

Establishment of Joint Ventures: Comparison of Elements of Joint Ventures under EC Competition Law and U.S. Merger and Antitrust Law which Are Decisive for Determination of Applicable Legal Regime

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TABLE OF CONTENTS

ABSTRACT.....	ii
ACKNOWLEDGEMENTS.....	iii
INTRODUCTION.....	1
CHAPTER I - JOINT VENTURES: DEFINITIONS, PURPOSE AND CLASSIFICATION..	8
1.1. Definition and Meaning	8
1.2. Purpose of Joint Venture Formation	12
1.3. Joint Ventures Distinguished From Cartels and Mergers.....	15
1.4. Types of Joint Ventures	19
1.5. Working Definition of Joint Venture Applied in This Thesis	21
CHAPTER II - JOINT VENTURE FORMATION IN EU COMPETITION LAW	22
2.1. Joint Venture Formation: Pre-Establishment Concerns	22
2.2. Concept of Joint Control.....	24
2.3. Concept of “Full-Function” Joint Venture	26
2.4. Assessment of Coordinated Practices in Joint Ventures	37
CHAPTER III - FORMATION OF JOINT VENTURES IN U.S. ANTITRUST LAW	41
3.1. Formation of Joint Venture in US Antitrust Law.....	41
3.2. Pre-Merger Notification under Hart-Scott-Rodino Act.....	43
3.3. Concept of “Fully Integrated” Joint Venture in US Antitrust Law.....	46
3.4. “Merger-Like” Joint Ventures as Defined by US Collaboration Guidelines	48
CHAPTER IV - COMPARISON OF JOINT VENTURES’ ELEMENTS WHICH ARE DECISIVE FOR APPLICABLE LEGAL REGIME	52
4.1. Joint Venture Formation: Approach of EU Competition Law and US Antitrust Law Compared	52
4.2. Obligation to File Pre-Merger Notification upon Joint Venture Formation.....	52
4.3. Application of Merger Analysis to Joint Ventures.....	56
CONCLUSION	63
BIBLIOGRAPHY	70

ABSTRACT

This thesis aims to describe and compare those elements of joint ventures which are decisive for the determination of the applicable legal regime at the time of their formation, i.e. whether the joint venture formation is assessed under merger laws as a structural problem or under cartel laws as a behavioural problem.

This thesis argues that in EU competition law, the basic elements taken into consideration are: (i) existence of joint control over the joint venture by the parents, (ii) Community dimension and (iii) the joint venture must be a “full-function” joint venture. The “full-function” joint ventures must meet following criteria: they must operate on a lasting basis, must serve more than only a single function for their parents, must be independent or autonomous economic entities, i.e. having sufficient resources, management in charge of day-to-day operations and to certain extent have commercial relations with third parties. On the other side, in US antitrust law, the joint venture formation is notified to the United States Department of Justice (Antitrust Division) and the Federal Trade Commission as a merger if the transaction or at least one parent exceeds a certain size. The concept of control is relevant only in cases of unincorporated joint ventures. This thesis concludes that in US antitrust law there are two separate concepts which determine the application of merger analysis: the concept of “fully integrated” and “merger-like” joint venture.

ACKNOWLEDGEMENTS

I would like to thank my supervisor, Professor Jules Stuyck, for providing me support and help during the period of thesis writing. My special acknowledgement is extended to Professor George A. Hay who helped me to start up my research in Ithaca and become familiar with basic concepts of US antitrust law. Further, I would like to thank Mrs. Eszter Timar for her well addressed questions.

Lastly, I would like to thank the Central European University Foundation for providing me the opportunity to do my research at Cornell University Law School in Ithaca, a beautiful place full of special people, and to Mrs. Katalin Horvath for arranging everything.

INTRODUCTION

The term “joint venture” is used both in EU competition law and US antitrust law. If we define joint venture broadly, it “*encompasses any collaborative undertaking by which two or more entities devote their resources to pursuing a common objective*”¹. Thus this term refers to some enterprise which involves a certain degree of cooperation between two or more, otherwise independent undertakings which pool together their assets in order to achieve certain objectives (efficiencies of scale or scope, entering into new market, etc.)². As we will see, the form of such cooperation may be either purely contractual or it may encompass as well the establishment of a separate legal entity operating the pooled activities³.

The joint ventures comprise a certain level of cooperation among the parent undertakings but they are distinguished from illegal cartel arrangements and also from mergers⁴. Thomas A. Piraino, for example, claims that cartels comprise completely un-integrated collaboration, mergers comprise completely integrated collaboration and the joint ventures comprise “partial integration” of parents’ assets⁵.

Thus, joint ventures have certain “in-between” status. They are not clearly anticompetitive as cartels because the joint ventures achieve efficiencies, they might “*lower costs, provide economies of scale, increase production capacity..., commercialize new products*”⁶. On the

¹ ABA Section of Antitrust Law, *Joint Ventures: Antitrust Analysis of Collaborations Among Competitors*, American Bar Association, 2006, 5.

² See Richard J. Hoskins, *Antitrust Analysis of Joint Ventures and Competitor Collaborations: A Primer for a Corporate Lawyer*, 10 U. Miami Bus. L. Rev. 119, 119; The Antitrust Guidelines for Collaborations Among Competitors of the U.S. Department of Justice and the Federal Trade Commission, issued in April 2000, Preamble, hereinafter referred to as “US Collaboration Guidelines”, available at <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf>.

³ See William J. Kolasky, *Antitrust Treatment of Joint Ventures*, 1738 PLI/Corp 129, 131; ABA Section of Antitrust Law, *Joint Ventures: Antitrust Analysis of Collaborations Among Competitors*, American Bar Association, 2006, 6-7; COMP/JV.19 KLM/Alitalia, decision of 11th August 1999, par. 11.

⁴ Thomas A. Piraino, *A Proposed Antitrust Approach to Collaborations Among Competitors*, 86 Iowa L. Rev. 1137, 1163; Joanna Goyder, Albertina Albors-Llorens, *Goyder’s EC Competition Law*, 5th ed., Oxford University Press, 2009, 464.

⁵ Thomas A. Piraino, *A Proposed Antitrust Approach to Collaborations Among Competitors*, 86 Iowa L. Rev. 1137, 1163.

⁶ ABA Section of Antitrust Law, *Joint Ventures: Antitrust Analysis of Collaborations Among Competitors*, American Bar Association, 2006, 5.

other side, joint ventures give rise as well to certain anticompetitive concerns, so they are not “clearly pro-competitive”.

In U.S.A., the joint ventures became popular in the late 1980s and early 1990s.⁷ At the same time, the antitrust regulation of the joint ventures, as it was cited by FTC Chairman Robert Pitofsky, “*seemed least clear and ... most out of date*”.⁸ It was not clear what kind of standards should be applied to such arrangements between competitors, especially those ones which did not “*fall within the prohibition of per se unlawful activity*”.⁹ The struggle concerned those joint ventures which had substantial pro-competitive benefits but on the other hand comprised some kind of anticompetitive behavior.¹⁰

The competitive concerns connected with joint ventures are often divided into structural (the fear that the joint venture may be as powerful as to damage competition in the relevant product and geographic market) and behavioral concerns (the risk that the joint venture parents will coordinate their behavior in related downstream or upstream markets)¹¹.

Because of these “twofold” concerns and the fact that the joint ventures involve a wide range of business arrangements, there is a lot of debate on whether to treat joint ventures as a structural or behavioral problem.¹² In EU competition law the question would be whether to assess joint ventures under EU Merger Regulation (structural problem) or whether to subject

⁷ ABA Section of Antitrust Law, *Joint Ventures: Antitrust Analysis of Collaborations Among Competitors*, American Bar Association, 2006, 1.

⁸ See ABA Section of Antitrust Law, *Joint Ventures: Antitrust Analysis of Collaborations Among Competitors*, American Bar Association, 2006, 1 (*citing* FTC Chairman Robert Pitofsky, Opening Statement, Hearings on the Joint Venture Project (June 2, 1997); US Collaboration Guidelines, Preamble (“*The increasing varieties and use of competitor collaborations have yielded requests for improved clarity regarding their treatment under the antitrust laws*”).

⁹ ABA Section of Antitrust Law, *Joint Ventures: Antitrust Analysis of Collaborations Among Competitors*, American Bar Association, 2006, 1.

¹⁰ ABA Section of Antitrust Law, *Joint Ventures: Antitrust Analysis of Collaborations Among Competitors*, American Bar Association, 2006, 2.

¹¹ Chalmers, D., Hadjiemmanuil, Ch., Monti, G., Tompkins, A., *European Union Law*, Cambridge University Press, 2006, 1075.

