited, no matter if they are agreed between parent companies themselves or between one of them and the joint venture. Granting of an individual exemption for these agreements will be out of question. The Office also considers whether it is possible to separate such provisions that distort competition from the agreement establishing a joint venture. If it is possible to separate these provisions from other parts of the agreement, they will be prohibited and void. If they cannot be separated, the whole agreement will be prohibited and void.

As far as concentrative joint ventures are concerned, the Act has a basic criterion on the control of concentrations between undertakings in one of its sections. Under Article 8a, par.2 of the Act, the Office must approve of a concentration if the applying firms prove that any detriment which may result from the distortion of competition will be outweighed by the economic benefits brought about by this concentration. In other cases, the Office must not approve of a concentration.

2.2 In order to be permitted in a joint venture context, do you require evidence that apparently anti-competitive clauses or sub-agreements are: a) reasonably linked to the joint venture's pro-competitive effects; and b) that they are also somehow necessary to achieve the joint venture's positive impact? If so, please describe the kind of evidence and factors you look for in order to make this determination. Do you insist that any competitive restraints found in a joint venture, represent the least anti-competitive means of attaining its pro-competitive effects? If so, please describe the kind of evidence you look for in order to make that assessment.

According to the Administrative Code, the Office is obliged to find out all details about the actual state of affairs and request all the information necessary for its decision. With concentrations, information is submitted by competitors in the form of a questionnaire that includes a number of facts and background information relevant for the decision on the given concentration (information about the parties, information concerning the given concentration, issues of ownership and control, personal and financial commitments, information about the relevant market and effected markets). The questionnaire also has a part on restrictions ancillary to concentrations that can be assessed together with the concentration itself. Firms are obliged to specify those restrictions of competition and explain the direct relation and the necessity for the implementation of the given concentration. It is in the undertakings' own interest to supply complete, correct and true information because otherwise the notification of a concentration may be considered faulty. In such a case the Office may interrupt the proceedings until the drawbacks in the notification have been removed. The Office can further require additional necessary information from the firms concerning the given concentration.

2.3 Do you encourage joint venturers to make commitments designed to ensure that their joint venture does not have a net anti-competitive effect (i.e. commitments intended to reduce anti-competitive effects and/or to enhance offsetting pro-competitive efficiencies)? If so, please cite some representative examples and describe whether such commitments were enforceable or not, plus any steps taken to reduce associated monitoring costs.

In its decision on the approval of a concentration under Article 8 par.2 of the Act, the Office can set some restrictions and obligations which it considers necessary for maintaining the economic competition. Basically they can be divided into five groups:

Structural commitments, involving changes in the market structure (such as selling part of the undertaking or a certain activity to a third party).

Commitments concerning behaviour, having no influence on the structure of the market, but which can influence the behaviour in the market, e.g. application of the non-competition clause for an unspecified period of time or the commitment to cease co-operation with another company or about the cessation of contractual relations with suppliers, making it thus possible for these suppliers to sell to a third party.

Quasi-structural commitments connected to the transfer of intellectual property rights, e.g. among others, the commitment not to use a registered trademark in a particular area or selling some trade mark to a

competitor specified by the Office or cessation of a licence agreement by a third co-operating party or granting a non-exclusive licence for patents and know-how to competitors.

A commitment to terminate personnel links in the bodies of the merging companies.

A commitment to submit reports about the state of implementation of commitments or to inform the Office about future intentions concerning the acquisition of shares in other companies and to inform the Office about the changes in the number of employees and submit the annual accounts.

The following examples can serve to illustrate the above mentioned division of commitments: in case of Sklo a.s./Skla•ska surovina, s.r.o. (upholding the present production of rod glass, beaded semiproducts and component rods for the manufacture of mock jewels for the period of five years) or the decision concerning Natura, a.s., Naturamyl, a.s., Lusiana de brasil Comércio International e representaceo Ltec/Dr. Oetker (maintaining the combine trade mark of the Czech product) or the commitment connected to intellectual property rights (safeguarding the trademarks accessibility of the concentrated breweries Plze•ský Prazdroj, Radegast, Gambrinus and Velkopopovický kozel in the internal market for five years) or the commitment to consult the Office in case of selling all or a major part of shares of Research Institute for brewery, a.s. outside the group South African Breweries when approving of the concentration between Plze•ský Prazdroj, a.s. and South African Breweries International.

Similarly, in a case of an exemption from the prohibition of agreements distorting competition, the Office may set conditions necessary to maintain economic competition.

In its decision-making practice the Office has not encountered a situation where the establishment of a joint venture would require a commitment to expand the pro-competition character of an agreement establishing a joint venture.

2.4 If your country has an identifiable competition policy applied to "joint ventures" (as you define them), does it apply only if they have a particular legal form (e.g. equity participation in a separate legal entity), or a certain degree of permanence? If that is the case, why is it so?

The Office has published Guidelines to legal regulations and procedures for merger control. These guidelines make it possible for the public to get acquainted with the Office's main principals in the process of deciding on approval of concentrations between undertakings and is aimed at a better "transparency" of its proceedings.

When assessing joint ventures, the Office must, no matter what the legal form of the parent companies or the joint venture, take into consideration all joint ventures that meet the requirements of the Act and assess them from the point of view of their impact on economic competition.

For the joint venture to be considered concentrative and fall under the rules on the control of concentrations between undertakings, it is necessary that it performs its activities on a permanent basis. The Office, in line with the European Commission, accepts a minimum period of five years for the establishing of a concentrative joint venture. This approach reflects the fact that merger control is a tool whose aim is to prevent permanent negative changes in the structure of concentrating undertakings and relevant markets.

2.5 If there has been empirical research tending to show that your joint venture laws and policies are either too liberal or not liberal enough, please identify that research and summarise the findings.

Up to now no analysis concerning joint ventures from the point of view of application of competition law has been made. However, an analysis of the decisions taken by the European Commission has been undertaken, where conditions and commitments were imposed on the parties participating in the merger. It follows from the experience that the Office has had so far that all cases of establishing a joint venture have been approved by the Office, no prohibition of an existing joint venture has been introduced and no changes in agreements establishing joint ventures to eliminate anti-competitive effects or to foster pro-competitive ones have been required either.

2.6 Does your agency balance the pro- and anti-competitive effects of a joint venture using a different "surplus" standard than it applies to mergers? For example, you might apply a strict consumers' surplus approach to joint ventures (e.g. cost reductions must be so great that price(s) will fall despite any increase in market power), but a more liberal total surplus approach to mergers [i.e. focus on net changes in the combined total of consumers' plus producers' surplus. Please explain, if pertinent, why two different standards are being applied.

The principal rule for approval of all concentrations between undertakings (including concentrative joint ventures) is laid down in Article 8a par. 2 of the Act. According to these provisions the Office must approve of a concentration if the applying firms prove that any detriment which may result from the distortion of competition will be outweighed by the economic benefits brought about by this concentration. In other cases, the Office must not approve of a concentration.

When assessing the impact on competition the Office does not apply the rules blindly. The assessed cases differ in a number of aspects. Nevertheless, each assessment from the point of view of impact on economic competition starts from the same basic procedure.

First it is necessary to clearly define the relevant market in which the parties operate. The greatest threat to competition are horizontal concentrations leading to a direct decrease in competition on the market. When assessing the detriment caused by the concentration between undertakings, the Office considers above all the following: the structure of the given market (especially the joint market share of the parties), barriers to market entry and vertical integration.

The economic benefits, which have to be justified by the parties to a concentration, arise from the benefits of a concentration and may include cost reduction, economies of scale, increased quality of production, better correlation between price and quality, improved ability to export and better competitiveness on foreign markets. It is also important for the firm to prove that these facts will be beneficial to third parties, i.e. to non-participating firms, consumers and the economy as a whole.

To answer the above question, it is generally possible to state that the Office, when assessing joint ventures, does not use any "surplus" standards. However, a particular emphasis is put on consumers' interests. This approach is illustrated by the ruling of the former Ministry of Economic Competition on the agreement to co-operate in cultivating a new breed of pig – the HYSUS Consortium. The Ministry approved of this agreement as consumers have benefited from the new breed of pig - having access to pork the quality of which is higher and which is leaner and in line with the European standards. Similarly in the case of a co-operative joint venture set up to manufacture pet food for dogs and cats, consumers' interests were considered. They could buy a good quality Czech product manufactured according to modern recipes using Czech ingredients.

2.7 Are there plans afoot in your jurisdiction to modify or introduce policies applied to joint ventures? If so, please describe why these changes are being contemplated.

In 2000 the Office has been working on a new draft bill on the protection of economic competition aimed at full compatibility with EU law. The bill was approved by the Czech government on August 30, 2000 and submitted to the Parliament of the Czech Republic. The new Act should enter into force on July 1st 2001.

The following are the main principles of the new Act concerning joint ventures:

- Refining the definition of concentrations between firms. A specification of the definition is one of the essential requirements for effective control of economic concentration and at the same time a prerequisite for legal certainty of the undertakings. It is thus important for the Act to include a standard wording such as that in Council Regulation No. 4064/89 as amended by Regulation No.1310/97. The proposed legislation states that the establishing of a joint venture is a form of a merger and it also includes criteria for distinguishing between co-operative and concentrative joint ventures.

- Introducing the criterion of turnover for the notification of concentrations of competitors. Apart from the market share as an existing criterion for the notification of concentrations between undertakings, the criterion of turnover achieved by the undertakings concerned in the preceding financial year has been suggested. Introducing the criterion of turnover is aimed at providing both compatibility with EU law and increasing legal certainty of the competitors. In accordance with EU law, different rules have been accepted for the calculation of turnover in banks and insurance companies. The net turnover of banks is a sum of revenues, especially those from interest, bonds and aggregate ownership interests, commission and fees generated by management of clients' assets.

- Introducing criteria for approval of concentrations between undertakings based solely on the principles of competition. According to the bill, it is essential whether or not, as a result of the concentration, a dominant position will arise or be strengthened, resulting in substantial restriction of competition on the given market. The Office will only approve of the concentration if the proceedings prove that such a dominant position will not arise. It will not approve of the concentration if it is the opposite case.

2.8 Please describe in detail one or more recent joint venture cases that your agency has worked on.

2.8.1 Establishing the CONTACTEL s.r.o. joint venture

The Office has worked on the merger between •ESKÉ RADIOKOMUNIKACE, a.s. (hereinafter only "•RA") and TeleDenmark A/S which has taken place after signing the agreement setting up Contactel, s.r.o. joint venture. The joint venture operates in the field of data and Internet services and voice telephony provided by means of hardwired telephone lines.

On the basis of the establishing agreement •RA and TeleDenmark have become owners of a 50 percent share of the Contactel s.r.o. company each and in this way have gained direct control of the company. Neither of the parent companies is supposed to make decisions about the company on their own. The joint venture is to be controlled by both parent companies.

In this particular case the Office has first assessed the type of the new joint venture – concentrative or co-operative type. Owing to the fact that Contactel is supposed to operate on the market as a fully fledged independent economic unit and the parent companies are not supposed to operate in the same field as the joint venture, the Office has evaluated the whole project as establishment of a joint venture of concentrative type.

The merger is supposed to increase the market share of its parent companies to more than 30 percent on relevant markets of radio and television signal transmission. According to the provisions of Article 8a, par. 1 of the Act on the Protection of Economic Competition such concentration is to be approved by the Office, which must, under Article 8a, par. 2, approve of such concentration between undertakings, provided the applying competitors prove that any detriment which may result from the distortion of competition is outweighed by the economic benefits brought about by this concentration. The very fact of decreasing the number of competitors on the market or gaining or strengthening the dominant position can be considered to be a detriment to economic competition. The Office stated that in this particular case the competitors could compete on the product markets of telecommunication services and once the joint venture is created, the number of competitors in the market will decrease and can thus be considered as a detriment to competition.

On the other hand, the Office has assessed the benefits which follow from establishing the joint venture, especially taking the interests of the end user into consideration. The Office has considered the entry of a new competitor to the market of voice telephony services and creating effective competition for the up-to-now dominant •eský Telecom, a.s. company to be the major benefit. The possibility to choose from several telecommunication operators will bring about reduced prices in telecommunication services. The consumer will profit from a higher quality and a wider portfolio of telecommunication services. TeleDenmark will provide the know-how and international experience from operating in telecommunication services. Higher quality of services is also desirable from the point of view of public interest, above all in order to provide versatile telecommunication services. Setting up the joint venture will also lead to increased competition on the market of Internet access providers as neither •RA nor TeleDenmark have so far provided these services.

Having assessed the benefits with regard to the distortion of competition, the Office has arrived at the conclusion that the benefits will outweigh the detriment caused by the concentration and has approved the concentration in the form of a joint venture of concentrative type.

3. International Aspects of Joint Ventures and International Co-operation Among Competition Offices

3.1 Please describe any international joint venture cases you have dealt with where there have been differences in treatments accorded by the competition offices involved. In such cases, would facilitating information exchange or assisting in other jurisdictions' investigations have contributed to more similar resolutions being adopted in each country? Why or why not?

In its proceedings the Office has not yet dealt with any case where there have been differences in treatment accorded by the competition authorities involved.

The Office is fully aware of the growing importance of competition policy on the international scale resulting from globalisation and internationalisation of the economies. Due to globalisation there are more and more competition issues surpassing the frontiers of individual states. For this reason the Office has been supporting active co-operation between competition authorities in the process of application of

competition law. Exchanging information between competition authorities is a prerequisite for a more effective implementation of competition law in cases which are subject to several national jurisdictions. For the purpose of arriving at the same evaluation of concentrations between undertakings by all competition authorities concerned, however, it is also necessary for the criteria of assessment to be based on the same principals and to be applied in a non-discriminatory way.

3.2 Please give examples, if there are any, of your agency co-operating with competition agencies in other jurisdictions on joint venture cases. Whether or not you have had such cases, what do you see as the main costs and benefits of such co-operation?

The Office has so far assessed only one case of joint venture that was also simultaneously dealt with by another competition authority. It was a concentration between undertakings in the form of establishing a joint venture by companies EXXON and SHELL, dealt with by the European Commission under Regulation No. 4064/89. The reason for the notification was in this case an attempt to provide identical assessment of the concentration by both competition authorities resulting in adopting the same rulings on the same matter.

The Office considers that co-operation between competition authorities in the form of exchange of information can be beneficial both to a more detailed assessment of the given case and can also lead to cost reduction for the participating undertakings (with respect to the necessity of notification of the concentration to several competition authorities).

3.3 Please present any evidence you may be aware of that across country differences in policies towards joint ventures have prevented companies from making better use of international joint ventures, or have resulted in competitive distortions, i.e. one set of firms has been favoured over another.

The Office has no information on such a case of differences in application of competition law.

DENMARK

1. Introduction

Before exploring the Danish stand towards joint ventures the concept itself needs to be defined. In this respect Danish law relies on EU law. According to the European Commission's notice on the concept of full-function joint ventures a joint venture is:

> …an undertaking jointly controlled by two or more undertakings[12].

With effect from 1 January 1998 the Danish Competition Act was amended to achieve a higher degree of EU-conformity. The amendment introduced a prohibition of anti-competitive agreements and a prohibition of abuse of dominant position – both similar to the ones contained in Articles 81 and 82 of the EC Treaty. In accordance with the wish to achieve a greater degree of EU-conformity the Competition Act is to be construed in the same manner as Articles 81 and 82.

In its original form the Competition Act did not contain provide rules on merger control. This meant that the Competition Council was not empowered to interfere with agreements on the establishment of full-function joint ventures as these entities are considered to be mergers. Full-function joint ventures are joint ventures that

> …on a lasting basis performs all the functions of an autonomous economic entity[13]

Joint ventures not being full-function are considered to be agreements between undertakings and are therefore covered by the prohibition against anti-competitive agreements.

Given this legal background the distinction between full-function and not full-function joint ventures has been quite important. To some extent this has however changed as rules on merger control were introduced in the Competition Act with effect from 1 October 2000. The new provisions are modelled on the EU merger provisions. As from this date the actual establishment of full-function joint ventures is analysed within the scope of the merger rules in the Danish Competition Act. According to these rules the overriding test is

> …whether a merger creates or strengthens a dominant position that results in the effective competition being significantly restricted[14].

Ancillary restraints to full-function joint ventures are to be analysed in connection with the concentration as a whole. Restraints that are not ancillary to the joint venture continue to be analysed under the rule on anti-competitive agreements.

The legal position with regard to joint ventures not being full-function does not change as a consequence of the introduction of merger control in Danish law. These partnerships continue to fall under the rule on anti-competitive agreements in the Competition Act.

As a result of the way the Competition Act used to be framed a major part of the Danish precedence on joint ventures concerns the distinction between full-function and not full-function joint ventures. There are two recent rulings of the Competition Council, which are particularly noteworthy in this respect. The cases concern the asphalt industry and the tile and brick industry.

2. Danish cases

2.1 The Asphalt Case

On 27 October 1999, the Competition Council laid down a landmark ruling in the so-called "Asphalt Case". The case concerns a network of joint ventures in the Danish asphalt industry and is important for several reasons. Firstly the case focuses on the distinction between full-function and not full-function joint ventures, cf. heading 1. Secondly this is the first case, where the Competition Council ordered the splitting up of existing companies.

In 1998, a number of co-operation agreements in the Danish asphalt industry were notified to the Danish competition authority. Most of the agreements concerned the setting up and operation of common asphalt production works. Due to the agreements being notified under a transition rule in the Danish Competition Act, the joint ventures had been operating for several years at the time of notification.

Figure 1 illustrates the structure of the co-operation in the Danish asphalt industry.

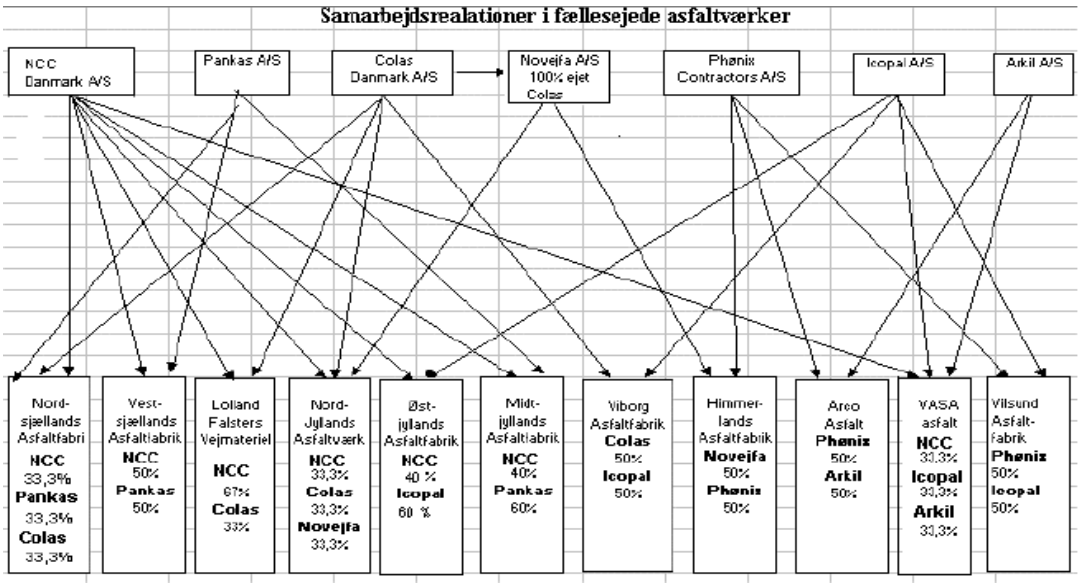


Figure 1: The network of joint venture agreements in the Danish asphalt industry. Each individual parent company participates in minimum two and maximum seven joint ventures. Each joint venture is owned by two or three companies. The figures in the boxes show each parent company's share interest.

In dealing with the notifications it was crucial to determine whether the joint ventures were full-function or not, cf. heading 1. In determining this the Competition Council applied the criteria used in EU law.

A full-function joint venture has three distinguishing features:

- the parent companies must have joint control over the joint venture;
- the joint venture must be established on a lasting basis; and
- it must perform all the functions of an independent company.

Not full-function joint ventures – on the other hand – share the following three distinguishing criteria:

- the joint venture only performs one of the parent companies' functions without itself having access to the market;
- the parent companies themselves are active on up-stream or down-stream markets; and
- substantial trade is going on between the parents and their joint venture.

When applying these criteria to the notified agreements on asphalt production plants the Competition Council concluded that nine out of eleven of these joint ventures were not full-function. The nine asphalt production plants referred to were established with the aim of producing asphalt to their owners, and between 89 percent and 98 percent of production of the individual works in 1997 was sold to their parent companies. As some of the production works had been operating for 15 – 20 years there was nothing to indicate that the sale to the parent companies was limited to a start-up phase.

The nine production plants were only active within production of asphalt and did not have access to the down-stream market concerned with the laying out of asphalt. This task was performed by the parent companies – giving them a strong presence in the down-stream market.

Furthermore the management of these joint ventures also indicated a strong dependency of the parent companies. A board appointed by the parent companies managed the joint ventures, and one of the parents was appointed business manager.

The remaining two joint ventures were both producing and laying out the asphalt and did therefore themselves have access to the down-stream market. These two companies did not directly carry out any work for the parent companies.

Apart from the joint ventures concerning production plants, two other joint ventures in the asphalt industry were notified to the Danish Competition Authority. These two companies carried out activities related to the laying out of asphalt, e.g. surface-painting of roads. More than half of the turnover in these companies resulted from work carried out for other customers than the parent companies. As regards this part of the turnover the joint ventures had participated in tenders, competing on an equal footing with other companies.

The Competition Council concluded that these two joint ventures, together with the two joint ventures both producing and laying asphalt, were full-function. Given the way the Competition Act was previously framed the Competition Council did not have legal authority to scrutinise the joint ventures held to be full-function. They did however have the authority to analyse restraints that were not ancillary to these joint ventures under the rule on anti-competitive agreements[15].

As regards the nine joint ventures held not to be full-function the Competition Council analysed the entire construction of each company under the rule on anti-competitive agreements. The Council found that the agreements established a formalised network of co-operational relations in the Danish asphalt industry. Only a few companies were active in this industry and companies representing a market share of more than 80 percent of the Danish asphalt production market participated in the arrangement.

The concerned joint venture agreements were found to hinder competition in the business as they effectively made the individual players dependent on each other. Competing vigorously in one area was likely to hurt both other companies and one-self in another area.

Under the Danish Competition Act anti-competitive agreements can only be maintained for a maximum of six months after the decision stating the violation of the law. As the production plants were already operating, this effectively meant that the joint ventures were to be split up within that period.

The asphalt companies have appealed the ruling and the appeal is currently pending before the Appeals Board for Competition Matters. The appeal stays the decision of the Competition Council.

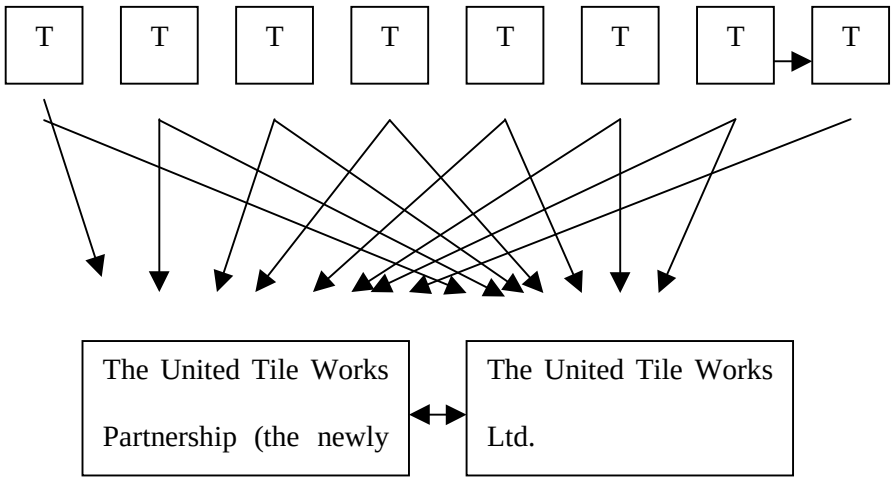
2.2 The United Tile works case

In January 1999, the Danish Competition Council prohibited an agreement between eight tile works and a company named "The United Tile Works Ltd.", in which the tile works held all the shares. The agreement provided for a joint sales arrangement of the tile works production through The United Tile Works.

The Danish Competition Council found that the arrangement restricted competition on the market and refused to grant an individual exemption. The Council ordered The United Tile Works to cancel the arrangement.

Following that The United Tile Works notified a new set of agreements containing an altered version of the previously notified arrangement. The main difference between the two arrangements was the establishment of a sister company to the United Tile Works. This company, a joint venture, was owned and controlled jointly by the eight tile works.

Figure 2. The structure of the co-operation arrangements in the Danish tile industry.



→ = Ownership

↔ = Supply agreement between sister companies

According to the agreements the joint venture was to be managed by a board elected at the general assembly. However, the daily administration was to be performed by the staff at The United Tile Works.

The central part of the agreement between the joint venture and The United Tile Works is an exclusive distribution agreement. According to this agreement the joint venture is obliged to sell the products delivered from the eight tile works to The United Tile works Ltd. The only exception to this obligation being that the joint venture is allowed to sell to any customer contacting the joint venture by themselves (so-called “passive sale”).

Furthermore, The United Tile Works and the joint venture are to plan the amount and the price of goods that The United Tile works is to buy from the joint venture three months ahead. Once a year, the parties are to agree on the minimum amount to be delivered to The United Tile Works during the next year.

As part of the general arrangement, each of the tile works had individually agreed with the joint venture to deliver bricks and other tile products to the latter. In each of these individual agreements the joint venture was to decide the amount to be delivered from the works and the time of delivery. The agreements also stated that the tile works were only allowed to sell to other customers, if these were not customers of either the joint venture or of The United Tile Works.

The Danish Competition Council found that the notified agreement was a classic example of both a price fixing and a quantity-controlling cartel. In reaching this conclusion it was decisive that The United Tile Works set the prices on the goods delivered from the joint venture, and that The United Tile Works is owned by the same eight tile works delivering to and controlling the joint venture. Furthermore, The United Tile Works and the joint venture jointly decide the amount of bricks and other tile products to be delivered from the joint venture to The United Tile works on a three monthly basis. The joint venture uses this information to decide on the amount of goods to be delivered from the individual tile works.

The Council stated that the agreement was a hard core violation of the Danish Competition Act and therefore did not qualify for an individual exemption. The Council ordered the parties to cancel the agreement before 31 October 2000.

The United Tile Works have appealed the ruling and the appeal is currently pending before the Appeals Board for Competition Matters.

NOTES

12. The Official Journal C 66/1 published 2 March 1998, point 3.

13. Regulation 4064/89 (the merger regulation), published in the Official Journal L 257/14 of 21 September 1990, Article 3(2).

14. The Danish Competition Act, s. 12 c, ss. 2.

15. The result of this analysis will not be elaborated in this paper, as it is not directly relevant for the issues dealt with.

GERMANY

1. Definition of the term joint venture and legal framework applying to joint ventures under German law

German cartel law does not contain any special laws regulating joint ventures and therefore does not provide a legal definition of this term. In practice, the term joint venture refers to enterprises involving two or more firms which are established either by creating a new enterprise or by jointly participating in an existing company.

German competition law distinguishes between cartel agreements (Section 1 ff. of the ARC)[16] and concentrations (Section 35 ff. of the ARC)[17] without explicitly excluding joint ventures entirely or partly from either of these fields. According to the practice of the courts, provisions on cartel agreements and concentrations are thus in principle applicable in parallel if the respective conditions are met (see item 3.b) below).

At the moment it is not intended to introduce special criteria or administrative regulations relating to joint ventures.

2. Treatment of joint ventures under competition law

2.1 Merger control

German merger control can only be applied if the enterprises concerned have merged. The law contains several merger criteria which may be fulfilled when a joint venture is established. Under Section 37(1) no. 3 of the ARC[18] the acquisition of 25 percent or 50 percent of the shares of an enterprise constitutes a concentration for example. Under this provision, merger control is also triggered if a parent company of an existing joint venture is replaced or if it is restructured, provided the shift in participations reaches the above thresholds.

Section 37(1) no. 2[19] stipulates that the acquisition by one or several enterprises of direct or indirect control over another enterprise shall be deemed to constitute a concentration. This provision also covers potential influences on the management of the joint venture which are not a direct result of equity interests, such as special rights concerning representation in the organs of the company, blocking quorums or de facto possibilities of influencing the enterprise.

Ex-ante merger control is only triggered if concentrations reach a certain turnover threshold. The relevant threshold under Section 35(1) of the ARC[20] is reached if the combined aggregate world-wide turnover of all participating enterprises is more than DM one billion and the domestic turnover of at least one participating enterprises is more than DM 50 million.

The Bundeskartellamt has to prohibit a concentration in the form of a joint venture if it is expected to create or strengthen a dominant position. In such a case, the general provisions of merger control apply. For the purposes of merger control, joint ventures and parent companies cannot simply be combined to form a single economic unit and their respective resources added together. The respective market shares and resources can only be considered on a cumulative basis if the parent companies transfer their entire operations in the joint venture's market to the joint venture or if they have joint control.

The special provisions on joint ventures are limited to two special clauses. Section 37(1) no. 3, sentence 3 of the ARC[21] contains a special criterion for joint ventures created by the acquisition of 25 percent or 50 percent of the capital shares or voting rights of another enterprise. For the purpose of formal merger control, i.e. for calculating thresholds, a fictional horizontal (partial) merger of the parent companies is assumed under this provision, in addition to the existing vertical concentrations of the respective parent company and the joint venture. As a consequence the turnovers of both the two parent companies and the joint venture have to be added up in order to calculate the thresholds. Without this special provision individual calculations would be made whereby the turnover of each parent company would be added to the turnover of the joint venture. The law thus extends the number of proposed concentrations that are subject to control in the field of joint ventures.

On the other hand, in accordance with the so-called multiple parent clause under Section 36(2) sentence 2 in conjunction with sentence 1 of the ARC[22], the joint venture and the two parent companies are considered to be a single economic unit if the parent companies act together in such a way that they can exercise a controlling influence on the joint venture. This is significant for assessing subsequent concentrations after the creation of the joint venture involving the joint venture itself or one of the parent companies. It means that if the joint venture participates in a concentration, the resources of both parent companies have to be considered in evaluating its market position.

2.2 Applicability of the ban on cartels under Section 1 of the ARC[23]

For a long time the highly controversial question remained unanswered as to whether in addition to merger control, joint ventures can also be subject to Section 1 of the ARC, which prohibits anti-competitive agreements between enterprises. This question was clarified by a fundamental decision of the Federal Supreme Court in 1985 stipulating that joint ventures are to be subject to dual control under both systems. Accordingly, in a second step after evaluation under merger control the Bundeskartellamt assesses whether the joint venture creates anti-competitive horizontal effects between the parent companies within the meaning of Section 1 of the ARC. The examination focuses on the question of whether co-operation within the joint venture causes so-called group effects in the form of concerted action by the parent companies in the joint venture's markets (direct group effect) or in third markets (indirect group effect).

The decision on whether the project can be classified as a full-function joint venture is a first indication of what the outcome of the examination is likely to be. According to the Bundeskartellamt's decision-making and administrative practices the joint venture can only have purely concentrative effects without leading to co-ordinating effects between the parent companies if it is an autonomous economic unit that plans and acts independently while the parent companies focus exclusively on their financial investments. Administrative and decision-making practices thus focus on whether at least one of the parent companies withdraws from the joint venture's market. If the joint venture basically remains at the level of simply performing supportive functions for the parent companies or if both parent companies continue to operate in the joint venture's market, this is considered to be a clear indication that there are likely to be competition-restraining co-ordination effects between the parent companies.

If, on the basis of these criteria, it can be assumed that there is a restraint of competition under Section 1 of the ARC[8], this can initially only be authorised under the exemptions conclusively stated ins Sections 2-7 of the ARC[24] (for example rationalisation or standardisation cartels) which do not contain any special regulations for joint ventures. This part of the Act does not in principle weigh up the pro-competitive against the anti-competitive effects of the co-operation. However, it does give certain criteria which the lawmaker considers to have a generally positive effect that compensates for the restraint of competition. Section 7(2) of the ARC[25] contains a more vague balancing clause which, however, is of secondary importance vis-à-vis the other criteria and therefore has not gained any practical significance so far.

In addition, two unwritten limitations have been developed in practice and by the practice of the courts which are of particular importance in relation to joint ventures. On the one hand, according to the consortium concept, a co-operative joint venture is not subject to the ban under Section 1 of the ARC[8] if co-operation in the form of a joint venture is the only possibility for the parent companies to penetrate a new market or to maintain their position in a current market. If this is the case, competition will not ultimately be restrained since the joint venture is the only way for the parent companies to become potential competitors in the market concerned at all. On balance, competitive structure will be improved as a result.

The second limitation relates to competition-restraining clauses in company agreements which otherwise are neutral from the point of view of cartel law and that are indispensable for the viability and functioning of the co-operation project. Since such clauses constitute what are essentially subsidiary agreements, they are not subject to the ban on cartels. It should, however, be emphasised that in practice only clauses are accepted which are absolutely indispensable to the viability of the project, and that it is not sufficient if they are merely "adequately linked" to the project or if they promote positive effects of the joint venture.

2.3 Procedures

The two examination steps outlined above are not embedded in a uniform procedural framework but are subject to different regulations. Thus, the merger control decision is subject to a four-month deadline while there is no time limit for the decision under Section 1 of the ARC[8] unless the notification of the merger was accompanied by an explicit request for exemption from Section 1 of the ARC[8], which in practice is only rarely the case.

The Bundeskartellamt tries as far as possible to inform the enterprises of its assessment under Section 1 of the ARC[8] at the same time as making the decision on merger control. If, at the time of notification, the facts brought forward give no grounds for an intervention under Section 1 of the ARC[8], the Bundeskartellamt includes a note to this effect as part of its clearance of the merger. This note does not constitute a formal authorisation but leaves open the option for the Bundeskartellamt to take up the case under Section 1 of the ARC[8] if new developments and external conditions give rise to competitive concerns about the joint venture. Joint ventures set up to operate Internet exchanges are a case in point. The rapid developments in this market hardly allow any forecasts to be made at the moment as to whether such operations will in practice result in concerted practices among the parties involved. If concerns with regard to Section 1 of the ARC require a more thorough investigation of the project, the Bundeskartellamt clears the merger but informs the parties that an examination regarding the ban on cartels is still in progress. This does not impair the legal validity of the clearance but prevents the enterprises de facto from putting the merger into effect because of the fines for illegal concerted practices that may be imposed if the Bundeskartellamt comes to a negative decision under Section 1 of the ARC[8].

2.4 Trends

Since German competition law does not provide any special regulations for joint ventures, they are not recorded separately in statistics. The above-mentioned merger criterion under Section 37 (1) no. 3 sentence 3 of the ARC[6] is the only exception, with 282 joint ventures being notified in 1999 and 102 until August 2000. What is striking about this is the high number of joint ventures notified in the energy sector in both years. This is basically due to the intensified co-operation efforts local energy suppliers made after the liberalisation of the energy markets began in 1998, which manifested itself either in co-operations with big energy suppliers or among local energy suppliers themselves. In the wholesale and retail trade sectors, a comparatively large number of projects were notified in both years, mainly relating to co-operations in the fields of e-commerce and logistics. In the field of banking and related activities, many joint ventures were founded in 1999 and 2000 with a view to establishing venture capital companies. The large number of joint ventures in the field of legal/tax/management consultancy in 1999 mainly involved investment companies. In the field of culture, sports and entertainment, the majority of joint ventures created in 1999 concerned the production of films and TV programmes. A relatively new trend which has now reached almost all industries are joint ventures involving electronic marketplaces for B2B transactions. In this field, the Bundeskartellamt has already held many preliminary negotiations and some notifications have already been filed.

3. Cases

3.1 Moksel/Südfleisch

In the Moksel/Südfleisch case, Moksel AG, Buchloe, and Südfleisch Holding AG, Munich, intended to create a joint venture under the name Ost-Fleisch GmbH. Moksel and Südfleisch are the leading companies in the meat industry with annual turnovers of DM 3.5 billion and DM 2.8 billion respectively. Their operations included acquiring cattle and pigs for slaughter and selling beef, pork and other meat products throughout Germany. Both enterprises' established slaughterhouses were based in the German states of Bavaria and Baden-Württemberg. Further plants were based in the new Länder where there were considerable excess slaughterhouse capacities. Moksel and Südfleisch intended to create a joint venture by Moksel taking over 2/3 and Südfleisch 1/3 of the capital shares. Both parties intended to incorporate a part of their east German slaughterhouses in the joint venture. Ost-Fleisch's operations were to include slaughtering, trading livestock and meat as well as producing and selling meat products of all kinds throughout Germany.

The Bundeskartellamt prohibited the creation of the joint venture both under merger control and cartel law. The prohibition concerned the nation-wide market for selling meat products in which both Ost-Fleisch and the two parent companies would also have been active, the market for acquiring animals for slaughter in the southern new Länder, where both Ost-Fleisch and the two parent companies would also have been active, as well as the market for acquiring animals for slaughter in southern Germany where only the two parent companies would have been active.