¹² Craig Paul, Grainne de Burca, *EU Law, Text, Cases and Materials*, 4th Ed., Oxford University Press, 2008, 1046.

them under Article 101 of the Treaty on the Functioning of the European Union¹³ as a behavioral problem¹⁴. On the other hand, in US antitrust law, the main issue is whether to subject joint ventures to Section 7 of the Clayton Act¹⁵, i.e. subject them to merger analysis as a structural problem¹⁶, or whether to analyze them under the per se rule and rule of reason under the Section 1 of the Sherman Act¹⁷.

In EU competition law, the approach of the legislator seems to solve this “twofold” problem by drawing the line between so called “full-function” joint ventures¹⁸ and other joint ventures. The creation of a “full-function” joint venture is treated as a merger and thus evaluated by the European Commission as a structural problem prior to its effectiveness. In addition, the EU Merger Regulation provides for appraisal of likely cooperative effects of “full-function” joint ventures (behavioral concern) within one procedure under EU Merger Regulation¹⁹.

The question then arises which types of joint ventures can fall within the definition of “full-function” joint venture. What are their distinguishing features which justify their assessment under merger analysis? Further – is the approach of EU competition law in this regard similar to the one applied in US federal antitrust law? If it is different, why is it so?

From these numerous questions, I have chosen to focus my research on the comparison of those decisive factors/elements of joint ventures, respectively the joint venture formation transaction as a whole, which determine the applicable legal regime upon their formation, i.e.

¹³ Article 101 of the Treaty on the Functioning of the European Union replaced the ex Articles 81 of the Treaty Establishing the European Communities. The Treaty on the Functioning of the European Union hereinafter referred to as “TFEU”.

¹⁴ Craig Paul, Grainne de Burca, *EU Law, Text, Cases and Materials*, 4th Ed., Oxford University Press, 2008, 1046.

¹⁵ 15 U.S.C. § 19; hereinafter referred to as “Section 8 of the Clayton Act”.

¹⁶ See ABA Section of Antitrust Law, *Joint Ventures: Antitrust Analysis of Collaborations Among Competitors*, American Bar Association, 2006, 16.

¹⁷ ABA Section of Antitrust Law, *Joint Ventures: Antitrust Analysis of Collaborations among Competitors*, American Bar Association, 2006, 18.

¹⁸ Council Regulation No. 139/2004, of 20th January 2004, on the Control of Concentrations between Undertakings (the EC Merger Regulation) [Official Journal L 24/1 of 29.01.2004], Art.3 (4), hereinafter referred to as “EU Merger Regulation”.

¹⁹ EU Merger Regulation, Art.2 (4) and (5).

whether the formation of the joint venture will be analyzed under cartel rules as a behavioral problem or under merger rules as a structural problem. The purpose of my thesis is thus to compare the approach of EU competition law and U.S. federal antitrust law when assessing formation of a joint venture.

The reason for choosing to compare these elements is that such detailed comparison has not yet been done. One probable reason might be the wide range of arrangements the term “joint venture” covers under EU competition and US antitrust law. However, as the competitors tend to collaborate more nowadays²⁰, such detailed comparison could serve future research on joint ventures with the objective of finding the proper legal regime, under which certain types of joint ventures should be analyzed.

In the first Chapter, among other issues, I will deal in detail with various definitions of the term “joint venture” under both EU competition and US antitrust law. For the purpose of this introduction suffice it to say that the term “**joint venture**” will be mostly used in this thesis to denote a separate legal entity jointly controlled by two or more undertakings²¹, i.e. I will use it in the sense it is used in the EU competition law rather than in its broader sense under US antitrust law²².

²⁰ See US Collaboration Guidelines, Preamble; Thomas A. Piraino Jr., *The Antitrust Analysis of Joint Ventures after the Supreme Court Decision in Dagher Case*, 57 Emory L.J. 735, 735.

²¹ Commission Notice on the Concept of Full-Function Joint Ventures under Council Regulation (EEC) No. 4064/89 on the Control of Concentrations between Undertakings (98/C 66/01), C 66/1-2 (“Under the Community competition rules, joint ventures are undertakings which are jointly controlled by two or more other undertakings. In practice joint ventures encompass a broad range of operations, from merger-like operations to cooperation for particular functions such as R & D, production or distribution.”, citation omitted), hereinafter referred to as “Commission Notice on Full-Function Joint Ventures”.

²² See e.g. Herbert Hovenkamp, *XIII Antitrust Law, An Analysis of Antitrust Principles and Their Application*, 2nd Ed., ASPEN Publishers, 2005, 3; ABA Section of Antitrust Law, *Joint Ventures: Antitrust Analysis of Collaborations Among Competitors*, American Bar Association, 2006, 5 (referring to: Comments and Hearings on Joint Venture Project, 62 Fed.Reg. 22,945 (Apr. 28, 1997), at 22,946 n.1 (“competitor collaborations include all collaborations, short of a merger, between or among entities that would have been actual or likely competitors in a relevant market absent that collaboration”); Robert Pitofsky, *A Framework for Analysis of Joint Ventures*, 74 Geo.L.J. 1605, 1605 (1986): (“A joint venture could involve any business enterprise in which two or more persons collaborate to achieve some commercial goal – a definition that include all of antitrust, except, perhaps, some single firm attempts to monopolize”).

Further, it is important to clarify the terminology used throughout this thesis. When referring to the competition law of European Union in general, I will denote it as “**EU competition law**”. On the other hand, the federal competition law of the United States of America will be denoted as the “**US antitrust law**”. When I refer to particular legal regimes within the EU competition law or US antitrust law, I will denote the area of law regulating concentrations, mergers and/or acquisitions as the “**merger law**” or “merger regulation” and the area of law regulating behavior of competitors, i.e. the agreements restricting competition, as the “**cartel law**”. However, this delimitation might not be observed in all cases. For example, sometimes I will use the term “acquisitions” when it is important to distinguish them from mergers *stricto sensu*.

When using the term “**Agencies**” I will refer to the United States Department of Justice, Antitrust Division and the Federal Trade Commission. As both Agencies to a large extent share enforcement jurisdiction over antitrust issues²³, both in the area of merger and cartel law, it is not necessary for the purpose of this thesis to distinguish them at each particular place. The European Commission will be denoted as the “**Commission**”.

As the scope of this thesis is limited, I will not cover other possible legal regimes which could be applied to joint ventures during their operation. First, I will cover only different legal regimes of the EU competition law as applied by the Commission. It means that I will neither deal with the possible application of EU competition laws by the national competition authorities or national courts²⁴, nor I will cover the application of national competition laws of the EU member states. Similarly, with regard to the US antitrust law, I will cover only the US federal antitrust laws, i.e. excluding possible application of various state antitrust laws.

²³ ABA Section of Antitrust Law, *Mergers and Acquisitions: Understanding the Antitrust Issues*, American Bar Association, 2008, 15.

²⁴ See Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [OJ L 1/1 of 04.01.2003], Art.1 and 3; EU Merger Regulation, Art. 4 and 9.

Second, this thesis will not cover the issues of antitrust or monopolization law, i.e. this thesis will not deal with the possible application of Art.102 of TFEU²⁵ or Section 2 of the Sherman Act²⁶. Instead, I will focus on the comparison of elements of joint ventures which are crucial for the determination of the applicable legal regime at the time of their formation, i.e. whether joint ventures will be evaluated as mergers under the merger laws or analyzed under the cartel laws as agreements restricting competition. Attached to this, there will be the evaluation whether the joint venture's parent undertakings will have to file pre-merger notification with the Commission under the EU Merger Regulation or with the Agencies under the Hart-Scott-Rodino Antitrust Improvement Act of 1976²⁷.

Lastly, I will focus only on the comparison of elements or features of joint ventures which are decisive for the applicable legal regime, as opposed to the comparison of different legal analyses applied by the Commission or the Agencies when actually assessing the joint ventures under merger or cartel law.

This thesis is divided into four chapters. Chapter I deals with definition of joint ventures as used both in EU competition and US federal law, further the purpose of their formation, differentiation of joint ventures from cartels and mergers and lastly the classification of joint ventures. Chapter II deals with the concepts of EU competition law which are decisive for the application of EU Merger Regulation as opposed to application of the Art.101 of TFEU, and that namely the concept of "joint control", concept of "full functionality" and with the likely co-operative effects of the joint ventures. Chapter III outlines the concepts of the US antitrust

²⁵ Article 102 of TFEU replaced the ex Articles 82 of the Treaty Establishing the European Communities. In general, Art. 102 TFEU prohibits abuse of dominant position by a dominant undertaking which market power entitles it to behave independently from other competitors (undertaking with dominant position) and thus distort competition, for example by restricting the output in a view to increase prices or opposite by decreasing prices below its production costs for temporal period of time with a view either to compel other competitors to leave the market or to restrict entry of potential competitors onto market and thus achieve higher profits after the market is "cleared" (predatory pricing), etc.

²⁶ 15 U.S.C. § 2; Section 2 hereinafter referred to as "Section 2 of the Sherman Act".

²⁷ 15 U.S.C. § 18a; hereinafter referred to as "Hart-Scott-Rodino Act" or "HSR Act"; William J. Kolasky, *Antitrust Treatment of Joint Ventures*, 1738 PLI/Corp 129, 132-133.

law, namely requirements for pre-merger notification of joint ventures' formation and the concepts of "fully integrated" and "merger-like" joint ventures. Finally, Chapter IV contains the comparison of those concepts and elements which were described as decisive in Chapters II and III.

CHAPTER I - JOINT VENTURES: DEFINITIONS, PURPOSE AND CLASSIFICATION

1.1. Definition and Meaning

Joint venture is a term used both in EU and US law. In this section will be outlined what is generally understood under the term “joint venture” from the perspective of EU competition law and US antitrust law. Thus, this section will, for example, not cover the term joint venture as it is used in US business/corporate law²⁸.

1.1.1. US Antitrust Law

Herbert Hovenkamp in its treatise Antitrust Law describes a joint venture as “*a form of organization in which two or more firms agree to cooperate in producing some input that they would otherwise have produced individually, acquired on the market, or perhaps would have done without.*”²⁹

The term “**a form of organization**” reflects the fact that joint ventures “*take many different forms, ranging from loose contractual arrangements to a virtually complete integration of the parents' operations in a particular line of business*”³⁰. ABA Section of Antitrust Law states that a joint venture “*can range from a mere contractual relationship between two independent companies where they share some direct or indirect control over assets to a new entity created through the contribution of assets from each parent organization.*”³¹

²⁸ In U.S. business law, the term joint venture denotes form of partnership or strategic alliance (“*a business undertaking by two or more persons engaged in a single defined project. The necessary elements are: (1) an express or implied agreement; (2) a common purpose that the group intends to carry out; (3) shared profits and losses; and (4) each member's equal voice in controlling the project*”; from Black's Law Dictionary, 8th Ed., 2004, <http://web2.westlaw.com>).

²⁹ Herbert Hovenkamp, XIII *Antitrust Law, An Analysis of Antitrust Principles and Their Application*, 2nd Ed., ASPEN Publishers, 2005, 3.

³⁰ William J. Kolasky, *Antitrust Treatment of Joint Ventures*, 1738 PLI/Corp 129, 131.

³¹ ABA Section of Antitrust Law, *Joint Ventures: Antitrust Analysis of Collaborations Among Competitors*, American Bar Association, 2006, 6-7.

The term “**firms**” means entities which might be direct or potential competitors³² but it is not a condition, i.e. they might operate business “*at different levels in a distribution chain, firms producing related products, or the same product in different geographic markets*”³³.

“**Cooperation**” denotes that the joint venture parents must cooperate or collaborate in order to enter into a joint venture agreement or form joint venture as a separate entity and later operate it, i.e. the collaboration is a prerequisite and thus single entity cannot create a joint venture but subsidiary.³⁴

An “**input**” might be according to Hovenkamp’s Antitrust Law the following: (i) product, (ii) service, (iii) hardware (i.e. production plant), (iv) transaction facilitator (e.g. joint ventures among credit card issuers or operators of automated teller machines (ATMs)), (v) information (e.g. exchange of list of names of customers who have not paid their bills, or exchange of scheduling information by airlines in order to create computer databases enabling passengers to coordinate their travel connections) and (vi) research and development.³⁵

The US Collaboration Guidelines do not use the term “joint venture”. Instead they use the more descriptive term “collaboration among competitors” or “competitor collaboration” which is characterized in Section 1.1 as “*set of one or more agreements, other than merger agreements, between or among competitors to engage in economic activity, and the economic*

³² US Collaboration Guidelines, § 1.1 Purpose and Definitions.

³³ Herbert Hovenkamp, *Economic and Federal Antitrust Law*, Handbook Series, West Publishing Company 1985, 111

³⁴ Robert Pitofsky, *A Framework for Analysis of Joint Ventures*, 74 Geo.L.J. 1605, 1605 (1986) (“A joint venture could involve any business enterprise in which two or more persons collaborate to achieve some commercial goal – a definition that include all of antitrust, except, perhaps, some single firm attempts to monopolize”).

³⁵ Herbert Hovenkamp, *XIII Antitrust Law, An Analysis of Antitrust Principles and Their Application*, 2nd Ed., ASPEN Publishers, 2005, 3-4.

activity resulting there from”³⁶. The U.S. courts case law provides as well an interesting list of joint venture definitions.³⁷

1.1.2. EU Competition Law

Whereas in US antitrust law, there is no general statutory definition of a joint venture, from the various definitions (either made by courts or legal scholars) follows that the term “joint venture” encompasses broad range of cooperation among competitors, ranging from loose contractual relationship up to establishment of a new business entity carrying on joint activity.

In EU competition law, the term joint venture is used in the EU Merger Regulation which defines one type of joint venture – the “full-function” joint venture.³⁸ This term is, among others, discussed in the Commission Notice on Full-Function Joint Ventures. It describes joint ventures in the introductory notes as *“undertakings which are jointly controlled by two or more other undertakings... [They] encompass a broad range of operations, from merger-like operations to cooperation for particular functions such as R & D, production or distribution.”*³⁹

³⁶ US Collaboration Guidelines, § 1.1 Purpose and Definitions.

³⁷ *Instructional Sys. Dev. Corp. v. Aetna Cas. & Sur. Co.*, 817 F.2d 639, 643 n.2 (10th Cir. 1987) (“Defining a joint venture for antitrust purposes as “an integration of operations between two or more separate firm, in which the following conditions are present: (1) The enterprise is under the joint control of the parents firms, which are not under related control, (2) Each parent makes 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 new market”); *COMPACT v. Metro. Gov’t*, 594 F.Supp. 1567, 1574 (M.D. Tenn. 1984) (“A joint venture is a separate enterprise characterized by an integration of operations between and subject to control of its parent firms which results in the creation of significant new enterprise capability in terms of new productive capacity, new technology, a new product, or entry into new market”); *McElhinney v. Med. Protective Co.*, 549 F.Supp. 121, 131 n.7 (E.D. Ky. 1982) (“In antitrust law, the term “joint venture” denotes a group of independent economic actors who have joined together, in part, to provide a common product or service.”).

³⁸ EU Merger Regulation, Art.3(4) states that a joint venture with certain features will be considered as an acquisition under the Art.3 (1)(b) (“The creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity shall constitute a concentration within the meaning of paragraph 1(b)”).

³⁹ Commission Notice on Full-Function Joint Ventures, 1-2 (“Under the Community competition rules, joint ventures are undertakings which are jointly controlled by two or more other undertakings. In practice joint ventures encompass a broad range of operations, from merger-like operations to cooperation for particular functions such as R & D, production or distribution.”, citation omitted).

The Commission's Guidelines on the Applicability of Article 81 of the EC Treaty to Horizontal Cooperation Agreements⁴⁰ do not use the term "joint venture" when referring to competitors' collaborations. Instead they use the term "agreement" covering "*agreements or concerted practices... entered into between two or more companies operating at the same level(s) in the market, e.g.... cooperation between competitors*"⁴¹. Further, they state that the term agreement includes cooperation between both actual and potential competitors.⁴² At the same time, the EU Guidelines on Horizontal Cooperation Agreements seem to use the term "joint venture" when referring to a common enterprise or undertaking established and jointly controlled by the competitors⁴³.

We could conclude from these definitions that the term "joint venture" thus has to encompass establishment of a new business entity or enterprise in order to satisfy the requirement of joint control exercised over it by the joint venture participants. However, the secondary sources are not consistent when interpreting the term "joint venture" under EU competition law. From some of them follows that "joint ventures" always encompass establishment of jointly controlled entity⁴⁴, whereas the others seem to cover as well joint contractual arrangements⁴⁵.

⁴⁰ Commission Notice - Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements (OJ C 3/2 of 06.01.2001), hereinafter referred to as "EU Guidelines on Horizontal Cooperation Agreements".

⁴¹ EU Guidelines on Horizontal Cooperation Agreements, C 3/3.

⁴² EU Guidelines on Horizontal Cooperation Agreements, C 3/3.

⁴³ See EU Guidelines on Horizontal Cooperation Agreements, C 3/12 (Par. 78: "*They may take the form of joint production through a joint venture, i.e. a jointly controlled company that runs one or several production facilities, or can be carried out by means of specialization or subcontracting agreements whereby one party agrees to carry out the production of a certain product.*").