From the point of view of merger control the project had to be prohibited since in the Bundeskartellamt's view, the concentration (Section 37 (1) no. 3 sentence 3 of the ARC)[6] would have led to a joint dominant position of Moksel and Südfleisch in the market for acquiring animals for slaughter in southern Germany. An indirect group effect of the parent companies was therefore likely. On the one hand, this group effect was to be expected on account of the economic significance of Ost-Fleisch for the parent companies. The sale of meat products accounted for about 50 percent of their respective aggregate group turnovers, with Ost-Fleisch contributing about 1/3 to 1/4 respectively. On the other hand, the parent

companies were also expected to participate in concerted practices because this could have helped to secure their investments in Ost-Fleisch's operations. Additional funds for rapid reinvestment could have been raised by co-ordinating a reduction in purchase prices for animals for slaughter in a co-ordinate manner in southern Germany. The indirect group effect would have resulted in a joint dominant position of Moksel and Südfleisch in the market for acquiring animals for slaughter in southern Germany (duopoly). In addition to Moksel's and Südfleisch's high market shares of 20 – 30 percent and 30 – 35 percent respectively, and the wide margin separating them from their next largest competitor, their superior financial power and their advantages in accessing the market through their comprehensive network of slaughterhouses pointed to a joint dominant position.

The Bundeskartellamt prohibited the establishment of Ostfleisch under cartel law, too. The Bundeskartellamt expected that if Moksel and Südfleisch remained active in the nation-wide market for selling meat products and in the market for acquiring animals for slaughter in the southern new Länder together with Ost-Fleisch, the three firms would not compete effectively with each other but would act rationally and avoid any competition that would be "detrimental" to all concerned. Therefore it had to be assumed that Moksel, Südfleisch and Ost-Fleisch would co-ordinate their market behaviour both in selling meat products and in acquiring animals for slaughter in the southern new Länder (direct group effect). In addition, rational business behaviour would also result in the parent companies co-ordinating their operations in acquiring animals for slaughter in southern Germany (indirect group effect). The economic significance of Ost-Fleisch and the parent companies' compulsion to secure their investments in the joint venture supported this assumption (see above).

The Berlin Court of Appeal approached by the parties approved of the part of the prohibition based on cartel law as far as the expected co-ordination between Ost-Fleisch, Moksel and Südfleisch in selling meat products throughout Germany was concerned. However, the Court of Appeal reversed the part of the prohibition based on merger control law since an indirect group effect of the parent companies in acquiring animals for slaughter in southern Germany was not to be expected. According to the Court of Appeal, this group effect was unlikely because the economic significance of Ost-Fleisch was not sufficient for the parent companies and there was no actual compulsion to secure their investments made in Ost-Fleisch's plants. Ost-Fleisch's shares in the parent companies' slaughterhouses were below 20 percent. The creation of the joint venture did not require additional funds since investments had already been made. The decision of the Court of Appeal is not yet final. The case is currently pending before the Federal Supreme Court.

3.2 Rollbeton Berlin

In the case of the joint venture Rollbeton Berlin, the Bundeskartellamt cleared the merger control aspects of a change in the partners of the joint venture and tolerated the cartel law aspects of the case for a limited period of time.

One third of Rollbeton Berlin's shares were held by a subsidiary of the Heidelberger Zement group. TBG Nord-Beton, a subsidiary of Alsen AG, intended to acquire the remaining two thirds. The purpose of the joint venture was to produce and sell ready-mixed concrete.

The planned acquisition of more than 50 percent of the shares constituted a concentration according to the criteria explained above and was thus subject to merger control. The market concerned was the product market for ready-mixed concrete, which, due to the specific properties of this material, constituted a separate product market. The relevant geographic market concerned was defined by the Bundeskartellamt as covering the greater Berlin area within a 40 km radius of the city centre. The geographic market was limited because deliveries could only be made within a certain distance due to

transport costs and the physical and chemical properties of the concrete (hardening). Owing to the high number of ready-mixed concrete plants in the Berlin area with largely overlapping sales territories, the Bundeskartellamt assumed a somewhat greater radius than in comparable cases in rural areas.

In assessing whether the concentration would result in a dominant position, the Bundeskartellamt first defined the market volume on the basis of statistical data regarding the per capita consumption of ready-mixed concrete obtained from the responsible Federal association. In assessing the future market position of the joint venture the problem arose that the parent companies concerned participated in many joint ventures with different partners in the relevant market. The ready-mixed concrete market is characterised by a dense network of affiliations since even individual ready-mixed concrete plants are operated as joint ventures by several parent companies. The Bundeskartellamt analysed all the links existing in the market concerned and attributed the market shares of all the enterprises in which one of the parent companies held more than 50 percent to the parent companies and thus to the joint venture. This market analysis established a cumulative market share of about one quarter.

In its assessment the Bundeskartellamt also took account of the fact that about 27 other companies operated in the market concerned including a number of financially powerful major companies operating throughout Germany. It was estimated that the overcapacities existing in the region would promote competition. In addition, the Bundeskartellamt uncovered a quota cartel in the market concerned last year and imposed record fines on the participants, which resulted in strong competition and a dramatic drop in prices. As a result, the Bundeskartellamt concluded that on balance a dominant position would not be created and cleared the project under merger control law.

In its decision clearing the project under merger control, the Bundeskartellamt stated at the same time that the project was in principle violating the ban on cartels under Section 1 of the ARC[8]. In the Bundeskartellamt's view, the joint venture had competition-restraining effects on the relations between the parent companies since they would both remain active in the joint venture's market either directly or through their subsidiaries. Given this constellation, the parent companies were not expected to engage in substantial competition with their joint subsidiary, Rollbeton, or with each other. Consequently, it was to be feared that competitive pressure would be eliminated or at least reduced (group effect). The Bundeskartellamt therefore threatened to prohibit the joint venture on the grounds that it violated the ban on cartels.

However, the participating companies convincingly announced that they would dissolve the Rollbeton joint venture by 31 December 2003 as part of their measures to reduce overcapacities. Investigations on the part of the Bundeskartellamt confirmed that there were substantial overcapacities in Berlin due to the slackening off of building activity after the boom that had taken place directly after reunification. In order not to impede necessary restructuring measures, the Bundeskartellamt agreed to tolerate the joint venture until that date. However, it made clear that an extension of this term was out of the question and that action would be taken against the joint venture immediately after the time limit had expired.

4. International co-operation

As far as international co-operation is concerned, there are no special provisions regarding joint ventures, either. However, it should be pointed out in this connection that there is a common form for notifying concentrations in Germany, France and Great Britain. The Covisint case can be taken as an example of how co-operation between the Bundeskartellamt and other competition authorities works in individual cases.

Covisint is a company developed and recently set up by the automobile producers Ford, General Motors and DaimlerChrysler with the participation of Renault/Nissan. Its purpose is to operate an electronic exchange for business-to-business (B2B) transactions in the automotive industry. In Germany, the creation of the joint venture was notified to the Bundeskartellamt under merger control law on 2 August 2000. The Bundeskartellamt subsequently sent questionnaires to the 15 major automobile suppliers and to four automobile producers in order to be able to make a competitive evaluation of the project. After receiving some replies voicing concerns about Covisint, the Bundeskartellamt initiated the main examination proceedings on 22 August 2000.

The FTC has been examining Covisint since June 2000 and proceedings have now reached the second request stage. Under the Hart-Scott-Rodino Act, Covisint is subject to an obligation to notify its intentions to the FTC in advance and to wait for a specified period before concluding any transactions. The project is being examined inter alia under the Antitrust Guidelines for Collaborations among Competitors. The FTC's obligation to observe confidentiality was waived in its dealings with the Bundeskartellamt. The Decision Division responsible then exchanged information with the FTC, providing it with a summary of the statements made by automobile suppliers and auto companies, without revealing their identities.

The FTC cleared the project on 12 September 2000 without imposing any conditions or obligations. However, it announced that it will continue to monitor Covisint in order to prevent it from being anticompetitive in its day-to-day operations.

The Bundeskartellamt cleared the project on 25 September 2000. In its decision the authority also reserves the right to further monitor the exchange and to check whether it has any anticompetitive effects.

The Covisint case clearly shows the important role international co-operation already plays in dealing with joint ventures that have cross-border effects. This role will become increasingly important as the globalisation of the economy continues.

ANNEX 1

Statistics; joint ventures/industries in 1999 and 2000

In 1999, 282 joint ventures were notified under Section 37 (1) no. 3 sentence 3 of the ARC. These involved inter alia the following sectors:

- 38 Energy sector,
- 22 Data processing,
- 21 Wholesale trade,
- 19 Legal, tax and business consulting,
- 17 Traffic/ancillary business, tourism,
- 16 Real estate sector,
- 15 Culture, sports and entertainment,
- 14 Ready-mixed concrete,
- 13 Banking and associated activities,
- 10 Printed products,
- 10 Retail trade,
- 10 Telecommunications and
- 9 Waste disposal.

Until 18 August 2000, 102 joint ventures were notified under Section 37 (1) no. 3 sentence 3 of the ARC. These involved inter alia the following sectors:

- 14 Energy sector,
- 11 Banking and associated activities,
- 8 Chemical products,
- 8 Ready-mixed concrete,
- 7 Wholesale trade,
- 7 Retail trade,
- 5 waste disposal and
- 5 Printed products.

NOTES

16. Section 1

Prohibition of Cartels

Agreements between competing undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition shall be prohibited.

17. Section 35

Scope of Application

(1) The provisions on the control of concentrations shall apply if, in the last business year preceding the concentration,

1. the combined aggregate world-wide turnover of all participating undertakings was more than DM 1 000 million, and

2. the domestic turnover of at least one participating undertaking was more than DM 50 million.

(2) Subsection (1) shall not apply:

1. insofar as an undertaking which is not controlled within the meaning of Section 36 (2) and had a world-wide turnover of less than DM 20 million in the last business year, merges with another undertaking, or

2. insofar as a market is concerned in which goods or commercial services have been offered for at least five years, and which had a sales volume of less than DM 30 million in the last calendar year.

Insofar as the concentration restricts competition in the field of publishing, producing or distributing newspapers or magazines or parts thereof, only sentence 1 no. 2 shall apply.

(3) The provisions of this Act shall not apply insofar as the Commission of the European Communities has exclusive jurisdiction pursuant to Council Regulation (EEC) no. 4064/89 of 21 December 1989 on the control of concentrations between undertakings, as amended.

18. Section 37

Concentration

(1) A concentration shall arise in the following cases:

3. Acquisition of shares in another undertaking if the shares, either separately or together with other shares already held by the undertaking, reach

a) 50 percent or

b) 25 percent

of the capital or the voting rights of the other undertaking. The shares held by the undertaking shall include also the shares held by another for the account of this undertaking and, if the owner of the undertaking is a sole proprietor, also any other shares held by him. If several undertakings simultaneously or successively acquire shares in another undertaking within the parameters mentioned above, this shall be deemed to also constitute a concentration among the acquiring undertakings with respect to those markets on which the other undertaking operates;

19. Section 37

Concentration

(1) A concentration shall arise in the following cases:

2. acquisition of direct or indirect control by one or several undertakings of the whole or parts of one or more other undertakings. Control shall be constituted by rights, contracts or any other means

which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular through

a) ownership or the rights to use all or part of the assets of the undertaking,

b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of the undertaking;

20. Section 35

Scope of Application

(1) The provisions on the control of concentrations shall apply if, in the last business year preceding the concentration,

1. the combined aggregate world-wide turnover of all participating undertakings was more than DM 1 000 million, and

2. the domestic turnover of at least one participating undertaking was more than DM 50 million.

21. Section 37

Concentration

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of the capital or the voting rights of the other undertaking. The shares held by the undertaking shall include also the shares held by another for the account of this undertaking and, if the owner of the undertaking is a sole proprietor, also any other shares held by him. If several undertakings simultaneously or successively acquire shares in another undertaking within the parameters mentioned above, this shall be deemed to also constitute a concentration among the acquiring undertakings with respect to those markets on which the other undertaking operates;

22. Section 36

Principles for the Appraisal of Concentrations

(1) A concentration which is expected to create or strengthen a dominant position shall be prohibited by the Federal Cartel Office unless the participating undertakings prove that the concentration will also lead to improvements of the conditions of competition, and that these improvements will outweigh the disadvantages of dominance.

(2) If a participating undertaking is a controlled or controlling undertaking within the meaning of Section 17 of the Joint Stock Corporation Act *[Aktiengesetz]* or a group company within the meaning of Section 18 of the Joint Stock Corporation Act, then the undertakings so affiliated shall be regarded as a single undertaking. If several undertakings act together in such a way that they can jointly exercise a controlling influence on another undertaking, each of them shall be regarded as controlling.

23. Section 1

Prohibition of Cartels

Agreements between competing undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition shall be prohibited.

24. Section 2

Standards-and-Types Cartels,

Condition Cartels

(1) Agreements and decisions whose subject matter is merely the uniform application of standards or types may be exempted from the prohibition under Section 1.

(2) Agreements and decisions whose subject matter is the uniform application of general terms of business, delivery and payment, including cash discounts, may be exempted from the prohibition under Section 1 insofar as they do not relate to prices or price elements.

Section 3

Specialisation Cartels

Agreements and decisions whose subject matter is the rationalisation of economic activities through specialisation may be exempted from the prohibition under Section 1 provided the restraint of competition does not lead to the creation or strengthening of a dominant position.

Section 4

Cartels of Small or Medium-Sized Enterprises

(1) Agreements and decisions whose subject matter is the rationalisation of economic activities through a form of co-operation among enterprises other than that described in Section 3 may be exempted from the prohibition under Section 1 provided

1. competition on the market is not substantially impaired thereby, and
2. the agreement or the decision serves to improve the competitiveness of small or medium-sized enterprises.

(2) Section 1 shall not apply to agreements and decisions whose subject matter is the joint purchasing of goods or the joint procurement of commercial services, but which do not, except in individual cases, compel the participating undertakings to purchase from that source, provided the conditions in subsection (1) nos. 1 and 2 are satisfied.

Section 5

Rationalisation Cartels

(1) Agreements and decisions which serve to rationalise economic activities may be exempted from the prohibition under Section 1 provided they are a suitable means of substantially increasing the efficiency or productivity of the participating undertakings in technical, commercial or organisational respects and of thereby improving the satisfaction of demand. The rationalisation effect should be of sufficient importance when compared with the restraint of competition connected with it. The restraint of competition shall not result in the creation or strengthening of a dominant position.

(2) If the agreement or decision aims to achieve the rationalisation in conjunction with price agreements or through the establishment of joint purchasing or selling organisations, an exemption from the prohibition under Section 1 may be granted, under the conditions of subsection (1), if the rationalisation effect cannot be achieved otherwise.

Section 6

Structural Crisis Cartels

In the event of a decline in sales due to a lasting change in demand, agreements and decisions of undertakings engaged in production, manufacturing or processing may be exempted from the prohibition under Section 1, provided the agreement or decision is necessary to systematically adjust capacity to demand, and the arrangement takes into account the conditions of competition in the economic sectors concerned.

Section 7

Other Cartels

(1) Agreements and decisions which contribute to improving the development, production, distribution, procurement, taking back or disposal of goods or services, while allowing consumers a fair share of the resulting benefit, may be exempted from the prohibition under Section 1 provided the improvement cannot be achieved otherwise by the participating undertakings and is of sufficient importance when compared with the restraint of competition connected with it, and the restraint of competition does not result in the creation or strengthening of a dominant position.

(2) Agreements and decisions whose subject matter is the rationalisation of economic activities through specialisation or in some other way, the joint purchasing of goods or the joint procurement of commercial services, or the uniform application of terms and conditions, may be exempted from the prohibition under Section 1 only pursuant to Section 2 (2) and Sections 3 to 5.

25. Section 7

Other Cartels

(2) Agreements and decisions whose subject matter is the rationalisation of economic activities through specialisation or in some other way, the joint purchasing of goods or the joint procurement of commercial services, or the uniform application of terms and conditions, may be exempted from the prohibition under Section 1 only pursuant to Section 2 (2) and Sections 3 to 5.

ITALY

1. Introduction

The Italian competition authority has not issued specific guidelines concerning the treatment of joint ventures. The approach taken, therefore, can be drawn by looking at the relevant provisions of the competition law as well as the actual decade-long enforcement practice.

This note starts by looking at the issue of definition and categorisation of joint ventures in the Italian legal framework. Observations regarding the actual treatment of joint ventures in the enforcement experience of the competition authority follows. The topic of the reliance on commitments imposed on the concerned enterprises to reduce the anticompetitive effects, as well as the description of two joint venture cases in more detail, are contained in the fourth and fifth sections of the note.

2. Joint ventures in the Italian competition policy framework

The Italian competition law (Law n° 287 of October 10th, 1990) does not provide for a specific definition of joint ventures nor does it subject them to distinct antitrust rules other than those applicable to concentrations or restrictive agreements. The only direct reference to joint ventures in the law is contained in art. 5(1) which states that concentrations are deemed to arise when, inter alia, "two or more undertakings create a joint venture by setting up a new company[26]. Art. 5(3), however, specifies that "operations which have as their main object or effect the co-ordination of the actions of independent undertakings shall not constitute concentrations".

The competition authority, when enforcing the law, distinguishes, therefore, between "concentrative joint ventures", which are assessed according to Art. 6[27] together with the related ancillary restrictions, and "co-operative joint ventures" falling under Art.2[28] dealing with restrictive agreements.

Joint ventures are deemed concentrative when: *a*) they are subject to joint control by two or more independent firms; *b*) they enjoy functional and organisational autonomy in their market operations and; "*c*) when their controlling (parent) companies are not present - or cease to operate - in the same or in contiguous markets. When such conditions are not met, joint ventures are deemed of the co-operative type. This applies particularly to joint ventures mainly supporting (or depending on) the activities of the parent companies or otherwise lacking real market autonomy.

Such distinction between concentrative and co-operative joint ventures is both of a procedural and substantive nature. With regard to procedures, it relates to the different timetable for antitrust review and to the compulsory pre-merger notification for concentrative joint ventures[29]. The timetable for the review of concentrations, in fact, is prescribed in the competition law (30 days plus 45 additional days, if in-depth scrutiny is required). As regards agreements, the law does not provide for specific deadlines, but proceedings concerning restrictive agreements usually last around nine months. Furthermore, article 13 provides that firms may notify the competition authority of any agreement they enter into, and that no investigation can be initiated by the authority after 120 days from the said notification.

With regard to substance, different review criteria apply. Concentrative joint ventures are subject to a dominance test: they are prohibited when they create or strengthen a dominant position on the domestic market with the effect of eliminating or restricting competition to a significant extent and on a lasting basis.

As far as agreements are concerned, on the other hand, they are prohibited when their object or effect leads to an appreciable restriction or distortion of competition. According to art. 4[30], however, the competition authority may authorise, upon explicit request from the parties, otherwise anticompetitive agreements, which have the effect of improving the conditions of supply in the market and of leading to substantial benefits for consumers.

Such improvements must be identified "taking also into account the need to guarantee to the undertakings the necessary level of international competitiveness and must be related, in particular, with increases in production, improvements in the quality of production or distribution, or with technical and technological progress. The exemption may not permit restrictions that are not strictly necessary for the purposes to be attained and may not permit competition to be eliminated in a substantial part of the market". The competition authority may revoke an exemption in cases where the parties concerned abuse it, or when any of the conditions on which the exemption was based no longer apply[31].

3. The treatment of co-operative joint ventures in the Italian enforcement practice

3.1. General observations

To date, the vast majority of joint ventures where the Italian competition authority opened a formal investigation were co-operative joint ventures involving the creation of a separate legal entity[32]. Therefore, they were all reviewed according to the substantive and procedural rules applying to agreements.

In terms of actual enforcement practice, two general observations are in order. First, as already mentioned, prohibited agreements include those having either the object or the effect (or both) of preventing, restricting or distorting competition. In this respect, a distinction can be made between joint ventures that are examined before they start operating (as a consequence of a prior notification), and those that already operate in the market (this is the case when the review is launched on the basis of a complaint or ex officio).

Indeed, particularly for newly operating joint ventures, the review primarily looks at the contractual provisions governing the creation and expected functioning of the joint venture to assess whether those provisions entail a significant risk of co-ordination among the parties with respect to important variables of their market behaviour (such as, for example, their pricing or output decisions). When such a risk of co-ordination does exist, then an in-depth analysis is carried out to assess, on the basis of the characteristics of the relevant market and the parties' shares therein, whether the joint venture is likely to appreciably restrict competition. For existing joint ventures, on the other hand, their actual effects on market conditions are usually analysed in the first place and may provide sufficient evidence of a violation of the law, irrespective of the objective (or intended) scope and content of the parties' contractual arrangements.

Second, unlike other jurisdictions, no distinction exists in the Italian law between "sham" (disguised cartels) and "structural" (involving real economic integration) joint ventures: both types are subject to the same provisions, pursuant to art. 2. As a matter of fact, however, sham joint ventures are much more likely to be ruled illegal and extremely unlikely to qualify for an authorisation.

3.2. The treatment of joint ventures involving real integration

An example of competition-restricting joint ventures authorised on efficiencies and consumer benefits grounds, is contained in the 1994 Son-Igi-Siad/Igat decision[33] involving three companies producing and marketing liquid gas (oxygen, nitrogen, argon, etc.) for industrial uses. The companies had notified their intention to set up a liquid gas production joint venture to the competition authority. Their plans were to market independently the additional gas produced by the joint company, at the same time maintaining their pre-existing production levels. The parties accounted for around 28 percent of total nation-wide sales[34]. Considerable fixed investments costs and significant scale economies were main characteristics of the relevant market. The authority argued that, because of the common stakes in the joint venture, competition among the parent companies would likely be eliminated with respect to their sales of liquid gas, both jointly as well as independently produced. In view of the parties' position on the relevant market and the significant barriers to entry the joint venture was therefore deemed to appreciably restrict competition.

However, the competition authority exempted the joint venture, granting it a ten year authorisation, because of the expected considerable efficiencies, ultimately leading to net benefits for consumers. The joint venture, in fact, allowed for the creation of substantial additional production capacity - leading to lower prices and wider product choice - that the parent companies would otherwise have been individually unable to fund. Furthermore, it was found that the joint venture would not completely eliminate competition from the market for the presence of an incumbent independent operator, holding a significant market share, would still ensure the existence of an acceptable degree of market rivalry.

3.3 The treatment of "sham" joint ventures

With regard to "naked" agreements among competitors aimed exclusively at fixing prices, sharing markets or restricting outputs, these have been invariably considered as the most serious violations of the competition law. While the law itself does not provide for any *per se* prohibition, these types of agreements are generally deemed illegal as well as void of any redeeming benefit, and are usually subjected to severe sanctions. This approach vis-à-vis naked hard-core restrictions also applies when such restrictions take place within the context of sham joint ventures, not leading to any real economic integration.

The type of assessment of hard-core restrictions usually carried out by the competition authority in the joint venture context can be seen in the 1993 Nord Calce[35] case involving lime producers. The concerned companies had notified the creation of a joint marketing company charged with purchasing and reselling at a commonly agreed price the lime produced independently by each supplier. The companies had agreed on production quotas allocation and on profit-sharing. The authority prohibited the joint venture.

The parties had asked for an exemption, claiming that through the joint venture they would have been able to promote research efforts with respect to alternative uses and applications for lime. Neither efficiencies nor R&D integration benefits were found likely to arise from the venture, as this was simply involved with allocating orders among the parent companies. The competition authority, rejecting the request for exemption, also stressed that those joint research efforts could have been undertaken by engaging in joint R&D activities without having to resort to joint sales initiatives.

4. The Italian competition authority's reliance on commitments to minimise joint ventures' anticompetitive effects

In the Italian competition enforcement experience joint ventures under investigation have often been cleared only after the parties involved had modified the initial agreement to reduce the likelihood of anticompetitive effects, and subject to the parties' continuous compliance with all the obligations undertaken in the course of the proceeding.

Binding commitments have been particularly common in relation to co-operative joint ventures with the concerned parties integrating their activities with respect to initial or intermediate phases of the production process. The authority has maintained a favourable approach vis-à-vis such forms of arrangements[36] as long as the involved parties put in place measures to reduce to the fullest extent possible collusive and exclusionary effects in the concerned as well as in upstream or downstream markets.

An industry where commitments have been largely used in the context of joint ventures is, for example, the oil sector. Joint ventures have been frequently set up to combine storage and logistics infrastructures used for the distribution of oil and of other fuel products (one of such cases is described in detail further below)[37]. The reliance on commitments aimed at avoiding possible collusive arrangements among the parent companies and exclusionary practices *vis-à-vis* existing or potential competitors. The commitments usually undertaken included:

the independent use (i.e. not according to predetermined quantities) by the parent companies of the logistic and transportation capacity owned by the joint venture;

the obligation on the joint venture not to engage in any co-ordination of the parent companies' commercial activities;

the design and implementation of specific rules to ensure that confidential and strategic information available to the joint venture management would not be shared with the parent companies;

the obligation to make unused capacity available for other oil suppliers on the basis of transparent and non-discriminatory conditions, particularly in those areas of the country where the establishment of new capacity in the relevant market was limited, or impeded, by administrative constraints introduced for environmental protection purposes.

5. Detailed description of joint venture cases treated by the Italian competition authority

5.1. AgipPetroli-Anonima Petroli Italiana-Esso Italiana/Petroven case

In June 1999, the competition authority launched an investigation on the possible anticompetitive effects deriving from the establishment of a new enterprise (Petroven), to be jointly controlled by three independent oil companies. Terms and conditions of the joint venture's operations had been notified to the authority for approval[38].

All three parties to the joint venture were major market players, vertically integrated in the oil (as well as other fuels) refinery, logistics, and retail distribution. AgipPetroli and Esso, in particular, held together a 65 percent share of oil retail distribution in Italy. Petroven had been established to combine all the storage and logistics capacity for the distribution of fuel products in three regions in the north-east of Italy (Veneto, Friuli Venezia Giulia and Alto Adige regions) previously owned, and managed on a separate basis, by the three companies. More specifically, the role of Petroven was to run warehouse and storage

facilities and to supply fuel products to gasoline road retail stations, to other inland fuel outlets, and for bunkering[39] activities provided by the three parent companies.

The joint-venture aimed inter alia at a reduction in the storage and logistics structural excess capacity existing in the Venice area. This objective was to be pursued by closing down some of the warehouses run by the three companies. The restructuring initiative intended to represent a joint response to the requests advanced by local authorities to reduce oil and chemical products traffic in the concerned geographic areas. These areas, and in particular the Lagoon of Venice, had over the years suffered substantial environmental damage.

The competition authority intended to verify whether the notified joint venture could have produced anticompetitive effects, due to possible co-ordination of the parent companies' operations and restriction in market access for third companies not holding sufficient storage capacity in the relevant areas. Petroven, in fact, was expected to have access to sensitive information about the parent companies' business activities that might have been used for collusive purposes. Also, in the relevant areas, substantial administrative constraints existed, representing obstacles for the creation of new logistics capacity by existing or new competitors[40].

In the course of the proceeding, Petroven's parent companies modified some of the modalities of operation of the joint venture, in order to reduce its anticompetitive implications. In particular, they committed to make available to third parties any additional unused capacity, in addition to the 10 percent share already foreseen in the original plan. Moreover, third parties would be given adequate information on the availability of unused capacity through announcements published in newspapers enjoying wide coverage.

The parties also committed themselves to the adoption and application of a binding "Code of Conduct" to be observed by all employees of Petroven and imposing strict confidentiality rules on information related to the parents' business downstream activities. Finally, the parent companies would use Petroven facilities according to their needs without setting pre-determined quotas[41].

In view of the amendments made to the initial joint venture agreement and of the commitments undertaken by the involved parties, the authority closed the investigation declaring that the joint venture did not result in a substantial lessening of competition according to article 2 of the competition law.

5.2 Generale Supermercati-Standa-Il Gigante/Supercentrale case.

In April 1997 the authority completed an investigation concerning a joint purchasing agreement between three enterprises: Generale Supermercati (GS) Spa, Standa Spa and Il Gigante Spa[42]. The three companies, which operated retail chain stores, had signed (and notified) an agreement to establish a joint-venture, called "Supercentrale", to whom they would assign the task of negotiating general purchasing conditions on their behalf. Under the notified agreement, however, Supercentrale was not supposed to make purchases directly.

The competition authority defined the relevant market having regard to the different kinds of products as well as the different services offered to consumers. Large retailers and supermarkets supply a large number of different products, e.g. food and products for domestic use, and services, allowing consumers to purchase several products for daily or weekly use in the same location. It was therefore pointed out that the modern retail chains market (i.e. large retailers, supermarkets, hard discounts) had to be considered as a distinct market from the more "traditional" distribution activities of small and medium retailers. As regards the geographic boundaries of the modern retail chains market, the competition

authority ascertained that this market had mainly a local dimension, due to the importance for consumers of retailers' location and proximity.

The authority evaluated the agreement with reference to its impact on competition both among existing large retailers of grocery products and among retailers' suppliers of such products. As for the impact on suppliers, it was pointed out that Supercentrale held only modest market shares in the purchasing market, similar to those held by other joint-purchasing entities; moreover, the counterparts were generally large suppliers, with significant bargaining power.

With reference to the effects on the retail services market, it was ascertained that the joint purchasing agreement would not lead to more homogeneous commercial policies and to uniform selling prices, by the three retailers. Particularly, the specific terms of operation of the joint venture were found to provide sufficient guarantees against the risk of an anticompetitive exchange of sensitive commercial information among the individual parent companies. Therefore, the authority concluded that the joint purchasing arrangement would not appreciably restrict competition in the relevant markets.

NOTES

26. Based on the authority's enforcement practice, concentrations are defined as to also include transactions that lead to the joint control of an existing firm by two or more independent firms.

2. Art. 6 states: " 1.The authority shall appraise concentrations subject to notification under section 16, to ascertain whether they create or strengthen a dominant position on the domestic market with the effect of eliminating or restricting competition appreciably and on a lasting basis. This situation shall be appraised taking into account the possibilities of substitution available to suppliers and users, the market position of the undertakings, the access conditions to supplies or markets, the structure of the relevant markets, the competitive position of the domestic industry, barriers to the entry of competing undertakings and the evolution of supply and demand for the relevant goods or services. 2. Whenever the investigation under section 16(4) shows that the operation entails the consequences referred to in subsection (1) the authority shall either prohibit the concentration or authorize it laying down the necessary measures to prevent such consequences ."

28. Art. 2 states: " 1. *The following shall be regarded as agreements: accords and/or concerted practices between undertakings, and any decisions, even if adopted pursuant to their Articles or Bylaws, taken by consortia, associations of undertakings and other similar entities. 2. Agreements are prohibited between undertakings which have as their object or effect appreciable prevention, restriction or distortion of competition within the national market or within a substantial part of it, including those that: a) directly or indirectly fix purchase or selling prices or other contractual conditions; b) limit or restrict production, market outlets or market access, investment, technical development or technological progress; c) share markets or sources of supply; d) apply to other trading partners objectively dissimilar conditions for equivalent transactions, thereby placing them at an unjustifiable competitive disadvantage; e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts. 3. Prohibited agreements are null and void. "*

29. Only concentrative joint ventures whose turnover exceeds the thresholds set in the competition law are subject to compulsory notification.

30. Art. 4 of the competition law closely resembles article 81.3 of the Rome Treaty,

31. The Competition authority does not employ an ad hoc standard for the review of joint ventures, rather the same one used for the analysis of mergers and restrictive agreements applies. For both mergers and restrictive agreements the applied standard is strongly biased toward consumers' welfare.

32. This submission refers exclusively to joint ventures among actual or potential competitors and not among parties in a vertical (buyer-seller) relationship.

33. I 88 *Son-Igi-Siad/Igat*, Bulletin No 8/1994.

34. The relevant geographic market was viewed as having a national dimension.

35. I 47 *Nord Calce*, Bulletin No 18-19/1993.

36. See, for example, Relazione Annuale dell'Autorità Garante della Concorrenza e del Mercato (Annual report), 30 Aprile 1996, page 175.

37. The oil distribution sector is characterized in Italy by high concentration and substantial administrative constraints impeding new entry and the expansion of the capacity of existing suppliers at all levels of production (logistics, distribution, etc.).

38. I387 *Agip Petroli-Anonima Petroli Italiana-Esso Italiana/Petroven*, Bulletin No 7/2000.

39. Bunkering refers to the supply of fuel for maritime transportation.

40. Petroven had been defined as a cooperative joint venture, to be assessed as an agreement according to article 2.1 of the competition law because it did not perform all functions of an enterprise (all storage and logistic activities were performed to the benefit of the parent companies).

41. Petroven would not perform any type of role with respect to coordination of the commercial activities undertaken by the parent companies.

42. I184 *Generale Supermercati-Standa/Supercentrale/Il Gigante*, Bulletin No 16/1997.

JAPAN

1. Introduction

With the globalisation of the economy and the progression in technological innovation, society is becoming more information-oriented than ever. To keep up with this trend a growing number of companies are forming various business alliances in production, sales, research and development and other areas. Joint investment companies (a company which is jointly established or acquired by two or more companies through a contract to pursue necessary operations in order to achieve mutual benefits) are one such example. The Antimonopoly Act (AMA) does not provide a definition of joint ventures, but the M & As Guidelines (published in 1998) show how the AMA should be interpreted with regard to joint investment companies.

2. The application of the AMA to the establishment of a joint investment company

1. Section 10 of the AMA (restriction on companies' shareholding) applies to the establishment of a joint investment company because the establishment of such a company means that one company holds stocks of another company. Section 16 of the AMA (restriction on acquisitions of business) applies to the transfer of business to a joint investment company from an investing company. If the establishment of a joint investment company may be substantially to restrain competition in any particular field of trade, the Fair Trade Commission (hereinafter referred to as FTC) will take remedial measures in accordance with the provisions of Section 17-2 of the AMA.

2. The types of joint investment companies that may be substantially to restrain competition in any particular field should be determined in accordance with the M & A Guidelines.

3. In the case of a joint investment company, contracts, agreements or arrangements, etc. for establishment or management may violate Section 3 of the AMA (horizontal agreement). In the following section, however, the point of view of regulations on M&As is described.

3. Determining factors of impact on competition

As with mergers, following the definition of relevant markets in the case of a joint investment company, whether the effect may be substantially to restrain competition is determined by comprehensively considering, *i)* industry position of the companies (market share, rank, existing competitive conditions between the companies, etc.) *ii)* the market conditions (number of competitors and degree of concentration, entry, importation and foreclosure or exclusivity based on trading relationships) *iii)* other issues (overall business capabilities, competitive pressure from related markets, etc.). The following items, however, must receive special attention in this examination.

3.1 Mutual Relationship Between the Investing Companies

Even if there is no direct stockholding relationship between companies that invest capital in a joint investment company, a joint relationship will be formed, maintained, or strengthened indirectly through the joint investment company. Although establishment of a joint investment company has aspects that tend to promote competition such as expansion of business into new sectors, technical development, rationalisation of production and sales activities, possibilities cannot be denied, for example, that the potential for price competition decreases in the case of sharing of costs for a joint production company, and that operation of a joint investment company creates possible venues for exchanging information between the investing companies. The impact on competition is more substantial when the investing companies are competitors. The impact on competition of the companies investing in a joint investment company will vary largely, depending on the business activities of the joint investment company. Therefore, the decision will be based on the content of the actual contract between the investing companies and the specifics of the M&A. Moreover, if there is a trading relationship between the investing companies, the specifics of the trading and its percentage in total operations are also considered.

3.2 Forms and Objectives of a Joint Investment Companies

The forms and objectives of joint investment companies include consolidation of production divisions (joint production company), consolidation of sales divisions (joint sales company), consolidation of purchasing divisions (joint purchasing company), expansion of business into new markets, and business alliance between foreign and domestic companies. The impact on competition is examined, depending on the type of joint investment company.. Of these types of joint investment companies, a consolidation of sales will have the greatest impact on competition in the market.

3.3 The Relationship between the Business of a Joint Investment Company and that of Investing Companies

The degree of impact on competition will vary depending on the connection between the business of the investing companies and that of the joint investment company. For example, if certain business departments of the investing companies are completely spun off by consolidation in the joint investment company, the connection between the business of the investing companies and that of joint investment company would be considered to be weak. On the other hand, the investing companies and the joint investment company may compete in the same market because business divisions with goods or services that have similar functions and uses are only partially consolidated. Therefore, there is a possibility that a collusive relationship might be formed between the investing companies through operation of the joint investment company.

3.4 Cases concerning Establishment of Joint Investment Companies

3.4.1 Establishment of a Joint Production Company for Large-scale Motors by Toshiba Corporation and Mitsubishi Electric Corporation(1999)

A Outline

Toshiba Corporation and Mitsubishi Electric Corporation planned to establish a joint investment company into which the research and development as well as designing and manufacturing aspects of their

respective large-scale motor operations would be consolidated for the purpose of strengthening their technical capabilities and cost competitiveness through the rationalisation of manufacturing processes. The marketing activities would continue to be independently carried out by the two companies even after the establishment of the joint investment company.

B Views with respect to the AMA

(A) Particular field of trade

In this case, it was concluded that the manufacturing and sale of large-scale motors would constitute a particular field of trade. Additionally it was also concluded that each of the manufacturing and sale of larger-sized large-scale motors and the manufacturing and sale of medium to small-sized ones needed to be examined because each kind of large-scale motor has different applications, etc.