⁴⁴ E.g. Joanna Goyder, Albertina Albors-Llorens, *Goyder's EC Competition Law*, 5th Ed., Oxford University Press, 2009, 461; Barry J. Rodger, Angus MacCulloch, *Competition Law and Policy in the EC and UK*, 4th Ed., Routledge Cavendish, 2009, 304 ("*Joint ventures involve the setting up of a company by two or more parent companies*"); Bent Iversen, coll., *Regulating Competition in the EU*, DJOF Publishing, 2008, 161 (referring to Commission's development of the "joint venture" concept under EU competition law: "*The Commission considers joint ventures to be a special institutionalized form of commercial cooperation*"; referring to Commission Notice concerning the assessment of cooperative joint ventures pursuant to article 85 of the EEC Treaty, OJ 1993 C 43/2, par. 1; "*...in this connection it defined a joint venture as an enterprise that is controlled by two or more independent undertakings. Subsequently the Commission has developed this definition by referring to the fact that the undertakings that control a joint venture shall be independent of each other, that it is not material whether or not the joint venture is for a limited period of time and that the corporate form by which the joint venture is carried on is immaterial*"; references omitted); Joseph F. Brodley, *Joint Ventures and Antitrust Policy*, 95 Harvard Law Review 1521 (1982), 1525-26 ("*integration of operations between two or more separate firms, in which the following conditions are present: (1) the enterprise is under the joint control of the parent firms, which are not under related control; (2) each parent makes 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*").

Respectively some authors recognize that this term is used as well in this popular sense as “any business operations owned and operated by two or more separate enterprises” or in its more precise sense as a “jointly controlled company”⁴⁶.

For example, Goyder’s EC Competition Law identifies four elements which seem to be needed in each case of joint venture establishment: “(i) the creation of either a separate legal undertaking, or at least a recognizable joint committee or informal organization clearly identifiable as separate from its parents, (ii) the transfer by the parents to the new undertaking of personnel and assets (often including intellectual property rights), (iii) the allocation by formal decision to the new undertaking of responsibility for carrying out its allotted functions and (iv) effective joint control by the parents of the joint venture.”⁴⁷

On the other hand, P. Craig and G. de Burca state that the term “joint venture” covers “a wide range of business arrangements, from the establishment of a new corporate entity by two competitors to a joint-purchasing scheme or joint research and development.”⁴⁸

1.2. Purpose of Joint Venture Formation

The business undertakings nowadays have two basic options how to develop their future commercial activities. They might try to “go it alone”, i.e. try to achieve the overall goal, like development of innovated or completely new product, with its own resources, accepting all possible risks in case of failure, or they might try to find a partner with whom they might

⁴⁵ Craig Paul, Grainne de Burca, *EU Law, Text, Cases and Materials*, 4th Ed., Oxford University Press, 2008, p.1046.

⁴⁶ Barry E. Hawk (editor), *FCLI: Mergers and Acquisitions / Joint Ventures*, B. Hawk Ed. 2004, Fordham Corporate Law Institute, 269; Michael Walther, Ulrich Baumgartner, *Joint Venture Under the New EC Merger Regulation*, The European Antitrust Review 2007, 22-26 (“Generally, the term ‘joint venture’ is used very broadly by the general public. Arrangements referred to as joint ventures range from transactions akin to mergers to mere cooperation agreements for research and development, production or distribution. Common synonyms are ‘strategic alliance’ or simply ‘cooperative agreements’. EC competition law, however, takes a narrower view, defining joint ventures as undertakings that constitute a separate and fully-functional business entity that is ‘jointly controlled’ by at least two parents.”) http://media.gibsondunn.com/fstore/documents/pubs/2007_Antitrust_Rev-WaltherBaumgartner-Joint_Venture.pdf.

⁴⁷ Joanna Goyder, Albertina Albors-Llorens, *Goyder’s EC Competition Law*, 5th Ed., Oxford University Press, 2009, 461.

⁴⁸ Craig Paul, Grainne de Burca, *EU Law, Text, Cases and Materials*, 4th Ed., Oxford University Press, 2008, 1046.

*“share opportunities and risks in particular project”*⁴⁹. Joint ventures *“permit the kind of specialization of function and economies of scale that are otherwise available only through larger aggregations of capital and talent, such as result from mergers. Thus, they permit small players to compete more effectively against giants.”*⁵⁰

The US Collaboration Guidelines recognize that the entrepreneurs, and among them as well competitors, need to cooperate in modern markets in order to be competitive and thus *“achieve goals such as expanding into foreign markets, funding expensive innovation efforts, and lowering production and other costs”*⁵¹. Such cooperation or collaboration may take different forms⁵², among others as well the form of joint venture. ABA Section of Antitrust Law mentions further reasons why firms enter into joint ventures, such as *“lower costs, provide economies of scale, increase production capacity..., commercialize new products,...”*⁵³ and as well other reasons, like: *“price-fixing conspiracy, curtail[ment of] competition between significant competitors, facilitate[ion of] collusion between co-venturers, or control [of] a third-party rival’s supply of a needed input”*⁵⁴.

All of the abovementioned reasons seem to be obviously advantageous to the participants of the joint ventures. However, from antitrust law perspective, not all intended goals of competitor collaborations are lawful and therefore some joint ventures might be challenged by antitrust authorities or by private plaintiffs in private litigation for being anticompetitive. The

⁴⁹ Joanna Goyder, Albertina Albors-Llorens, *Goyder’s EC Competition Law*, 5th Ed., Oxford University Press, 2009, 460

⁵⁰ Richard J. Hoskins, *Antitrust Analysis of Joint Ventures and Competitor Collaborations: A Primer for a Corporate Lawyer*, University 10 U. Miami Bus. L. Rev. 119, 119.

⁵¹ US Collaboration Guidelines, Preamble.

⁵² Federal Trade Commission’s Guide to the Antitrust Laws, available at: http://www.ftc.gov/bc/antitrust/dealings_with_competitors.shtml (“In today’s marketplace, competitors interact in many ways, through trade associations, professional groups, joint ventures, standard-setting organizations, and other industry groups. Such dealings often are not only competitively benign but pro-competitive. But there are antitrust risks when competitors interact to such a degree that they are no longer acting independently, or when collaborating gives competitors the ability to wield market power together.”).

⁵³ ABA Section of Antitrust Law, *Joint Ventures: Antitrust Analysis of Collaborations Among Competitors*, American Bar Association, 2006, 5.

⁵⁴ ABA Section of Antitrust Law, *Joint Ventures: Antitrust Analysis of Collaborations Among Competitors*, American Bar Association, 2006, 5 (referring to Charles A. James, *Recent Developments and Future Challenges at the Antitrust Division*, Address Before the Dallas Bar Ass’n (17th September, 2002)).

anticompetitive aim of such joint venturers is the aim to fix prices, restrict output or divide market (thus creating monopoly in certain restricted area). However, these anticompetitive reasons “*explain only a small percentage of joint venture agreements*”⁵⁵. Hovenkamp argues that most joint ventures are created “*to enable the participants to achieve certain economies... by allowing them to do something at lower cost.*”

Therefore competitor collaboration enables joint venturers “*to perform an activity at minimum optimal scale (MOS), while a single firm acting alone could not*”⁵⁶ achieve it. Hovenkamp⁵⁷ states an example with three firms which all need for the production of their final products the input of specialized metal alloy. Each of the firms needs such metal alloy in the amount of 40,000 tons per year, whereas the efficient production of the alloy requires a plant capable of producing at least 100,000 tones of alloy per year. “*If the three firms build together the plant, they will be able to maintain the output at an efficient rate*”⁵⁸. These three firms might be direct competitors in the market of sale and distribution of the final products but they do not need to be, i.e. the three firms might operate in different geographic markets (USA & Canada, Europe, Asia) or their final products are not considered to be interchangeable.

Various types of joint ventures bring various advantages to their participants: for example, the joint venture established to commonly produce an output provides the opportunity to produce it at efficient scale (economies of scale), thus reduce the costs to the joint venturers; the joint selling joint venture can as well reduce marketing costs of each participant, thus provide

⁵⁵ Herbert Hovenkamp, *Economic and Federal Antitrust Law*, Handbook Series, West Publishing Company 1985, 111.

⁵⁶ Herbert Hovenkamp, *Economic and Federal Antitrust Law*, Handbook Series, West Publishing Company 1985, 112.

⁵⁷ Herbert Hovenkamp, *Economic and Federal Antitrust Law*, Handbook Series, West Publishing Company 1985, 112.

⁵⁸ Herbert Hovenkamp, *Economic and Federal Antitrust Law*, Handbook Series, West Publishing Company 1985, 112.

possibility to “take advantage of new marketing opportunities”⁵⁹; the research and development joint ventures might solve the “free rider” problem⁶⁰.

1.3. Joint Ventures Distinguished From Cartels and Mergers

The term joint venture might cover “wide range of activities”⁶¹. As we will see, the term “joint venture” can denote on one side pure contractual arrangement of two or more competitors or even some non-competitors and on the other side a merger-like joint venture comprising integration of all assets by establishment of a new entity operating the venture; in the middle would be placed numerous collaborations, each of them realized for different purposes and comprising different activities.⁶² Therefore, if some collaboration is denoted as a “joint venture”, we cannot conclude that such collaboration is automatically illegal or legal or what are its effects on competition in the affected market⁶³.

It is as well important to distinguish joint ventures from cartels on one side and mergers on the other side. Joint ventures, cartels and as well mergers comprise certain level of collaboration among competitors. Whereas cartels comprise completely un-integrated collaboration, mergers comprise completely integrated collaboration. The in-between status, partial integration, is the characteristics of joint ventures⁶⁴.

Cartels are clearly anticompetitive whereas mergers and joint ventures comprise anticompetitive and as well pro-competitive effects. From the latter two, joint ventures are

⁵⁹ Herbert Hovenkamp, *Economic and Federal Antitrust Law*, Handbook Series, West Publishing Company 1985, 112

⁶⁰ Herbert Hovenkamp, *Economic and Federal Antitrust Law*, Handbook Series, West Publishing Company 1985, 112 (“a firm in competition, facing the likelihood that a particular research project will cost a substantial amount but will benefit all firms in the market, will simply forego the project”).

⁶¹ Joanna Goyder, Albertina Albors-Llorens, *Goyder’s EC Competition Law*, 5th Ed., Oxford University Press, 2009, 464.

⁶² Joanna Goyder, Albertina Albors-Llorens, *Goyder’s EC Competition Law*, 5th Ed., Oxford University Press, 2009, 464.

⁶³ Herbert Hovenkamp, *Economic and Federal Antitrust Law*, Handbook Series, West Publishing Company 1985, 111 (“As a result, to characterize something as a “joint venture” is to say nothing about its effect on competition between the parties to the venture or its legality under the antitrust laws.”).

⁶⁴ Thomas A. Piraino, *A Proposed Antitrust Approach to Collaborations Among Competitors*, 86 Iowa L. Rev. 1137 (2001), 1163.

considered to be less anticompetitive as they do not permanently eliminate one competitor from the market but comprise only temporal collaboration.⁶⁵

The basic competitive concerns connected with establishment and operation of a joint venture lies in the possibility of the joint venture participants to coordinate their behavior in the market directly concerned by cooperation⁶⁶, then to coordinate their behavior on possible spill-over markets (i.e. *“the market which is downstream or upstream or a neighboring market closely related to the market directly concerned by the cooperation”*), as well referred to as the “spill-over effect”⁶⁷ or that they will cause foreclosure effects (anticompetitive effect caused by the ability of at least one of the joint venture participants, having large market share, to increase the price of products in a neighboring market for the other competitors or rivals)⁶⁸. These competitive concerns connected with joint ventures, as it was outlined already in Introduction, are often divided into structural and behavioral concerns⁶⁹.

1.3.1. Cartels

Thomas A. Piraino claims that cartels are “incapable of generating any efficiencies” due to lack of integration of any resources. They do not involve establishment of a separate legal entity and are almost always hidden, secretive.⁷⁰ Alan Lear states that they are *“collaborations of convenience and not of economic or business necessity”*⁷¹. Thus, the

⁶⁵ Thomas A. Piraino, *A Proposed Antitrust Approach to Collaborations Among Competitors*, 86 Iowa L. Rev. 1137 (2001), 1169.

⁶⁶ EU Guidelines on Horizontal Cooperation Agreements, C 3/13, Par. 83.

⁶⁷ EU Guidelines on Horizontal Cooperation Agreements, C 3/12, Par. 82 (*“Secondly, a production agreement in one market may also affect the competitive behavior of the parties in a market which is downstream or upstream or a neighboring market closely related to the market directly concerned by the cooperation (so-called “spill-over markets”).*

⁶⁸ EU Guidelines on Horizontal Cooperation Agreements, C 3/13, Par. 85 (*“They are not caused by a competitive relationship between the parties, but by a strong market position of at least one of the parties (e.g. on an upstream market for a key component, which enables the parties to raise the costs of their rivals in a downstream market) in the context of a more vertical or complementary relationship between the cooperating parties.”*).

⁶⁹ Chalmers, D., Hadjiemmanuil, Ch., Monti, G., Tompkins, A., *European Union Law*, Cambridge University Press, 2006, 1075.

⁷⁰ Alan Lear, *Joint Ventures: Treatment under New Zealand, United States and European Competition Law*, 11 NZBLQ 187 (2005), Section 2.2 Cartels and Mergers.

⁷¹ Alan Lear, *Joint Ventures: Treatment under New Zealand, United States and European Competition Law*, 11 NZBLQ 187 (2005), Section 2.2 Cartels and Mergers.

competitors in cartel arrangement merely agree not to compete, to fix prices, to reduce output or divide markets⁷², i.e. the competitors do not achieve pro-competitive efficiencies but achieve higher profits by elimination of competition without improvement of their business activities.

Not surprisingly, some competitors tried to enter into disguised cartel activity under the heading of “joint venture”.⁷³ So they tried to create appearance that their collaboration is necessary in order to achieve efficiencies and that it brings about as well some pro-competitive benefits, whereas the main purpose of their collaboration was to conspire or in other words to restrict competition within a cartel. Cartels or so called “hard-core” cartels are illegal automatically both under EU competition law and US antitrust law (per se illegal)⁷⁴.

1.3.2. Mergers

Under the EU competition law, the basic question lies whether the joint venture will be treated as a merger, falling within the scope of EU Merge Regulation, or as an agreement restricting competition, falling within the scope of Article 101 of TFEU.

Goyder’s EC Competition Law identifies three elements which determine whether a joint venture will be treated as a merger. These three requirements are: “(1) *parent companies are acquiring joint control of the joint venture*, (2) *the aggregate turnovers of the parent companies of the joint venture reach the thresholds for world and EC turnovers, set out in*

⁷² Thomas A. Piraino, *A Proposed Antitrust Approach to Collaborations Among Competitors*, 86 Iowa L. Rev. 1137 (2001), 1163-64 (“Cartels include many of the practices that have traditionally been defined as *per se* illegal: horizontal price-fixing, territorial allocations, divisions of customers, and other agreements not to compete that are unrelated to any efficiency-enhancing integration. Since the parties have not pooled their resources or contributed any assets to the arrangement, a cartel has neither the objective nor the possibility of generating any pro-competitive efficiencies”), 1165-66 (“A cooperative arrangement among competitors can only generate efficiencies when the parties integrate their resources in some way”; citation omitted).

⁷³ William J. Kolasky, *Antitrust Treatment of Joint Ventures*, 1738 PLI/Corp 129 (2009), 131; See *Timken Roller bearing Co. v. United States* 341 U.S. 593 (1951) (“simply characterizing an agreement among competitors as a joint venture will not save it from condemnation as a *per se* unlawful agreement in restraint of trade where the only purpose and effect is to eliminate competition”).

⁷⁴ See e.g. Bent Iversen, coll., *Regulating Competition in the EU*, DJOF Publishing, 2008, 52, 110; US Collaboration Guidelines, 3.

*Article 1 of the Merger Regulation, and (3) the joint venture itself is a “full-function”, performing on a lasting basis all the functions of an autonomous economic entity”*⁷⁵. If the third requirement is not satisfied, such joint venture will fall under the scope of Article 101 of TFEU.⁷⁶

The joint ventures which are full-function and at the same time “*ha[ve] as [their] object or effect the coordination of the competitive behavior of undertakings that remain independent*”, will be subject to EU Merger Regulation and furthermore, the Commission will appraise it under the Art.101(1) and (3) of TFEU in order to determine whether such competitor collaboration is compatible with the internal market.

Under the US antitrust law, mergers involve complete integration of resources of competitors in certain relevant market. As a result, the previous two or more competitors stop to compete against each other on that relevant market and “[a] *single entity (the collaborative venture) takes the place of the former competitors in the market*”⁷⁷ which comprises “*fusion of their partners' market power*”⁷⁸. Thomas A. Piraino claims that the antitrust authorities should balance such resulting collective market power against “*a transaction's potential efficiencies*”⁷⁹, i.e. even if the mergers cause anticompetitive concerns they should not be deemed automatically illegal.

As it was stated above, the basic distinction between a merger and a joint venture under US antitrust law is that the merger comprises (i) complete integration of the participants' assets in the relevant market. The joint venture participants, on the other hand pool together only

⁷⁵ Joanna Goyder, Albertina Albors-Llorens, *Goyder's EC Competition Law*, 5th Ed., Oxford University Press, 2009, 462.

⁷⁶ Joanna Goyder, Albertina Albors-Llorens, *Goyder's EC Competition Law*, 5th Ed., Oxford University Press, 2009, 462.

⁷⁷ Thomas A. Piraino, *A Proposed Antitrust Approach to Collaborations Among Competitors*, 86 Iowa L. Rev. 1137 (2001), 1168.

⁷⁸ Thomas A. Piraino, *A Proposed Antitrust Approach to Collaborations Among Competitors*, 86 Iowa L. Rev. 1137 (2001), 1168.