(B) Impact on competition

The combined share of the two companies in the total value of domestic production of large-scale motors is approximately 44 percent. The sum of two companies' share in term of the value of sales accounts for approximately 40 percent. Thus, though the combined share in the total value of production was relatively high, the marketing activities would continue to be independently carried out by the two companies even after the establishment of the joint investment company. In addition, when the following circumstances were comprehensively considered, it was determined that the proposed establishment of the joint investment company might not be substantially to restrain competition in any particular field of trade defined in term (A). Order solicitation activities including presenting proposals covering the engineering work play a key role in selling large-scale motors. Since each of the two companies would continue to carry out such order solicitation activities independently and they stated that they would take specific measures to ensure their autonomy in carrying out marketing activities even after the establishment of the joint investment company, competition between the two companies in the field of marketing, including engineering work, would be maintained. Furthermore, there were several major domestic competitors having a manufacturing capability in and sales of large-scale motors including larger-sized units, and the difference in product quality is small among the manufacturers, so that users were able to readily change suppliers. Moreover, buyers of large-scale motors, especially of large-sized ones, were large-scale corporations and have strong bargaining power, and this situation is expected not to change in the future. In addition, imports were on the increase in the recent years and, after leading Western manufacturers entered the Japanese market, the price of domestic manufacturers' products declined substantially. The products of Western manufacturers, as far as large-sized large-scale motors, especially in the field of sale to domestic plant builders as products for foreign end users (accounting for about a quarter of the whole domestic production) were concerned, and the products of the manufacturers in Asian countries, as far as small and medium sized large-scale motors were concerned, were evaluated as factors promoting competition.

3.4.2 Joint Venture of Tire Operation by Sumitomo Rubber Industries, Ltd. and Good Year Tire & Rubber Company(1999)

A Outline

Both Sumitomo Rubber and Goodyear produce and sell tires world-wide. In September 1999, these two companies planned to establish joint investment companies in some parts of the world (Japan, North America, and Europe respectively). In Japan, their plan was an establishment of two joint investment companies by Sumitomo Rubber and Goodyear Japan (the companies will be owned 75 percent by

Sumitomo Rubber and 25 percent by Goodyear Japan). One of the joint investment companies would take over Dunlop Japan Ltd., (a company where stocks are all owned by Sumitomo Rubber) and Goodyear Japan's operation of tires for original equipment manufactures, and the other would take over Good Year Japan's operation of tires for replacement market. They were also going to establish a cross-shareholding.

B Views with respect to the AMA

(A) Particular field of trade

In this case, it was concluded that the sale of tires in Japan would constitute a particular field of trade. Additionally, it was concluded that the sales of tires for original equipment manufacturers and the sales of tires for the replacement market also needed to be examined respectively, because each kind of tire has different users.

(B) Impact on competition

The combined sales of the companies concerned would account for a little more than 20 percent of the total sales quantity in the tire market in Japan, which would rank them in the second place. However, not only the leading firm in this market had sales quantity share of a little more than 40 percent, but also another strong competitor exists in this market even after the transaction. Moreover, the increase in the market share of the companies concerned by this transaction was expected to be a few percent both in terms of the sales of tire for original equipment manufacturers and in terms of the sale of tires for the replacement market. When these circumstances were comprehensively considered, it was determined that the effect of the proposed joint ventures might not be substantially to restrain competition in the field of the tire sales in Japan.

3.4.3 Establishment of a joint investment company for 300mm silicon wafers by Sumitomo Metal Industries, Ltd., Mitsubishi Material Corp. and Mitsubishi Material Silicon Corp. (1999)

A. Outline

Sumitomo Metal Industries, Ltd., Mitsubishi Material Corp. and Mitsubishi Material Silicon Corp. planned to establish a joint investment company with the aim to develop the technology of mass-producing next-generation, 300-mm silicon wafers (12-inch silicon wafers; hereinafter referred to as 300-mm wafers), which requires a huge amount of capital investment, advanced technology, and skills in managing and operating a facility to produce prototypes.

B. Views with respect to the AMA

(A) Particular field of trade

Silicon wafers are a basic material for semiconductors. As the 300-mm wafers were being produced and sold on an experimental basis, the JFTC concluded that the development of 300-mm wafer technology would constitute a particular field of trade.

(B) Impact on competition

Most of the silicon wafers that were being widely used at the time were 150 mm or 200 mm. The joint investment company had a combined market share accounting for 30% in the silicon wafer sales market if its existing silicon wafers were included, making it the No. 1 company in the market. However the JFTC has concluded that the establishment of the joint investment company might not be substantially to restrain competition in the particular field of trade defined in term (A), when the following circumstances were comprehensively considered.

- Although 300-mm wafers were currently being produced only on an experimental basis, it was expected that such wafers would be mass-produced in several years. Therefore, the establishment of the joint investment company also implicated entry into the 300-mm wafer market.

- Besides the joint investing companies concerned, a number of potential competitors, both those in Japan and abroad, had already established their own pilot assembly lines in efforts to develop technology of mass-producing 300-mm wafers.

- The new company was commissioned by the investing companies to develop technology of mass production of 300-mm wafers and manufacture prototypes.

KOREA

1. Application of Competition Law to Joint Ventures

Joint ventures have drawn growing attention from the KFTC, as Korea has witnessed a dramatic surge in strategic alliances, following the rapid advances in IT, between online and offline firms, as well as among Internet venture companies. Joint ventures are treated as a type of business combination or concerted act under the Monopoly Regulation and Fair Trade Act (hereinafter, the MFRTA), the general competition law of Korea.

Under Article 7 of the MRFTA, business combination is defined as the acquisition of stock, merger, business transfer, participation in the establishment of a new corporation, interlocking directorate by an officer or employee of large corporation (with total assets or turnovers including those of affiliates exceeding 2 trillion Won). Therefore, joint ventures that are business combinations such as the establishment of a new corporation, acquisition of stock, and interlocking directorate are subject to the application of Article 7 of the MRFTA.

Otherwise, Article 19 of the MRFTA, which concerns concerted acts, may apply to joint ventures that do not fall under business combinations. Article 19 of the MRFTA include price/ output restraints and restraints of transaction territory/ partner as well as the conduct of establishing a corporation or the like aimed to jointly conduct or manage primary areas of business . This allows for the application of this Article to most of sub-agreements of joint ventures. Joint ventures that establish new corporations are governed both by Articles 7 and 19 of the MRFTA, which opens the possibility of overlapping applications.

The current MRFTA provides for an internal mechanism to take into account efficiency-enhancing effects of joint ventures. First, the benefit of increased efficiency can be considered with respect to joint ventures that fall under business combinations, under Paragraph 2, Article 7 of the MRFTA (exemptions to regulation of business combination). Second, joint ventures that are concerted acts but are found to have greater efficiency-boosting benefits than anti-competitive effects in KFTCs reviews receive approvals under Paragraph 2, Article 19 of the MRFTA (authorisation of concerted acts).

In these cases, participants in joint ventures may seek to have the less stringent Paragraph 2 of Article 7 applied rather than Paragraph 2 of Article 19, in order to cover up their collusive conducts and to evade the application of competition law. Therefore, the KFTC in its M&A reviews (following the M&A Guidelines) gives sufficient thoughts about the possibility of collusion, preventing a tacit permission of anti-competitive joint ventures.

As such, the scope of M&A and collusion-related provisions under the MRFTA is broad enough to cover various types of joint ventures. In addition, the MRFTA has in place an internal device to consider pro-competitive effects of joint ventures. To date, however, there are only a handful of adjudication cases on joint ventures. Thus, identifiable method of analysis or competition policy in this area is yet to be formed in Korea.

2. Recent Joint Venture Case

2.1 Facts

Ten asphalt concrete manufacturers in Northern part of Kyonggi Province, in selling their products for private demand (hereinafter, the product), agreed to jointly sell the product through asphalt concrete sellers from Nov. 1999, rather than sell the product individually to consumers. On Feb. 17, 2000, they established, through joint contributions, Korea Construction Materials (KCM), an asphalt concrete selling firm. The ten companies, in entering into product supply contracts, included the provision which stipulated that the companies would be liable for damages amounting to their total turnovers when they sell the product, except those for internal consumption, to a customer without prior consultation with the KCM. In addition, most of the manufacturers forwarded to the KMC performance guarantee insurance policies (one-year policy with the face value of 50 million Won) issued by Seoul Guarantee Insurance Company. The KMC emerged as the sole seller of the product produced by the ten firms in the northern Kyonggi region. From its incorporation to July 31, 2000, it sold 68.3 percent of the turnovers of the product manufactured by the ten companies.

2.2 Definition of Relevant Market

In 1999, there were 306 factories producing asphalt concrete in Korea. The total annual turnovers reached 800 billion Won (27.1 million tons) with asphalt concrete for private consumption taking up 400 billion Won (13.4 million tons). In the Seoul and Kyonggi region, 31 asphalt concrete manufacturers were in operation. The market for private consumption in this region amounted to 20 ~ 25 percent of the total, and the ten firms concerned in 1999 posted 24.2 billion Won in turnovers in the private and public sectors, respectively.

Asphalt concrete is a paving material, produced by mixing and boiling at 150~180 C stones, asphalt, sands, pebbles, etc. The product is non-storable, and the temperature should be maintained within 120~140 C range while in transit. This characteristic makes the transactions of asphalt concrete normally confined to an area within the 40 ~ 50 km boundary (taking roughly 90 minutes in transportation). Taking into account the travel distance, etc. necessary for maintaining appropriate temperate of asphalt concrete, the Federation of Seoul-Kyongin Ascon Co-operatives divided the Seoul-Kyonggi area into four zones (see Table 1). The ten firms all belong to the Northern Kyonggi Province, with manufacturers in other zones rarely supplying to this zone. Given this fact, relevant market in this case was defined as the asphalt concrete market in Northern Kyonggi Province.

Table 1
Four Zones in the Seoul-Kyonggi Area

	Eastern Zone	Western Zone	Southern Zone	Nothern Zone
No. of Firms	6	12	3	10

2.3 Determination of Illegality

The KFTC found that the ten manufacturers engaged in undue anti-competitive conducts in the product market of Northern Kyonggi Province by restraining transaction partners through an agreement to sell the product via certain product selling firm, instead of selling it directly to consumers. The participants in the concerted selling conduct had not acquired prior approval from the KFTC, citing the rationalisation of transaction terms or industrial rationalisation.

2.4 Measures taken

The KFTC assessed surcharges on each firm, equivalent to 0.5 percent of the products sales amount to the KCM from the incorporation of KMC to July 31, 2000. At the same time, it ordered the companies to promptly cease the joint selling and to terminate the product supply contracts with the KMC within 30 days.

APPENDIX

Joint Venture-related Provisions under the Monopoly Regulation and Fair Trade Act (MRFTA) and its Enforcement Decree

1. Article 7 of the MRFTA (Restrictions on Business Combinations)

(1) No person shall, directly or through specially related persons provided for by the Presidential Decree (hereinafter, Specially Related Person), engage in any acts that fall under one of the following categories (hereinafter, Business Combination) which substantially restricts competition in a Given Area of Trade; provided, however, that when the act specified in Subparagraph 2 is carried out by a person other than Enterprises whose total assets or turnover (total asset or turnover of affiliates combined) meets the criteria provided for by the Presidential Decree (hereinafter, "Large-Scale Enterprise"), the foregoing shall not apply.

1. acquire or own shares of another corporation;

2. concurrently hold a position as an officer of a corporation while being an officer or employee (meaning a person other than an officer who is regularly engaged in the business of the corporation) of another corporation. Hereinafter Interlocking Directorate);

3. merge with another corporation;

4. take over or lease the whole or a substantial part of the business, undertake the management of another corporation, or take over the whole or a substantial part of the fixed operating assets of another corporation (hereinafter Take-over of Business); or

5. participate in the establishment of a new corporation, except-

   – when a Person other than Specially-Related Person (except for those set forth under the Presidential Decree) does not participate, or;

   – when a new corporation is established by means of division from the existing corporation pursuant to the provisions of Paragraph 1 under Article 530-2 (Division or Merger-After-Division of Corporations) of the Commercial Code.

(2) When the Commission recognises that a Business Combination is pertinent to any of the following categories, provisions of Paragraph 1 shall not apply. In such event, the Enterprises in question shall bear the burden of proving whether the business combination meets the criteria.

1. when efficiency-enhancing effects deemed hard to achieve without the proposed combination far exceed potential harms of curbing competition;

2. Article 19 of the MRFTA (Restrictions on Improper Concerted Acts)

(1) No Enterprise shall agree with other Enterprises by contract, agreement, resolution, or any other means, to jointly engage in any of the act listed in the items below which substantially restricts competition in a Given Area of Trade (hereinafter referred to as Improper Concerted Acts).

1. fix, maintain, or alter prices;

2. determine the terms and conditions for trade in goods or services or for payment of prices or compensation thereof;

3. restrict the production, shipment, transportation of, or trade in goods or services;

4. restrict the territory of trade or customers;

5. hinder or restrict the establishment or expansion of facilities or installation of equipment necessary for the manufacturing of products or the rendering of services;

6. restrict the types or specifications of the goods at the time of production or trade thereof;

7. establish a corporation or the like aimed to jointly conduct or manage primary areas of businesses; or

8. hinder or restrict the business activities or the nature of the business of other Enterprises, thereby substantially restraining competition in a relevant area of trade.

(2) The provisions in Paragraph (1) shall not apply to Improper Concerted Acts which are carried out for one of the following purposes, and which meet the criteria set forth in the Presidential Decree and are authorised by the Fair Trade Commission.

1. industrial rationalisation.

2. promoting research and technology development.

3. overcoming economic depression.

4. promoting industrial restructuring.

5. rationalising terms of trade.

6. strengthening the competitiveness of Small-and-Medium Enterprises.

(3) Matters necessary for the standards, methods and procedures for authorisation and, modification of authorisation under the provisions of Paragraph (2) shall be determined by the Presidential Decree.

3. Article 24-3 of the Enforcement Decree of the MRFTA (Criteria for Concerted Acts for the Purpose of Research and Technological Development)

Authorisation of Concerted Acts for the purpose of research and technological development under Article 19 (Prohibition of Improper Concerted Acts), Paragraph (2), Subparagraph 2 of the Act is limited to Concerted Acts that meet all of the following conditions:

9. the research and technological development is indispensable to the strengthening of industrial competitiveness and its economic impact is substantial;

10. the scale of investment necessary for the research and technological development is too large for a single Enterprise;

11. collaboration is necessary for the dispersion of risks associated with the uncertainties of research and technological development results; and

12. the beneficial effects of research and technological development outweigh the effects of prohibiting restriction of competition.

4. Criteria for Competition-Restrictiveness of the Notification on M&A Review Guidelines

Competition-restrictiveness of M&As shall be determined based on the relationship between the Acquiring Party and others and the Acquired Party, classified according to their types as horizontal M&As, vertical M&As, conglomerate M&As, etc.

4.1 Horizontal M&As

Whether a horizontal combination substantially restricts competition is judged by the comprehensive consideration of market concentration before and after the business combination, the degree of foreign competition introduced and international competition situation, possibility of entry, possibility of collusion between competing businesses, and existence of similar goods and adjacent markets.

4.1.1 Possibility of Collusion by Competitors

A merger is likely to substantially restrict competition if the decrease in the number of competitors as a result of the merger creates a situation conducive to explicit or implicit collusion on price, output or terms of trade. Whether the collusion by competitors becomes easy will be assessed by the followings:

(1) whether the price of the products sold in the relevant product market has been markedly higher than the average price of similar products not included in the relevant market.

(2) whether enterprises in competing relations have maintained a stable market share for the past several years in the market where the demand for the product transacted in the relevant area of trade is inelastic.

(3) whether there is high homogeneity among products supplied by enterprises in competing relations and whether the terms of production and sale of competitors are similar.

(4) whether the information on the business activities of competitors is easily accessible.

(5) whether there have been cases of undue concerted acts in the past.

NETHERLANDS

1. Introduction

There is widespread agreement[43] that collaborative practices can generate significant private as well as social benefits, such as: sharing risk associated with investments that serve uncertain demand or involve uncertain technology; synergies arising when venturers share complementary skills or assets; or the attainment of economies of scale and scope in production, procurement or logistics. The disadvantages come from the risk of a consortium reducing output and increasing prices or reducing competition on adjacent markets. By means of illustration, take a look at alliances: a small alliance can increase competition by (internalising the reaction of companies outside the alliance to this change[44]) increasing output, but a big alliance (or a small alliance in a concentrated industry) can reduce competition by (internalising the reaction of companies outside the alliance) decreasing output. The task of the competition authority is to investigate which situation is at hand. The number of firms in a sector is a crucial parameter in this regard.

An alliance for example, can be implemented by setting up a production joint venture that sets transfer prices in such a way that output in final good markets is influenced in a desirable way. Variations on this mechanism are:

(a) Fixed costs (investments) at the intermediate good increase the incentive to co-operate. Alliances then tend to be larger and thus more anti-competitive. When one can balance the efficiency gains from joint production and the losses due to increased "market power" (rather: strategic behaviour), the gains may well dominate.

(b) If marginal costs are decreasing at the intermediate stage, the case is more difficult, because the members of larger alliances now truly have lower marginal costs and thus an incentive to expand output. This works opposite to the strategic effect. Larger alliances are then not only more efficient, but also induce more aggressive behaviour than smaller alliances

In this contribution attention will be paid to some literature on joint ventures and other forms of co-operation. Furthermore the legal framework and the practice of competition assessment in the Netherlands are described, followed by international aspects. The issues paper as prepared by the OECD and the questions raised there, provide the structure of this contribution.

2. Definition

2.1 Definition of Joint Venture or Strategic Alliance

Joint ventures (JV's) and strategic alliances (SA's) occur in a large variety of shapes, ranging from agreements between independent firms and joint ventures with joint managerial control to nearly full

mergers of (equal) partners into a new entity. One way to define a SA is: 'a coalition where partners remain independent firms which co-ordinate some of their activities while being competitors in other areas'.[45] Generally the term 'strategic' is used if firms take some action in an earlier stage in order to influence behaviour at a later stage. A strategic alliance should therefore be defined as: the co-operation of at least two actual or potential competitors in an oligopolistic market with perceived interdependence, where strategic investments are co-ordinated and/or the alliance contract is used as a device to change the incentives in the following stages.

2.2 Evidence indicating a marked change in the last few years in the incidence of JV's and SA's

Since the NMa has started only at January 1, 1998, too little experience has been gained to answer this question.

3. Why do firms engage in JV's and how do competition authorities deal with them?

As mentioned in the introduction, co-operation between firms can generate significant private and social benefits. However, co-operation can also have detrimental effects due to reduced competition. Below some brief considerations from economic theory are given. These considerations can provide further guidance on how to assess the effects of joint ventures by adding parameters such as externalities, transaction costs characteristics etc. Within the limited set-up of this contribution the descriptions are necessarily rather short.

3.1 R&D joint ventures[46]:

Many joint ventures are set up for co-operation in the fields of Research and Development (R&D). Externalities are frequently claimed to be the motive for such co-operation. The three most commonly mentioned externalities are *(i)* technological spillovers, *(ii)* pecuniary externalities and *(iii)* environmental externalities. These will be briefly described while relating them to private and social benefits.

(i) Technological spillovers: when information produced by some firm becomes available to some other firm without the latter having to pay for it.

An R&D JV is a way to internalise the full benefits of R&D activities (social rates of return are likely to exceed private returns) and to avoid free-riding by competitors. They therefore tend to increase R&D spending in sectors where spillovers are large.

(ii) Pecuniary externalities(PE): when the actions of one firm directly affect the profits of one of its rivals (by affecting the latter's cost or demand).

Positive (risk sharing) PE's tend to stimulate R&D, whereas negative PE's generally discourage R&D (for example pre-emptive R&D in so called patent races that are meant to keep potential competitors out of a new – developing - market). Consequently, R&D JV's between producers of complementary products are more likely to increase 'long run' R&D than when producers of substitute products engage in joint R&D activities.

Since knowledge embodied in specific products is often too use-specific to spill over, so that spillovers are likely to be relatively larger than negative pecuniary externalities arising from output markets in the case of research activities than with development activities.

(iii) Environmental externalities

When the actions of one firm affect the behaviour of some other firm (strategic behaviour).

In general certain R&D joint ventures will tend to be pro-competitive if they are:

- non-exclusive agreements;
- concern complementary skills, or
- firms producing complementary products;
- if research efforts will be felt in many output markets.

Other elements that have to be taken into consideration:

- alternative methods of appropriation;
- determinants of imitation costs and imitation time;
- size of spillovers (EC block exemption speaks of "know how and patents which result from the research contribute substantially to technical and economic progress").

3.2 Transaction cost economics: an alternative approach of economic analysis[47]

In an "applied price theory" approach the firm is regarded as a production function which natural boundaries are technologically determined. The allocation of economic activity between firm and market is mainly seen as a result of production technologies. This can lead to a rather strict anti-trust approach to forms of co-operation between undertakings, which can not be explained by technological factors such as economies of scale. A transaction cost economics (TCE) approach[48] can help to explain the allocation of activities between firm and market by taking other factors into account.

Rather than focus on technology and price-to-cost margins, TCE focuses on *(1)* the attributes of transactions (frequency, uncertainty and asset specificity) and *(2)* the attributes of governance structures (safeguards, incentive intensity and adaptability), the object being to effect a discriminating alignment between transactions and governance. Low frequency, a high degree of uncertainty and asset specificity can make the market as a governance structure for the transaction unsuitable because of the risk of opportunistic behaviour. In turn, the form of the organisational structure, whether it is a simple market transaction or a complicated strategic alliance, can partly be explained by needs for safeguards, incentives and adaptability to changing circumstances. TCE can provide a complementary explanation for the choice between the market and the firm with the dimensions of these attributes. Vertical integration, for example, can also be explained as a means to encourage investments in transaction specific capital, there being greater confidence that adaptive, sequential decision making will proceed effectively and information exchanges between stages can be facilitated thereby permitting investment benefits. While integration can improve adaptability, a counterbalancing effect can occur if taking the transaction out of the market significantly diminishes the incentive for efficient production. Hybrid or intermediate forms such as JVs,

franchising and the like, support incentive intensity and adaptability of intermediate degrees. Hereby transactional economies (dealing with asset specificity problems, adaptability or uncertainty) are introduced next to the technological economies (economies of scale) of the applied price theory.

In sum TCE can provide additional economic reasoning to explain governance structures by looking at attributes such as frequency, uncertainty and incentive intensity. This should not be taken as a catch-all excuse for co-operation between firms but can provide a valuable additional instrument for anti-trust authorities for competitive assessment of forms of co-operation.

3.3 Which types of competitive restraints are subject to summary (per se) condemnation

Under the exemption regime (i.e. appraisal of agreements under article 6 Netherlands Competition Act (CA) there are some hard-core restrictions which are prohibited, e.g. directly or indirectly fixing purchase or selling prices. In this regard the NMa follows the European competition law and its development via case law etc. In combination with an appraisal of the economic context (e.g. (potential) competitive conditions on the relevant market) decisions are taken. The example below can illustrate this.

Case 1011 KPN Telecom - SNT - Telecom Teleservices

KPN is the former monopolist supplier of telephone services, SNT is the biggest call center company, with a market share of [20-40 percent]. Parties want to *(i)* reach economies of scale and *(ii)* bundle knowledge, both to increase cost efficiency in (only) the production of call center services. Marketing will be done independently by each partner. Both gains will lead to a cost reduction that can be passed on to consumers through lower prices.

Elements of the agreement: SNT and KPN will:

- exchange information before bidding on large projects;
- not approach each others customers;
- exchange information about their customers;
- KPN and SNT are preferred suppliers of Telecom Teleservices for a number of subcontracting services.

The four conditions in article 6 CA are satisfied since:

- production or distribution are improved and/or technological or economic progress is promoted, since productive activities are concentrated in one new enterprise which increases cost efficiency and enables economies of scale;
- in view of competitive pressure, it is expected that cost efficiencies will be passed on to consumers;
- necessity of restrictions: SNT is experienced in managing call centers, KPN has extensive experience with and knowledge of technical issues;
- because of the number of competitors remaining, their market shares, low entry barriers and the high growth rate, competition is not eliminated.

3.4. What kind of evidence do you require to determine if anti-competitive clauses are reasonably linked to the JV's pro-competitive effects and necessary to achieve the JV's positive impact?

Parties are asked to motivate the why and how of parameters of anti-competitive clauses such as the duration, the size of the exclusive territory, the set-up and extent of fining clauses related to a premature/early break-up of the JV. For a concentrative JV this is used to determine if such clauses qualify as ancillary restraints as set out in the Notice on ancillary restraints with concentrations of 1990[49]. Agreements which are assessed under article 6 CA follow a similar line of reasoning as set out in the *Elopak/Metal Box- Odin*[50] decision "*where specific provisions of the agreement which are no more than is necessary to ensure the starting-up and proper functioning of the JV do not fall under Article 81 of the EC Treaty*". Sometimes (potential) competitors are asked to give their opinion or a research agency is employed for providing additional information. General guidelines are hard to give, since account must be taken of the specific circumstances of each individual case.

3.5 Do you encourage JV'ers to make commitments designed to enhance the pro-competitive nature of a JV?

During the investigation of cases, the parties concerned sometimes, after consultation with the NMa or otherwise, voluntarily change some of the provisions of the agreement or merger which are deemed to be anti-competitive and would probably prevent non-opposition, the granting of a licence or an exemption. Another possibility for commitments is incorporating these in the formal decision, e.g. issuing a licence for the concentration subject to restrictions and/or conditions. An example of the aforementioned is the decision on the licence for *Friesland Coberco Dairy Foods'* acquisition of *Zuivelfabriek De Kievit*[51]. There parties agreed to segregate *De Kievit's* farm milk trading before the take-over and to transfer them to a subsidiary of *De Kievit* shareholder *Hoogwegt*, which would continue the activities and integrate them with its activities.

3.6 Does your JV policy apply only if they have a particular legal form or a certain degree of permanence?

Under Dutch law, the difference between co-operative and concentrative joint ventures, as it existed under the EU Merger regulation[52] until 1998, still exists. Whereas the current EU Merger regulation incorporates the test of article 81 of the EC Treaty if a co-operative joint venture is concerned, this is not the case in the Netherlands. That is: within the EU merger regulation it is investigated if the co-operative joint venture satisfies the following cumulative conditions:

1. the joint venture must provide a significant contribution to improvement of production or distribution of goods/services or the promotion of technical or economic progress;

2. a fair share of the benefits must go to consumers;

3. the co-operative agreement must be indispensable;

4. competition must not be eliminated in the relevant market.

Under the Netherlands Competition Act , a concentrative joint venture is investigated (merely) for the existence or strengthening of a dominant position. If the notified merger is not declared a concentration because of a perceived risk for co-ordination between any of the parents and the joint venture, the case will be transferred to the department dealing with exemptions, which applies the same conditions as in article 81 EC Treaty. Consequently, there is not yet any possibility, to weigh the

advantages and disadvantages as is possible under article 81 EC Treaty, within the Dutch concentration control framework of assessment. Instead, this investigation whether the conditions for exemption are satisfied is done within the separate exemption regime with its own procedural obligations and provisions.

Since the degree of permanence of a JV is one of the factors which determines whether a joint venture qualifies as a full function operation or not, it indirectly also determines under what regime – merger control or exemption – it will be assessed. The legal form of a JV is also important in the sense that weaker – not formalised in a legal body - forms of co-operation are seldomly considered as full function joint ventures. Consequently these would be assessed under the exemption regime.

3.7 Identify and summarise empirical research showing that competition policy towards JV's is too liberal or strict.

In general little or no research has been done on the effects and restrictiveness of competition policy with regard to joint ventures and strategic alliances. One of the main causes of this deficiency are the problems one is confronted with, when estimating demand and supply functions. Recently, some methodological progress has been made, however, in evaluating the impact of market structure on prices and welfare. *Park and Zhang [2000]* and *Pinkes and Slade [2000]* have made interesting contributions. Park and Zhang investigate the effects of several international airline alliances on demand (sign of higher quality), equilibrium prices, quantities and welfare. Their model estimates show that complementary alliances tend to increase output, lower prices and consumer surplus, whereas parallel alliances tend to reduce total output and consumer surplus. Alliances in other sectors could be studied in a similar way. Pinkes and Slade apply an innovative structural model to the British beer market and study the effects of product differentiation and concentration on prices.

3.8 Does your agency balance pro- and anti-competitive effects of a JV using a different 'surplus' standard than it applies to mergers?[53]

Under Dutch Law, there exists no possibility to allow for an efficiency defence, as under the US system, for clearing a merger. Consequently, there is no surplus standard in merger policy applied to (concentrative) joint ventures. As far as ancillary restraints in combination with concentration filings are concerned, the assessment is merely based on the indispensability of the constraint for accomplishing the transaction. This is not the same as an assessment to determine if the four cumulative conditions as applied to exemptions are fulfilled.

Co-operative joint ventures have to fulfil the cumulative criteria for exemption as set out in article 17 of the CA (compare with art. 81.3 EC) if the JV falls under article 6 of the CA. This means amongst others that competition must not be eliminated and the JV must be indispensable for achieving its goal.

3.9 Are there plans in your jurisdiction to modify procedures applied to JVs ? Why?

At the moment there are no plans to modify procedures applied to JVs. The review of the Competition Act in 2001-2002, however, might lead to modifications.

3.10 Describe in detail one or more recent JV cases

Competition policy frequently interacts with – sometimes extensive – sectoral regulation by the government in certain industries. Health care is one example, retirement saving and public transportation two others. Such cases are particularly interesting because they show the limits competition authorities are confronted with as a result of supplementary (usually sector specific) regulation by governments. The following two cases are specifically interesting because they deal with this interaction. They can be qualified as concentrative joint ventures; more precisely a production JV and a production and marketing JV. After that some examples of joint purchasing and joint production, which where assessed under the provisions for exemption from Article 6 CA, are presented. Finally the special regime for crisis cartels is briefly covered.

3.10.1 Concentrative joint ventures

Case 1201 ABP-PGGM-NIB (production joint venture)

ABP and PGGM are the two biggest Dutch pension funds. In March 1999 they planned to take a 50 percent stake each in investment bank NIB.

The following facts were available when the case was assessed:

- parties declared that NIB's parents will not be active on markets where NIB itself would be present: production and distribution of investment products, investing for own risk and account, investment and asset management for third parties. Consequently, there was no risk for co-ordination between the parents and the JV.

- ABP and PGGM asserted that they actually were no competitors since Dutch law does not allow for any real freedom of choice for the customers of both ABP and PGGM.

The NMa is confronted with this line of argument in several state-monopolised or regulated industries: since there is no competition, parties argue that a merger between them will not actually change the competitive conditions on the relevant markets. In the decision, this issue was could be left unanswered, because all the activities that NIB engages in and are important from the perspective of an investor-pension fund are supplied by a large number of competing firms.

Case 1383 NS – Arriva – NoordNed (production and joint marketing)

In August 1999, NS and Arriva intended to bundle bus and train transportation into one company that would provide integrated transportation. NS is the incumbent national monopolist provider of railway transportation services; Arriva is a British multinational that, among other things, arranges all public transportation in the city of Groningen and (regional) bus, taxi and car services in the northern part of The Netherlands.

Because this case concerned a so called concentrative JV (the parents were withdrawing from the markets where the JV would be active, so there was no risk of co-ordination between the parents or a parent and the JV), the only issue to be investigated was whether the transaction threatened to create or to strengthen a dominant position on any influenced market. The JV agreement provided for the following:

- it would get a five-year concession to supply bus and train transportation in the northern provinces, with an option for another five years;

– NoordNed would get access to the national rail network.

Parties, among other things, stated that the combination would imply a combination of two regional monopolies, one in bus transport and the other in railway transport, but that competition would not be affected since the existing regulation (rail) and practices (bus) did not allow for any competition between them(this argument was in many ways similar to that in the ABP-PGGM-NIB case).

It was ruled that there was no risk for a dominant position in view of that fact that:

1. bus and rail services constitute complementary services due to differences in price (train + 20-40 percent), travelling time, routes and distance between stops;

2. there was no overlap between the activities of the parties;

3. the (at that time) proposed (but by now accepted) Law on Personal Transportation is not likely to aim at compulsory tendering of bus transport within at least a number of years ;

4. there is not yet a law proposal that envisages competition in rail transportation;

5. parties thus cannot compete with each other on the markets for regional public transportation outside their concession areas since current regulation does not allow for competition yet;

6. since competition is most likely to be introduced only in the field of bus services, any risk for co-ordination will only concern Arriva and NoordNed (since Arriva could participate in the same bus tenders as NoordNed);

7. the first new competitor of NS would be formed.

What can we conclude from this experience?

Despite a strict competition law, supplementary regulation poses limits to the relevance of a competition test. As long as sector specific regulation allows that government imposed monopolies are continued, a competition test is unlikely to lead to an improvement of competitive conditions.

3.10.2 Assessment under Article 6 CA; joint purchasing

Generally speaking joint purchasing agreements in itself are not considered as limiting competition by object, on the basis of efficiency and countervailing power arguments. Nevertheless such agreements can have harmful effects on competition depending on the structural characteristics of the relevant markets and the position of the joint purchasing co-operative and the provisions of the agreement.

When assessing joint purchasing agreement attention must therefore be paid to restrictions of competition, like restriction of sales opportunities on upstream markets or restrictions of competition on the downstream market between the members of the joint purchasing co-operative. Below two applications for exemptions of joint purchasing agreements, on which the Netherlands Competition Authority took a formal decision, are described.

Case 169 *Hout Import Combinatie (HIC)*[54]

The HIC is an alliance for purchasing pinewood. The agreement encompassed that the three undertakings concerned would jointly import pinewood. Each party is free to buy pinewood independently, in as far as this involves domestic purchases (i.e. the intermediate trade). The agreement could not be

qualified as a concentrative joint venture. In the relevant markets, the market for the importation of pinewood and the market for pinewood wholesaling, the market share of HIC is less than 10 per cent. Furthermore, the large number of undertakings active in this market, the absence of significant access and expansion barriers and the negotiation power of customers, lead to the conclusion that the market is very competitive. Therefore the agreement did not give rise to an appreciable restriction of competition in the markets concerned. The same applied to the exclusive take-up commitment, which was contracted for an indefinite period jointly with the joint purchasing agreement.

Case 224 *Multizorg*[55]

The Multizorg co-operative purchases hearing aids, respirators, stoma articles, diabetic materials, incontinence materials and maternity care for its members. Ten care providers, who offer private care insurance, are affiliated to this co-operative. The members operate on a national scale and are free to buy care from other sources. In addition, Multizorg's purchases of aids and maternity care accounted only for a very small share of these markets. Therefore the conclusion was reached that joint-purchasing via Multizorg did not give rise to any appreciable effect on competition in the markets for purchasing of care, to restriction of sales opportunities of care providers or a restriction of competition between these care providers. The accompanying exit scheme on the basis of which the members were charged for costs when they withdrew from the co-operative lead to the same conclusion.

3.10.3 Assessment under Article 6 CA; Joint production

Below, two examples of decisions on applications for exemption for joint production are given. In both cases the co-operation agreement was found to be pro-competitive because it enabled a new competitor to enter the market.

Case 21: Interpolis & Cobac[56]

Interpolis (a fully consolidated subsidiary of *Rabobank* and affiliated companies), *Cobac* (part of the *Euler* group which is connected to the *Allianz* group) and *Cobac* services (a 49 percent subsidiary of *Cobac*) set up the joint venture *Interpolis kredietverzekeringen,* which offers credit insurance. *Interpolis* is an insurer, which is not active in the Dutch credit insurance market. The *Euler* group is active in the field of credit insurance. *Cobac* has a limited market share of about five per cent on the Dutch credit insurance market while *Cobac* Services is not independently active on this market. The joint venture is not totally independent, e.g. *Cobac* determines the size of the insured credit and the terms from which the credit insurance policy starts, bases on risk assessment via its own specific database. Additionally, *Cobac* provides acceptation and other activities for the joint venture. *Interpolis* provides its distribution channels to the joint venture. In other words, the joint venture is dependent on *Interpolis* and *Cobac* for important and essential parts of her activities and can therefore be classified as co-operative (as opposed to concentrative).

In the competitive assessment account was taken of the effect of the set up and maintenance of the joint venture on competition on the relevant market and between the parent companies within the economic context of the relevant market. The dominant player in this market is NCM with a market share of more than 80 percent. The very specific nature of credit insurance as a service, whereby the set-up of a database is a very time-consuming and costly process lead to the conclusion that this market is characterised by high entry barriers. The combination of the distribution channels of *Interpolis* (including *Rabobank's* subsidiaries) with the technical expertise and experience in this market of *Cobac*, creates synergy effects in the joint venture which give it the possibility to credibly put pressure on NCM's position in the market. Without the co-operation between *Interpolis* and *Cobac* this would not have been possible.

Cobac could not achieve that by itself, since developing a large channel of distribution could not have been realised as quickly and efficiently as the JV could. Neither could *Interpolis* offer credit insurance independently without the necessary knowledge, experience and technical expertise. Combining this with the very strong position of the dominant player lead to the conclusion that the entry of the new undertaking venture *Interpolis kredietverzekeringen* can be expected not to limit but instead to improve competition on the relevant market. Therefore no exemption was necessary. Ancillary agreements could be qualified as being directly related to the set-up and maintenance of the joint venture and consequently did not need an exemption either.

Case 427: *K.O. Bus Bedrijven Groep Nederland*[57]

This application for exemption concerns an alliance of 43 construction companies operating on a local and regional scale. This alliance, the *K.O. Bus Karwei Onderhoudsdienst* related to the maintenance of buildings. The alliance aimed at increasing sales of maintenance services by enabling its individual members to provide a more attractive service to national buyers of such services, by working together. Such national customers would not do business with individual K.O. Bus members. Since the K.O. Bus members do not (and can not) compete in the national market for maintenance services the agreement does not restrict competition but actually increases it because a new provider enters the national market. Furthermore the market share of *K.O. Bus Karwei Onderhoudsdienst* is very small. Taking this all into consideration no exemption was required.

3.10.4 Assessment under Article 6 CA; joint reduction of capacity: crisis cartels

The European Commission applies special principles to crisis cartels[58]. These principles are a set of strict conditions, which must be fulfilled in order to qualify for approval for agreements in a sector, designed to solve structural problems through a co-ordinated reduction of overcapacity. The economic reasoning behind this is that after the restructuring, healthy competition can be restored in an improved market situation. Such agreements (or parts thereof) are prohibited if they restrict individual decision making freedoms and competitive conditions too severely and do not comply with the conditions for exemption of Article 81.3 EC Treaty (Article 17 Competition Act). The application for exemption of the Foundation of the *Pig Slaughterhouses Restructuring Fund*[59] is an example of application of these principles by the Netherlands competition Authority. In this case the application for exemption was rejected for the provisions which included restrictions on production for the (remaining) capacity of the slaughterhouses concerned.

4. International aspects of JV's and international co-operation among competition authorities

4.1 Describe any international JV cases where there have been differences in treatments accorded by CA's.

The NMa has no experience of such cases so far.

4.2 Would facilitating information exchange or assistance in other jurisdictions' investigations have contributed to more similar solutions being adopted in your country?

To give an example: the Dutch notification form for concentration requires parties to submit a relatively small amount of information on their activities, e.g. no information is requested on adjacent/related markets. Consequently, the NMa could profit from exchanging information with other EU

member states, which require more extensive information for notification of a concentration such as information about adjacent markets. Of course the NMa also has the possibility to ask the parties involved additional questions e.g. in order to obtain information about up- or downstream markets.

4.3 Give some examples of international co-operation: what are costs and benefits

The following general observations can be given. An impediment to international co-operation is the lacking of a legal basis for the exchange of (confidential) information. Moreover, the merger and exemption application procedures differ between competition authorities, resulting in different information requirements, definitions and procedural provisions such as deadlines for taking a decision etc. Language and physical distance are other impediments to international co-operation. With regard to merger procedures the strict rules for taking a decision within a set period necessitate fast and flexible co-operation. These factors should be taken into account if international co-operation is to be facilitated. Benefits could be harmonisation of application of merger and cartel control between different countries. In the field of merger control international JVs have to notify in an increasing number of countries, co-operation between countries would greatly reduce the administrative burden on business for filing in different countries with different procedures etc. Assistance could also help investigation into effects on relevant markets outside the national borders.

4.4 Present evidence of across country differences in policies towards JV's that have prevented companies from making better use of international JV's or have led to competitive distortions

Such evidence was not available.

NOTES

43. *Shapiro and Willig (1990).*

44. So called Stackelberg leadership.

45. *Morasc h(2000)*

46. P. Geroski *(1993)*

47. Oliver E. Williamson, *Antitrust lenses and the use of transaction cost economics reasoning*, chapter 7 in Jorde/Teece (eds.) *Anititrust, Innovation and Competitiveness*, Oxford 1992, pp.137-164

48. An elaborate explanation of TCE can be found in *The economic institutions of capitalism* by Oliver E.Williamson, Free Press, New York 1985.

49. [1990] OJ C 203/5

50. [1990]OJ L 209/15, paras 28-29

51. Decision of d-g NMa *FCDF/De Kievit* , casenumber 1132, dd. 7 July 1999

52. Council Regulation (EEC) 4064/89 of 21 December 1989 on the control of concentrations between undertakings, [1989] OJ L 385, [1990] OJ L 257 with amendments introduced by Council Regulation (EC) 1310/97 of 30 June 1997, [1997] OJ L 180/1.

53. See Williamson (1988) for some alternative surplus measures.

54. Decision d-g NMa, casenumber 169, *Hout Import Combinatie*, dd. 3 December 1999

55. Decision d-g NMa, casenumber 224, *Multizorg*, dd. 25 October 1999

56. Decision d-g NMa, casenumber 21, *Interpolis & Cobac*, dd. 19 October 1998

57. Decision d-g NMa, casenumber 427, *K.O. Bus Bedrijven Groep Nederland*, dd. 1 July 1999

58. *XXIIIrd Report on Competition Policy 1993*, European Commission, Brussels 1994, pp. 47-50

59. Decision d-g NMa, *Pig Slaughterhouses Restructuring Fund*, casenumber 374, dd. 23 March 1999

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TURKEY

1. Introduction

Joint ventures cover a wide range of co-operative agreements between companies. A joint venture is often associated with the formation of a company. The key characteristic of a joint venture is joint control of business venture by two or more independent firms. The definition and treatment of joint ventures from the Turkish Competition Policy perspective are stated below.

2. Definition

After stating in paragraph 1 of Article 7 of the Act on Protection of Competition, No:4054: "Merger of two or more undertakings, or acquisition, except acquisition by inheritance, by an undertaking or by a person, of another undertaking, either by acquisition of all or a part of its assets or securities or other means by which that person or that undertaking acquires a controlling power in that undertaking concerned, which would create or strengthen the dominant position of one or more undertakings as a result of which, competition would be significantly impeded in a market for goods and services in the whole territory of State or in a substantial part of it, is unlawful and prohibited.", in paragraph 2 of the same Article, it is stated that "the Board shall publish the categories of mergers and acquisitions which, to be considered as legally valid, require a prior notification to the Board."

Based on this said Article 7/2, joint ventures are defined in part (c) of Article 2 entitled "Cases Considered as Merger and Acquisition" of the Communiqué No: 1997/1, entitled "Communiqué on Mergers and Acquisitions Calling for the Authorisation of the Competition Board" as: "Joint ventures which emerge as an autonomous economic entity possessing assets and labour to achieve their objectives, and which do not have any aims or effects restricting competition among the parties, or between the parties and the joint venture". Accordingly, being an autonomous economic entity in order to achieve the aim (functional independency), not having any aims or effects restricting competition and though not mentioned in the Communiqué, those procedures having conditions of joint control, which are the basic elements of joint ventures, are assessed to create concentration. In case any of these elements is not present, subject joint venture is considered as an agreement leading to co-operation and thus evaluated under Article 4 of the Act No:4054.

In the EU, Council Regulation dated 21.12.1989 and Numbered 4064/89 regulates the rules to be implemented on mergers, acquisitions and joint ventures. In Turkey, legislations regarding mergers, acquisitions and joint ventures have been regulated parallel with the said Regulation. However, some amendments were made on the Council Regulation 4064/89 through Council Regulation No: 1310/97, dated 30.06.1997 which was put into effect on March 1, 1998. Owing to the modification on joint ventures, a joint venture functioning completely as an autonomous entity under joint control of the parties shall be assessed as a merger creating concentration as viewed by EU Competition Law, and be assessed under Regulation No: 4064/89. The element of not creating co-ordination of competition is not anymore assessed in EU Competition Law as establishing element in the evaluation of joint ventures creating concentration.

In Turkey however, studies on the new communiqué taking into account the latest changes in EU are in progress.

In Article 4 of the Communiqué No: 1997/1, amended by Communiqué No: 1998/2, there is the following provision: "… if, regarding the relevant product market in all parts or a part of the country, the total market shares of the merging or acquiring undertakings exceed 25 percent of the market, or their total turnover exceeds 25 trillion Turkish Liras, even though the total market shares do not exceed this rate, it is compulsory for them to receive the authorisation of the Competition Board". Thus, joint ventures that are over the stated thresholds are subject to authorisation under the Communiqué.

Sectoral Breakdown of Joint Venture Decisions
5.11.1997 – 31.12.1999

SECTORS	JOINT VENTURE
Chemistry and chemical products, petroleum products, fertilisers	2
Construction, cement and other construction materials	1
Press, publication, records, cassettes etc. recorded media	2
Food products and refreshments	2
Electricity, gas, water	2
Vehicles for land, air, water and railways	1
Furniture, White Goods, Toys, Sports Equipment, Musical Instruments, Jewellery	1
Financial Services (banking, insurance etc.)	2
Textile and ready-wear	1
TOTAL	14

In Turkey, most of the notified joint ventures are built by local and foreign partnerships. As a consequence of globalisation, while foreign firms want to enter the Turkish market with local firms having experience and market information, on the other hand, local firms would like to make use of the know-how of the former. In addition to this, foreign firms, via joint ventures, learn how business is done in Turkish markets, make use of the distribution channels and marketing knowledge of local firms, and are able to carry out transactions of country's legislations via local firms. And the local firms, on the other side, have access to new technologies and marketing information, become able to transfer technology at lower costs, and obtain advantages of the "trade mark" or "brand name" of the foreign partner.

3. Why do firms engage in joint ventures, and how do competition agencies deal with them?

The Competition Board, regarding joint ventures, accepts presence of all parties on the same market with the joint venture as a co-operation agreement having the effect of restriction on competition, and thus does not authorise such transactions. That is to say, regarding the application made for five different joint ventures to be formed by Migros Türk T.A.S. and Metro AG, the decision of the Turkish Competition Board dated 19.03.1998 and numbered 57/424-52, significantly clarifies the issue of coexistence of parties and the joint venture in the same market. In the said decision, after stating: "… presence of both mother companies (Metro AG – Migros Türk T.A.S.) in the same geographical market (city and town centers) with three different joint ventures formed with Sok Ucuzluk Marketleri A.S., Real Market A.S. and Metro Grossmarket Bak•rköy Alisveris Hizmetleri Ltd. Sti. shall transform this joint venture to an agreement restricting competition, and creating co-operation", and for this reason, it was decided that, regarding the subject joint venture transactions:

"As per paragraph 3 of Article 6 of the Communiqué No: 1997/1, as long as the subject joint venture agreement is in force, both mother companies not to coexist in the same geographical market and directly or indirectly enter into the relevant product market with the joint venture; in other words, only one of Metro AG or Migros Türk T.A.S. be permitted to operate with the joint venture in the relevant product market in any city or town center within the territory of Turkey; and in case not acting in compliance with this condition, subject joint venture be considered to fall under Article 4 of the Act No:4054 and be considered as an agreement restricting competition and notification be made, stating preliminary research and/or investigation with Authority's own initiative be initiated".

As understood by this decision, the Competition Board has decided to treat coexistence of all parties in the same market with the joint venture as a co-operation agreement restricting competition.

Below given are sample decisions regarding joint ventures:

3.1 LPG Joint Venture.

Upon the application for granting authorisation to the referred "joint venture", along the lines of the shareholders contract concluded between the parties, in order for the joint venture company to gain validity which is targeted to be established for supplying liquefied petroleum gas (LPG), the Competition Board, in its meeting of 27.05.1999, did not give authorisation to the transaction in question as a result of negotiating the report prepared by the Reporters, and the evaluations performed. Below-mentioned are the relevant parts of the said decision:

"Upon the notification registered in the records of the Authority on 02.11.1998 with the request for granting authorisation to the application regarding the referred joint venture, along the lines of the shareholders contract concluded between the parties, in order for the joint venture company to gain validity which is targeted to be established with the participation of 39 firms for purposes of supplying liquefied petroleum gas (LPG), it was expressed in the Preliminary Examination Report prepared by the Reporters and submitted to the Chairmanship of Competition Board that it could not be understood from the information and documents available in the file whether the joint venture which is the subject of file was a merger creating concentration under article 7 of The Act, or an agreement creating co-operation that may be considered under article 4 of The Act.

The Preliminary Examination Report in question was discussed in the meeting of the Board and it was decided that the application in question be subjected to final examination.

Besides the fact that the quorum as to taking decisions for the management of the joint venture which is the subject of file was not organised such that 29 LPG distribution companies having minority shares would have a word in strategic decisions, any provisions could not be noticed in the shareholders contract which ensure a right to veto for these companies. Within this framework, it is not possible to speak about a joint control, in other words to say that there formed a new will independent of the will of the individual parties concerned in the joint venture in question. Furthermore, it is observed that the financial and administrative structuralisation of the joint venture to be established and its position in the structure of the market are not independent of the parties, and that therefore, it does not bear the following condition sought in the sub-paragraph (c) of the article 2 of the Communiqué No. 1997/1, which lists the cases of mergers and acquisitions: "An independent economic entity such that it would possess the manpower and assets so as to realise its goals…"

The contract which is the subject of application should be considered as a co-operation agreement which the undertakings party to the joint venture made among themselves. Essentially, due to gathering the competing undertakings, this agreement is not only contrary to the essence of the article 4 of The Act, but also involves some particular cases which are expressly stated in the sub-paragraphs of this article, and restrict competition. As the price and other conditions of sale are determined between the parties via the agreement in question, the opinion reached was that the following violations of competition expressed would become practical: the subparagraph (a) of the second paragraph of the article 4 which reads as: "Determining the purchase or sale price of goods or services, elements constituting the price such as costs, profits, and any kind of terms of purchase or sale"; when it is taken into account that the large groups which are party to the company and may enter the supply market individually would easily control the supply and distribution of LPG in the market through the joint venture which already has a customer portfolio of about 92 percent in the distribution market, the sub-paragraph (b) of the same paragraph which reads as: "Partitioning the markets for goods or services, and sharing or controlling any kind of market resources or elements."; and the sub-paragraph (c) which reads as: "Control of the amount of supply or demand as to goods or services, or determining them outside the market."

In the light of the foregoing information;

It was decided that:

- the transaction which is the subject of file did not emerge as an independent economic entity and had effects restricting competition, and therefore was not a joint venture under the following sub-paragraph (c) of the article 2 entitled "Cases Deemed as Mergers or Acquisitions" in the "Communiqué Concerning the Mergers and Acquisitions Calling for the Authorisation of the Competition Board": "Those joint ventures which emerge as an independent economic entity such that they would possess the manpower and assets so as to realise their goals, and which have no goal or effect of restricting competition between the parties, or the parties and the joint venture";

- therefore, the transaction which is the subject of application was not a merger or an acquisition under the Article 7 of The Act, but rather a co-operation agreement restricting competition under its article 4;

- as a result of the negative clearance and exemption examination performed along the lines of the request which takes place in the notification form and reads as "…In case the Competition Board does not give authorisation to the transaction which is the subject of notification, we submit that the notification be considered as an application for negative clearance or a notification for individual exemption.", the agreement in question could not be granted a negative clearance due to having effects restricting competition under the article 4 of The Act;

- the agreement in question had a nature likely to ensure economic development as joint investments bring certain physical and economic advantages to the parties; however, due to the fact that such economic benefit does not reflect on the consumer, and the agreement unduly restricts competition in a significant part of the relevant market, it did not bear the conditions for exemption which take place in the sub-paragraphs (b), (c) and (d) of the first paragraph of the article 5 entitled "Exemptions" in The Act, and therefore could not be granted an individual exemption;

- the application be refused authorisation, which related to establishing a joint venture company with the title “LPG Provision Distribution Industry and Trade Inc” to operate in the LPG supply market under the shareholders contract to be concluded between the parties with the participation of 39 companies operating in the Turkish LPG distribution market.”

3.1.1 Garanti – Balfour

In the Board meeting numbered 00-29/307, as a result of negotiations and assessments made the report prepared by the reporters upon the application to transfer 49.177096 percent of the shares of Garanti – Koza Insaat Sanayi ve Ticaret A.S., who is under Koç Group, to Balfour Beatty Overseas Ltd. conditional authorisation was granted to the transaction. Related parts of the subject decision are given below.

According to the Shareholder’s Contract signed between Garanti – Koza •nsaat Sanayi ve Ticaret A.S. and Balfour Beatty Overseas Ltd., the company is said to operate in "construction and undertaking business" market. The territory of the Republic of Turkey has been determined as the geographical market.

In the "Introduction" section of the Shareholder’s Agreement between Koç Holding A.S. and Balfour Beatty Overseas Ltd. (BBOL), it is concluded that pursuant to the transfer of the shares which are subject of notification, each of Koç Grubu and BBOL shall hold 49.177096 percent of shares, and the remaining 1.645808 percent of the shares shall be held by various persons. Further, it is stated that the company that shall be established will be "co-managed" by Koç Grubu and BBOL.

Within the frame of this information, it is understood that, as a result of the acquisition, a joint venture company is established. Thus, now, it is necessary to determine, whether the co-managed company is or is not a joint venture company, and in order to assess this joint venture company under Article 7 of the Act No: 4054, it is necessary to determine whether it does or does not lead the way to concentration.

Regarding the joint ventures, the following definition is given in Article 2 of the Communiqué on the Mergers and Acquisitions Calling for the Authorisation of the Competition Board, Communiqué No: 1997/1, entitled "Cases Considered as Merger or Acquisition": "Joint ventures which emerge as an autonomous economic entity possessing assets and labour to achieve their objectives, and which do not have any aims or effects restricting the competition among the parties, or between the parties and the joint venture".

Taking the above definition as first step, conditions to accept that a joint venture has concentrative effects and thus subject to authorisation by the Competition Board and falling under the scope of Communiqué No: 1997/1 are the presence of undertaking (joint venture) which is under co-management, and this undertaking’s emerging as an independent economic entity and not having any aims or effects restricting the competition among the parties, or between the parties and the joint venture.

As per the Shareholder’s Agreement, both of Koç Grubu and Balfour Beatty Overseas Ltd. shall have control on 49.177096 percent of Garanti Koza. In addition, it is understood from other provisions of the agreement regarding the control of the joint venture that a full joint control has been established between the undertakings.

Garanti Koza-In•aat Sanayi ve Ticaret A.S. before the joint venture act, operates and acts as an independent purchaser and seller. Thus, it is understood that it does have a level of operation and resources, which are sufficient for a fully-functioning joint venture. The geographical market where the company shall operate has been determined to be 16 "Countries of Agreement" including Turkey. The

duration of the company is established to be "unlimited as of the date of establishment". Thus, it is made clear here that the condition for the joint venture to be an autonomous economic entity is met.

As said in the Shareholder's Agreement: "Each of the parties agree that starting from the date the agreement is put into effect, and during the whole course of its validity, a party itself or the companies connected with it shall perform no activities in the countries of agreement regarding the activities of the Company without the prior written consent of the other party", and thus parties' activities in the relevant product market has been bound to "the receipt of written consent of the other party".

As known, parties' operation in the same product market with the joint venture changes the feature of joint venture as 'leading to concentration' to 'establishing co-ordination'.

Regulations in Article 7 of the aforesaid Shareholder's Agreement clarify that parties are in agreement with regard not to operate in the same market with the joint venture, and that the tendency of the parties is to operate in the relevant market via the joint venture. However, the statement found in Article 7.1 of the said Agreement as: "… without the prior written consent of the other party…" might create the possibility for both of the parties to operate in the relevant market, thus might lead to co-ordination.

On the other hand, when taking into consideration the competitive structure of the sector, it is contemplated that operation of only one of the parties with the joint venture in the same market shall not lead to a risk of co-ordination, and thus shall not result in a significant restriction on competition in the market.

Under the supervision of the above given information, for the subject joint venture transactions, in order not to create a co-ordination risk, maximum one of the parties should be able to operate in the relevant product market within the territory of the Republic of Turkey during the course of the joint venture period. Though the 25 percent market share threshold is not exceeded, it is understood that the joint venture is subject to authorisation under the "Communiqué on the Mergers and Acquisitions Calling for the Authorisation of the Competition Board, No: 1997/1", due to the reason that the turnover threshold stated in Communiqué No: 1997/1, amended by the Communiqué No: 1998/2 has been exceeded.

Though there is no reliable statistical information available regarding the construction sector in Turkey, the information and documents in the file reveal that annual turnover of the construction sector is approximately 13 billion USD. As a great many undertakings operate in the sector, it can be deduced that the sector has a competitive structure and the level of concentration is low.

Representatives of sector state that there are 200 000 - 300 000 undertakings operating in the construction sector, 55 000 of which hold contractor licenses; and the market share of the largest undertaking in the sector is below ten percent.

In conclusion, it was decided that the subject transaction is not of a kind to create a dominant position or empower a dominant position in the relevant product market, and is not of a kind to result with a significant diminishing in competition neither in the whole or a part of the country; and with the condition that only one of the parties establishing the Garanti Balfour Beatty •nsaat Sanayi ve Ticaret A.S. joint venture be permitted to operate during the course of the operation of the joint venture, within the territory of the Republic of Turkey, in the relevant product market (where Garanti Balfour Beatty operates); and in case carrying out transactions not complying with this condition, the joint venture be counted as an agreement restricting competition under Article 4 of the Act No: 4054, Regarding the Protection of Competition and thus preliminary research and/or investigation be necessary.

UNITED KINGDOM

1. Introduction

The aim of this paper is to outline the economic approach of the Office of Fair Trading (OFT) to assessing joint ventures within the United Kingdom and European legal context. The paper also highlights those distinguishing features of joint ventures which influence the OFT's consideration under either merger control and the United Kingdom's Competition Act 1998/EC Article 81 (or both); and how the OFT balances the restrictive against the efficiency effects in dynamic and innovative markets**.**

2. Definition

A wide spectrum of joint ventures exists, encompassing many types of arrangement ranging from loose collaborative arrangements (where parties co-operate for a limited time period and for a very specific purpose[60]) to structural joint ventures (where companies form new formal full function businesses for indefinite periods). The OFT does not have a definition of a joint venture or a special regime to deal with joint ventures since jurisdiction is based on the terms of the Fair Trading Act (if the joint venture meets the criteria for defining a qualifying merger) and the Competition Act 1998. The OFT does, however, recognise the common denominators of a joint venture as the retained economic independence of parent companies; a form of agreement to perform a business function; and the combining or contribution of assets[61] to form an integrated operation.

3. Merger or agreement

The Competition Act 1998, which is used to examine agreements, is disapplied to mergers, whether or not they qualify for investigation under the merger provisions of the Fair Trading Act 1973. Mergers are defined as two enterprises ceasing to be distinct, at least one of which is carried on in the UK or is controlled by a UK body. In general, enterprises cease to distinct if they are brought under common ownership or control, control being widely defined to embrace material influence as well as de facto or de jure control. Mergers qualify for investigation if they meet one of two alternative tests – first, if the value of the assets being acquired is £70 million or more; second, if following the merger there is an increase in the share of supply or acquisition of particular goods or services and that share is or will become 25 percent or more in the UK or a substantial part of it. In practice relatively few joint ventures qualify for investigation as mergers – certainly fewer than qualify under the European Community Merger Regulation.

4. Interrelationship between EC Merger Regulation (ECMR) and UK domestic competition law

If the ECMR applies, the European Commission has exclusive competence (subject to certain provisions for reference back to member states) (ECMR Article 9[62]). This will be the case for all "concentrations with a community dimension" (as defined in the ECMR). This will include full function

joint ventures: those joint ventures which have a structural effect on the market (ECMR Article 3(2)) and also other transactions where control is acquired (ECMR Article 3(4)).

This jurisdictional framework means that the EC and domestic provisions may apply in different ways to joint ventures and in different ways to different types of joint ventures depending on how they are constituted. A joint venture which is not a concentration with a community dimension for example may fall under Article 81 and the merger provisions of the Fair Trading Act[63] or under Article 81 and the Competition Act

5. Assessment under the Chapter I prohibition of the Competition Act

5.1 Chapter I and EC Article 81

The formation of a joint venture will infringe the Chapter I prohibition if the underlying agreement has as its object or effect an appreciable prevention, restriction or distortion of competition in the UK. Section 60 of the Competition Act means that the application of the Chapter I prohibition will follow a similar approach to the assessment of joint ventures indicated by EC Jurisprudence (Article 81). The EC Horizontal guidelines[64] are also helpful in addressing domestic joint ventures where they operate in the ways considered in the guidelines.

5.2 An appreciable effect on competition

There is no per se prohibition on any form of joint venture. However, any joint venture where the co-ordination involves an express agreement effectively to price fix, limit output or share markets would carry a rebuttable presumption of producing a negative market effect – and therefore would be almost always caught by the Act. In contrast, any joint venture that involved the co-operation of non-competitors[65] would not be caught by Chapter I. Otherwise, an assessment of joint ventures would require a full analysis of the joint venture's market position, market and structural conditions, the spill-over effects and the potential for market power. The assessment of appreciable effect also depends on both the provisions constituting the joint venture and the relative position of the parent undertakings.

5.3 Ex ante and ex post co-ordination effects

The OFT regards the central features of the economic assessment within this framework as being whether the joint venture is formed between existing/potential competitors[66], and if so, the difference between *ex ante* and *ex post* co-ordination incentives and effects.

Firstly, the actual setting up of a joint venture between two parents (who were previously at least potential competitors in the field of activity of the joint venture) may constitute a restriction of competition in the relevant market due to the replacement of two undertakings by a single joint venture. This is the *ex ante* effect. What may be happening is that two potential competitors in a new market may be replaced by a monopolistic provider – and hence this is why, when considering exemption (see below) an important question is whether the parties would be able to produce the same results independently. In terms of the competitive effect, this requires an economic assessment similar to that undertaken by merger regulation (see below).

Secondly, there are *ex post* co-ordination (spill-over) effects in the market within which the joint venture is not strictly operating and where the parent companies retain their competitive "independence":

- There may be a collusive effect (of, for example, production targets or prices) resulting from the joint management bringing the two parent companies together and creating a co-operative culture between them. (Indeed, collusion in existing markets may have been the original intention of the parties and hence are using the joint venture as a disguised vehicle for this activity).

- The joint venture will not compete with its respective parent companies;

- If the joint venture is vertically linked to the parent companies there may be possible foreclosure effects in relation to third party competitors.

5.4 Forms of joint venture

Different forms of joint venture tend to carry different implications for the *ex post* and *ex ante* co-ordination effects. For example, a purely marketing function – thereby operating very close to final customers - would imply that the joint venture is not operating in a separate market and would markedly increase the chances of *ex post* collusion between the parent companies outlined above. R&D and production joint ventures are less likely to infringe Chapter I (or more likely to be exempted) for this reason, but the OFT would examine the *ex ante* effects closely[67].

But all potential effects necessarily need to be assessed on a case by case basis by the OFT. Factors that would be taken into account include the ownership and control structure operating within the new entity; the size of the joint venture compared to the parents' independent operations; the duration of the agreement; and the extent of the exchange of commercially sensitive information. For example, where the same parents operate a network of joint ventures between themselves, this is more likely to be regarded as restrictive. On certain occasions, the OFT will also undertake an economic analysis of the incentives on the parents to co-ordinate their behaviour as well as the likely effects of doing so.

5.5 Individual exemptions of joint ventures under Chapter I

The OFT will firstly consider whether any parallel exemption applies to the formation of the joint venture and is covered by a European Commission individual or block exemption under Article 81(3) or would be covered by a European Commission block exemption if the agreement had an effect on trade between EC member states. The most relevant EC block exemptions[68] relate to research and development and specialisation agreements, reflecting a belief that these types of agreement are more likely to produce net benefits. In addition there may be applicable UK block exemptions[69]. If there is no applicable exemption the OFT will assess whether the joint venture has an appreciable effect on competition to the extent that it infringes Chapter I, and if so, whether an individual exemption may be granted.

The OFT recognises that joint ventures may potentially yield productive benefits[70] and a joint venture that is found to infringe Chapter I of the Competition Act 1998 may nevertheless be exempted (the criteria for exemption are set out in section 9[71]). The main consideration - in terms of the restrictive effects being proven to be indispensable to the joint venture's benefits – is showing that it would enable the parties to develop a new product or enter a new market that either party would have failed to do independently (but note that while this would "exonerate" the *ex ante* co-ordination effect outlined above, it will not necessarily outweigh the *ex post* co-ordination spillover effects).

In this respect, the OFT would necessarily make informed presumptions on the previous activities and expertise of the parent companies and their access to the necessary technology and financial resources. Factors that the OFT would also consider include whether:

- the individual parents could realistically bear the *ex ante* risks associated with the operations of the joint venture;

- each parent has the necessary know-how and financial strength to achieve the expected result of the joint venture;

- each parent already produces similar outputs to those produced by the joint venture.

In broad terms, research and development and production/manufacturing joint ventures are *(i)* likely to yield higher productive benefits; and *(ii)* provide fewer ex post collusive effects in comparison to sales/marketing joint ventures.

6. The assessment of joint ventures under UK merger control (Fair Trading Act 1973)

Unlike the Commission's approach – which assesses whether the joint venture creates or strengthens a single or collective dominant position on the relevant market(s) – the OFT takes into account all matters which appear to it to be relevant in determining whether a joint venture operates or may be expected to operate against the public interest. Any joint venture which seems likely to reduce competition in a way or to a degree that would give the joint venture sustained market power is likely to be referred to the Competition Commission[72].

The analysis will follow a very similar approach to one followed under Chapter I of the Act (see paragraphs 8-12 above). Unlike assessment of a co-ordination joint venture under Chapter I, however, the OFT itself would not normally take into account any countervailing benefit claims of the joint venture. If the joint venture appeared to create significant competition concerns it would be subject to a second phase investigation by the Competition Commission who would take such benefits into account.

Another difference in the treatment of joint ventures in comparison to Chapter I assessments is that the OFT may negotiate undertakings in lieu of a reference to the Competition Commission[73].

NOTES

60. For example, in R&D, distribution, marketing, purchasing and selling.

61. Human as well as non-human assets.

62. Article 22 refers to the exclusive competence, Article 9 refers to the reference back provisions.

63. One such case was the proposed joint venture between The Peninsular and Oriental Steam Navigation Company and Stena Line AB. The MMC (now Competition Commission) reported on this in November 1997. The European Commission also investigated this under Article 81.

64. Guidelines on the Applicability of Article 81 to horizontal co-operation agreements, July 2000 – still in draft form.

65. Competitors include potential competitors

66. And note there may be an implicit trade-off: the nearer the parents are in terms of being competitors, the more likely that they will provide complementary assets and produce benefits.

67. If the joint venture was not otherwise block exempted.

68. The block exemption criteria are based on the nature of the agreement and market share thresholds.

69. The OFT is currently consulting, on a Block Exemption Order for Public Transport Ticketing Schemes.

70. For example, reduced duplication in fixed costs, the exploitation of scale and scope economies and exchanges of complementary knowledge.

71. The criteria for exemption are that any agreement *(a)* contributes to *(i)* improving production or distribution, or *(ii*) promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit; but *(b)* does not *(i)* impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; or (*ii*) afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.

72. The OFT may refer a joint venture to the Competition Commission; and the Commission's conclusions are reported to the Secretary of State. On a reference, section 84 of the Fair Trading Act states that the Competition Commission must take into account "all matters which appear to them to in the particular circumstances to be relevant". Five key points are: maintaining and promoting effective competition*;* promoting the interests of consumers, purchasers and other users of goods and services in relation to price, quality and variety*;* promoting through competition the reduction of costs and the development and use of new techniques and new products and facilitating the entry of new competitors into existing markets*;* maintaining and promoting the balanced distribution of industry and employment*;* maintaining and promoting competitive activity in overseas markets.

73. Though the OFT may grant individual Chapter I *conditional* exemptions.

ANTITRUST GUIDELINES FOR COLLABORATION AMONG COMPETITORS

JOINT NOTE BY THE US FEDERAL TRADE COMMISSION AND THE US DEPARTMENT OF JUSTICE

UNITED STATES

This document is available at the following Web Site:
http:www.ftc.gov.os/2000/04/ftcdojguidelines.pdf

JOINT VENTURE GUIDELINES: VIEWS FROM ONE OF THE DRAFTERS

Remarks by
Robert Pitofsky, Chairman
Federal Trade Commission

ABA/ Section of Antitrust Law, Workshop: Joint Ventures and Strategic Alliances: The New Federal Antitrust Competitor Collaboration Guidelines

Washington, D.C.
November 11 & 12, 1999

This document is available at the following Web Site:
http://www.ftc.gov/speeches/pitofsky/jvg991111.htm

EUROPEAN COMMISSION

1. Introduction

This paper is intended to give a general overview of the policy of the European Commission (the "Commission") on the analysis under European Community competition law of joint ventures (JVs), for the purposes of the OECD Mini-Roundtable on Joint Ventures on 24 October 2000.

In Community competition law a distinction is made between full function JVs and non-full function JVs. A full function JV, provided there is an acquisition of joint control by two or more undertakings (its parent companies)[74] and a Community dimension (i.e. provided certain turnover thresholds are met[75]), falls within the scope of the Merger Regulation[76]. Non-full function JVs do not come within the ambit of the Merger Regulation but are dealt with under Article 81 of the EC Treaty (ex Article 85) and Regulation 17/62[77]. Full function JVs which do not have a Community dimension are also governed by Article 81 and Regulation 17/62.

2. Full Function JVs vs Non-Full Function JVs

Prior to the amendment of the Merger Regulation in 1997[78] a distinction was made between concentrative and co-operative JVs. A JV performing on a lasting basis all the functions of an autonomous economic entity, without giving rise to co-ordination of the competitive behaviour of the parties amongst themselves or between them and the JV amounted to a concentration and fell within the Merger Regulation.

Co-operative JVs were, however, outside the scope of the provisions on merger control and subject to assessment under Article 81(1) and (3) and Regulation 17/62. Co-operative JVs included:

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

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

- JVs which perform all the functions of an autonomous economic entity (full function JVs) where they give rise to co-ordination of competitive behaviour by the parents in relation to each other or to the JV.

In 1997, the Merger Regulation was amended and now applies to "full function" JVs with a Community dimension. A JV is deemed to be "full function" whenever two or more companies set up a JV that performs "on a lasting basis all the functions of an autonomous economic entity".[79] The Commission Notice on the concept of full function JVs defines this as meaning that a JV must operate on a market, performing the functions normally carried out by undertakings operating on the same market. In order to

do so the JV must have a management dedicated to its day-to-day operations and access to sufficient resources including finance, staff, and assets (tangible and intangible) in order to conduct on a lasting basis its business activities within the area provided for in the JV agreement.[80]

Non-full function (or partial-function) JVs are not governed by the Merger Regulation. A JV is "partial function" if it assumes only limited functions within the business activities of its parent companies. For example, JVs limited to R&D, production, distribution or sales. Such JVs will be assessed under Article 81 of the EC Treaty and Regulation 17/62 with a view to establishing whether they lead to a co-ordination of the competitive behaviour of the parties.[81]

The Commission tends to give a broad interpretation to the concept of full function JV and provided they have a Community dimension, most JVs are now subject to the Merger Regulation. The Merger Regulation is currently under review by the Commission and further changes to the rules governing JVs may be introduced.

3. Assessment of Full Function JVs

Three possible scenarios may arise:

3.1. JVs within scope of Merger Regulation but no co-ordination of competitive behaviour

Full function JVs which fall within the scope of the Merger Regulation (i.e. have a Community dimension) but do not have as their object or effect the co-ordination of the competitive behaviour of undertakings that remain independent are subject to appraisal exclusively under the terms of the Merger Regulation.

Full function JVs which fall within the scope of the Merger Regulation are assessed in accordance with the provisions of Article 2 thereof with a view to establishing whether or not they are compatible with the Common Market. In making this appraisal, the Commission takes into account, *inter alia*, the following:

- the need to preserve and develop effective competition within the common market in view of, among other things, the structure of all the markets concerned and the actual or potential competition from undertakings located either within or without the Community;

- the market position of the undertakings concerned and their economic and financial power, the opportunities available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.[82]

A JV which does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it will be declared compatible with the common market. A JV which does create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it will be declared incompatible with the common market.[83]

3.2 JVs within scope of Merger Regulation + co-ordination of competitive behaviour

Full function JVs which fall within the scope of the Merger Regulation (i.e. have a Community dimension) and have as their object or effect the co-ordination of the competitive behaviour of undertakings that remain independent, will be subject to appraisal under Article 81EC by virtue of Article 2(4) of the Merger Regulation as regards such co-ordination.[84]

In making this appraisal, the Commission takes into account, in particular:

- whether two or more parent companies retain to a significant extent activities in the same market as the JV or in a market which is downstream or upstream from that of the JV or in a neighbouring market closely related to this market;

- whether the co-ordination which is the direct consequence of the creation of the JV affords the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products or services in question.[85]

The Commission is concerned with both restrictions of competition between the parent companies and between the parent companies and the JV.[86]

Such JVs ("full function co-operative JVs"), are therefore examined both under the Merger Regulation and the provisions of Article 81. If the Commission concludes that the JV at issue creates or strengthens a dominant position it will declare its incompatibility with the Common Market without needing to examine additional anti-competitive co-ordination effects.[87] However, where the Commission decides that the JV does not create or strengthen a dominant position, it must also assess anti-competitive effects resulting from the parties' co-ordination of their competitive behaviour under Article 81. It has the power to grant clearance in general terms (under a block exemption regulation) or on the merits of the individual case at hand (Article 81(3)).

Examples of anti-competitive co-ordination include the exchange of commercially sensitive information, discriminatory treatment of third parties impeding their market access or exclusive supply obligations that hinder third parties from entering the market.

Restrictions accepted by the parent companies of the JV that are directly related and necessary for the implementation of the concentration ("ancillary restrictions"), will be assessed together with the concentration itself.[88]

The assessment of anti-competitive co-ordination depends on the facts of each case. The parties' position on the JV's market and closely related markets will in particular be examined.

The Commission's tendency is to work with the parties in order to remove or reduce anti-competitive concerns.[89] It often seeks commitments and accepts undertakings from parties. In fact, the Commission has recently issued a draft Notice on commitments submitted to the Commission in the context of the Merger Regulation.[90] The draft Notice sets out the types of commitments accepted by the Commission as well as the formal and substantive requirements for the submission of commitments and the requirements for their implementation.

A case which demonstrates the application of Article 2(4) of the Merger Regulation is that of Canal+/ CDPQ/ BankAmerica.[91] The JV concerned pay-TV in France. Competition problems were found to result in the market for the wholesaling of TV rights in Spain. In Spain, Canal+ had strong or dominant positions on the pay-TV market as well as on the upstream market for content. The notified transaction was

found, through the balance of power in the JV, to give Canal+ a strong incentive to favour Cableuropa (controlled by CDPQ and BankAmerica) in the sale of Spanish pay-TV rights. The remedies adopted were designed to eliminate the possibility of discrimination against other competitors on the Spanish pay-TV market.