⁷⁹ Thomas A. Piraino, *A Proposed Antitrust Approach to Collaborations Among Competitors*, 86 Iowa L. Rev. 1137 (2001), 1163.

partial assets on the relevant market and thus still (ii) keep competing against each other on that relevant market. Further, in mergers, such pooling of assets is aimed to be (iii) permanent, whereas in joint ventures the collaboration is usually only for temporary period of time.

1.4. Types of Joint Ventures

Even if the joint ventures “*come in an infinite variety of structures and durations and forms and scopes*”⁸⁰, there are attempts to classify them. For the purpose of this thesis, the most important is to distinguish joint ventures which fall under the cartel regime as opposed to those which are treated as mergers. Therefore, in US antitrust law, it will be important to find the distinction between the fully-integrated or “merger-like” joint ventures as opposed to other partially integrated joint ventures and in EU competition law to draw the line between the “full-function” and the “non-full-function” joint ventures.

ABA Section of Antitrust Law recognizes “*six primary types of competitor collaborations: fully-integrated, research and development, production, marketing, purchasing, and network joint ventures.*”⁸¹ The US Collaboration Guidelines mention in addition collaborations in the area of information sharing and various trade association activities.⁸²

Thomas A. Piraino classifies joint ventures into two basic categories: (i) the “upstream” joint ventures which should be always presumed to be pro-competitive (like purchasing and research and development joint ventures) and (ii) downstream joint ventures which could

⁸⁰ J. Paul McGrath, *Antitrust Problems in Negotiating a Joint Venture Agreement*, 54 Antitrust L.J. 971, 973 (1985).

⁸¹ ABA Section of Antitrust Law, *Joint Ventures: Antitrust Analysis of Collaborations Among Competitors*, American Bar Association, 2006, 7; The same classification of joint ventures is contained in publication of Mary L. Azcuenaga, John J. Fedele and James K. Kaleigh, *Overview of the Antitrust Analysis of Joint Ventures*, 1714 PLI/Corp 175 (2009), 180-183.

⁸² US Collaboration Guidelines, §1.1 Purpose and Definitions. Other classification of joint ventures by William J. Kolasky, *Antitrust Treatment of Joint Ventures*, 1738 PLI/Corp 129, 131 (2009) (“*Common types of joint ventures include: a) Research and development joint ventures, where the parties pool their R&D activities in a particular area; b) Joint production ventures, where the parties pool their resources either to produce a product they will each sell in downstream markets or to produce needed inputs; c) Joint purchasing arrangements, where the parties pool their purchasing activities in order to achieve efficiencies in their purchasing operations, and d) Joint marketing and selling arrangements.*”).

cause anticompetitive harm as their operation is closer to the marketplace, i.e. there is higher threat that the joint venture participants could collude in price and output determination (among downstream joint ventures belong: production and marketing joint ventures).⁸³

The EU Guidelines on Horizontal Cooperation Agreements cover only agreements, which “*potentially generate efficiency gains*”, and that: R & D, production (including specialization agreements), purchasing, commercialization (e.g. selling/distribution/promotion), standardization, and environmental agreements⁸⁴. They mention as well other types of joint ventures (“*on exchange of information or on minority shareholdings*”) but do not address them specifically.

Each type of the joint ventures (as opposed to cartels) generally involves certain pro-competitive benefits and might involve as well some anticompetitive harm. Depending on the overall competitive effect of respective joint venture, it can be illegal or legal. Certain types of joint ventures are in general almost always considered to be more pro-competitive than anticompetitive (research and development, joint buying joint ventures)⁸⁵, whereas others are found legal only exceptionally (marketing joint ventures).⁸⁶ For example, the positive approach to R&D joint ventures is possible to see as well in legislation and the guidelines issued by both EU and US antitrust authorities⁸⁷.

⁸³ Thomas A. Piraino, *A Proposed Antitrust Approach to Collaborations Among Competitors*, 86 Iowa L. Rev. 1137 (2001), 1177-78.

⁸⁴ EU Guidelines on Horizontal Cooperation Agreements, C 3/3.

⁸⁵ See Thomas A. Piraino, Jr., *A Proposed Antitrust Approach to Collaborations Among Competitors*, 86 Iowa L. Rev. 1137 (2001), 1177-78; US Collaboration Guidelines, § 3.31(a) (“*Most such agreements are pro-competitive, and they typically are analyzed under the rule of reason.*”).

⁸⁶ See Joanna Goyder, Albertina Albors-Llorens, *Goyder’s EC Competition Law*, 5th Ed., Oxford University Press, 2009, 482-3; Mary L. Azcuenaga, John J. Fedele and James K. Kaleigh, *Overview of the Antitrust Analysis of Joint Ventures*, 1714 PLI/Corp 175 (2009), 181.

⁸⁷ See Commission Regulation (EC) No. 2659/2000 of 29th November 2000 on the application of Article 81(3) of the Treaty to categories of research and development agreements [OJ L 304, 05.12.2000]; EU Guidelines on Horizontal Cooperation Agreements, C 3/8-11, Sec. 55-74; 15 U.S.C. § 4301-06, NCRP Act, available as well at: http://www.law.cornell.edu/uscode/15/usc_sup_01_15_10_69.html; US Collaboration Guidelines, § 4.3, 25-26 (safety zones for R & D collaborations).

1.5. Working Definition of Joint Venture Applied in This Thesis

It seems that, in both US and EU law, the term joint venture denotes certain type of cooperation or collaboration between or among potential or actual competitors. Whereas in US antitrust law, the term joint venture is generally used to cover contractual arrangements and as well merger-like joint ventures comprising establishment of a new enterprise jointly controlled by the joint venturers, under EU competition law this term is used to refer to enterprises jointly controlled by two or more separate undertakings. Only the secondary sources recognize that this term is used to denote as well “strategic alliances” or “cooperative agreements”⁸⁸.

As the purpose of this thesis is to compare the elements of joint ventures at the time of their establishment, which determine the applicable competition laws, I will use this term to denote a common enterprise (separate business entity) jointly controlled by the joint venture participants.

⁸⁸ Michael Walther, Ulrich Baumgartner, *Joint Venture Under the New EC Merger Regulation*, The European Antitrust Review 2007, 22.

CHAPTER II - JOINT VENTURE FORMATION IN EU COMPETITION LAW

2.1. Joint Venture Formation: Pre-Establishment Concerns

After the competitors initiate negotiations regarding possible cooperation and reach agreement that cooperation is beneficial for them from business perspective, they might agree to cooperate on a contractual basis or establish a separate undertaking – legal entity. If they agree to form such separate legal entity, the parent undertakings will have to consider the competition issues “*at the earliest stages in the formation of a joint venture*”⁸⁹.

The joint venture’s parents will have to, among other legal issues, consider whether the creation of joint venture (i) will have to be notified with Commission under the EU Merger Regulation, (ii) whether it might be declared incompatible with the internal market pursuant to Art.2 (3) or Art.2 (4) and (5) of the EU Merger Regulation and lastly (iii) whether it is illegal under Art.101 (1) of TFEU as an agreement restricting competition.

The “full-function” joint ventures, “*performing on a lasting basis all the functions of an autonomous economic entity*”⁹⁰, are acquisitions within the meaning of Art.3 (1) (b) of the EU Merger Regulation. The Notice on Full-Function Joint Ventures stated that a formation of joint venture will be considered to be a merger if there are met two basic criteria: (i) there is present the acquisition of joint control by the parent undertakings over the joint venture⁹¹ and (ii) the established joint venture is a “full-function” joint venture⁹². To these two basic criteria may be added as well the criteria of Community dimension⁹³, important for determination of

⁸⁹ ABA Section of Antitrust Law, *Joint Ventures: Antitrust Analysis of Collaborations Among Competitors*, American Bar Association, 2006, 61.

⁹⁰ EU Merger Regulation, Art.3 (4).

⁹¹ Notice on Full-Function Joint Ventures, Part II, Section 1, par. 9 (“*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.*”).

⁹² EU Merger Regulation, Art.3 (4).

⁹³ EU Merger Regulation, Art.1 (2) (“*A concentration has a Community dimension where: (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5 000 million; and (b) the aggregate Community-*

applicability of the EU Merger Regulation⁹⁴. However, this last requirement is not discussed in this thesis as it only distinguishes mergers of substantial size to which EU Merger Regulation shall apply.

If the transaction entails as well cooperative elements, it will be assessed pursuant to Art.2 (4) and (5) of EU Merger Regulation within one procedure under the Art.101 (1) and (3) of TFEU⁹⁵. It means that the EU Merger Regulation now allows (and at the same time obliges) the Commission to appraise concentrative and co-operative aspects of joint ventures within one procedure set out by EU Merger Regulation⁹⁶. Chalmers, D. and coll. state that this regulation brings about benefit both to the parties (procedural efficiency of the EU Merger Regulation) and to the European Commission (“*simultaneous assessment of the structural and behavioral dimensions of the joint venture*”)⁹⁷.