In this case, the notified transaction did not create or strengthen the dominant position of Canal+ as such. Rather, it gave rise to a situation where the company's commercial incentives would change so that there would be an increased risk of discrimination against other pay-TV operators in Spain. It created a direct link between Canal+ and the notified transaction which provided incentives to behave in a potentially anti-competitive way. Further, the remedy set a benchmark for the future conduct of Canal+ on the Spanish market for pay-TV content, but left the notified transaction structurally unchanged. In the absence of Article 2(4), this remedy would have been difficult to accept under the Merger Regulation.

3.3 JVs with no Community dimension

Finally, full function JVs which do not have a Community dimension are subject to assessment under Article 81.

4. Assessment of non-Full Function JVs

Non-full function or partial function JVs are subject to the normal rules of EC competition law. As stated above, a JV is "partial function" if it assumes only limited functions within the business activities of its parent companies, examples being JVs limited to R&D, production, distribution or sales.

Partial function JVs may infringe Article 81EC if their formation or operation gives rise to co-ordination between the parent companies or between the parent companies and the JV. Certain partial function JVs may benefit from block exemption regulations: Regulation 418/85 on R&D Agreements, Regulation 417/85 on Specialisation Agreements (the Commission has recently issued new draft regulations on R&D and specialisation agreements) or Regulation 240/96 on Technology Transfer Agreements.[92] If not covered by one of these block exemption regulations, a partial function JV will be assessed on an individual basis. The Commission has recently issued a set of draft guidelines which provide guidance as to the Commission's approach to horizontal restraints[93] (these Guidelines, once adopted, will replace the Notices concerning the assessment of co-operative JVs[94] and the Notice concerning agreements, decisions and concerted practices in the field of co-operation between enterprises[95])

4.1 R&D JVs

JVs devoted to R&D are subject to block exemption Regulation 418/85 if they are restrictive of competition. Provided they fall within this block exemption, such agreements will not infringe Article 81(1). The Regulation sets out a number of restrictions which are black-listed (such as price fixing and export bans) and which prevent a JV from benefiting from the block exemption. A white-list sets out restrictions which will not prevent a JV from benefiting from exemption.

The new draft R&D block exemption Regulation provides that R&D agreements will fall outside Article 81(1) provided that a number of conditions are satisfied. These include the requirement that all the parties must have joint access to the results of the work (Article 2). In addition, where the participating undertakings are competitors the JV will be exempt if their combined market share does not exceed 25 percent on the relevant market (Article 3). However, the Regulation sets out a list of hard core

restrictions which take an agreement outside the scope of the block exemption. These include price fixing or the limitation of output or sales (Article 5). The Commission's draft guidelines on horizontal restraints contain provisions on R&D agreements.[96]

In the draft guidelines the Commission observes that most R&D agreements do not fall under Article 81(1). The guidelines state that:

> "The competitive relationship between the parties has to be analysed in the context of affected existing markets and/or innovation. If the parties are not able to carry out the necessary R&D independently, there is no competition to be restricted. […] The issue of potential competition has to be assessed on a realistic basis. For instance, parties cannot be defined as potential competitors simply because the co-operation enables them to carry out the R&D activities. The decisive question is whether each party independently has the necessary means as to assets, know how and other resources."

The Commission considers that R&D co-operation which does not include the joint exploitation of possible results by means of licensing, production and/or marketing rarely falls under Article 81(1). Such "pure" R&D agreements can only cause a competition problem, if effective competition with respect to innovation is significantly reduced. R & D co-operation between non-competitors can however produce foreclosure effects under Article 81(1) if it relates to an exclusive exploitation of results and if it is concluded between firms, one of which has significant market power with respect to key technology.

4.2 Production JVs

Production JVs are not considered to be full function since they depend on their parent companies' raw materials and technical input, are not active independently on the market and sell their products to, or at the request of, the parent companies. Thus, they do not perform all the functions of an autonomous economic entity. It is to be noted that the Commission has proposed, in its recent White Paper on Modernisation of the Rules implementing Articles 81 and 82EC,[97] to submit production JVs to analysis under the Merger Regulation. Paragraph 81 of the White Paper stated that:

> "The Commission […]envisages extending the scope of [the Merger] Regulation to include partial-function joint production ventures, which would be subjected both to the dominance test, under Article 2(3) of the [Merger] Regulation, and to the Article 8[1] test, under Article 2(4) [of the Merger Regulation]."

However, the recent proposal for the revision of Regulation 17[98] reserved the discussion of this issue for later :

> "The question of extending the procedures of the Merger Regulation to partial-function production joint ventures, that was also raised in the White Paper (nos. 79-81), will be further examined in the context of forthcoming reflections on the revision of that regulation."

JVs whose objective is to specialise production between the parties are subject to block exemption Regulation 417/85 on Specialisation Agreements. Like the R&D block exemption Regulation, Regulation 417/85 sets out black and white-listed clauses, the former preventing a JV from benefiting from the block exemption.

Under the new draft block exemption Regulation on Specialisation Agreements specialisation agreements fall outside Article 81(1) provided that the participating undertakings have a combined market share of not more than 20 percent on the relevant market (Article 3) and provided there are no hard core

restrictions such as price fixing or market partitioning (Article 4). The Commission's draft guidelines on horizontal restraints also contain provisions on production and specialisation agreements.[99]

The Commission views the main source of competition problems that can possibly arise from production agreements as being the co-ordination of the parties' competitive behaviour as suppliers. This type of competition problems arises where the co-operating parties are actual or potential competitors on at least one of these relevant market(s), i.e. on the markets directly concerned by the co-operation and/or on possible spill-over markets. Foreclosure problems and other negative effects towards third parties may also arise, but are less frequent in the context of production agreements. However, the fact that the parties are competitors does not automatically cause the co-ordination of their behaviour.

Production agreements between competitors do not necessarily come under Article 81(1). Co-operation between firms which compete on markets closely related to the market directly concerned by the co-operation cannot be defined as restricting competition if the co-operation is the only commercially justifiable possibility to enter a new market, to launch a new product or service or to carry out a specific project. In addition, an effect on the parties' competitive behaviour as market suppliers is highly unlikely if the parties have only a small proportion of their total costs in common.

The Commission considers that agreements which fix the prices for market supplies of the parties, limit output or share markets or customer groups have the object of restricting competition and do almost always fall under Article 81(1), unless *(i)* the parties agree on the output directly concerned by the production agreement (e.g. the capacity and production volume of a JV or the agreed amount of outsourced products), or *(ii)* where a production JV sets the sales prices for the manufactured products when the JV also carries out the distribution of these products so that the price fixing by the JV is the effect of integrating the various functions. In both scenarios the agreement on output or prices will be assessed together with the other effects of the JV on the market in order to determine the applicability of Article 81(1).

4.3 Distribution/Commercialisation JVs

JVs between competitors set up solely for distribution infringe Article 81(1)EC because they lead to common prices, exclude competing offers by the parent companies and reduce the number of independent suppliers on the relevant market. Generally, such cases are not exemptable under Article 81(3).[100] However, joint selling arrangements between non-competitors do not restrict competition.[101] The Commission's draft guidelines on horizontal restraints provide guidance on distribution agreements.[102]

The guidelines apply to distribution agreements between competitors. The Commission considers that the principal competition concern about a distribution agreement between competitors is price fixing. Agreements limited to joint selling have as a rule the object and effect of co-ordinating the pricing policy of competing manufacturers. In this case they not only eliminate price competition between the parties but also restrict the volume of goods to be delivered by the participants within the framework of the system for allocating orders. They therefore restrict competition between the parties on the supply side and limit the choice of purchasers and fall under Article 81(1).

This appreciation does not change if the agreement is non-exclusive. Article 81(1) continues to apply even where the parties are free to sell outside the agreement, as long as it can be presumed that the agreement will lead to an overall co-ordination of the prices charged by the parties.

For distribution arrangements that fall short of joint selling there will be two major concerns. The first is that the joint commercialisation provides a clear opportunity for exchanges of sensitive commercial information particularly on marketing strategy and pricing. The second is that, depending on the cost

structure of the commercialisation, a significant input to the parties' final costs may be common. As a result the actual scope for price competition at the final sales level may be limited. Joint commercialisation agreements therefore can fall under Article 81(1) if they either allow the exchange of sensitive commercial information, or if they influence a significant part of the parties' final cost.

4.4 Purchasing JVs

Purchasing JVs between actual or potential competitors may restrict competition since they reduce the number of independent purchasers and lead to common purchase prices for products which may account for a significant proportion of demand. Therefore, such agreements may fall within Article 81(1). The possibility of exemption under Article 85(3) will depend on the extent of the restrictions as well as the market position of the parties. The Commission's draft guidelines on horizontal restraints contain provisions on purchasing agreements.[103]

In the guidelines, the Commission observes that purchasing agreements are often concluded by small and medium sized enterprises to achieve similar volumes and discounts as their bigger competitors. These agreements between small and medium sized enterprises are therefore normally pro-competitive. Even if a moderate degree of market power is created, this may be outweighed by economies of scale provided the parties really bundle volume.

The Commission considers that, by their very nature joint buying agreements will be concluded between companies that are at least competitors on the purchasing markets. If however competing purchasers co-operate who are not active on the same relevant market further downstream (e.g. retailers which are active in different geographic markets and can not be regarded as realistic potential competitors), Article 81(1) will rarely apply unless the parties have a very strong position in the buying markets, which could be used to harm the competitive position of other players in their respective selling markets. In most cases, however, joint buying will be agreed between companies that are competitors on both the purchase and the selling market.

4.5 De Minimis JV Agreements

It is to be noted that the Commission's Notice on agreements of minor importance which do not fall under Article 81(1) applies to the assessment of any agreement under Article 81(1). The Notice provides that Article 81(1) does not apply where the impact of the agreement on intra-Community trade or on competition is not appreciable. It sets out a number of guidelines for determining whether or not an agreement has an appreciable effect.

5. Commission Approach in a Number of Recent Cases

5.1 SHELL/BASF (project Nicole)[104]

This case concerned a JV in which the parties proposed to combine all of their world-wide polypropylene ("PP") and polyethylene interests held by Montell, Targor and Elenac.

The JV was cleared after a Phase 1 investigation subject to a package of commitments offered by the parties. The combination of the two companies' businesses raised horizontal competition issues in the markets for PP technology licensing, PP resins and PP compounds that were remedied by commitments to divest significant amounts of resins and compounds production capacity as well as BASF's PP technology

licensing business (Novolen). In addition, BASF held a suite of patents for the next generation of PP catalysts (metallocenes) that would have been strong enough to block others bringing any metallocene catalysts to the market.

The Commission considered that the combination of this strong patent position with the position that the JV would have held in the traditional (Ziegler-Natta) catalysts and technology would have further strengthened the parties' dominance. To remedy these concerns, the parties committed to a package of measures involving licensing and non-assertion of these patent rights, as a result of which the JV's ability to prevent the development of metallocene catalysts would be removed.

5.2 BBL/BT/ISP[105]

The case involved the creation of an Internet service provider (ISP) JV in Belgium. A derogation from suspension was requested because Skynet, Belgacom's Internet subsidiary, was about to launch a subscription free Internet product in Belgium. In the face of this, any delay in the implementation of the JV would have resulted in Belgacom achieving a very strong market share, causing significant damage to the parties. The Commission considered that the derogation from the suspension would not pose any threat to competition since the JV was a new entrant, which was supposed to challenge the incumbent Belgacom.

5.3 FreeCom/Dangaard Holding[106]

The Commission approved the creation of a JV between the German companies BHS Holding GmbH & CoKG/Debitel AG and the Danish companies Fleggaard Holding AS/Fleggaard Partner AS. The parent companies transferred to the JV their respective wholesale businesses (FreeCom GmbH and Dangaard Holding AS) concerning mobile telecommunications devices, in particular mobile phones, and related value added services (e.g. hot-line and repair services, implementation of promotion programmes for retailers, packaging for retailers). The operation allowed the JV to offer its customers a pan-European company structure and to better face increasing competition from network operators and service providers in bringing mobile phones to the market.

The Commission, while considering it not strictly necessary to define in detail the relevant product market, tended towards considering the wholesaling and the provision of related value added services to be two distinct markets. The issue as to whether the geographical market was EU-wide or national could be left open. FreeCom had a well-established position on the German market while Dangaard was dominantly active in the Scandinavian markets and in Switzerland. Therefore, the activities of the two companies were to a large degree geographically complementary. In Germany, where the Parties' activities overlapped, the resulting market share of the JV in the wholesale market did not exceed 15 percent.

The Commission concluded that the operation did not lead to the creation of a dominant position.

5.4 The British Interactive Broadcasting Decision[107]

The Commission exempted on 15 September 1999 pursuant to Article 81(3) of the EC Treaty the creation of a JV company, British Interactive Broadcasting Ltd (BiB, now named Open). Open's parent companies are BSkyB Ltd, BT Holdings Limited, Midland Bank plc and Matsushita Electric Europe Ltd. Open is to provide a new type of service, digital interactive television services, to consumers in the United Kingdom. This involves putting in place the necessary infrastructure and services to allow companies, such as banks, supermarkets and travel agents, to interact directly with the consumer. The following services

will form part of the Open digital interactive television service: home banking, home shopping, holiday and travel services, down-loading of games, learning on line, entertainment and leisure, sports, motor world, a limited collection of "walled garden" internet sites provided by a third party and e-mail and public services. An important element of this infrastructure is a digital set top box. Open will subsidise the retail-selling price of digital satellite set top boxes.

The Commission's decision follows the substantial undertakings given by the parties to the Commission in order to ensure that the digital interactive television services market in the UK remains open to competition.

The Commission considered that the combination of the very significant market power of BT and in particular of BSkyB in related markets to that in which BiB will be active, such as the customer access infrastructure market, the technical services for pay-tv and digital interactive services market, the pay-tv market and the market for the wholesale supply of film and sport channels for pay-tv, risked eliminating a substantial part of competition on the markets for digital interactive TV services.

The main element of concern raised by the Commission pursuant to Article 81 EC was that the operation eliminated BT and BSkyB as potential competitors in the digital interactive television services market. Both had sufficient skills and resources to launch such services and both would be able to bear the technical and financial risks of doing so alone. The conditions imposed should ensure that this risk does not materialise and that, in particular, competition to BT comes from the cable networks, that third parties are ensured sufficient access to BiB's subsidised set top boxes and to BSkyB's films and sport channels and that set top boxes other that BiB's set top box can be developed in the market, so that the digital interactive television services market remains open to competition.

5.5 P&W/GE

On 14 September 1999, the Commission adopted a Decision approving the creation of a JV between Pratt & Whitney (P&W) and General Electric Aircraft Engines (GE). The JV, called the Engine Alliance, was created to develop and sell a new jet engine intended for Airbus' future, very large aircraft, known as the A3XX.

P&W and GE are two of the world's three manufacturers of big jet engines, the third competitor being Rolls-Royce plc (RR). The Engine Alliance would be owned and run on an equal basis by P&W and GE and be responsible for the final assembly of the new engine and for the sales and marketing thereof.

The Commission concluded that, although it might be economically more efficient for the parties to develop the new engine jointly, it would be technologically and economically feasible for both parties to develop it independently. The creation of the Engine Alliance appreciably restricted competition for the new engine, since it reduced the choice of engine suppliers from three potential suppliers to two. It was therefore caught by Article 81(1) However, the Commission considered that the JV fulfilled the conditions for exemption under Article 81(3). It enabled each of P&W and GE to concentrate on the specific elements where it had a technological advantage allowing the parties to jointly develop a new engine fulfilling stricter performance targets than any existing engine within a shorter time frame and at a lower cost than would otherwise have been possible. Competition would not be eliminated, since RR was able to offer its Trent engine in competition with the new engine.

The Commission was concerned that, since there were only three competitors on the market for large jet engines, the co-operation should not extend into other market segments where P&W and GE competed and where they both had high market shares. It considered that there was a risk that the JV would provide an incentive in the future for the parties to adapt the new engine for use on other aircraft

instead of individually developing new engines. This would have the effect of reducing competition between the parties. Thus, the Commission granted exemption on condition that the co-operation remained limited to a specific engine that was exclusively intended for the A3XX aircraft and to any future, four-engine aircraft of Boeing, designed for more than 450 passengers. A number of other conditions were also imposed in order to enable the Commission to monitor the parties' compliance with the above condition. The parties also gave a number of undertakings. The exemption was granted for 15 years.

5.6 .KLM/Alitalia[108]

This was a JV in the airline sector. The Commission approved the operation subject to commitments and in view of the companies' significant undertakings to promote the entrance of new competitors on two hub-to-hub routes, Amsterdam-Milan and Amsterdam-Rome, where the Commission found that the Alliance between Alitalia and KLM raised competition concerns. The Commission concluded in its investigation that the concentration would have created a monopoly on these routes. To overcome this anti-competitive situation, Alitalia and KLM proposed to take a set of measures that would facilitate the entrance of potential competitors. The extensive undertakings offered include a commitment to make slots available to existing competitors and new entrants who apply to operate on any of the two routes in question; a commitment to reduce the parties' frequencies on the Amsterdam-Milan and/or Amsterdam-Rome routes when a new entrant airline started operations; a commitment to enter into interline agreements with the new entrant airline and to give the new entrant the opportunity to participate in KLM's and Alitalia's Frequent Flyer Programme; a commitment to refrain from tying travel agents and corporate customers in Italy and The Netherlands respectively with loyalty or other similar rebate schemes; and a commitment to ensure that, once a competing airline has entered on the route(s) in question, the first screen of the computer reservation system is not filled with the flights of the Alliance and that consumers will be informed about the precise code-share arrangements.

5.7 BT/AT&T[109]

In this case, the Commission investigated possible co-ordination effects of the proposed JV between British telecom and the US company AT&T under Article 2(4) of the Merger Regulation. BT was, at the time, the fifth largest telecommunications operator. Its principal activity was the supply of telecommunications services and equipment in the UK. AT&T was the second largest telecommunications operator world-wide by turnover, and the largest US long distance telecommunications operator. AT&T was also active internationally, notably in the UK where it operated a group of wholly-owned subsidiary companies including AT&T Comms UK, and ACC Long Distance UK, a subsidiary of ACC Corp. There was a risk of parental co-ordination between ACC, a wholly-owned subsidiary of AT&T, BT and Telewest, in which AT&T through TCI held a 22 percent stake and regarding the distribution of AT&T/Unisource services in the UK.

The Commission raised concerns that the JV could lead to the co-ordination of the competitive behaviour of the parties. In order to remove the competition concerns AT&T offered to divest ACC UK. AT&T also committed itself to the creation of a greater structural separation between AT&T and Telewest and undertook to give another distributor the possibility to distribute AUCS services in the UK, as AT&T UK would be wound up. Subject to full compliance with these undertakings, the Commission declared the concentration compatible with the common market.

5.8 Telia/Telenor/Schibsted[110]

Telia, the incumbent telecoms operator in Sweden, Telenor the Norwegian incumbent and Schibsted, a Norwegian publishing and broadcasting company, formed a JV to provide Internet gateway services and offer web site production services. Internet gateway services are designed to enable users of the Internet to access content more easily. This content may be provided by the gateway service provider or other third parties and may be free of charge to the user (normally financed by advertising) or content for which the user has to pay for access ("paid-for content").

In its analysis of the case, the Commission found that the supply of gateway services in themselves did not amount to a market as such, but that advertising on web pages and paid-for content could be considered relevant markets. These two markets were relevant markets for the purposes of dominance, as was the production of web sites. Web site production was also considered to be a candidate market for the analysis of co-ordination under Article 2(4) as the JV and two of the parent companies (Telia and Telenor) were present on this market. The other candidate market was the provision of dial-up Internet access where both Telia and Telenor (through its stake in the Swedish telecommunications company Telenordia) were present.

In its analysis of the operation, the Commission had two distinct situations to assess under Article 2(4). First, the web site production market involved the presence of the JV and two of the parent companies on the same market. The combined market share of the parent companies and the JV was less than ten percent on the narrowest possible and most unfavourable market definition to the parties. Accordingly, the Commission concluded that, even if the parent companies were to co-ordinate their activities on this market, it would not amount to an appreciable restriction of competition. In the second part of its Article 2(4) reasoning, on the dial-up Internet access market in Sweden, the Commission found that that market was characterised by high growth, relatively low barriers to entry and low switching costs. The market shares which Telia and Telenordia enjoyed on this market were 25-40 percent and 10-25 percent respectively, but the Commission found that these market shares were of limited significance in such a growing market and, therefore, the market structure was not conducive to the co-ordination of competitive behaviour. In addition, the likelihood of co-ordination was reduced further by the relative size of the dial-up Internet access market (which accounted for over 90 percent of Internet revenue in Sweden) compared with the size of the other markets on which the JV would be active. The Commission therefore concluded that there would be no likelihood of the parent companies co-ordinating their behaviour on this market.

NOTES

74. Article 3(1)(b) of the Merger Regulation. The concept of control is set out in Article 3(3). This provides that control is based on the possibility of exercising decisive influence over an undertaking, which is determined by both legal and factual considerations (See Commission Notice on the concept of full-function joint ventures under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings OJ C 066, 02/03/1998 p.1.)

75. See Annex 1.

76. Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings OJ L 395, 30/12/1989 p. 1.

77. EEC Council: Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty OJ 13, 21/02/1962 p.204 (http://europa.eu.int/eur-lex/en/lif/dat/1962/en_362R0017.html). Regulation 17/62 is currently under revision and a draft of the proposed new regulation can be found at : http://europa.eu.int/comm/competition/antitrust/others/#reform_reg_17_new_reg_proposal

78. Council Regulation (EC) No 1310/97 of 30 June 1997 amending Regulation (EEC) No 4064/89 on the control of concentrations between undertakings OJ L 180, 09/07/1997 p. 1.

79. Article 3(2).

80. Commission Notice on the concept of full-function joint ventures under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings OJ C 066, 02/03/1998 p.1, at paragraph 12; See also Case IV/M.527 - Thomson CSF/Deutsche Aerospace, 2 December 1994 (paragraph 10), Case IV/M.560 EDS/Lufthansa, 11 May 1995 (paragraph 11), Case IV/M.585 - Voest Alpine Industrieanlagenbau GmbH/Davy International Ltd, 7 September 1995 (paragraph 8), Case IV/M.686 - Nokia/Autoliv, 5 February 1996 (paragraph 7) and Case IV/M.791 - British Gas Trading Ltd/Group 4 Utility Services Ltd, 7 October 1996, (paragraph 9).

81. Commission Notice on the concept of full-function joint ventures under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings OJ C 066, 02/03/1998 p.1, at paragraph 13.

82. Article 2(1) (a) and (b).

83. Article 2(2) and (3).

84. Article 2(4) states that:

"To the extent that the creation of a joint venture constituting a concentration pursuant to Article 3 has as its object or effect the coordination of the competitive behaviour of undertakings that remain independent, such coordination shall be appraised in accordance with the criteria of Article 85 (1) and (3) of the Treaty, with a view to establishing whether or not the operation is compatible with the common market." In 1999, 19 such cases were investigated and 15 decisions taken. Four cooperation cases were cleared only after the parties submitted undertakings. See Part V of this paper.

85. Article 2(4).

86. See Agfa-Gevaert/DuPont, 1998 OJ L 211/222, at 113-116.

87. Bertelsmann/Kirch/Premiere, 27.05.1998, 1999 OJ L 53/1; Deutsche Telekom/BetaResearch, 27.05.1998, 1999 OJ L 53/31.

88. See Commission Notice on the concept of full-function joint ventures, OJ C 066, 02/03/1998 p.1 at paragraph 16; see also Commission Notice regarding restrictions ancillary to concentrations OJ No C 203, 14.8.1990, p. 5; note: the Commission has recently issued a proposed new Notice on ancillary restraints which can be found at:

http://europa.eu.int/comm/competition/mergers/legislation/draft_notices/

89. An example can be found in Yoplait/Valio, June 23 1999, IP/99/420; where the 50:50 control of a JV between competitors was changed to 51:49 control in order to ensure the JV's independent competitive force and to avoid anti-competitive co-ordination between the parents and the JV. See also BT/AT&T, Case IV JV 15, March 30 1999, at:

http://europa.eu.int/comm/competition/mergers/cases/index/by_nr_jv_0.html#jv_15

90. Draft Notice on commitments submitted to the Commission under Council Regulation (EEC) 4064/89 and under Commission Regulation (EC) 447/98, at:

http://europa.eu.int/comm/competition/mergers/legislation/draft_notices/

91. Case No. IV/M.1327 at:

http://europa.eu.int/comm/competition/mergers/cases/decisions/m1327_en. pdf

92. Commission Regulation (EEC) No 418/85 OF 19 December 1984 on the application of Article 85(3) of the Treaty to categories of research and development agreements *OJ L 53, 22.2.1985, p. 5, a*s amended; Commission Regulation (EEC) No 417/85 OF 19 December 1984 on the application of Article 85(3) of the Treaty to categories of specialisation agreements, as amended *OJ L 53, 22.2.1985. p. 1;* Commission Regulation (EC) No 240/96 of 31 January 1996 on the application of Article 85 (3) of the Treaty to certain categories of technology transfer agreements (Text with EEA relevance) *OJ No. L31, 09/02/1996 p.2*; the new draft Regulations can be found at:
http://europa.eu.int/comm/competition/antitrust/others/horizontal/reform/consultation/

93. Draft Guidelines on the applicability of Article 81 to horizontal co-operation agreements, at:
http://europa.eu.int/comm/competition/antitrust/others/horizontal/reform/consultation/

94. OJ C 43, 16.2.1993, p. 2

95. OJ C 75, 29.7.1968

96. See points 40-73.

97. 1999 OJ C 132/1 points 14, 79-81.

98. See http://europa.eu.int/comm/competition/antitrust/others/#reform_reg_17_new_reg_proposal

99. See points 74-105.

100. See for example, FIFA 27.10.1992, OJ L 326/31; ASTRA 23.12.1992, 1993 OJ L 20/23.

101. Notice concerning agreements, decisions and concerted practices in the field of cooperation between enterprises, OJ C 75, 29.7.1968, p. 3, point II 6 (a).

102. See points 131-150.

103. See points 106-130.

104. M.1751 at http://europa.eu.int/comm/competition/mergers/cases/decisions/m1751_en.pdf; see Competition Policy Newsletter 2000 Number 2 June.

105. Case No.IV/M.1667 at ; see Competition Policy Newsletter 2000 Number 1 February.

106. Case No COMP/JV. 26.

107. Case No IV.36.539-British Interactive Broadcasting/Open ; see Competition Policy Newsletter 1999 Number 3 October.

108. Case No.JV.19 at http://europa.eu.int/comm/competition/mergers/cases/decisions/jv19_en.pdf

109. Case No. JV.15 at http://europa.eu.int/comm/competition/mergers/cases/decisions/jv15_en.pdf; see Competition Policy Newsletter 1999 Number 2 June.

110. Case IV JV 1, 27.05.1998 at:

http://europa.eu.int/comm/competition/mergers/cases/decisions/jv1_en. pdf

ANNEX 1

A JV has a Community dimension if it satisfies the following thresholds set out in Article 1 of the Merger Regulation:

"(2) For the purposes of this Regulation, a concentration has a Community dimension where;

- the aggregate world-wide turnover of all the undertakings concerned is more than ECU 5 000 million, and

- the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than ECU 250 million,

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

"(3) For the purposes of this Regulation, a concentration that does not meet the thresholds laid down in paragraph 2 has a Community dimension where:

- the combined aggregate world-wide turnover of all the undertakings concerned is more than ECU 2 500 million;

- in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than ECU 100 million;

- in each of at least three Member States included for the purpose of point (2), the aggregate turnover of each of at least two of the undertakings concerned is more than ECU 25 million; and

- the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than ECU 100 million,

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State."

BRAZIL

1. Introduction

This report is submitted by Secretariat for Economic Monitoring (SEAE) of the Ministry of Finance in answer to the questions raised in the Issues Paper prepared by OECD Committee on Competition Law and Policy to the Roundtable on "Joint Ventures" on 24-25 October 2000 (CLP/2000.90) to all delegates and observers.

The Issues Paper raises five sets of questions that are assessed, as far as the Brazilian experience permits, by each of the sections of the document.

In reading this report, it is important to note that there are three competition authorities in Brazil with distinct functions and powers. Regarding merger control, the Brazilian antitrust law requires SEAE to issue a technical report to the Secretariat of Economic Law (SDE) of the Ministry of Justice and SDE must in turn issue a final report. Both reports are forwarded to Administrative Council for Economic Defence (CADE) where the commissioners take the final decision. CADE is an independent administrative tribunal and its decisions can only be reviewed by the courts.

2. Definitions

2.1 General Aspects

Merger control in Brazil is provided by Article 54 of the antitrust law (law 8884/94). Article 54 provides that: "(...) Any acts that may limit or otherwise restrain open competition, or that result in the control of relevant markets for certain products or services, shall be submitted to CADE for review (...)". This definition has been applied by CADE to all agreements (and not just mergers), joint ventures included.

Law 8884/94 establishes no specific definition for joint ventures or strategic alliances, either general or specific to certain activities. No regulations establishes any block exemptions to the law.

Since June 1999, however, SEAE´s Merger Guidelines authorises its officials not to proceed the full analysis for the cases of "classical joint-ventures" i.e., joint ventures that involves the creation of new productive capacity, new technology, a new product or entry into a new market.

2.2 CADE´s definitions

Annex I to CADE´s Resolution 20 differentiates between "cartels" and "other [horizontal] agreements." The Annex recognises that non-cartel agreements may have beneficial, pro-competitive effects, which requires "a more judicious application of the rule of reason."

In Concentration Case 58/95, the vote of the Reporting Commissioner applies three criteria to differentiate joint ventures from mergers and acquisitions: *(a)* the participation of at least two independent firms*; (b)* parent firms are not under related control after the operation and *(c)* the objective is the planning (and execution) of some long or medium term activity.

In Concentration Case 83/96, the vote of the Reporting Commissioner specifically considers the importance of parts of the contract that could restraint competition and favour naked price fixing.

In Concentration Case 119/97, the vote of the Reporting Commissioner uses a temporal criteria to differentiate among mergers and joint-ventures. According to the vote, a joint venture without a predefined ending date should be treated as a traditional merger or acquisition.

3. Why do firms engage in joint-ventures?

3.1 The incidence of joint ventures in 1996-1999

Joint ventures reviewed by CADE increased more than tenfold during the last five years, passing from two in 1996 to 27 in 1999. In 2000, this number is likely to increase further: until October, SEAE has reported to SDE 32 cases.

In relative terms, however, the figures are rather stable: joint ventures represented roughly ten percent of all merger cases in CADE in 1996 and less than 12 percent in 1999. In January-October 2000, joint ventures corresponded approximately to 9 percent of all merger reported by SEAE.

Until 1999, the incidence of joint ventures was higher in manufacturing industries. In 1999, for instance, 80 percent of all joint ventures reviewed by CADE occurred in manufacturing and roughly 25 percent happened in the auto-parts industry.

This might be related to the “automotive regime” between Brazil and Argentina but is hardly related to either globalisation or changes in enforcement policies toward joint ventures.

3.2 The incidence of joint ventures in 2000

A shift in this trend has apparently occurred in 2000. Almost 67 percent of all joint-ventures reported by SEAE to SDE referred to service industries, most notably in internet related services; retail and media sectors.

In 2000, less than 20 percent of the joint ventures were established between Brazilian enterprises (either nationals or subsidiaries of multinationals) and 15 percent, involving only foreign firms, would qualify as purely “transnational operations”. Similarly, only 12 percent of the joint ventures were motivated by joint R&D programs and only 21 percent of the joint ventures had the international market as the primary target of their actions.

Most of the joint venture agreements reported by SEAE to SDE from January to October 2000 involved, therefore, foreign and Brazilian enterprises having the Brazilian market as the main cause of the operation. This is consistent with the recent increase in the flow of foreign direct investment in Brazil and with the necessity of overcoming the knowledge gap when entering a new market.

The underlying motivation of most joint-ventures agreement in 2000 seemed to be, therefore, entry in the Brazilian market by foreign firms.

4. How competition agencies deal with them?

Unless when considered the potential competition effects, most of the joint venture cases so far involved few risks to competition. Accordingly, CADE has become more lenient with this type of operations over the time. In fact, in 1999, CADE imposed conditions in only one case (out of 27), against two (out of 4) in 1997.

In Concentration Cases 58/95 and 83/96, two joint ventures in beer industry involving the two main Brazilian brewers at that time, CADE imposed the elimination of all references to prices or price formulas in the agreement as a condition for approval. Concerned with potential competition effects, CADE also imposed behavioural conditions, mostly intended to opening the access of small brewers to the incumbents production facilities.

In Concentration Case 83/96, CADE imposed a two year limit for the duration of the joint venture.

SEAE has also been lenient with two recent cases involving rivals with large market shares in different relevant markets. In a first case involving two of the main market research firms of the country, the fact that the joint venture was intended to produce an entirely new product (innovation) was considered enough to dissipate doubts about anticompetitive motivations.

In a second case involving the first and the third largest newspapers in the country, the proposed joint venture was aimed to start a new activity – namely a business newspaper. Because the business newspaper consisted a true new product (when compared to the their regular newspapers) that would compete with a virtual monopolist, SEAE considered that the joint venture was unlikely to cause any harm to competition.

In a different case, the two largest domestic carriers were jointly creating a site at internet to sell their own airline tickets. The extension of information exchange was SEAE´s main concern. The parts involved, however, were very conservative and had a specific provision in their joint venture agreement that restricted the exchange of information. Although the predicted exchange of information did not involve sensitive data, SEAE recommend CADE to impose legal restrictions to the joint venture even if imposed restrictions were not substantively different from those established by the private parts.

Perhaps the biggest challenge to joint venture analysis are the agreements involving the state owned oil monopolist – *Petrobrás*. Since the beginning of deregulation, *Petrobrás* has signed several agreements with potential competitors such as YPF, BP-Amco, Petróleo Ipiranga, Texaco, Shell, Iberdrola, some local distributors of electricity, among others. All of these enterprises are potential competitors in the downstream market of oil or in related markets such as natural gas and electricity. None of these contracts were submitted to the Brazilian antitrust authorities yet. But since Brazilian antitrust law does not exempt state companies, it is likely that the contracts will be presented soon.

5. International aspects of joint ventures and international co-operation among competition offices

Since 2000, there were informal conversations with Argentina antitrust authority to improve international co-operation on merger control between both countries.

AIDE-MEMOIRE OF THE DISCUSSION

The Chairman opened the roundtable by remarking that a good number of written contributions were received. He also drew attention to an interesting difference between European (including the European Commission) and non-European countries. In the first group there are procedural differences between merger control and the prohibition of anti-competitive agreements. In addition, the substantive standard for the admissibility of joint ventures treated as mergers may differ from the standard applied to anti-competitive agreements. And, finally, there may also be differences between whether or not an efficiency defense is allowed. Contributions from European countries accordingly spend quite a bit of time delineating what is a concentrative, full function joint venture and describing the legal treatment of various types of joint ventures.

In the non-European contributions, characterisation of a joint venture as either a merger or a potentially anti-competitive agreement tends to take much less time. Much more attention is instead devoted to discussing the possible competitive or anti-competitive impact of joint ventures.

A common theme in virtually all the contributions is that joint ventures are becoming more frequent particularly, but not exclusively, in the information technology sector. Two contributions make the interesting point that in developing or transition countries, foreign firms often enter joint ventures with local enterprises in order to gain access to the market.

The Chairman opted to begin with the European Commission. Its contribution mentioned the 1997 amendment of the Merger Regulation where a switch was made from distinguishing between co-operative and concentrative joint ventures to one of classifying them as full function or non-full function. Full function joint ventures having a community dimension are dealt with under the Merger Regulation if they do not entail the co-ordination of activity between the parent companies, or under Article 81 if they do. This change means that at least some joint ventures now benefit from the Merger Regulation's streamlined procedures. But there remains a possibility that significantly different legal treatments will be accorded to joint ventures having what could be similar economic effects.

Since so many countries have been influenced by the European Commission's approach, the Chairman asked for an explanation of its what he considered to be a somewhat complex system. He also asked whether the Commission believed that parties were deliberately structuring their joint ventures so as to ensure more favourable treatment under the European Union competition rules.

A delegate from the European Commission stated that a lot of its "problems" in this area stem purely from the historical situation, particularly as regards merger control. Joint ventures were dealt with in the EU before merger control in a very systematic and straightforward way. They were all treated as falling under what was then Article 85(1), and usually exempted under Article 85(3) which later became Article 81(3). Basically a rule of reason was applied focusing on whether a joint venture eliminated competition to a substantial degree and also on whether it offered efficiencies in production or distribution that could not be realised by less restrictive means.

When merger control was introduced, it became necessary to decide which joint ventures would be considered under the new regulation and which would remain subject to Article 81 and the procedures set out in Regulation 17/62. Included in the latter would obviously be sham joint ventures, i.e. thinly

disguised price fixing or other arrangements involving minimal structural change. Included as well would be co-operative arrangements which the parties obviously did not consider to be mergers. Moreover, Article 3(2) of the initial Merger Regulation stated that the creation of a joint venture which has its object or effect the co-ordination of the competitive behaviour of undertakings which remain independent shall not constitute a concentration within the meaning of the regulation. All joint ventures falling outside the Merger Regulation would not profit from the accelerated procedure provided for mergers (first phase of one month, final decision in five months).

The delegate acknowledged that the different procedures and tests applied to mergers versus joint ventures falling outside the Merger Regulation did create a type of forum shopping incentive and that parties were perhaps structuring their transactions as mergers even though a joint venture might have been more commercially appropriate. The incentives to do this were not just procedural in nature. They were substantive as well, i.e. a dominance test under the Merger Regulation versus a test looking at whether a restriction of trade and competition was compatible with the common market coupled with the possibility of exemption under Article 81.

After struggling with guidelines issued in 1993 and 1994 dealing with how co-operative joint ventures would be dealt with under Article 81, and with the distinction between co-operative and concentive joint ventures, plus processing a lot of cases, the Commission concluded that a more structural approach would be better. Article 3(2) was therefore revised making it possible to deal with a lot more joint ventures under the Merger Regulation. To qualify for such treatment a joint venture must truly be under joint control and perform on a durable basis the functions normally carried out by the undertakings operating on the relevant market. This requires that the management of the joint venture be dedicated to day to day operations, and have access to sufficient finance, staff, and assets to perform like a normal company. If the joint venture will take over only one specific function within the parent companies, without full access to the market, then it is not considered a merger. For example, joint ventures limited to R & D, production, or distribution and sales of parent companies' products are not treated as mergers.

The current system can lead to three different scenarios. First, full function joint ventures not associated with a risk of co-ordination are treated under the Merger Regulation and subject simply to a dominance test. Second, full function joint ventures lacking a community dimension are subject to Article 81 on substance and Regulation 17 on procedure. The third, most complex, scenario arises in the case of full function joint ventures having a community dimension and importing a risk of co-ordination between the parents or between them and the joint venture. Procedurally these are treated under the Merger Regulation, but its Article 2(4) provides that the co-ordination aspects are dealt with under Article 81. All this will be considerably clarified when the new guidelines on horizontal agreements are published and applied. These guidelines should contain substantial assistance in describing the economic analysis the Commission will apply to joint ventures.

The Chairman noted that the Dutch contribution raises the issue of whether convergence in competition policy is always a good thing. The Netherlands still applies the co-operative and concentrative joint ventures distinction now abandoned at the European level, including applying a dominance test to concentrative joint ventures while making co-operative joint ventures eligible for an exemption, and has no plans to change that. Quite aside from this point, the Dutch contribution contains a very interesting discussion of the transaction cost rationale for joint ventures. He asked the Dutch delegation to elaborate on that. The Chairman also invited discussion of the KPN Telecom - SNT - Telecom Teleservices case which he found particularly interesting because the joint venture was cleared even though KPN and SNT explicitly agreed, among other things, not to approach each others' customers. The restrictions contained in the agreement were apparently accepted as necessary to the establishment of the joint venture.

A Dutch delegate stated that the discussion of transactions costs found in his country's contribution was inserted as a complementary set of theory that might give guidance on the rationale behind joint ventures. He drew special attention to sunk costs and the possibilities for opportunistic behaviour. If parties agree to do something together there is a risk of opportunistic behaviour after one party has invested in things which cannot be turned back. One such example arises in the case of information and this is particularly relevant in co-operation on R & D. In order to assess the value of information you have to receive it, and once received it can be reproduced without any limit. So, there is a problem in securing its value.

Turning to the Teleservices case, the delegate discussed the market situation before and after the joint venture, and how the parties divided tasks between themselves. As an aside he mentioned that six months after the joint venture was cleared, KPN decided to acquire a controlling stake in SNT and that too was cleared by the competition authority ("NMA").

The market for call center services is very dynamic (annual growth rates are as high as 25 percent) and includes call centers, training personnel for call centers and technical infrastructure related to call centers. Another important aspect is that there are many domestic and foreign suppliers in the markets some of whom have "deep-pockets" such as financial institutions and venture capital funds. Another important factor is that entry is relatively easy. The only investment is in the center itself, and this need not be "high tech". Training for personnel can be quite short and suitable employees are readily found in the Netherlands.

The Teleservices joint venture brought together SNT and KPN. SNT's core activity is setting up and managing call centers. KPN is the incumbent telecom operator and is primarily interested in the technical side of the call centers, including the provision of temporary satellite connections for very large orders. KPN managed some call centers for its own business units but this was a rather fragmented affair.

The parties applied to the NMA for an exemption so they could form a joint venture. The NMA treated it as a co-operative joint venture because of the possibilities it presented for information sharing among the parties. SNT and KPN gave scale effects and cost efficiencies as their reasons for forming the joint venture. The efficiencies were linked to the advantages of combining the technical expertise of KPN and its ability to refer customers to the joint venture, with the management expertise of SNT. It appeared that a combination of inputs from KPN and SNT would create a viable competitor.

After forming the joint venture, KPN would retain to itself the marketing possibilities it had as a telecom operator with easy access to potential customers. SNT would retain its existing customer base, except for KPN. But, as they both invested something in the venture, they wanted clarity and certainty that neither party would take advantage of the joint venture to compete in domains they retained to themselves. So KPN asked for commitments regarding bidding on large projects and SNT asked for commitments that KPN would not contact SNT's existing customers.

The Chairman then moved on to Italy, observing that it follows the EU model in the sense that although the law does not define the term "joint venture", a distinction is nevertheless made according to whether a joint venture is concentrative or co-operative. A dominance test is applied to concentrative joint ventures and an effects test to co-operative joint ventures. He noted the Italian contribution's reference to the Son-Igi-Siad/Igat ("Igat") case which involved a joint venture between three companies producing and marketing liquid gases for industrial use. In view of the parties' position on the relevant market and significant barriers to entry, the joint venture was deemed to appreciably restrict competition. The competition authority nevertheless exempted the joint venture on efficiency grounds. The Chairman therefore asked Italy to describe its general system for analysing joint ventures and to comment on cases in which an efficiency defence could be successful despite an appreciable restriction of competition.

An Italian delegate stated that the Italian approach to joint ventures indeed reflects EU provisions. For co-operative joint ventures, the point of departure is determining whether there is a substantial restriction of competition. This is followed by looking at whether there are benefits to the consumer. The Italian law clearly follows a consumer surplus standard, i.e. efficiencies must benefit the consumer. The Igat case is important because it shows how artificial this two step procedure is. In this sense it goes very much in the direction of favouring the new system that the EU is proposing, i.e. considering Article 81 as a whole. It is very difficult to say first that something restricts competition and then, it is efficiency enhancing hence does not, in fact, restrict competition.

The Igat case involved a production, rather than full function, joint venture having some co-operative features. The companies were joining forces to create a huge plant that would account for more than ten percent of the Italian market in the production of industrial gases. The partners had other production facilities as well and they intended to market independently the output of the joint venture which was to be divided according to each parent's share of the capital of the joint venture. Given there were just three competitors in the market and considering the joint venture's large market share, it was not difficult to conclude that it would entail a substantial restriction of competition. However, since the joint venture also promised substantial economies of scale, it was felt that costs would be reduced so much that there would be no increase in market power. Accordingly, the joint venture received a ten year exemption.

The Chairman followed by asking why the parties had to enter into a joint venture to benefit from the economies of scale, i.e. what was stopping one of the partners from growing or building a very efficient larger plant and displacing its rivals. The Italian delegate responded that for the three parties to build the larger plant they had to close other plants.

The Chairman then took the discussion to Denmark noting it relied on the distinction between full and non-full function joint ventures, but with the added twist that until October 2000, Denmark did not have any merger control. That meant full function joint ventures were essentially free from review. The Danish contribution referred to an interesting case where a large number of asphalt manufactures created joint ventures. Some of those were found to be full function and others non-full function joint ventures with different legal treatments applied to the two groups. The Chairman wished to know whether the pre-October situation had pushed firms into merging in order to avoid trouble with the competition authority.

A Danish delegate began by drawing attention to an error in the Danish paper [corrected in the version included in the proceedings], i.e. that ancillary restraints in full-function joint ventures are to be analysed in connection with the concentration as a whole, while restraints that are not ancillary continue to be analysed under the rule on anti-competitive agreements.

Concerning the prior absence of merger control in Denmark, the political reason for this was a conviction that Danish companies had to be permitted to grow large enough to compete in the international market. This view changed, partly because of a 1999 merger between Denmark's two largest dairies accounting for 90 percent of the market. The Danish Competition Council lacked the power to commit the two parties to reduce the anti-competitive effects of that merger.

As to the Chairman's question concerning how the absence of merger control may have biased firms in favour of mergers as opposed to more light-handed co-operation, the delegate could offer no firm evidence. It is interesting, however, that about six months prior to the dairy merger just alluded to, the same parties made a production sharing agreement. The Danish Competition Council analysed that under the rule applied to anti-competitive agreements and ordered the parties to cancel some of the sections of their agreement. That decision led indirectly to the two companies eventually merging.

As for the asphalt case, this involved a network of joint ventures which basically made it impossible for the companies to actually compete with each other. If the joint ventures had been organised as competing groups, that would have been more acceptable. In any case, it was somewhat artificial to analyse some of the joint ventures as full function and others as non-full function. They were basically doing the same things except that the non-full function joint ventures engaged in more co-operation with their parent companies.

Turning to Germany, the Chairman drew attention to an important Federal Supreme Court decision in 1985 establishing that mergers can be assessed under both Section 1 of the Competition Act dealing with cartel agreements and also under the merger control provisions. At the same time there are procedural and substantive differences between the two sets of provisions. The Chairman sought confirmation of these points and also invited discussion of the Moksel/Südfleisch slaughterhouse joint venture. The Bundeskartellamt ("BkartA") prohibited this arrangement under both merger and cartel provisions, but the Berlin Appeal Court decided to reject the merger related portion of the decision. The case is now before the Supreme Court. The Chairman sought elaboration of what the practical consequences for the joint venture would be if the appeals court decision is upheld.

A German delegate confirmed that in his country joint ventures can be assessed under both the merger control regime and the provisions related to anti-competitive agreements (Section 1 of Germany's competition statute), assuming that necessary pre-conditions are met. For merger control, the pre-requisites have to do with turnover thresholds and shareholdings being held by both parents. For the application of Section 1, the partners of the joint venture must be at least potential competitors. The possibility of dual review means that there is an important difference between the German and EU approach. In particular, despite the fact that a joint venture is non-full function, it could still be subject to merger review under the German system.

There are some procedural differences between the application of merger control and Section 1, but they are limited mostly to the different time frames for the final decisions. As to substance, under the merger control regime, joint ventures are not cleared if they create or strengthen a dominant position either for the parent companies or for the joint venture itself. The Section 1 assessment, on the other hand, focuses mainly on the horizontal effects of the joint venture among its partners. All agreements between competitors having as their object or effect an appreciable restriction of competition are prohibited. There is, however, a possibility for exemptions.

In assessing a joint venture's possible co-ordinating effects, the BkartA determines first whether the venture is full function or not, applying roughly the same criteria as the European Commission. If the project is non-full function, there is the possibility of applying a kind of presumption that it will lead to co-ordination among its parents. If all parent companies remain active in the market along with the joint venture, this is taken as a very strong indication that there will be co-ordinating effects among the parents. The market power of the parties is relevant at this stage only in so far as *de minimis* agreements fall outside the scope of Section 1, i.e. situations where the parties do not exceed the market share threshold of about 5 percent in all the relevant markets.

There are possible exemptions applying to both merger control and Section 1 provisions. Under the former, there is only one general balancing clause. It is provided that a merger can be cleared even if it results in dominance, if the parties prove that the concentration will also lead to improvement in the conditions of competition in a structural sense and these improvements will outweigh the problems and the disadvantages of dominance. The provisions relating to anti-competitive agreements, on the other hand, provide a wider range of possible exemptions. They cover, for example, standardisation agreements or agreements improving competitiveness of small and medium enterprises. Importantly, under German law, joint purchasing agreements are allowed in principal only among small and medium enterprises.

Last year, a more general exemption was added for Section 1 cases. The BkartA may now balance pro- and anti-competitive effects of the agreement, but as this provision is subsidiary to all the other exemptions, it has so far not had much practical impact. There is still no exemption or safe harbour related purely to market share thresholds in the German law. Moreover, it should be noted that all exemptions apply only if the agreement represents the least restrictive way to produce the positive affects, and no exemption will be granted if an agreement would result in a joint dominant position by the parties to the agreements. This provides an interesting linkage to the dominance test applied in merger control.

The Moksel/Südfleisch case, which could become one of Germany's leading competition cases, arose when the two largest companies in the meat industry proposed to create a joint venture incorporating part of their slaughterhouses in the new Landers in Eastern Germany. Three markets were affected by this joint venture. The nation-wide market for meat products, plus the regional markets relating to acquiring cattle and pigs for slaughter. The particularly affected regions were found in the southern new Landers and the German south-west.

The BKartA prohibited the creation of the joint venture under both Section 1 and merger control. As for Section 1, the previously mentioned presumption of co-ordinated effects was applied because the two parent companies remained active on the same market as the joint venture. The joint venture was also prohibited under the merger provisions because there was some concern that the joint venture would lead to co-ordinating effects on a third market where the joint venture was not yet active. That conclusion was reached because of the economic significance of the joint venture for the parent companies.

As already noted, the appeal court only upheld the BkartA's decision as to the cartel aspect of the case. Consequently, the BkartA has appealed to the Federal Supreme Court for a final clarification on the important merger issue.

The Chairman turned next to the Czech Republic noting that in that country one of the most important motivations for joint ventures is the desire of foreign firms to gain access to the market by teaming up with a local company. Its contribution contains an extensive discussion of the definition of joint venture, again applying the distinction between concentrative and co-operative joint venture. The contribution also describes the Ceské Radiokomunikace/TeleDenmark joint venture in the fields of data and Internet services and voice telephony. On the one hand, the Czech Office for the Protection of Economic Competition ("Office") found that the number of competitors in the market was going to decrease because of the creation of the joint venture. On the other hand, it also determined that the entry of a new competitor in the market for voice telephony would create effective competition for the dominant company. The Chairman invited comment on this case.

A Czech Republic delegate explained that a joint venture named Contactel was created by Ceske Radiokomunikace, a Czech radio-telecommunications company active in data transmission and fixed-line voice telephony services, and TeleDenmark, a company active in Internet services and also in voice phone services. The purpose of establishing Contactel was to create a stronger competitor in fixed-line voice telephony services.

The Office began by determining that Contactel was a concentrative joint venture. Under the competition law, the Office must approve concentrations if the parties prove that any detriment which may result from the distortion of competition will be outweighed by the economic benefits brought about by the concentration. Although this particular concentration would lead to a decrease in the number of competitors, it must be noted that both parents were very weak competitors for Ceský Telecom, which enjoyed a dominant position in fixed line voice telephony services. It was believed that the joint venture would be essentially pro-competitive because it would create one powerful new competitor out of two formerly weak competitors. On this basis, it was approved.

The Chairman noted that as with the Czech Republic, joint ventures in Turkey are often a way for foreign firms to gain access to the Turkish market and for Turkish firms to gain access to foreign technology. Another similarity is that Turkey also follows the EU model and makes a distinction between concentrative and co-operative joint ventures. The Turkish competition law applies merger review provisions to full function concentrative mergers. Other joint ventures are assessed under the provisions relating to agreements.

The Turkish contribution refers to a case in which 39 companies wanted to establish a joint venture for the supply of LPG. The Turkish Competition Board ("Board") decided that it did not qualify as a merger and prohibited the joint venture because it included price fixing and market sharing clauses. It had also found, however, that the joint venture would have yielded certain economic efficiencies. The Chairman wished to know if the same result would have obtained if the case had instead been analysed as a concentration. Under that scenario the efficiencies would have counted in favour of the merger, and the market sharing and price fixing clauses would have been less damning.

A Turkish delegate began by providing a brief summary of the treatment of joint ventures in Turkish competition policy. As in many other jurisdictions, the Turkish competition law does not contain a specific definition of joint ventures. However, in Paragraph 2 of Article 7 of the Competition Act, it is stated that “the Board, shall publish communiqués to announce the categories of mergers and acquisitions which require prior notification to the Board.” Accordingly, the communiqué on Mergers and Acquisitions provides for Board authorisation of joint ventures fulfilling three criteria: having functional independence; not directed towards or having the effect of restricting competition; and third, under joint control. If any of those elements is missing, a joint venture is considered as an agreement leading to co-operation and thus evaluated under Article 4, the Turkish equivalent to the EU's Article 81. Turkey's merger control is also analogous to what is found in the EU.

As already noted, subsequent to amendments in 1997, the element of not creating co-ordination of competition is no longer assessed under the EU Merger Regulation as an element in the evaluation of whether a joint venture creates a concentration. Turkey is still assessing making a similar change in its merger and acquisition communiqué.

In a case where the parents remain on the same market as a joint venture, the Board treats it as a co-operation agreement having the effect of restricting competition and does not authorise it. This is illustrated in the Metro-Migros case involving five joint ventures where the Board stated that both parent companies could not coexist in the same relevant market with a joint venture. In other words, only one of the parties, Metro AG or Migros is permitted to operate with the joint venture in the relevant product market. Failure to comply with this condition would mean that the joint venture would be considered as an agreement restricting competition.

The LPG joint venture represents another important case. There were two reasons why this was not found to be a concentrative joint venture. First, 29 of the LPG distribution companies having minority share holdings would not have a say in strategic decisions, i.e. there was no joint control. Second, due to the joint venture's financial and administrative structure, it would not be independent of its parents. The transaction was accordingly treated as a co-operation agreement and found to contravene Article 4 of the Competition Act because of its price control aspects. In addition, the Board noted the fact that some large groups party to the joint venture, who could readily procure supplies individually, would easily control the supply and distribution of LPG in the market through the joint venture which, the delegate noted, already accounted for some 92 percent of the distribution market.

The Board found that the agreement had a nature likely to ensure economic development. However, due to the fact that such economic benefits did not accrue to consumers and the agreement could

restrict competition in a significant part of the relevant market, it did not satisfy the conditions for an individual exemption.

The Chairman repeated his question about what would have happened if the 29 smaller firms party to the joint venture had had some say in the general policy, and therefore, the transaction had been considered a concentration joint venture. The Turkish delegate noted that if that had been the case there would still have been the problem of collusion between 39 firms accounting between them for 92 percent of the market. This meant it would have been difficult to grant authorisation under the merger legislation.

General Discussion

A Swiss delegate noted that his country also made the distinction between concentrative and co-operative joint ventures and defined the former as requiring that all the functions of a normal enterprise be performed in an autonomous, durable fashion. He then asked the European Commission or countries with a similar approach for details concerning how they applied the durability criterion and whether they made distinctions among various economic sectors. For example, a joint venture intended to last five years could be classified as short term in a mature sector such as food and beverages, but quite long in a new technology sector where product cycles last only three to four years.

In response, a European Commission delegate noted that a joint venture is compared with an average company in the particular segment of the market at issue. There can be differences across sectors in the time needed for a company to be up and running especially comparing rapidly growing with more mature sectors. Beyond considering the peculiarities of a particular market, the general rule applied is that no more than three years should be necessary for a joint venture to be able to operate without assistance from its parents. Whatever the sector, a joint venture should be expected to last for indefinite period of time.

A BIAC delegate underlined the important consequences flowing from the distinction between mergers on the one hand and co-operative joint ventures on the other hand, and also between concentrative and co-operative joint ventures. He noted as well that in the EU's Merger Regulation, a full function joint venture is defined not just in terms of durability but also with reference to its autonomy. There have been important cases where that autonomy is being judged according to the volume of products exchanged between a joint venture and its parents. So there could be a major joint venture integrating production facilities, research and development, and even marketing such that it has the market to itself (i.e. to the exclusion of its parents). Yet in that situation if the joint venture produces an important component for its parents as well as third parties, it could quite easily lose its "full function" status and fall within the scope of Article 81(1).

The consequences of such a classification are not only a loss of time in handling the procedures. It could also mean loss of eligibility for a specific exemption if notice has not properly been given. There is also the issue of whether the parties should have notified the joint venture to countries such as Germany who apply dual tests. He compared that to the American approach which he described as first considering the degree of integration of assets and then dealing with everything else as ancillary.

The delegate urged the CLP to remember the in-house jurisdiction issue when considering problems associated with multi-jurisdictional mergers.

A delegate from the European Commission said that the EC was well aware of the problems BIAC alluded to, particularly in relation to partial joint ventures in production. These are treated under the 81(3) procedure, hence are not subject to a pre-set short deadline for consideration. In its White Paper on modernisation, the EC proposed that partial function production joint ventures, and perhaps others, be

considered under the Merger Regulation regardless of the substantive test to be applied. This turned out to be highly controversial, so in the latest recently tabled proposal, the EC expressly reserved that issue for the next revision of the Merger Regulation.

End of General Discussion

The Chairman next called upon the United Kingdom and noted that it distinguished between mergers and joint ventures which are not mergers. The joint ventures which may qualify as mergers fall under the Fair Trading Act of 1973. He believed that very few mergers are actually so treated, meaning that most are instead examined under Chapter one of the Competition Act which deals with anti-competitive practices. But the difference between merger and agreement treatment is less important in the UK because mergers are considered under a broad public interest test allowing consideration not just of possible dominance, but also anything that might be of redeeming value in the merger.

The UK's contribution also devotes considerable discussion to the distinction between *ex ante* and *ex post* co-ordination in joint ventures. The Chairman invited the UK to explain its system and to elaborate as well on the significance of the *ex ante*/*ex post* distinction.

A United Kingdom delegate began by stating that his country does not apply a special definition to joint ventures, we have no definition of joint ventures which we operate. A full range of law exists for dealing with full function and non-full function joint ventures, including the merger law and most recently the Competition Act, 1998 (which came into force on March 1, 2000), modelled along the lines of Europe's Articles 81 and 82.

Since approximately 1984, the "public interest" merger test applied under the Fair Trading Act of 1973 has been interpreted under the "Tebbit doctrine" (named after the Minister at that time). Under this doctrine the test amounts to the effect of the merger on competition. Successive governments have upheld that interpretation. The current government is considering revising the merger law, including making the competition test more explicit.

As for application of the Competition Act, section 60 requires having regard to the EU experience under Articles 81 and 82. There is no *per se* prohibition of any form of joint venture. Nevertheless, there is a rebuttable presumption that joint ventures involving express agreements effectively to fix prices or market shares or to limit output will produce negative market effects and therefore will almost always be caught under the Act. But as with Article 81, under Chapter One of the Competition Act there is a test for an appreciable effect on competition.

Another UK delegate stated that the determination of appreciable effect on competition is organised into two broad categories which can be labelled *ex ante* and *ex post,* although they could also be thought of as direct and spill over effects. The same distinctions are also helpful in dealing with the exemption issue. The *ex ante* or direct effects concern the direct restrictive effects of a joint venture in a relevant market. These could be important even in a genuinely new market where two potential competitors are being replaced by a monopoly provider. Direct effects are assessed analogously to their treatment in a merger analysis, looking at things like market conditions, structure and entry.

The *ex post* or spill over effects are concerned with the independence that parent companies are supposed to retain in markets in which the joint venture is not operating. One of the key factors to be considered is how the joint venture might serve as a vehicle for co-operation or development of a co-operation culture between parent companies. This could arise for example because the management of the joint venture works quite closely with the parent companies. This risk could vary across types of joint

ventures being greater for instance in pure marketing joint ventures than it would be for R & D joint ventures. Other spill over effects might also enter the equation as where there is a vertical link having negative effects in terms of inputs supplied to third parties.

If there are restrictive effects, attention turns to a possible exemption. Strong benefits are considered and attention is also devoted to determining whether the restrictions are indispensable to obtaining those benefits. The key element examined is whether the parent companies, absent the joint venture, would fail to undertake the activity independently. Are they capable of bearing the risks and finding the necessary finance on their own, and are they producing similar outputs to what the joint venture would produce? Exemption decisions mostly turn on *ex ante* or direct effects, but attention is also paid to spill over effects, i.e. impact on possible collusion.

Moving away from Europe, the Chairman remarked that the Australian contribution reviews the economic literature on joint ventures, compares mergers and joint ventures from the standpoint of commitment, and derives a rule of thumb for assessing joint ventures. Australia is also noteworthy in that its competition law exempts some joint venture price fixing from *per se* illegality, which the Chairman found interesting in light of the earlier discussed Turkish case. The Chairman also drew attention to the application of a net public benefit standard to joint ventures in Australia, where benefits could include things like expansion of employment, promotion of equitable dealings in the market, or industrial harmony. He was hoping for some elaboration of how the public benefit standard is actually applied.

The Australian contribution referred to the Pasminco case where the ACCC authorised the establishment of a lead and zinc production entity to be jointly owned by two companies, CRA and North, even though it created a monopoly at the production level. This was allowed on the basis that the parent companies would maintain independent marketing arms. The Chairman wondered how much competition one could expect in such a case.

An Australian delegate pointed out that most Australian joint ventures have not been connected to research and development or taken place in the information technologies sector. Instead they have been concentrated in the resource sector where they are used because of the large minimum efficient scales required and very high capital costs. For example, most gas marketing is by joint ventures. Virtually all aluminium smelting is also done through joint ventures with partners supplying inputs according to their shares of smelter ownership, but marketing and selling their own outputs. These joint ventures seem to have worked very effectively in terms of efficiency and competition.

In Australia joint ventures are simply subject to the standard provisions of the Trade Practices Act. The emphasis is on the economic consequences of the arrangements. Typically these are examined using the same framework applied to merger analysis. This means that even those joint ventures which lead to a substantial lessening of competition can be allowed to continue if they yield a net public benefit. The ACCC and the courts have accepted a very wide range of public benefits. Some, such as industry cost savings and rationalisation, and the promotion of exports and/or import replacement, are closely linked to efficiencies. But some of the public benefits accepted in the past have also involved much broader matters such as industrial harmony and more equitable dealing between parties, i.e. typically between buyers and sellers.

The public benefit factors are factored into the analysis only when joint ventures are believed to lead to a substantial lessening of competition. When that happens, the parties can provide public submissions addressing the public benefits issue. For example, in some instances parties have shown that a joint venture is likely to lead to increased employment or at least to smaller reductions than would otherwise be the case.

Recently in Australia joint ventures are becoming more common in mature industries, especially where there is excess capacity and a need for rationalisation into fewer, larger production facilities. A joint venture can solve the problem that no one wishes to exit the market, yet there is a need for industry rationalisation, new capitalisation and a means to achieve greater scale economies. Examples can be found in approved joint ventures in the quarrying and cement sectors. Vertically integrated concrete producers have set up joint ventures in quarrying, sand packs and various other inputs, but they compete at the output stage with regard to ready mix concrete.

The Pasminco case provides a more extreme version of the same thing. Australia's only two manufacturers of lead and zinc applied to establish a production joint venture. Both companies were major minerals producers and exporters in a range of products besides lead and zinc.

When the Trade Practices Commission [forerunner to the ACCC] concluded that the Pasminco joint venture led to a substantial lessening of competition, the parties applied for authorisation on public benefit grounds. The main benefits advanced related specifically to enhanced international competitiveness, lower operating costs and increased efficiencies from integrating the production of separate plants. The objective was clearly to close some plants, to re-capitalise and to achieve scale economies. The efficiencies appeared to be unavailable individually and the lack of scale was allowing imports to increase, admittedly from a fairly low base. The parties' view was that in the absence of a joint venture, it was fairly likely that their production would become increasingly marginal. They stated they would maintain separate marketing arms, but of course there was concern about the extent to which marketing can be separated when there is a production monopoly. As it happened, there was some evidence that the two marketing arms did compete, but probably only at the margin and not intensively. The real competition apparently came from imports, and the separate marketing arms tended to concentrate on supplying their traditional customers.

The efficiencies expected from the Pasminco joint venture were probably reaped, and there was new investment. Because of import competition, some of the efficiencies were probably passed on to consumers.

The separation of the marketing arms continued for about five years, but ultimately the parties applied to merge them. Inquiries carried out at the time seemed to confirm initial suspicions that in fact imports were a more significant competitive factor than the existence of separate marketing arms.

The Chairman asked whether the parties had supported their second application by arguing that since the marketing arms did not really compete, a further merger would not be anti-competitive. The Australian delegate said no, and added that the Commission takes a dim view of such rationalisations, but realistically, they are sometimes tried.

At this point the Chairman turned to consider the US. "Guidelines for Collaborations Among Competitors" ("Guidelines") which he thought deliberately tried to avoid the pitfalls of excessively fine legal distinctions and inconsistent treatments of various types of joint ventures. In its written contribution, the US mentioned that the analytical approach of the Guidelines is consistent with the goal of cutting across all types of joint ventures and all segments of the economy. The Chairman also noted that in the US, the crucial distinction seems to be between joint ventures handled under a *per se* rule and those dealt with less harshly under a long or short rule of reason. He asked the U.S. for more information about its Guidelines.

A United States delegate [from the Federal Trade Commission - FTC] began with a little background information including noting that in the U.S., as in other countries, the incidence of joint ventures is increasing. Partly this appears due to their being so appropriate in high-tech industries where

complementary knowledge and technologies are needed to achieve a particular result, and partly it results from increased global competition. Many exporting firms seek local firms as partners in order to address local conditions.

When the private sector in the United States was asked which part of American law they found the most confusing and most likely to lead to abandoning transaction because of lack of legal certainty, the overwhelming response was joint ventures. This provided an incentive for the FTC and the Department of Justice to embark on the very challenging task of writing guidelines for horizontal collaboration. Vertical joint ventures and standard setting were avoided because they were believed to raise a whole different set of issues.

The goal for the Guidelines was three fold. First, there was a desire to achieve a single analytical approach and avoid subtle distinctions based on types of joint ventures or sectors dealt in. There seems to be no good reason why joint ventures in R & D, production, sales and marketing should not be addressed through the same analytical approach. Equally, there seems to be no reason why joint ventures in oil, steel, plastics or the Internet, or ones involved in domestic versus international trade really should be treated any differently.

The second goal was to update the way of thinking about joint ventures. Traditionally when courts examined joint ventures they thought of it involving a factory or building. But more and more joint ventures are simply combinations of ideas. This point was recognised when the Guidelines noted that joint ventures can be achieved by contract or otherwise, a significant departure from traditional thinking about this subject.

The third goal was to communicate a permissive attitude towards joint ventures. These arrangements are a sensible form of business organisation which produces great efficiencies and enhances consumer welfare. Although they can be used for anti-competitive purposes, they should generally benefit from a permissive antitrust approach.

The most challenging set of issues had to do with the treatment accorded joint ventures: illegal *per se* versus analysis under an abbreviated or full rule of reason. Traditionally, *per se* treatment has been reserved for agreements that have a direct effect on price, allocate markets, or affect quantity and output. The Guidelines note, however, that even if there are such direct effects, provided they are reasonably related to an efficiency enhancing integration and necessary to achieve its pro-competitive effects, the agreement will be analysed as a joint venture. It will not be disposed of on a *per se* basis. On the other hand if the agreement amounts to simple co-ordination then it is liable to be treated as price fixing and to be disposed of very quickly. The delegate illustrated this key difference as follows. When a firm manufactures a product but does not have a sales force and another firm has a sales force but no product and they enter into a joint arrangement by contract or otherwise to distribute the product, that is an agreement reasonably related to efficiency enhancing integration. It is justifiably treated as a joint venture and benefiting from an elaborate review. On the other hand, if three firms get together and agree that one will market in Europe, another in the United States and a third in Asia, regardless of their calling this a joint venture, there is no reasonable relationship to an efficiency enhancing integration. It is simple co-ordination and deserves to be treated under an abbreviated approach.

The delegate then made three additional points. One, in a typical application of the rule of reason, the progression is from market power to purpose and on to effect. Only at the end is it asked whether there might have been a less competitively restrictive way of achieving the same benefits. And if so, that can be a basis for finding a violation. The Guidelines move the less restrictive analysis up front. It is included in the decision on whether or not a *per se* or rule of reason will apply. This makes sense. Why, the delegate

asked, conduct an elaborate rule of reason analysis if at the end you are going to conclude you did not need the joint venture because the same benefits could have been achieved through a short term contract?

Second, there is a provision in the Guidelines for some fairly limited safe harbours. For example, for production joint ventures a market share below 20 percent, constitutes a safe harbour. For R & D joint ventures, the threshold share is 25 percent. It should be noted, however, that a transaction outside a safe harbour is not necessarily illegal. It is simply subject to a review not applied to transactions within a safe harbour.

Finally, Guidelines clarify the treatment of otherwise legal joint ventures having some illegal aspects - for example, a covenant not to compete in one country out of twenty. Rather than strike down the entire joint venture, the Guidelines express a willingness to strike down only the small part of the joint venture that is illegal.

The delegate concluded that the Guidelines appear to have achieved their principle goals by setting out a single analytical approach and espousing the view that joint ventures need not involve bricks and mortar.

Moving to Japan, the Chairman noted that several sections of the Anti Monopoly Act ("AMA") apply to joint ventures. And the treatment of joint ventures in Japan seems to focus mainly on their economic consequences, rather than on the fine distinction about whether they are concentrative or co-operative. Among the interesting cases mentioned in the Japanese contribution, one concerns the Toshiba and Mitsubishi Electric Company's establishment of a joint production company for large-scale motors. The two companies had a combined (approximate) 40 percent market share. The Japan Fair Trade Commission ("JFTC") found the joint venture acceptable because of countervailing buying power. The Chairman sought more information about this case.

A Japanese delegate commented that there is no specific definition of joint ventures in the AMA, but the Mergers and Acquisitions Guidelines ("Guidelines") published in 1998 explain how the AMA should be interpreted with regard to joint investment companies, i.e. companies established or acquired by two or more companies through contract to pursue necessary operations in order to achieve mutual benefits. Whether a joint investment company may substantially restrain competition in any particular field of trade is determined in accordance with the Guidelines.

As with mergers, the analysis begins with defining the relevant market. Following that, possible competitive effects are analysed by comprehensively considering the companies' industry position, market conditions and other issues.

In the Toshiba/Mitsubishi joint production or large scale motors case, the combined market share was relatively high. But since each of the two parents continued to carry out separate marketing activities, and specific measures were taken to ensure autonomy in those activities, competition between the two companies would be maintained. There were also several major domestic competitors with manufacturing and marketing capabilities in the market. In addition, the difference in product quality is small among manufacturers, so users were readily able to change suppliers. Moreover large buyers enjoy strong bargaining power, and this situation is not expected to change in the future. Finally, imports offered strong competition and they had been growing recently. Taking all these factors together, the JFTC determined that the establishment of the joint investment company might not substantially restrain competition in any particular field of trade.

The Chairman next considered the Korean contribution drawing attention to Article 7 of Korea's competition statute. That Article contains a very wide definition of business combination with the result is

that most joint ventures would be included. As for those falling outside Article 7, they would be caught by Article 19. Efficiency defences apply in either case, but it seems that the standard for the efficiency defence is slightly different under the two articles. He invited further comment on that.

The Chairman was puzzled by two statements found on the same page of the Korean contribution. The first maintains that Korea witnessed a dramatic surge in strategic alliances following the rapid adoption of information technology, while the second notes that to date there are only a handful of adjudicated cases on joint ventures. He wanted to know why there was a paucity of such cases.

A Korean delegate confirmed that Korea has witnessed a dramatic surge in strategic alliances in the last decade especially as regards links between on line and off line firms and among Internet venture companies. These areas are newly evolving markets in Korea. Until the present they have not been associated with concerns about concentration or anti-competitive effects on relevant markets. That explains the lack of adjudicated cases. However, it is expected that the number of adjudicated cases will increase as the market develops.

General Discussion

A Korean delegate opened the general discussion by asking the US delegation for information about the number of joint ventures that have been reviewed subsequent to the adoption of its Guidelines, and the percent of those which were found to be efficient.

A United States delegate [from the FTC] responded that few cases have yet been so examined due to the Guidelines having been so recently adopted. But looking back over the last five years or so, there have only been three of four instances out of perhaps hundreds, where the FTC concluded that a joint venture was not sufficiently efficient to overcome anti-competitive effects. Of those very few cases most were in the health care industry where doctors or pharmacists joined forces, and claimed that such integrations helped consumers. The FTC instead found them to be anti-competitive on balance. Only one such case has arisen subsequent to the adoption of the Guidelines.

A Dutch delegate, referred to what had been said in the Danish contribution about its asphalt case, and also by the United Kingdom regarding indirect or spillover effects associated with joint ventures. He asked the European Commission if it had any general views about the threshold at which such effects become problematic.

A European Commission delegate began by thanking Chairman Pitofsky for the very clear presentation of the US view and added that the thinking behind the US. Guidelines is also in substantial part reflected in the EC's new draft guidelines on horizontal agreements.

With one exception, i.e. full function joint ventures not entailing any co-ordination between parent companies, all types of joint ventures are covered by the guidelines regardless of whether they are reviewed under the Merger Regulation or under the new regulation 17. That explains why the guidelines contain core restrictions against price fixing or output or customer allocation, practices which have always been viewed non-permissively. The guidelines provide safe harbours, i.e. for production specialisation joint ventures (below 20 percent market share) and for research and development joint ventures (below 25 percent market share). They also apply the same economic analysis independently of the type of the joint venture. Since practically all joint ventures, including the production ones, will fall under these guidelines, what is left will be the so called the pure mergers. They will continue to be reviewed under a dominance test. If they fail that test, they presumably substantially eliminate competition so would not have passed muster under 81(3) test either.

Concerning spillover effects, the delegate noted the relevance of the EC guidelines relating to the application of the Merger Regulation's articles 3(2) and 2(4) applying to partial function joint ventures. These are likely to run into trouble if there is a strong presence of parent companies in either upstream, downstream or related markets, or if the parents of a production joint venture heavily depend on it in order to bring a product to market. In the latter instance, problems could arise if the joint venture's output is a substantial part of its parents' sales. This is left unqualified. Depending on the market, if a parent relies on a joint venture for two thirds or eighty or ninety percent of its sales, that would likely be regarded as substantial. It would imply that the joint venture is not allowed to be an independent, autonomous entity in the market. Instead it relies on others for channelling its products into the market. There is no firm threshold level that is applied in these situations.