Therefore, I will deal in this Chapter II in more detail only with the concept of joint control and “full functionality”. In addition, I will deal as well with the co-operative effects of “full function” joint ventures, as these cooperative effects determine concurrent application of EU Merger Regulation and the Article 101 of TFEU.

*wide turnover of each of at least two of the undertakings concerned is more than EUR 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”); EU Merger Regulation, art.1 (3) (“A concentration... has a Community dimension where: (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2 500 million; (b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million; (c) in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; and (d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 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.”); Joanna Goyder, Albertina Albors-Llorens, *Goyder’s EC Competition Law*, 5th Ed., Oxford University Press, 2009, 393.*

⁹⁴ These three criteria (joint control, full-functionality and Community dimension), as it was already stated in Chapter I, Section 3, are stated in publication: Joanna Goyder, Albertina Albors-Llorens, *Goyder’s EC Competition Law*, 5th Ed., Oxford University Press, 2009, 462.

⁹⁵ EU Merger Regulation, Art.2 (4) and (5); Richard Whish, *Competition Law*, Butterworth, 2003, 847.

⁹⁶ Chalmers, D., Hadjiemmanuil, Ch., Monti, G., Tompkins, A., *European Union Law*, Cambridge University Press, 2006, 1075 (The footnote no. 32 states that this route was recommended by an influential American commentator: B. Hawk, *Joint Ventures under EEC Law*, Fordham Corporate Law Institute, 1991, 575); Paul Craig, Grainne de Burca, *EU Law, Text, Cases and Materials*, Oxford University Press, 2008, 1046-7.

⁹⁷ Chalmers, D., Hadjiemmanuil, Ch., Monti, G., Tompkins, A., *European Union Law*, Cambridge University Press, 2006, 1076.

2.2. Concept of Joint Control

The Consolidated Notice on Concentrations⁹⁸ provides detailed (and structured) guidance to the undertakings regarding the concept of control, including joint control.

With regard to joint ventures is important the guidance given with regard to “acquisition of control” under the Art.3 (1) b) of the EU Merger Regulation. The Consolidated notice distinguishes acquisition of control on “*a legal or a de facto basis*”⁹⁹. Further, “*it may take the form of sole or joint control, and extend to the whole or parts of one or more undertakings*”¹⁰⁰. The control may be acquired by different means: by acquisition of shares or assets, by contractual arrangements or otherwise¹⁰¹.

Sole control may be acquired by one (sole) undertaking over another undertaking (either over whole or part of such undertaking) and that in two different ways: (i) by positive sole control¹⁰² or (ii) by negative sole control.¹⁰³

The joint control, as its name indicates, means that there will be more undertakings which exercise decisive influence over another undertaking. Goyder’s EU Competition Law explains that “*if... there are several participants in a joint venture, it may be that only some of them will, by virtue of their larger shareholding or other rights conferred on them by the joint-*

⁹⁸ Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings [OJ C 95/1 of 16.04.2008]; hereinafter referred to as “EU Consolidated Notice on Concentrations”; EU Consolidated Notice on Concentrations expressly states in Part A (Introduction), par. 2 that it replaces the Notice on Full-Function Joint Ventures.

⁹⁹ EU Consolidated Notice on Concentrations, par. 16, C 95/7.

¹⁰⁰ EU Consolidated Notice on Concentrations, par. 16, C 95/7.

¹⁰¹ EU Consolidated Notice on Concentrations, par. 17 till 21, C 95/7-8 (The Consolidated Notice on Concentrations mentions in par. 20 the other possible means of control acquisition under exceptional circumstances: “*In exceptional circumstances, a situation of economic dependence may lead to control on a de facto basis where, for example, very important long-term supply agreements or credits provided by suppliers or customers, coupled with structural links, confer decisive influence* (24)”; Reference made to following cases: Case IV/M.794, *Coca-Cola/Amalgamated Beverages GB* of 22 January 1997; Case IV/ECSC.103, *US/Sollac/Bamesa* of 28 July 1993; Case IV/M.625, *Nordic Capital/Transpool* of 23 August 1995; for the criteria see also Case IV/M.697, *Lockheed Martin Corporation/Loral Corporation* of 27 March 1996).

¹⁰² EU Consolidated Notice on Concentrations, par. 54, C 95/16 (The ability of the controlling undertaking to determine the strategic commercial decisions through exercise of its majority of voting rights).

¹⁰³ EU Consolidated Notice on Concentrations, par. 54, C 95/16 (Where there is no positive sole control but nevertheless the controlling undertaking is able to veto strategic decisions).

venture agreement, be considered to have necessary elements of joint control required by [EU] Merger Regulation.”¹⁰⁴ The Consolidated Notice on Concentrations characterizes it as “the possibility of a deadlock situation resulting from the power of two or more parent companies to reject proposed strategic decisions”¹⁰⁵. It further concludes that these shareholders are “required to cooperate... [in order to] reach a common understanding in determining the commercial policy of the joint venture”¹⁰⁶. Goyder’s EU Competition Law further concludes that “[t]he essence of joint control is that the parent companies must agree on decisions concerning the activities of the joint venture... require joint agreement on matters of strategic importance to the joint venture.”¹⁰⁷

There are distinguished three basic ways, the controlling undertakings exercise control over the controlled undertaking: (i) by equality of the voting rights or appointment to decision-making bodies (typical example is an undertaking jointly controlled by two parent companies from which each has 50% of the voting rights, i.e. they must cooperate in order to reach any decision)¹⁰⁸, (ii) veto rights (“where minority shareholders have additional rights [(related to strategic decisions on the business policy)] which allow them to veto decisions which are essential for the strategic commercial behavior of the joint venture”) ¹⁰⁹ and (iii) joint exercise of voting rights (where there is no express veto right of the minority shareholders but nevertheless the minority shareholders together form a “majority” able to exercise control; such “majority” may be established either by contract (pooling agreement) or on a *de facto* basis where the minority shareholders hold strong commonality of interests)¹¹⁰.

¹⁰⁴ Joanna Goyder, Albertina Albors-Llorens, *Goyder’s EC Competition Law*, 5th Ed., Oxford University Press, 2009, 462.

¹⁰⁵ EU Consolidated Notice on Concentrations, par. 62, C 95/17.

¹⁰⁶ EU Consolidated Notice on Concentrations, par. 62, C 95/17.

¹⁰⁷ Joanna Goyder, Albertina Albors-Llorens, *Goyder’s EC Competition Law*, 5th Ed., Oxford University Press, 2009, 461.

¹⁰⁸ EU Consolidated Notice on Concentrations, par. 64, C 95/18.

¹⁰⁹ EU Consolidated Notice on Concentrations, par. 65 till 73, C 95/18-19

¹¹⁰ EU Consolidated Notice on Concentrations, par. 74 till 80, C 95/19-21

The Consolidated Notice on Concentrations provides expressly an example of *de facto* joint control in a joint venture context: “...when each parent company provides a contribution to the joint venture which is vital for its operation (e.g. specific technologies, local know-how or supply agreement). In these circumstances, the parent companies may be able to block the strategic decisions of the joint venture and, thus, they can operate the joint venture successfully only with each other's agreement on the strategic decisions even if there is no express provision for any veto rights.”¹¹¹

2.3. Concept of “Full-Function” Joint Venture

The EU Merger Regulation contains definition of “full-function” joint venture¹¹², but does not provide additional information regarding its features or elements. The helpful information with this regard is to be found in the Consolidated Notice on Concentrations, which describes the concept of “full-function” joint ventures in detail in Part IV¹¹³. Further light to this concept could be brought by looking at previous decisions of the European Commission, the General Court and the Court of Justice of the European Union.

The Consolidated Notice on Concentrations starts with the explanation of terms used in the definition of “full-function” joint venture. It states that the term “**creation**” of a joint venture does not mean only a setting up of a new entity (“green-field” operation) but as well when “the parties contribute assets to the joint venture which they previously owned individually”¹¹⁴. The term “**autonomous economic entity**” does not mean that the joint venture “enjoys autonomy as regards the adoption of its strategic decisions”¹¹⁵ as it is jointly

¹¹¹ EU Consolidated Notice on Concentrations, par. 77, C 95/20

¹¹² EU Merger Regulation, Art.3 (4) (“perform on a lasting basis all the functions of an autonomous economic entity”).

¹¹³ EU Consolidated Notice on Concentrations, Part IV (Joint Ventures – The Concept of full-Functionality).

¹¹⁴ EU Consolidated Notice on Concentrations, par. 92, C 95/23.

¹¹⁵ EU Consolidated Notice on Concentrations, par. 93, C 95/23.

controlled by the parent companies¹¹⁶. The abovementioned autonomy refers to its operational aspects, i.e. that the joint venture must be autonomous from its “*operational viewpoint*”¹¹⁷.