A BIAC delegate stressed the importance of legal clarity as regards joint ventures and the need for a certain degree of similar treatment across jurisdictions, both substantively and procedurally. The important thing about having procedures such as those provided in the EC's Merger Regulation or the American Hart-Scott-Rodino Act is that they provide *ex ante* instead of *ex post* review. He noted, however, that in the course of discussions about modernisation, the European Commission has not proposed to provide for *ex ante* control for joint ventures falling outside the scope of the Merger Regulation.

The delegate highlighted two significant issues: should certain joint ventures that are similar to mergers be subject to mandatory merger review including required waiting periods; and for joint ventures clearly outside merger review, should at least a voluntary procedure be provided for parties wishing some kind of *ex ante* assessment. Regarding the latter point, paragraph 2.4 of the US. Guidelines states, in part, that "...the Agencies assess the competitive effects of a relevant agreement as of the time of possible harm to competition, whether at formation of the collaboration or at a later time, as appropriate." There follows a reference to "Example 3" and the paragraph continues with: "However, an assessment after a collaboration has been formed is sensitive to the reasonable expectations of participants whose significant sunk cost investments in reliance on the relevant agreement were made before it became anti-competitive." The delegate sought more information, including examples, of how that procedure is being applied.

The BIAC delegate also noted that the definition issue is relevant to the matter of competition authorities exchanging confidential information. For joint ventures amounting to mergers, the US would probably not entertain the possibility of such exchanges. In Europe, how joint ventures are defined might also make a difference in willingness to exchange confidential information. In any event, for the same joint venture, there could be some variation across jurisdictions in willingness to exchange confidential information.

A delegate from the United States [FTC] answered by first noting that the matter of when the legality of a joint venture is to be determined was one of most difficult and controversial issues addressed in the Guidelines. The easy answer would be that under American law, legality is determined at the time of the lawsuit. So, if a joint venture was formed in 1920, but came to court in 1999, its legality would be examined as of 1999. The Supreme Court decision in Dupont-General Motors takes that position. The delegate referred to an interesting case that arose out of "Panagra", a joint venture by Pan American and Grace formed when airlines were still very new. Eventually Panagra and Pan American expanded and began to overlap. So Pan American used its joint venture voting authority to veto the expansion of Panagra. That behaviour was judged at the time the veto was exercised, not when Panagra was first formed.

It seems a little unfair for firms to enter into a joint venture that is legal in 1920 and then see their behaviour challenged in 1999. That is why it is necessary to take account of the parties' reasonable expectations when the joint venture was formed. But under certain circumstances, for example, if a joint

venture grows into a monopoly and the monopoly abuses its position, competition officials might have no choice but to challenge the joint venture based on its subsequent behaviour.

A delegate from Finland said that for reasons of legal certainty, companies might prefer *per se* prohibitions to a more flexible but also more uncertain rule of reason approach to joint ventures. He asked BIAC to comment on that.

A Dutch delegate asked the European Commission to comment on the apparently more lenient treatment afforded to production as compared with distribution or commercial joint ventures. The delegate noted there were studies showing that production joint ventures could also lead to common prices if the good supplied to parents accounted for a large chunk of the costs incurred by the parent in selling a good.

A European Commission delegate stated that the danger to competition stemming from production joint ventures arises where the venture creates a large commonality of costs for the parents as, for example if no additional elements are added downstream by the parents. In such situations, both the incentive and scope for competition are largely reduced. So although production joint ventures can generally enhance efficiencies, they can also present risks of co-ordination and non-competition.

Chairman's Summary Remarks

At this point the Chairman offered some summary remarks beginning by observing that the European Union system for analysing joint ventures is a bit cumbersome, even though it is evolving towards being more flexible and permissive. The Merger Regulation is part of the reason for the system being cumbersome and there is nothing much one can do about it, but it seems that an enormous amount of time is spent on issues that are really inconsequential.

The US approach as reflected in its Guidelines seems much more satisfying since it focuses on economic consequences without first expending a great deal of effort describing what needs discussing. The European Commission did say, however, that it was willing to move in the same direction, as much as the system allows.

The US also stressed that it was basically friendly towards joint ventures but the European Commission only made that point towards the end of the discussion. Historically, there may be a little bit more suspicion in Europe. This too may be evolving, however, and is possibly a sign of maturity of the European competition authorities.

Finland's point towards the end, made in reaction to the BIAC intervention, highlighted an important tradeoff between flexibility and legal certainty. The business community should presumably be interested in both. Joint ventures cover a very wide spectrum of behaviour extending from hard core anti-competitive arrangements to deep integration possibly for very good efficiency reasons. Any system offering legal certainty might not be subtle enough to accommodate the flexibility necessary for looking at joint ventures. BIAC did point out though that one possible way to obtain greater legal certainty without reducing flexibility would be to try to get an opinion as early as possible. That is where notification or the possibility of obtaining an early opinion could play a role.

The Chairman thought that the main virtue of the round table was its clarification of the different approaches to joint ventures. It also promoted understanding regarding how the system could eventually converge, and helped delegates appreciate the positive aspects of both types of approaches.

The Chairman ended by commenting that the discussion had deliberately skirted joint ventures related to the Internet. Those would be featured in the next day's roundtable on electronic commerce.

AIDE-MÉMOIRE DE LA DISCUSSION

Le président ouvre la table ronde en signalant qu'un grand nombre de contributions écrites ont été reçues. Il attire l'attention sur une différence intéressante entre les pays européens (catégorie dans laquelle figure la Commission européenne) et les pays non européens. Dans le premier groupe, le contrôle des concentrations et l'interdiction des accords anticoncurrentiels n'obéissent pas aux mêmes procédures. En outre, le critère qui permet, sur le fond, d'autoriser les entreprises communes assimilées à des concentrations diffère parfois de celui qui s'applique aux accords anticoncurrentiels. Enfin, il y a aussi des différences selon que l'argument de l'efficience est jugé recevable ou non. En conséquence, les contributions des pays européens s'étendent assez longuement sur ce qui caractérise une entreprise commune de plein exercice, constitutive d'une opération de concentration, et sur le traitement juridique réservé aux divers types d'entreprises communes.

Dans les contributions des pays non européens, la distinction entre fusions/concentrations et accords potentiellement anticoncurrentiels ne fait généralement pas l'objet d'aussi longs développements. Ce qui retient beaucoup plus l'attention, en revanche, c'est la question de l'impact positif ou négatif des entreprises communes sur la concurrence.

Toutes les contributions ou presque constatent que les entreprises communes sont en train de se multiplier, en premier lieu, mais pas uniquement, dans le secteur des technologies de l'information. Deux d'entre elles notent aussi, fait intéressant, que dans les pays en développement ou en transition, les entreprises étrangères tendent à privilégier la création d'entreprises communes avec des partenaires locaux pour avoir accès au marché.

Le président décide de commencer par la Commission européenne. Celle-ci mentionne l'amendement de 1997 apporté au règlement sur les concentrations, qui a remplacé la distinction fondée sur le caractère coopératif ou concentratif des entreprises communes par la notion d'entreprise commune de plein exercice ou à fonctions partielles. Les entreprises communes de plein exercice qui ont une dimension communautaire relèvent du règlement sur les concentrations lorsqu'elles n'entraînent pas la coordination des activités des société-mères, et de l'article 81 dans le cas contraire. Grâce à ce changement, une partie au moins des entreprises communes bénéficient désormais des procédures simplifiées du règlement sur les concentrations. Il n'en demeure pas moins que des traitements juridiques sensiblement différents peuvent être appliqués à des entreprises communes qui ont peut-être des effets analogues du point de vue économique.

Étant donné que beaucoup de pays ont été influencés par l'approche de la Commission européenne, le président demande une explication sur ce qui lui paraît être un système plutôt complexe. Il voudrait également savoir si la Commission estime que les entreprises communes qui lui sont notifiées sont délibérément organisées de manière à obtenir un traitement plus favorable au regard des règles de l'Union européenne en matière de concurrence.

Un délégué de la Commission européenne déclare que bon nombre de « problèmes » dans ce domaine découlent tout simplement de la situation historique, surtout en ce qui concerne le contrôle des fusions/concentrations. L'UE s'est occupée des entreprises communes avant de s'intéresser aux fusions, et

elle l'a fait de façon très simple et très systématique. Toutes les entreprises communes étaient examinées au regard des dispositions de ce qui était alors l'article 85(1), lesquelles étaient en général déclarées inapplicables au titre de l'article 85(3) devenu ultérieurement l'article 81(3). Le raisonnement consistait en substance à déterminer, d'une part, si l'entreprises commune avait pour objet ou pour effet d'éliminer la concurrence dans une partie substantielle du marché et, d'autre part, si elle contribuait à améliorer la production ou la distribution par des moyens qui ne pouvaient pas être moins restrictifs.

Lorsque le contrôle des opérations de concentration a été réglementé, il est devenu nécessaire de faire la distinction entre les entreprises communes qui relèveraient des nouvelles dispositions et celles auxquelles l'article 81 et les procédures définies dans le règlement 17/62 continueraient de s'appliquer. Dans la deuxième catégorie figurent bien évidemment les entreprises communes fictives, c'est-à-dire les accords de prix à peine déguisés ou d'autres arrangements caractérisés par des modifications structurelles minimales. Il entre également dans cette catégorie les mécanismes de coopération, que les parties ne considèrent pas à l'évidence comme des opérations de concentration. En outre, aux termes de l'article 3(2) du règlement initial sur les concentrations, la création d'une entreprise commune qui a pour objet ou effet la coordination du comportement concurrentiel d'entreprises qui restent indépendantes ne constitue pas une concentration. Toutes les entreprises communes qui n'entrent pas dans le champ d'application du règlement sur les concentrations ne peuvent pas bénéficier de la procédure accélérée qu'il prévoit (un mois pour la première phase et la décision finale au bout de cinq mois).

Le délégué reconnaît que les différents critères et les différentes procédures applicables aux fusions et aux entreprises communes ne relevant pas de la réglementation sur les concentrations ont effectivement créé une sorte d'incitation à la comparaison et que certaines opérations sont peut-être ainsi montées comme des fusions alors que d'un point de vue commercial la création d'une entreprise commune serait plus appropriée. En l'occurrence, le choix n'est pas uniquement une affaire de procédure, c'est aussi une question de fond, avec, du côté du règlement sur les concentrations, un critère d'appréciation fondé sur la notion de position dominante, et du côté de l'article 81, un principe consistant à vérifier si une restriction du commerce et de la concurrence est ou non compatible avec le marché commun, assorti de possibilités d'exemption.

Face aux difficultés soulevées par les directives adoptées en 1993 et 1994 pour préciser le traitement des entreprises communes de nature coopérative dans le cadre de l'article 81, face au problème de la distinction entre les entreprises communes coopératives et les entreprises communes concentratives, et après avoir examiné un grand nombre de dossiers, la Commission est parvenue à la conclusion qu'il était préférable d'adopter une approche plus structurelle. L'article 3(2) a donc été révisé de façon à étendre la portée du règlement sur les concentrations à un nombre bien plus grand d'entreprises communes. Pour pouvoir bénéficier des nouvelles dispositions applicables, il est indispensable que l'entreprise commune soit véritablement sous le contrôle conjoint des société-mères et qu'elle accomplisse de manière durable les fonctions dont s'acquittent normalement les entreprises autonomes du secteur considéré. Cela signifie que l'équipe de direction de l'entreprise commune assume les affaires courantes et a accès à des ressources financières, humaines et productives suffisantes pour fonctionner comme une entreprise ordinaire. Si l'entreprise commune n'assume que l'une des fonctions spécifiques des sociétés qui l'ont créée, sans avoir pleinement accès au marché, elle ne constitue pas une concentration. A titre d'exemple, les entreprises communes uniquement chargées des activités de R-D, de la fabrication ou de la distribution et de la vente des produits des société-mères ne sont pas considérées comme des concentrations.

Le système actuel aboutit à trois scénarios. Premièrement, les entreprises communes de plein exercice pour lesquelles il n'existe pas de risque de coordination relèvent du règlement sur les concentrations et font l'objet d'une simple évaluation sur le critère de position dominante. Deuxièmement, les entreprises communes de plein exercice qui n'ont pas de dimension communautaire sont régies par l'article 81 sur le fond et par le règlement n° 17 pour la procédure. Le troisième scénario, plus complexe,

se présente dans le cas des entreprises communes de plein exercice qui ont une dimension communautaire et qui entraînent un risque de coordination entre les société-mères ou entre celles-ci et l'entreprise commune. Du point de vue de la procédure, c'est le règlement sur les concentrations qui s'applique, mais en ce qui concerne le problème de la coordination, l'article 2(4) de ce même règlement renvoie à l'article 81 du traité. Tout cela sera beaucoup plus clair lorsque les nouvelles lignes directrices concernant les accords horizontaux seront publiées et appliquées, car elles devraient aider à se faire une bien meilleure idée de l'analyse économique que la Commission entend appliquer aux entreprises communes.

Le président note que la contribution néerlandaise pose la question de savoir si la convergence des politiques de la concurrence est toujours une bonne chose. Ainsi, bien que la distinction entre les entreprises communes concentratives et coopératives n'ait plus cours au niveau européen, les Pays-Bas continuent de faire cette différence, avec application du critère de position dominante aux premières et régime dérogatoire pour les secondes, et ils n'ont pas l'intention de procéder autrement. Dans un tout autre domaine, la contribution néerlandaise contient des arguments très intéressants sur le rôle que peuvent jouer les coûts de transaction dans la création d'entreprises communes. Le président demande à la délégation néerlandaise de bien vouloir développer cette idée et propose également d'évoquer le cas de *KPN Telecom – SNT – Telecom Teleservices*, particulièrement instructif à son avis, puisque KPN et SNT ont reçu le feu vert pour leur entreprise commune bien que chacun ait explicitement convenu, entre autres, de ne pas chercher à approcher la clientèle de son partenaire, restriction que les autorités ont apparemment jugée indispensable à l'objet même de l'entreprise commune.

Un délégué néerlandais précise que les commentaires sur les coûts de transaction qui figurent dans la contribution de son pays visent à compléter et si possible à éclairer la discussion sur les raisons qui justifient les entreprises communes. Pour lui, les coûts irrécupérables et le risque de comportement opportuniste méritent en particulier de retenir l'attention. Lorsque des entreprises décident de faire quelque chose ensemble, le risque de comportement opportuniste survient dès que l'une d'elles a réalisé un investissement irréversible. Tel est le cas, par exemple, en matière d'information, surtout lorsqu'il y a coopération dans le domaine de la R-D. Pour apprécier la valeur de l'information, il faut d'abord la recueillir, mais une fois recueillie, il devient possible de la reproduire sans limite. S'assurer de la valeur d'une information pose donc un problème.

S'agissant du cas de *Teleservices*, le délégué décrit tout d'abord la situation du marché avant et après la création de l'entreprise commune, et rappelle comment les entreprises se sont réparti les tâches. Il indique par ailleurs que six mois après l'approbation de ce projet, KPN a décidé de prendre une participation majoritaire dans le capital de SNT, opération qui a elle aussi obtenu le feu vert de l'autorité de la concurrence (la NMA).

Les services de centre d'appel, qui comprennent les centres d'appel eux-mêmes, la formation de leur personnel et les technologies qu'ils mettent en œuvre, constituent un marché très dynamique (avec un taux de croissance annuelle de 25 pour cent). En outre, c'est un marché où il existe de nombreux fournisseurs nationaux et étrangers, dont certains, comme les institutions financières et les fonds de capital-risque, ont de gros moyens. Autre facteur important, l'entrée dans le secteur est relativement aisée. Le seul investissement requis est celui du centre lui-même, lequel n'exige pas forcément de solutions techniques très élaborées. La formation du personnel peut être assez courte et il n'est pas difficile de trouver des télé-opérateurs compétents aux Pays-Bas.

L'entreprise commune *Teleservices* est une initiative de SNT et de KPN. SNT est une société spécialisée dans la création et la gestion de centres d'appel, tandis que KPN, l'opérateur de télécommunications historique, s'intéresse surtout aux aspects techniques des centres d'appel, y compris la fourniture de liaisons temporaires par satellite pour de gros débits. KPN gère lui-même quelques centres d'appel pour les besoins de ses propres unités commerciales, mais cette activité reste assez fragmentaire.

Les partenaires ont fait une demande de dérogation à la NMA pour pouvoir mettre sur pied leur entreprise commune. Compte tenu des possibilités de partage des informations qu'il offrait, les autorités ont décidé de classer le projet dans la catégorie des entreprises communes de nature coopérative. Pour motiver leur demande, SNT et KPN ont mis en avant les effets d'échelle et les efficiences en matière de coût. Les efficiences étaient liées à la mise en commun de l'expertise technique de KPN et de sa capacité d'adresser des clients à l'entreprise commune avec les compétences de SNT en matière de gestion. Il est apparu qu'en combinant leurs apports respectifs, KPN et SNT étaient en mesure de donner naissance à un concurrent viable.

Une fois l'entreprise commune mise sur pied, il était convenu que KPN conserverait pour lui-même les possibilités de prospection commerciale que lui procurait sa position d'opérateur de télécommunications ayant facilement accès aux clients, et que SNT garderait sa clientèle existante, KPN excepté. Toutefois, comme ils investissaient tous deux quelque chose dans l'affaire, les partenaires voulaient être sûrs qu'aucun ne pourrait utiliser l'entreprise commune pour empiéter sur le terrain de l'autre. KPN a donc demandé à SNT de s'engager à lui laisser le champ libre sur les grands projets, et SNT à KPN de ne pas chercher à prendre contact avec ses clients existants.

Le président passe ensuite à l'Italie, en faisant remarquer que la situation dans ce pays correspond au modèle de l'UE, car même si la loi ne définit pas le terme « entreprise commune », elle opère néanmoins une distinction entre le caractère coopératif et le caractère concentratif d'une opération, en appliquant le critère des effets dans le premier cas et celui de la position dominante dans le second. Reprenant la contribution italienne, il évoque le cas *Son-Igi-Siad/Igat* (*Igat*), entreprise commune formée par trois sociétés spécialisées dans la production et la commercialisation de gaz liquides à usage industriel, et rappelle qu'étant donné la position des partenaires sur le marché et les difficultés d'établissement notables dans le secteur, le projet paraissait susceptible de restreindre sensiblement le jeu de la concurrence, mais que cela n'a pas empêché les autorités de le faire bénéficier d'une exemption sur la base du critère d'efficience. Le président demande donc à l'Italie de décrire le système général d'évaluation des entreprises communes et de commenter les cas où l'argument de l'efficience à pu prévaloir malgré la perspective d'une restriction sensible de la concurrence.

Un délégué italien confirme que l'approche de son pays reflète en effet les dispositions communautaires. En ce qui concerne les entreprises communes coopératives, on cherche tout d'abord à déterminer s'il existe un risque de restriction sensible de la concurrence, et on s'interroge ensuite sur les avantages potentiels pour le consommateur. La rente du consommateur est une préoccupation essentielle de la législation italienne : c'est dans ce sens que les efficiences doivent jouer. L'affaire *Igat* est importante car elle montre le caractère artificiel de cette procédure en deux temps. Et de ce point de vue, elle constitue un bon argument en faveur du nouveau système proposé par l'UE, qui préconise maintenant de considérer l'article 81 dans son ensemble. Il est très difficile de dire, dans un premier temps, qu'une opération a pour effet de restreindre la concurrence, et d'affirmer ensuite le contraire au motif qu'elle représente un gain d'efficience.

Dans le cas *Igat*, il s'agissait de mettre sur pied une entreprise commune assumant une fonction de production, plutôt que toutes les fonctions d'une entité économique autonome, et dotée de certaines caractéristiques de nature coopérative. Les sociétés fondatrices voulaient en fait unir leurs forces pour créer un énorme usine capable d'assurer dix pour cent de la production de gaz industriels sur le marché italien. Elles possédaient d'autres installations de production et leur intention était de commercialiser parallèlement la production de l'entreprise commune, en se la partageant en fonction du montant de leur participation. Étant donné la présence de trois concurrents seulement dans le secteur et la part de marché considérable qu'allait se tailler l'entreprise conjointe, il n'était pas difficile de conclure que l'opération aurait pour effet de restreindre sensiblement la concurrence. Pourtant, comme l'entreprise commune laissait aussi entrevoir d'importantes économies d'échelle, on a estimé que l'ampleur de la réduction de

coût à attendre empêcherait tout renforcement de la puissance de marché. En conséquence de quoi une exemption pour dix ans a été accordée.

Le président poursuit en demandant pourquoi les sociétés concernées avaient besoin de créer une entreprise commune pour bénéficier d'économies d'échelle, autrement dit qu'est-ce qui empêchait l'une quelconque d'entre elles de se développer ou de bâtir une grosse usine très performante et d'évincer ses concurrents. Le délégué italien répond que pour construire une grosse usine les trois sociétés auraient été forcées de fermer d'autres sites.

Le président dirige ensuite la discussion sur le Danemark et note que l'on y pratique la distinction entre entreprises communes à fonctions partielles et entreprises communes de plein exercice, en ajoutant toutefois que jusqu'en octobre 2000 le pays ne disposait pas de système de contrôle des fusions, ce qui signifie que les entreprises communes de plein exercice n'étaient pour ainsi dire soumises à aucune procédure d'examen. La contribution danoise mentionne le cas intéressant de la création, par un grand nombre de fabricants de bitume, d'entreprises communes qui ont fait l'objet de traitements différents parce que certaines étaient considérées comme étant de plein exercice et d'autres non. Le président aimerait savoir si la situation antérieure à octobre 2000 a poussé les entreprises à se lancer dans des opérations de fusion afin d'éviter les tracas causés par les autorités de la concurrence.

Un délégué danois signale tout d'abord une erreur dans le document de son pays [corrigée dans la version jointe au compte rendu] et tient à préciser que dans le cas des entreprises communes de plein exercice les restrictions accessoires doivent être analysées dans le cadre général de la concentration, tandis que les restrictions non accessoires continuent d'être examinées au regard de la réglementation sur les accords anticoncurrentiels.

En ce qui concerne l'absence de système de contrôle des fusions au Danemark, la raison politique en est la conviction qu'il fallait permettre aux entreprises danoises d'acquérir une taille suffisante pour pouvoir affronter la concurrence sur le marché international. Toutefois, cette optique a changé du fait notamment de la fusion réalisée en 1999 entre les deux plus grandes compagnies laitières du pays, qui s'octroyaient ainsi 90 pour cent du marché, car on s'est alors rendu compte que le conseil danois de la concurrence n'avait pas le pouvoir de contraindre ces deux sociétés à réduire les effets anticoncurrentiels de leur projet.

A propos de la question du président sur le point de savoir si l'absence de système de contrôle des fusions n'a pas incité les entreprises à favoriser les concentrations par rapport à des mécanismes de coopération plus légers, le délégué ne peut fournir aucun élément concret. Il est toutefois intéressant de noter qu'environ six mois avant la fusion en question, les deux sociétés avaient passé un accord de partage de la production, dont le conseil danois de la concurrence avait interdit certaines clauses en vertu de la réglementation sur les accords anticoncurrentiels. Cette décision a indirectement motivé la fusion qui a eu lieu par la suite.

Quant à l'affaire des fabricants de bitume, le réseau d'entreprises communes était tel qu'il rendait pratiquement impossible toute concurrence véritable entre les sociétés. Si les entreprises communes avaient été organisées comme des entités concurrentes, la chose aurait été plus acceptable. Quoi qu'il en soit, il était un peu artificiel d'opérer une distinction entre les entreprises communes de plein exercice et les entreprises communes à fonctions partielles. Elles faisaient toutes à peu près la même chose, à ceci près que les secondes avaient des relations de coopération plus développées avec les société-mères.

Passant au cas de l'Allemagne, le président signale une décision importante de la Cour suprême fédérale, prise en 1985, établissant que les fusions doivent être examinées à la fois au regard des dispositions de la section 1 de la loi sur la concurrence relative aux ententes et au regard des dispositions

en matière de contrôle des fusions. Il existe pourtant des différences, et de procédure et de fond, entre ces deux dispositifs. Le président demande confirmation de ces points et souhaite également ouvrir la discussion sur le cas de l'entreprise commune d'abattage *Moksel/Südfleisch*, projet qui a été interdit par le Bundeskartellamt (« BkartA ») en application de la législation sur les fusions et de celle sur les ententes, et dont la Cour suprême est maintenant saisie après que la Cour d'appel de Berlin a rejeté la partie de la décision de première instance relative aux fusions. Le président aimerait avoir des détails sur ce qui se passerait dans la pratique pour l'entreprise commune si le jugement en appel devait être confirmé.

Un délégué allemand confirme que dans son pays les entreprises communes peuvent effectivement être examinées en fonction tant du régime applicable au contrôle des fusions que des dispositions relatives aux accords anticoncurrentiels (section 1 de la loi sur la concurrence), dès lors qu'elles remplissent certaines conditions préalables. Du point de vue du contrôle des fusions, ces conditions ont trait au chiffre d'affaires et à la part détenue par les deux sociétés-mères ; du point de vue de la section 1 de la loi sur la concurrence, il faut que les partenaires qui s'associent dans le cadre de l'entreprise commune soient des concurrents réels ou tout au moins potentiels. Cette possibilité d'examen selon une double optique démarque nettement la procédure allemande de celle de l'UE. Dans le système allemand, par exemple, une entreprise commune à fonctions partielles, et non de plein exercice, pourrait quand même faire l'objet d'une évaluation au titre du contrôle des fusions.

Il existe certaines différence de procédure entre le régime de contrôle des fusions et les dispositions de la section 1, mais elles se limitent pour l'essentiel aux délais prévus dans un cas et dans l'autre pour la décision finale. Sur le fond, les entreprises communes qui créent ou renforcent une position dominante soit pour les sociétés-mères, soit pour elles-mêmes ne sont pas autorisées en application du régime de contrôle des fusions, tandis qu'au regard des dispositions de la section 1, qui mettent surtout l'accent sur les effets horizontaux de l'entreprise commune entre les partenaires, tous les accords entre entités concurrentes qui ont pour objet ou pour effet de restreindre de manière significative la concurrence sont interdits. Il existe toutefois des possibilités d'exemption.

Pour évaluer les effets de coordination possibles d'une entreprise commune, le BkartA détermine tout d'abord s'il s'agit ou non d'une entreprise commune de plein exercice, en appliquant à peu près les mêmes critères que la Commission européenne. Lorsqu'il ne s'agit pas d'une entreprise commune de plein exercice, il peut retenir une forme de présomption de coordination potentielle entre les sociétés fondatrices. Si celles-ci restent actives sur le marché en même temps que l'entreprise conjointe, les effets de coordination entre les sociétés-mères sont jugés hautement probables. Le pouvoir de marché des sociétés n'intervient à ce stade que dans la mesure où les accords *de minimis* ne tombent pas dans le champ d'application de la section 1 – situations où les partenaires ne dépassent pas la part de marché maximale d'environ cinq pour cent sur tous les marchés considérés.

Le régime de contrôle des fusions comme les dispositions de la section 1 offrent des possibilités de dérogation. Dans le premier cas, il n'existe qu'une seule clause de portée générale. Elle prévoit qu'une fusion peut être autorisée même si elle aboutit à une position dominante, lorsque les parties apportent la preuve que leur projet contribuera aussi à améliorer les conditions de la concurrence sur le plan structurel et que cet avantage l'emporte sur les problèmes et les inconvénients de la position dominante. Les exemptions sont beaucoup plus nombreuses, en revanche, dans le cas des dispositions relatives aux accords anticoncurrentiels. En bénéficient par exemple, les accords de normalisation et tous les accords qui visent à renforcer la compétitivité des petites et moyennes entreprises. Il faut savoir à cet égard que la législation allemande n'autorise en principe les accords d'achat en commun que pour les petites et moyennes entreprises.

L'an dernier, une clause d'exonération plus générale a été ajoutée aux dispositions de la section 1, qui permet dorénavant au BkartA de mettre en balance les effets favorables et les effets

contraires à la concurrence de l'accord, mais comme il s'agit d'une disposition annexe par rapport à tous les autres cas d'exemption, ses conséquences pratiques sont pour le moment assez limitées. Il n'existe encore dans la législation allemande aucune exemption ou immunité qui soit uniquement liée aux seuils de parts de marché. En outre, il convient de noter que les exemptions ne sont envisageables que lorsqu'un accord représente le moyen le moins restrictif de produire ses effets positifs, et qu'aucune ne peut être accordée dès lors que le projet présente un risque de position dominante conjointe. Cette disposition établit un lien intéressant avec le critère de position dominante appliqué dans le cadre du régime de contrôle des fusions.

L'affaire *Moksel/Südfleisch*, qui pourrait devenir une référence en la matière, débute lorsque les deux plus grandes compagnies de l'industrie de la viande décident de créer une entreprise commune qui regrouperait une partie de leurs abattoirs dans les nouveaux Länder d'Allemagne orientale. Trois marchés sont concernés : le marché national de la viande et deux marchés régionaux des bovins et des porcs destinés à la boucherie, dans le sud des nouveaux Länder et dans le sud-ouest de l'Allemagne.

Le BkartA a interdit la création de cette entreprise commune au titre des dispositions de la section 1 et du régime de contrôle des fusions. En ce qui concerne la section 1, c'est la présomption de coordination évoquée précédemment qui a joué, car les deux sociétés-mères continuaient à déployer leurs activités sur le marché de l'entreprise commune. En ce qui concerne le contrôle des fusions, l'interdiction a été prononcée également à cause du risque de coordination que l'entreprise commune pouvait entraîner sur un autre marché où elle n'était pas encore présente, cette crainte étant fondée sur l'importance économique du projet pour les sociétés fondatrices.

Comme on l'a déjà indiqué, la cour d'appel a confirmé la décision du BkartA uniquement en ce qui concerne le volet relatif aux ententes. Le BkartA a donc formé un recours auprès de la Cour suprême fédérale pour obtenir une clarification définitive sur cette affaire importante.

Le président passe ensuite à la République tchèque. Dans ce pays, fait-il remarquer, l'une des principales raisons qui motivent la création d'entreprises communes est le désir des entrepreneurs étrangers d'accéder au marché en faisant équipe avec une entreprise locale. La contribution du pays expose en détail ce qu'il faut entendre par entreprise commune, en opérant là encore une distinction entre les entreprises communes de nature concentrative et celles de nature coopérative. Elle évoque également le cas de *Ceské Radiokomunikace/TeleDenmark*, entreprise commune créée dans le domaine des services de communication de données, de l'Internet et de la téléphonie vocale. L'Office tchèque pour la protection de la concurrence économique (l'« Office ») ayant estimé, d'une part, que la création de cette entreprise commune allait faire diminuer le nombre de concurrents sur le marché, et, d'autre part, que l'arrivée d'un nouvel acteur dans le secteur de la téléphonie vocale ferait effectivement concurrence à l'opérateur dominant, le président sollicite des commentaires à ce sujet.

Un délégué de la République tchèque explique que l'entreprise commune en question, baptisée Contactel, a été créée par Ceske Radiokomunikace, une entreprise tchèque de radio-télécommunications spécialisée dans les services de transmission de données et de téléphonie vocale fixe, et TeleDenmark, un prestataire de services Internet ayant également des activités de téléphonie vocale, pour renforcer la concurrence dans le domaine de la téléphonie vocale fixe.

Dans un premier temps, l'Office a établi que Contactel était une entreprise commune de nature concentrative. En vertu de la législation sur la concurrence, l'Office doit autoriser toute concentration dont il est prouvé que les avantages économiques l'emporteront sur les inconvénients susceptibles de résulter de l'entorse faite à la concurrence. Bien que, dans le cas particulier, l'opération de concentration ait eu pour conséquence une diminution du nombre de concurrents sur le marché, les deux sociétés fondatrices se trouvaient l'une et l'autre dans une position très faible vis-à-vis de Ceský Telecom, l'opérateur dominant

dans le secteur de la téléphonie vocale fixe. On a estimé au contraire que l'entreprise commune aurait surtout des effets favorables à la concurrence dans la mesure où elle permettrait de remplacer deux concurrents de faible envergure par un nouveau concurrent plus puissant. C'est sur la base de ce raisonnement que l'autorisation a été accordée.

Le président observe qu'à l'instar de ce qui se passe dans la République tchèque, les entreprises communes créées en Turquie sont souvent un moyen pour les entreprises étrangères d'avoir accès au marché turc et pour les entreprises turques d'avoir accès à la technologie étrangère. Autre ressemblance, la Turquie suit aussi le modèle de l'Union européenne en faisant la distinction entre les entreprises communes de nature concentrative et celles de nature coopérative. La législation turque sur la concurrence prévoit l'application des dispositions relatives aux fusions dans le cas des entreprises communes concentratives de plein exercice. Les autres relèvent du régime des accords.

La contribution turque mentionne un cas dans lequel 39 entreprises ont voulu créer une entreprise commune pour la distribution de GPL. Le Conseil turc de la concurrence (le « Conseil ») a estimé que ce projet ne correspondait pas une opération de fusion et l'a interdit au motif qu'il comportait des clauses de fixation de prix et de partage du marché. Il a néanmoins estimé qu'il aurait pu s'accompagner de certaines efficiences économiques. Le président souhaiterait savoir si une analyse menée dans l'optique des concentrations aurait abouti au même résultat, car les efficiences auraient alors joué en faveur de l'entreprise commune, et les clauses de partage du marché et de fixation des prix n'auraient pas été aussi rédhibitoires.

Un délégué turc rappelle brièvement pour commencer le traitement que réserve la politique turque de la concurrence aux entreprises communes. Comme dans beaucoup d'autres pays, la loi turque sur la concurrence ne contient pas de définition spécifique des entreprises communes. Toutefois, au paragraphe 2 de l'article 7, elle stipule que « le Conseil publie des communiqués pour annoncer les catégories de fusions et acquisitions qui doivent faire l'objet d'une notification préalable au Conseil ». D'après ces communiqués, sont autorisées les entreprises communes qui : 1) exercent leurs fonctions de façon indépendante, 2) n'ont pas pour objet ou pour effet de restreindre la concurrence, et 3) sont placées sous le contrôle conjoint des sociétés-mères. Lorsque l'une quelconque de ces conditions n'est pas satisfaite, l'entreprise commune est considérée comme un accord de coopération et par conséquent soumis à évaluation au titre de l'article 4, équivalent turc de l'article 81 du traité de l'UE. Le régime de contrôle des fusions est lui aussi analogue aux dispositions communautaires en la matière.

Depuis les amendements de 1997, on l'a vu, la coordination du comportement concurrentiel ne fait plus partie des critères d'évaluation des entreprises communes figurant dans le règlement de l'UE sur les concentrations. La Turquie étudie à l'heure actuelle la possibilité d'introduire un changement analogue dans son communiqué sur les fusions et acquisitions.

Si les sociétés-mères restent sur le même marché que l'entreprise qu'elles veulent créer en commun, le Conseil interdit l'opération car il la considère comme un accord de coopération ayant pour effet de restreindre la concurrence. C'est ce qui s'est passé dans le cas des cinq entreprises communes *Metro-Migros*, auxquelles le Conseil a refusé son autorisation en déclarant que les deux sociétés fondatrices ne pouvaient pas coexister avec leur entreprise commune sur un même marché. En d'autres termes, une seule de ces deux sociétés, Metro AG ou bien Migros, est autorisée à maintenir sa présence sur le marché visé. Sinon, l'entreprise commune est considérée comme un accord ayant pour conséquence de restreindre la concurrence.

L'entreprise commune créée pour la distribution de GPL est une autre affaire importante. Cette opération ne tombait pas dans la catégorie des entreprises communes concentratives pour deux raisons. Premièrement, 29 des entreprises fondatrices ne détenaient pas une part de capital suffisante pour participer

aux décisions stratégiques : le critère du contrôle conjoint n'était donc pas satisfait. Deuxièmement, l'entreprise commune avait une telle structure financière et administrative qu'elle ne pouvait pas être indépendante des sociétés-mères. L'opération a donc été considérée comme un accord de coopération relevant de l'article 4 de la loi sur la concurrence et l'on a estimé qu'elle contrevenait aux dispositions dudit article en raison des arrangements prévus en matière de contrôle des prix. De plus, le Conseil a relevé le fait que quelques-uns des grands groupes parties à l'opération, bien placés pour assurer individuellement l'approvisionnement du marché, auraient pu facilement contrôler l'offre et la distribution de GPL par l'intermédiaire de l'entreprise commune, laquelle représentait déjà, comme le fait observer le délégué, environ 92 pour cent de la distribution nationale.

D'autre part, jugeant que l'accord était de nature à promouvoir le développement économique, le Conseil a néanmoins estimé, étant donné que cet avantage ne profiterait pas aux consommateurs et que l'accord était susceptible de restreindre la concurrence dans une partie substantielle du marché, qu'il ne remplissait pas les conditions requises pour bénéficier d'une exemption individuelle.

Le président demande à nouveau ce qui se serait passé si les 29 petites entreprises participant à l'opération avait eu une plus grande influence sur la politique générale de l'entreprise commune et si celle-ci avait été de ce fait considérée comme une concentration. Le délégué turc précise que même dans ce cas, il y aurait encore eu le problème de la collusion entre les 39 entreprises représentant ensemble 92 pour cent du marché, et il est peu probable que l'autorisation ait pu être obtenue dans le cadre de la législation sur les fusions.

Débat général

Un délégué suisse indique que son pays fait lui aussi la distinction entre les entreprises communes de nature concentrative et les entreprises communes de nature coopérative, les premières étant définies comme accomplissant de manière autonome et durable toutes les fonctions d'une entreprise normale. Il demande ensuite à la Commission européenne ou aux pays qui suivent la même approche qu'elle des détails sur la manière dont ils appliquent le critère de durabilité et s'ils font des différences entre les divers secteurs économiques. Ainsi, une entreprise commune créée pour cinq ans pourrait être considérée de courte durée dans un secteur parvenu à maturité comme celui de l'alimentation et des boissons, mais d'une durée bien plus longue dans le secteur des nouvelles technologies où les cycles des produits ne dépassent guère trois à quatre ans.

Un délégué de la Commission européenne répond que l'on compare l'entreprise commune avec un établissement type du segment de marché considéré. Il peut y avoir des différences quant à la durée de mise en route d'une entreprise, surtout entre les secteurs à croissance rapide et les secteurs plus ou moins parvenus à maturité. Mais au-delà des particularités de tel ou tel marché, la règle générale est que trois ans au plus doivent être nécessaires pour qu'une entreprise commune soit en mesure de fonctionner sans l'aide des sociétés qui l'ont créée. Quel que soit le secteur, en outre, une entreprise commune est censée avoir une durée indéterminée.

Un délégué du BIAC souligne les conséquences non négligeables qu'entraîne le fait de distinguer entre les fusions et les entreprises communes de nature coopérative, mais aussi entre ces dernières et les entreprises communes de nature concentrative. Il observe en outre que dans le règlement de l'UE sur les concentrations, la définition de l'entreprise commune de plein exercice ne fait pas seulement référence à la durabilité, mais aussi à l'autonomie. Or, il est arrivé plus d'une fois, dans des affaires importantes, que cette autonomie soit appréciée en fonction du volume de produits échangés entre l'entreprise commune et les sociétés fondatrices. On peut donc imaginer une entreprise commune de grande envergure, intégrant à la fois des installations de production et des fonctions de recherche, de développement et même de

commercialisation, qui a le marché pour elle seule (sans le partager avec les société-mères) et qui perd pourtant sa qualité d'entreprise commune « de plein exercice » pour tomber dans le champ d'application de l'article 81(1), parce qu'elle produit un composant essentiel pour les société-mères et pour d'autres entreprises.

Une telle classification n'a pas seulement pour conséquence une perte de temps dans le choix des procédures. Elle peut aussi entraîner l'impossibilité de se prévaloir d'une clause d'exemption particulière si l'opération n'a pas été correctement notifiée. Se pose aussi la question de savoir si les parties auraient dû notifier l'entreprise commune à des pays comme l'Allemagne, qui pratiquent une double évaluation. Il compare cette façon de procéder à l'approche américaine qui consiste, selon ses termes, à examiner tout d'abord de degré d'intégration des actifs, et à traiter ensuite tous les autres aspects comme des questions annexes.

Le délégué recommande au CLP de ne pas oublier la question des juridictions nationales parmi les problèmes soulevés par les fusions qui font intervenir plusieurs échelons de compétence.

Un délégué de la Commission européenne déclare que son institution a parfaitement conscience des problèmes auxquels le délégué du BIAC a fait allusion, notamment en ce qui concerne les entreprises communes partielles dans le secteur de la production. Comme ces opérations relèvent de la procédure 81(3), leur examen n'est pas soumis à un délai très court prédéterminé. Dans son livre blanc sur la modernisation, la CE a proposé que ce type d'entreprises communes, et peut-être aussi d'autres catégories, soient évaluées au regard des dispositions du règlement sur les concentrations, indépendamment du critère de fond à appliquer. Il s'en est suivi une telle polémique que dans la dernière proposition qu'elle vient de présenter, la Commission renvoie expressément la question à la prochaine révision du règlement sur les concentrations.

Fin de débat général

Le président donne ensuite la parole au Royaume-Uni en rappelant que ce pays distingue les fusions des entreprises communes qui ne sont pas de nature concentrative, et que les entreprises communes assimilables à des fusions relèvent du Fair Trading Act de 1973. Ces cas sont toutefois très rares, lui semble-t-il, et la plupart des opérations sont en fait examinées au regard des dispositions du chapitre 1 de la loi sur la concurrence, qui traite des pratiques anticoncurrentielles. Cela dit, la différence de traitement entre fusion et accord est moins importante au Royaume-Uni, car l'évaluation des fusions se fait en fonction d'un critère assez large d'intérêt général qui permet de dépasser l'examen de la seule position dominante pour prendre en compte d'autres aspects susceptibles de jouer en faveur du projet.

La contribution du Royaume-Uni s'attache par ailleurs assez longuement à la distinction *ex ante*/ex *post* qui caractérise la coordination à laquelle peuvent donner lieu les entreprises communes. Le président invite le RU à expliquer son système et à préciser également la signification de cette distinction.

Un délégué du Royaume-Uni déclare pour commencer qu'il n'y a pas dans son pays de définition de l'entreprise commune. Il existe en revanche toute une série de dispositions applicables aux entreprises communes partielles et de plein exercice, y compris la loi sur les fusions et, depuis peu, la loi sur la concurrence (qui est entrée en vigueur le 1er mars 2000), inspirée des articles 81 et 82 du traité de l'UE.

Depuis 1984 environ, le critère de l'« intérêt général » appliqué aux fusions en vertu du Fair Trading Act de 1973 s'interprète selon la « doctrine Tebbit » (du nom du ministre de l'époque), qui revient en fait à évaluer les effets des opérations considérées sur la concurrence. Les gouvernements qui se sont

succédé ont maintenu cette interprétation. Le gouvernement actuel envisage de réviser la loi sur les fusions, et de rendre notamment le critère de la concurrence plus explicite.

Quant à l'application de la loi sur la concurrence, la section 60 stipule qu'il y a lieu de tenir compte des dispositions des articles 81 et 82 du traité de l'UE. Aucune forme d'entreprise commune n'est interdite en soi, mais il existe une présomption relative que les entreprises communes reposant sur des accords expressément destinés à fixer les prix ou les parts de marché ou à limiter la production produiront des effets négatifs sur le marché et seront donc pratiquement à coup sûr interdits par la loi. Toutefois, comme dans le cas de l'article 81, le chapitre premier de la loi sur la concurrence instaure un critère d'évaluation fondé sur la notion d'effet appréciable sur la concurrence.

Un autre délégué du Royaume-Uni explique que la détermination de l'éventuel effet appréciable sur la concurrence distingue deux grandes catégories que l'on pourrait intituler *ex ante* et *ex post*, ou bien encore effets directs et indirects. On utilise la même distinction pour examiner les possibilités d'exemption. Les effets *ex ante* ou directs sont les effets restrictifs immédiats qu'une entreprise commune peut exercer sur un marché donné, effets qui peuvent être importants même dans un secteur véritablement nouveau où deux concurrents potentiels sont remplacés par un fournisseur en situation de monopole. Ces effets directs sont évalués selon les mêmes critères que dans le cas des fusions : état et structure du marché, conditions d'entrée, etc.

Les effets *ex post* ou indirects sont ceux qui ont trait à l'indépendance que les sociétés-mères sont censées conserver sur les marchés où l'entreprise commune n'est pas présente. L'un des principaux facteurs à considérer est la façon dont l'entreprise commune pourrait servir à promouvoir la coopération ou à développer une culture de coopération entre les sociétés-mères, ce qui peut arriver, notamment, lorsque la direction de l'entreprise commune travaille en étroite collaboration avec les entreprises qui l'ont fondée. Ce risque, qui varie selon le type d'entreprise commune, est probablement plus grand dans celles qui s'articulent uniquement autour de la fonction marketing, par exemple, que dans les entreprises communes de R-D. D'autres effets indirects sont également envisageables lorsqu'il existe un lien vertical susceptible de nuire aux conditions de transaction avec les tiers.

Lorsque les effets restrictifs sont manifestes, l'attention se tourne vers les possibilités d'exemption. On examine alors les avantages les plus importants de l'opération en essayant de déterminer si les restrictions sont indispensables pour leur réalisation. La question essentielle consiste à se demander si, en l'absence de l'entreprise commune, les sociétés-mères entreprendraient ou non indépendamment l'activité envisagée. Autrement dit : sont-elles capables chacune de son côté de supporter les risques et de trouver les fonds nécessaires, et obtiendraient-elles à elles seules les mêmes résultats que l'entreprise commune ? Les motifs d'exemption sont le plus souvent liés aux effets directs ou *ex ante*, mais ils tiennent aussi compte parfois des effets indirects, c'est-à-dire des possibilités de collusion.

Se détournant de l'Europe, le président rend compte de la contribution australienne qui passe en revue les travaux publiés sur les entreprises communes, compare les fusions et les entreprises communes du point de vue de l'engagement qu'elles représentent et propose une méthode d'évaluation empirique des entreprises communes. Fait à noter également, la loi australienne sur la concurrence exempte certaines clauses de fixation des prix, normalement déclarées illégales en tant que telles, ce que le président trouve intéressant par rapport au cas turc évoqué précédemment. Le président signale par ailleurs l'application aux entreprises communes d'un critère d'intérêt général net permettant de prendre en considération des avantages tels que l'expansion de l'emploi, la promotion de conditions de transaction équitables sur le marché ou la paix sociale. Il demande quelques explications à ce sujet.

La contribution australienne évoque le cas de *Pasminco*, une entreprise commune créée et contrôlée par deux sociétés, CRA et North, et à laquelle l'ACCC a donné son autorisation, malgré la

situation de monopole qui allait être la sienne sur la production de plomb et de zinc, au motif que les branches commerciales des entreprises fondatrices devaient rester indépendantes. Le président se demande jusqu'où peut aller la concurrence dans un pareil cas.

Un délégué australien fait observer que la plupart des entreprises communes qui ont vu le jour dans son pays ne sont pas liées à des projets de recherche et développement ni au secteur des technologies de l'information, mais à l'exploitation des ressources naturelles, activité où les échelles minimales d'efficience et les coûts d'investissement sont très élevés. Ainsi, la commercialisation du gaz se fait en majeure partie par l'intermédiaire d'entreprises communes, et il en va de même pour la fusion de l'aluminium, assurée en quasi-totalité par des installations dont les copropriétaires assurent l'approvisionnement en fonction de leur participation, mais commercialisent et vendent ensuite séparément la production. Du point de vue de l'efficience comme de la concurrence, ces entreprises communes fonctionnent apparemment de façon très satisfaisante.

En Australie, les entreprises communes sont simplement soumises aux dispositions ordinaires du Trade Practices Act, qui mettent l'accent sur les conséquences économiques des opérations. En règle générale, celles-ci sont examinées dans le même cadre que les fusions. Autrement dit, même les entreprises communes qui ont pour effet de restreindre sensiblement la concurrence peuvent se voir autorisées si elles satisfont au critère d'intérêt général net. Derrière cette notion, telles que l'ont interprétée l'ACCC et les tribunaux, se rangent en fait une très grande diversité de facteurs. Certains, comme la rationalisation industrielle et économique, la promotion des exportations et/ou le remplacement des importations sont étroitement liées aux efficiences. D'autres, en revanche, telles que la paix sociale et des conditions de transaction plus équitables entre parties, habituellement entre acheteurs et vendeurs, ont une portée beaucoup plus large.

Le critère de l'intérêt général n'entre en ligne de compte que lorsque l'analyse de l'entreprise commune laisse entrevoir un effet restrictif considérable sur la concurrence. Dans ce cas, les parties peuvent soumettre publiquement leur argumentation sur la question. Il est déjà arrivé, par exemple, que certaines d'entre elles parviennent à démontrer que leur projet allait sans doute permettre d'accroître l'emploi ou tout au moins de limiter l'ampleur des réductions qui auraient eu lieu autrement.

Depuis peu, en Australie, les entreprises communes ont tendance à se multiplier dans des secteurs parvenus à maturité, en particulier là où l'existence de capacités excédentaires se double d'un besoin de rationalisation de la production au profit d'unités plus grandes et moins nombreuses. Lorsqu'aucun des acteurs en présence ne souhaite quitter le marché, mais qu'il est nécessaire à la fois de rationaliser l'activité, de la doter de nouveaux moyens et de réaliser de plus grandes économies d'échelle, la création d'entreprises communes offre une solution appropriée. Les opérations de ce type qui ont reçu le feu vert dans les secteurs de l'extraction de pierres et du ciment en offrent un exemple. Des producteurs de béton intégrés verticalement ont mis sur pied des entreprises communes pour l'extraction en carrière, la fourniture de sable et d'autres biens intermédiaires, tout en restant concurrents en aval sur le marché du béton manufacturé.

Le cas *Pasminco* constitue une version plus radicale du même phénomène. Dans cette affaire, les deux seuls producteurs de plomb et de zinc d'Australie, également grands producteurs et exportateurs d'autres produits minéraux, souhaitaient créer une entreprise commune de production et avaient déposé une demande d'autorisation à cet effet.

Lorsque la Trade Practices Commission [qui a précédé l'ACCC] est parvenue à la conclusion que Pasminco allait entraîner un affaiblissement substantiel de la concurrence, les parties ont invoqué le critère de l'intérêt général. Les principaux avantages mis en avant étaient les suivants : renforcement de la compétitivité internationale, abaissement des coûts d'exploitation et gains d'efficience du fait de

l'intégration d'installations de production jusque-là distinctes. Manifestement, l'objectif était de fermer certains sites, de réinjecter du capital et de réaliser des économies d'échelle. Les efficiences paraissaient impossible à obtenir séparément par chacun des producteurs, et l'organisation de la production à échelle trop réduite avait en outre pour effet d'augmenter les importations, certes à partir d'un niveau assez bas. Sans la création d'une entreprise commune, les producteurs estimaient que leur activité avait de fortes chances de devenir de plus en plus marginale. Ils affirmaient leur intention de maintenir des branches commerciales séparées, mais on se demandait naturellement dans quelle mesure cela serait possible lorsqu'ils auraient le monopole de la production. En fait, certains éléments donnent à penser que les deux sociétés-mères sont effectivement restées concurrences au niveau de la commercialisation, mais sans doute de façon accessoire et sans grande conviction. Apparemment, la véritable concurrence était celle qui venait des importations, tandis que les branches commerciales des deux partenaires avaient tendance à se concentrer chacune sur ses clients habituels.

Les efficiences attendues de l'entreprise commune Pasminco se sont probablement concrétisées, et il y a eu de nouveaux investissements. En outre, du fait de la concurrence des importations, les avantages qui en ont résulté ont sans doute aussi profité en partie aux consommateurs.

Quant à la séparation des branches commerciales, elle a été maintenue pendant cinq ans environ, mais les producteurs ont fini par demander l'autorisation de les faire fusionner. Les enquêtes menées à l'époque ont confirmé les premiers soupçons, à savoir que les importations étaient bien un facteur de concurrence plus important que l'existence de forces commerciales distinctes.

Le président demande si, pour justifier leur deuxième projet de fusion, les producteurs ont fait valoir qu'il ne pouvait pas être qualifié d'anticoncurrentiel puisque les entités considérées n'étaient pas vraiment concurrentes. Le délégué australien répond par la négative et ajoute que la Trade Practices Commission ne voit guère d'un bon œil ce genre de raisonnement, même s'il est vrai que, dans la réalité, certains y ont parfois recours.

A ce point, le président décide de passer à l'examen des lignes directrices mises au point par les États-Unis pour la collaboration entre concurrents (les « Lignes directrices »), qui ont le mérite, lui semble-t-il, d'éviter l'écueil des distinctions juridiques trop subtiles et des incohérences de traitement entre les différents types d'entreprises communes. Dans leur contribution écrite, les États-Unis indiquent d'ailleurs que l'approche analytique des Lignes directrices correspond à la volonté de dépasser les lignes de partage entre tous les types d'entreprises communes et tous les secteurs de l'économie. Le président note en outre qu'aux États-Unis, la distinction la plus importante semble se situer au niveau du traitement, entre la règle très stricte de l'interdiction *per se* et la règle de raison (*rule of reason*), moins rigoureuse et de portée plus ou moins étendue. Il demande des explications à ce sujet.

Un délégué des États-Unis [représentant la Federal Trade Commission – FTC] commence par donner un aperçu général de la situation en indiquant notamment que dans son pays, comme ailleurs, les entreprises communes tendent à se multiplier. Cela semble dû en partie au fait qu'elles constituent une solution particulièrement appropriée dans les secteurs de pointe, où il est nécessaire de mettre en commun des connaissances et des technologies complémentaires pour aboutir à un résultat particulier, et en partie à l'intensification de la concurrence mondiale. Beaucoup d'entreprises exportatrices cherchent à s'associer avec des partenaires locaux pour pouvoir mieux s'adapter au marché visé.

Lorsque l'on a demandé au secteur privé d'indiquer quelles étaient les dispositions de la législation américaine les plus ambiguës et les plus susceptibles de faire renoncer à une opération par peur de tomber dans l'illégalité, ce sont les entreprises communes qui sont arrivées en tête des réponses à une écrasante majorité. Cela a incité la FTC et le Département de la justice à entreprendre la tâche particulièrement délicate de mettre au point un ensemble de lignes directrices applicables à la collaboration

horizontale. Les entreprises communes verticales et les accords de normalisation, aux enjeux jugés très différents, ont été laissés de côté.

L'objectif visé était triple. Tout d'abord, il s'agissait de mettre au point une approche analytique unique et d'éviter les distinctions subtiles fondées sur les différents types d'entreprises communes ou de secteurs. On ne voit pas très bien en effet pourquoi des entreprises communes dans les domaines de la R-D, de la production, de la vente ou de la commercialisation ne devraient pas être considérées sous le même angle d'analyse. Et l'on ne voit pas non plus pourquoi des entreprises communes mériteraient d'être traitées différemment selon qu'elles appartiennent aux secteurs du pétrole, de la sidérurgie, des plastiques ou de l'Internet, ou encore parce qu'elles sont tournées vers le marché intérieur ou vers le marché international.

Le deuxième objectif était de faire évoluer la conception que l'on avait des entreprises communes. Lorsqu'ils examinaient le cas d'entreprises communes, les tribunaux étaient habitués jusque-là à les voir sous la forme d'usines ou de bâtiments, alors que, de plus en plus, il s'agit simplement d'assemblages d'idées. C'est cette nouvelle situation que les Lignes directrices prennent en compte lorsqu'elles précisent qu'une entreprise commune peut être réalisée au moyen d'un contrat ou autrement, se démarquant ainsi nettement de l'approche traditionnelle.

Troisièmement, enfin, les promoteurs des Lignes directrices souhaitaient favoriser une attitude de tolérance à l'égard des entreprises communes. Après tout, il s'agit d'une forme d'organisation judicieuse, qui se traduit par des gains d'efficience et profite au consommateur. Bien qu'elles puissent être utilisées à des fins contraires à la concurrence, les entreprises communes devraient en général bénéficier d'une attitude bienveillante de la part des autorités.

Le traitement réservé aux entreprises communes constituait l'aspect le plus délicat de la question : interdiction formelle (*per se*) ou analyse élaborée/abrégée selon la règle de raison ? D'ordinaire, l'interdiction *per se* était appliquée aux accords ayant un effet direct sur les prix, le partage des marchés, la quantité produite et la production. D'après les Lignes directrices, toutefois, dès lors que des effets directs de cette nature peuvent raisonnablement être considérés comme liés à une intégration susceptible de produire des gains d'efficience et nécessaires pour que se concrétisent les effets favorables à la concurrence d'une telle opération, l'accord soumis à examen est considéré comme une entreprise commune. Il ne peut faire l'objet d'une interdiction *per se*. En revanche, si cet accord se résume à une simple coordination, il sera probablement assimilé à une tentative de fixation des prix et de ce fait très rapidement interdit. Le délégué donne l'exemple suivant pour illustrer cette différence essentielle. Lorsqu'une entreprise qui fabrique un produit mais ne possède pas de force de vente décide, pour faire distribuer ce produit, de s'associer, par contrat ou autrement, avec une autre entreprise qui dispose, elle, d'une force de vente mais qui n'a pas de produit, on peut raisonnablement considérer que l'accord conclu est lié à une opération d'intégration qui va entraîner des gains d'efficience. Cet accord est donc légitimement traité comme une entreprise commune et fait l'objet d'un examen détaillé. Par contre, si trois entreprises s'associent et décident que l'une commercialisera sa marchandise en Europe, l'autre aux États-Unis et la troisième en Asie, même si elles qualifient cet arrangement d'entreprise commune, on ne peut pas dire qu'il est raisonnablement lié à une intégration créatrice de gains d'efficience. En tant que simple accord de coordination, il mérite d'être traité selon une procédure abrégée.

Le délégué des États-Unis ajoute ensuite trois remarques. D'abord, dans un cas d'application classique de la règle de raison, l'analyse passe en revue successivement le pouvoir de marché, l'objet et les effets. Ce n'est qu'à la fin que se pose la question de savoir s'il y aurait un moyen moins restrictif, du point de vue de la concurrence, de parvenir aux mêmes résultats positifs. Et si tel est le cas, cet argument peut servir de base à la constatation d'une infraction. Les Lignes directrices, elles, procèdent inversement en incluant d'emblée la question des moyens moins restrictifs dans le choix de l'interdiction *per se* ou de la

règle de raison. Cela paraît logique. Quel intérêt y a-t-il, en effet, demande le délégué, à conduire un examen détaillé selon le principe de la règle de raison, si c'est pour s'apercevoir en fin de compte que l'entreprise commune ne se justifie pas et qu'un contrat de courte durée serait tout aussi avantageux ?

Ensuite, les Lignes directrices prévoient quelques possibilités d'exemption assez limitées. Pour les entreprises communes de production, par exemple, une part de marché inférieure à 20 pour cent constitue un critère d'exonération. Ce seuil passe à 25 pour cent dans le domaine de la R-D. On notera toutefois qu'une opération sortant du cadre des exemptions n'est pas forcément illégale. Elle fait simplement l'objet d'un examen différent.

Enfin, les Lignes directrices apportent des éclaircissements sur le traitement des entreprises communes dont certains aspects seulement sont contraires à la législation – par exemple, une clause de non-concurrence dans un pays sur vingt. Au lieu de frapper d'interdiction l'ensemble de l'opération, les Lignes directrices préconisent d'annuler uniquement les quelques aspects illicites.

En conclusion, le délégué estime que les Lignes directrices ont atteint leurs principaux objectifs en définissant une approche analytique unique et en faisant passer l'idée que les entreprises communes ne doivent pas forcément être assimilées à des entreprises traditionnelles.

Abordant le cas du Japon, le président observe que plusieurs sections de la loi antimonopole (l'« AMA ») concernent les entreprises communes, et que la façon dont celles-ci sont traitées semble dépendre essentiellement de leurs conséquences économiques, plutôt que de la distinction subtile entre opérations de nature concentrative et opérations de nature coopérative. L'un des nombreux cas intéressants mentionnés dans la contribution du Japon concerne la création par Toshiba et Mitsubishi Electric Company d'une entreprise commune de production de moteurs à grande échelle (environ 40 pour cent du marché), autorisée par la Commission de contrôle des pratiques commerciales (la « JFTC ») en raison d'effets compensateurs favorables en termes de pouvoir d'achat. Le président souhaiterait avoir davantage d'informations à ce sujet.

Un délégué japonais indique qu'il n'y a pas de définition spécifique des entreprises communes dans l'AMA, mais que les Lignes directrices sur les fusions et acquisitions (les « Lignes directrices ») publiées en 1998 expliquent comment il convient d'interpréter la loi en ce qui concerne les entreprises communes, c'est-à-dire celles qui sont créées ou acquises par deux ou plusieurs entreprises, par le biais d'un contrat, en vue de conduire des activités mutuellement bénéfiques. Ce sont également ces Lignes directrices qui permettent de déterminer si une entreprise commune risque ou non d'entraîner une restriction considérable de la concurrence.

Comme dans le cas des fusions, l'analyse commence par une définition du marché en cause. Les effets potentiels de l'opération sur la concurrence sont ensuite évalués en tenant compte globalement de la position respective des entreprises fondatrices, de l'état du marché et d'autres aspects.

Dans le cas de l'entreprise commune Toshiba/Mitsubishi, la part de marché cumulée était relativement importante. Toutefois, étant donné que les activités de commercialisation des deux sociétés-mères restaient séparées et que des mesures spéciales avaient été prises pour en assurer l'autonomie, la concurrence pouvait continuer de s'exercer. En outre, il y avait sur le marché plusieurs autres concurrents nationaux disposant de moyens de production et de commercialisation de grande envergure, et la différence de qualité entre les produits n'était pas assez grande pour retenir les clients de changer de fournisseur. D'autre part, on sait que les gros acheteurs ont un pouvoir de négociation important et que cela n'est pas près de changer. Enfin, les importations étaient très compétitives et elles augmentaient. Compte tenu de tous ces facteurs, la JFTC a estimé que la création de l'entreprise commune n'aurait pas pour effet de restreindre considérablement la concurrence, quel que soit le secteur considéré.

Le président passe ensuite à la contribution de la Corée en appelant l'attention sur l'article 7 de la loi sur la concurrence, qui contient une définition suffisamment large des formes d'association pour englober la plupart des entreprises communes. Celles qui échappent à l'article 7 tombent dans le champ d'application de l'article 19. Des exceptions d'efficience sont prévues dans les deux textes, mais le critère sur lequel elles reposent paraît légèrement différent suivant le cas. Il faudrait revenir sur ce point.

Le président déclare sa perplexité devant deux informations présentées sur la même page de la contribution coréenne, où l'on peut lire, d'une part, que la Corée a connu une augmentation spectaculaire des alliances stratégiques après l'adoption rapide des technologies de l'information, et, d'autre part, que le nombre de décisions judiciaires prises jusqu'à présent au sujet d'entreprises communes est très réduit. Il aimerait connaître la raison de cette situation.

Un délégué coréen confirme le formidable essor des alliances stratégiques depuis une dizaine d'années, surtout entre les entreprises en ligne et hors ligne ainsi qu'entre les sociétés Internet. Il s'agit là pour la Corée de nouveaux marchés en pleine évolution sur lesquels les phénomènes de concentration ou les effets anticoncurrentiels ne constituent pas encore une menace. Voilà pourquoi si peu d'affaires sont allées devant la justice. Mais il est probable qu'avec le développement du marché, ces cas augmenteront.

Débat général

Un délégué coréen ouvre le débat général en en demandant à la délégation des États-Unis une indication du nombre d'entreprises communes soumises à examen depuis l'adoption des Lignes directrices, et de ce que représentent, en pourcentage, celles qui ont été jugées efficientes.

Un délégué des États-Unis [représentant la FTC] lui répond qu'un petit nombre de cas seulement ont été examinés jusqu'à présent, car les Lignes directrices sont encore très récentes. Mais si l'on en juge par le bilan des cinq dernières années environ, le nombre de fois où la FTC a jugé qu'une entreprise commune n'était pas assez efficiente pour compenser ses effets anticoncurrentiels se limite à trois ou quatre, peut-être, sur des centaines de dossiers. Sur ces quelques opérations, la plupart avaient pour cadre le secteur de la santé, où médecins et pharmaciens ont tenté d'unir leurs forces en avançant l'intérêt des consommateurs pour justifier leurs projets. Mais la FTC a été d'un avis contraire, jugeant finalement ces intégrations incompatibles avec la concurrence. Une seule de ces affaires s'est produite depuis l'adoption des Lignes directrices.

Un délégué néerlandais, se référant à ce qui a été dit dans la contribution danoise sur le cas des fabricants de bitume, et aussi par le Royaume-Uni sur les effets indirects des entreprises communes, demande à la Commission européenne si elle a une idée, même générale, du seuil à partir duquel ces effets commencent à poser des problèmes.

Un délégué de la Commission européenne remercie tout d'abord le président Pitofsky pour sa présentation très claire du point de vue des États-Unis et ajoute que les idées qui sous-tendent les Lignes directrices mises au point par ce pays se reflètent également pour une bonne part dans le nouveau projet de principes directeurs de la CE relatifs aux accords horizontaux.

A une exception près, celle des entreprises communes de plein exercice qui ne supposent aucune coordination entre les sociétés-mères, toutes les entreprises communes sont prises en compte par les principes directeurs, qu'elles soient examinées au titre du règlement sur les concentrations ou au titre du nouveau règlement n° 17. C'est la raison pour laquelle les principes directeurs contiennent des restrictions fondamentales contre la fixation des prix, le partage de la production ou des débouchés, pratiques qui ont toujours été considérées sans aucune indulgence. Mais les principes directeurs prévoient aussi des exemptions, par exemple pour les entreprises communes spécialisées dans la production (au-dessous d'une

part de marché de 20 pour cent) et pour la recherche-développement (au-dessous d'une part de marché de 25 pour cent). Ils appliquent en outre la même analyse économique à tous les types d'entreprises communes, quels qu'ils soient. Étant donné que la quasi-totalité des entreprises communes relèveront de ces principes directeurs, il ne restera plus que les fusions au sens strict du terme. On continuera de les examiner en fonction du critère de position dominante, et si elles ne satisfont pas à ce critère, c'est probablement parce que l'on aura estimé qu'elles risquent de restreindre considérablement la concurrence, de sorte qu'elles n'auraient pas été jugées acceptables non plus au regard des dispositions de l'article 81(3).

S'agissant des effets indirects, le délégué note l'intérêt des principes directeurs de la CE relatifs à l'application des articles 3(2) et 2(4) du règlement sur les concentrations concernant les entreprises communes à fonctions partielles. Ces entreprises risquent d'avoir des problèmes si les sociétés-mères sont très actives en amont, en aval ou sur les marchés connexes, ou encore, lorsqu'il s'agit d'entreprises communes de production, si les sociétés-mères dépendent largement de ces dernières pour mettre un produit sur le marché. Dans ce cas, des difficultés peuvent surgir si la production de l'entreprise commune représente une part substantielle des ventes des sociétés-mères. Bien qu'il n'y ait pas de chiffres précis à cet égard, si, selon le marché, une société-mère dépend d'une entreprise commune pour les deux tiers, pour quatre-vingts ou pour quatre-vingt-dix pour cent de son chiffre d'affaires, il y a des chances que l'on juge cette part substantielle. On en déduira alors que l'entreprise commune n'est pas une entité indépendante et autonome, puisqu'elle ne peut écouler toute seule ses produits. Rappelons toutefois qu'il n'existe aucun seuil prédéfini applicable à ce genre de situation.

Un délégué du BIAC souligne l'importance que revêt la clarté des dispositions juridiques relatives aux entreprises communes, ainsi que la nécessité d'un certain degré d'uniformisation, des règles de fond comme des procédures, dans tous les pays. L'intérêt de dispositions comme celles du règlement de la CE sur les concentrations ou de la loi Hart-Scott-Rodino, aux États-Unis, c'est qu'elles permettent un examen *ex ante*. Il note toutefois que dans le cadre de ses débats sur la modernisation, la Commission européenne n'a pas proposé de contrôle *ex ante* pour les entreprises communes ne relevant par du règlement sur les concentrations.

Le délégué soulève deux questions importantes : certaines entreprises communes assimilables à des fusions doivent-elles être soumises à la procédure d'examen obligatoire, avec les délais de carence qu'elle implique ; et dans le cas des entreprises communes qui ne relèvent pas du tout de cette procédure, faut-il prévoir au moins une procédure facultative pour ceux qui souhaitent procéder à une sorte d'examen *ex ante* ? Sur ce dernier point, le paragraphe 2.4 des Lignes directrices adoptées aux États-Unis stipule que « … les Agences évaluent les effets sur la concurrence de l'accord en question au moment du préjudice potentiel, en déterminant comme il convient si ce moment correspond au début de la collaboration ou à un stade ultérieur ». Vient ensuite une référence à l'« exemple 3 », et le paragraphe se poursuit ainsi : « toutefois, toute évaluation intervenant après le début d'une collaboration est susceptible de répondre aux attentes raisonnables des parties prenantes, dont les lourds investissements à fonds perdus ont été réalisés sur la base d'un accord qui n'était pas encore devenu anticoncurrentiel ». Le délégué souhaiterait savoir, exemples à l'appui, comment ces dispositions sont appliquées.

Le délégué du BIAC note par ailleurs que la question de la définition se rattache à celle des échanges de renseignements confidentiels entre autorités de la concurrence. Pour les entreprises communes assimilables à des fusions, il est probable que les États-Unis n'envisageraient pas la possibilité de tels échanges. En Europe aussi, selon la définition des entreprises communes, les autorités seraient peut-être plus ou moins prêtes à échanger des renseignements confidentiels. Quoi qu'il en soit, c'est un domaine où il y aurait sans doute des différences d'un pays à l'autre, pour une même entreprise commune.

Un délégué des États-Unis [FTC] répond tout d'abord, sur la question de savoir à quel moment dans le temps évaluer la légalité d'une entreprise commune, que c'est là un des points les plus délicats et

les plus sujets à controverse des Lignes directrices. La réponse facile consisterait à dire que dans la législation américaine, la légalité est déterminée au moment de l'action en justice. Ainsi, dans le cas d'une entreprise commune créée en 1920 et soumise à l'examen d'un tribunal en 1999, c'est sur la situation en 1999 que celui-ci se prononcerait. La décision de la Cour suprême dans l'affaire *Dupont-General Motors* reflète cette position. Le délégué évoque le cas intéressant de l'entreprise commune « Panagra », créée conjointement par Pan American et Grace à l'époque où les compagnies aériennes étaient encore très peu développées. Avec le temps, les activités de Panagra et de Pan American ont commencé à se chevaucher, et Pan American a alors utilisé le droit de vote que lui conférait sa participation dans l'entreprise commune pour empêcher l'expansion de Panagra. Dans cette affaire, le comportement de Pan American a été jugé à ce moment précis de l'histoire de l'entreprise commune, et non lorsque celle-ci a été formée.

Cela dit, il semble un peu injuste que des sociétés puissent créer une entreprise commune reconnue légale en 1920 pour la voir ensuite remise en cause en 1999. C'est pourquoi il convient de tenir compte des attentes raisonnables des parties lorsqu'elles se sont associées. Dans certaines circonstances, toutefois, par exemple si une entreprise commune se transforme en monopole et que celui-ci abuse de sa position, les autorités chargées de la concurrence n'ont pas d'autre choix que de contester la légalité d'une entreprise commune sur la base d'un comportement qui a évolué depuis sa création.

Un délégué de la Finlande estime que pour des raisons de sécurité juridique, il se peut que des entreprises préfèrent un régime d'interdiction *per se* à l'approche plus souple mais aussi plus incertaine de la règle de raison. Il demande au BIAC de faire part de ses observations à ce sujet.

Un délégué néerlandais demande à la Commission européenne de commenter le fait que les entreprises communes bénéficient apparemment d'un traitement plus indulgent dans le secteur de la production que dans celui de la distribution ou de la commercialisation. D'après certaines études, ajoute-t-il, les entreprises communes de production peuvent elles aussi conduire à une entente sur les prix lorsque le produit fourni aux sociétés-mères compte pour une large part de leurs coûts de commercialisation.

Un délégué de la Commission européenne estime que les entreprises communes de production font en effet peser une menace sur la concurrence lorsqu'elles créent une charge importante pour les sociétés-mères, par exemple lorsque celles-ci n'ajoutent aucun élément supplémentaire en aval. Dans ces cas-là, la concurrence perd à la fois beaucoup de son ampleur et de son intérêt. Par conséquent, s'il est vrai que les entreprises communes de production entraînent généralement des gains d'efficience, elles présentent aussi des risques de coordination et de non-concurrence.

Remarques succinctes du Président

A ce point, le président résume la discussion en notant tout d'abord que le système d'évaluation des entreprises communes en vigueur dans l'Union européenne est encore assez complexe, même s'il évolue dans le sens d'une plus grande tolérance et d'une plus grande souplesse. Le règlement sur les concentrations est en partie à l'origine de ces complications et il n'y a pas grand-chose à faire à cet égard, mais il n'en demeure pas moins que l'on passe apparemment beaucoup de temps sur des questions qui sont vraiment sans importance.

L'approche des États-Unis, telle qu'elle se traduit dans les Lignes directrices adoptées par ce pays, paraît bien plus satisfaisante car elle met l'accent sur les conséquences économiques, sans s'attacher trop longuement à déterminer tout d'abord ce qui doit ou ne doit pas être examiné. Cela dit, il est vrai que la Commission européenne a affirmé son intention de s'orienter, autant que possible, dans la même direction.

D'autre part, comme leurs délégués ont tenu à le dire d'emblée, les Etats-Unis ont une attitude *a priori* favorable aux entreprises communes ; or ce n'est que vers la fin de la discussion que l'Union européenne a fait valoir la même position. Les Européens ont peut-être toujours été un peu plus circonspects en la matière. Mais là encore, les choses semblent évoluer et il faut sans doute y voir un signe de maturité des autorités.

Le point de vue exprimé vers la fin du débat par la Finlande, en réaction à l'intervention du délégué du BIAC, souligne le délicat compromis à trouver entre souplesse et sécurité juridique, deux aspects qui intéressent sans doute les milieux d'affaires. Les entreprises communes couvrent un large spectre de comportements allant des accords anticoncurrentiels injustifiables jusqu'aux opérations d'intégration très poussée, et elles peuvent être motivées par des raisons d'efficience parfaitement légitimes. Un système capable d'offrir la sécurité juridique risque de ne pas être assez subtil pour prendre en compte les particularités des entreprises communes. Toutefois, comme le BIAC l'a fait observer, l'un des moyens de renforcer la sécurité juridique sans compromettre la flexibilité serait d'obtenir un avis aussi vite que possible. Les modalités de notification et d'appréciation anticipée sont ici concernées.

De l'avis du président, la table ronde a eu le grand mérite de clarifier les diverses manières d'aborder le problème des entreprises communes. Elle a aussi permis de mieux voir comment les différents systèmes pourraient converger, tout en montrant aux délégués les aspects positifs des approches adoptées.

Pour terminer, le président remarque que les entreprises communes liées à l'Internet ont été délibérément écartées du débat, car elles font partie des questions dont on parlera demain à l'occasion de la table ronde sur le commerce électronique.