The wording of the Art.3 (4) of the EU Merger Regulation suggests (especially the wording “*the **creation** of a joint venture*”) that the concept of “full functionality” will apply solely to joint ventures established as a separate legal entities, jointly controlled by the parent undertakings.

However, from the decisions of the European Commission follows that it will treat as “full-function” not only separate legal entities but as well joint ventures created on a contractual basis¹¹⁸. The case demonstrating this approach is the case KLM/Alitalia, in which the Commission concluded “*that a contractual alliance between those two airlines amounted to concentration between the parties, even though there was neither a merger in the conventional sense or the creation of a joint venture company*”¹¹⁹. The decision states following reasons for finding “full-function” contractual joint venture: “*The Alliance will be jointly controlled by Alitalia and KLM, and will bring about a lasting change... The two airlines will withdraw from the air transport market and will cease to operate independently. KLM and Alitalia will lose their autonomy as operating carriers since the main strategic and commercial decisions ... will have to be adopted jointly*”¹²⁰. Commission further remarked that even if KLM and Alitalia will maintain certain operations independently (maintenance,

¹¹⁶ EU Consolidated Notice on Concentrations, par. 93, C 95/23 (“*Otherwise, a jointly controlled undertaking could never be considered a full-function joint venture and therefore the condition laid down in Article 3(4) would never be complied with. It is therefore sufficient for the criterion of full-functionality if the joint venture is autonomous in operational respect*”, reference omitted).

¹¹⁷ EU Consolidated Notice on Concentrations, par. 93, C 95/23.

¹¹⁸ Richard Whish, *Competition Law*, 5th Ed., Butterworth, 2003, 546 and 810.

¹¹⁹ COMP/JV.19, *KLM/Alitalia*, decision of 11th August 1999; Richard Whish, *Competition Law*, 5th Ed., Butterworth, 2003, 810.

¹²⁰ COMP/JV.19, *KLM/Alitalia*, decision of 11th August 1999, par. 11.

ground handling, charter flights), these operations do not form the core business of the two undertakings¹²¹.

Nevertheless, a “typical full-function” joint venture remains to be a separate company or other legal entity created and jointly controlled by the parent undertakings.

Mark Furse distinguishes two key elements of a full-function joint venture, and that “lasting” and “autonomous” basis.¹²² The Consolidated Notice on Concentrations provides following basic elements which are taken into consideration when the European Commission applies the concept of “full functionality”: (i) operation on a lasting basis, (ii) activities beyond one specific function for the parent undertakings, (iii) sufficient resources to operate independently on relevant market, (iv) sale and/or purchase relations with the parent undertakings¹²³. The publication of Bent Iversen¹²⁴, on the other hand, refers to the following elements: (i) sufficient resources (including finance, staff and assets, tangible and intangible), (ii) management dedicated to its day-to-day operations, (iii) joint venture must carry on autonomous business activities, and (iv) operation on a lasting basis. The Consolidated Notice on Concentrations as well mentions the requirement of a “management dedicated to its day-to-day operations” but does not address this issue in more detail.

These abovementioned criteria were meant to distinguish those joint ventures which “*provide an input into their parents’ activities, which have no contractual relationships with non-associated companies, [have] no staff, assets, funds or resources of their own*”¹²⁵ and those which “*have contractual relations primarily or exclusively with third parties, buy from and sell to third parties, are not dependent in any respect on their parents for staff, assets,*

¹²¹ COMP/JV.19, *KLM/Alitalia*, decision of 11th August 1999, par. 11.

¹²² Mark Furse, *Competition Law of the EC and UK*, 5th Ed., Oxford University Press, 2004, 368.

¹²³ EU Consolidated Notice on Concentrations, par. 94 till 109.

¹²⁴ Bent Iversen, coll., *Regulating Competition in the EU*, DJOF Publishing, 2008, 323-7.

¹²⁵ Barry E. Hawk (editor), *FCLI: Mergers and Acquisitions / Joint Ventures*, Fordham Corporate Law Institute, 2004, 331.

technology, funds or resources”¹²⁶, thus resulting in a new entity behaving independently on the market. As it is concluded in the publication edited by B. E. Hawk, most joint ventures fall somewhere in-between the abovementioned “extremes” and therefore the concept of “full-functionality” serves to identify those joint ventures, which are not continuously dependent on its parents¹²⁷.

In this part of my thesis, the elements of the “full-functionality” concept are categorized as follows: I will first describe the **lasting basis** requirement which clearly refers to the time frame within which the joint venture shall operate. Second, I will focus on the requirement that the joint venture shall take over **more than a single function** of the parents. And third, I will describe the requirement of “**independence**” or “autonomous economic entity”, under which I subordinated these elements: (i) the management, (ii) sufficient resources and (iii) sale and/or purchase relations with the parents.

2.3.1. Lasting Basis

The EU Merger Regulation is intended to deal with structural changes of the market and therefore covers mergers which involve permanent changes of the markets¹²⁸. This is presumed to be satisfied with regard to joint ventures created for indefinite period of time¹²⁹. The fact, that the parent undertakings can agree on dissolution of the joint venture or that the joint venture may be wound up upon failure of the project, does not bar application of the presumption, i.e. it does not “*alter the conclusion that a joint venture is established on an enduring basis*”¹³⁰.

¹²⁶ Barry E. Hawk (editor), *FCLI: Mergers and Acquisitions / Joint Ventures*, Fordham Corporate Law Institute, 2004, 331.

¹²⁷ Barry E. Hawk (editor), *FCLI: Mergers and Acquisitions / Joint Ventures*, Fordham Corporate Law Institute, 2004, 331.

¹²⁸ See Joanna Goyder, Albertina Albors-Llorens, *Goyder's EC Competition Law*, 5th Ed., Oxford University Press, 2009, 461.

¹²⁹ Bent Iversen, coll., *Regulating Competition in the EU*, DJOF Publishing, 2008, 326.

¹³⁰ EU Consolidated Notice on Concentrations, par. 103, C 95/26; Bent Iversen, coll., *Regulating Competition in the EU*, DJOF Publishing, 2008, 327.

The Commission treats joint ventures as created on a “lasting basis” even if they are established for specific period of time¹³¹. However, the Commission stated in case *Lehman Brothers/Starwood/Le Meridien* that period of three years is insufficient¹³². The Commission considered in the same case that sufficient minimum period shall be not less than 10 to 15 years¹³³. In other decision was held that the joint venture established for the period of 6 and half years satisfies the “lasting basis” criteria as the business sector in which it operated “*was in a permanent state of change*”¹³⁴.

From the decisions of Commission could be assumed that it will not be as much interested in, whether the agreement creating joint venture is concluded for specific or indefinite period of time, but rather it investigates what is the shortest possible period of its duration under specific circumstances¹³⁵.

2.3.2. Activities Beyond One Specific Function for the Parents

As the concept’s name (“**full**-functionality”) suggests, the joint venture will have to take over “*all the functions of an autonomous economic entity*”¹³⁶. As the Consolidated Notice on Concentrations states “*full-function character essentially means that a joint venture must operate on a market, performing the functions normally carried out by undertakings*

¹³¹ EU Consolidated Notice on Concentrations, par. 103 (referring to following cases: COMP/M.2903, *DaimlerChrysler/Deutsche Telekom/JV* of 30 April 2003 where a period of 12 years was considered sufficient; COMP/M.2632, *Deutsche Bahn/ECT International/United Depots/JV* of 11 February 2002 with a contract duration of 8 years; COMP/M.3858, *Lehman Brothers/Starwood/Le Meridien* of 20 July 2005, the Commission considered a minimum period of 10-15 years sufficient, but not a period of three years).

¹³² Consolidated Notice on Concentrations, par. 103 (referring to case COMP/M.3858, *Lehman Brothers/Starwood/Le Meridien*, decision of 20th July 2005).

¹³³ Consolidated Notice on Concentrations, par. 103 (referring to case COMP/M.3858, *Lehman Brothers/Starwood/Le Meridien*, decision of 20th July 2005).

¹³⁴ Bent Iversen, coll., *Regulating Competition in the EU*, DJOF Publishing, 2008, 327; COMP/M.259, *British Airways/TAT* of 27 November 1992.

¹³⁵ Case COMP/M.970, *TKS/ITW Signode/Titan*, decision of 6th May 1998, par. 10 (The Commission concluded that such period of time was “*sufficiently long to bring about a lasting change in the structure of the undertakings concerned*”), available at http://ec.europa.eu/competition/mergers/cases/decisions/m970_en.pdf; Case COMP/M.259, *British Airways/TAT* of 27 November 1992, par. 10 http://ec.europa.eu/competition/mergers/cases/decisions/m259_en.pdf; Whish, Richard, *Competition Law*, 5th Ed., Butterworths, 2003, 809.

¹³⁶ EU Merger Regulation, Art.3 (4).

*operating on the same market*¹³⁷. In other words, the newly created joint venture cannot take over only “*one specific function within the parent companies' business activities without its own access to or presence on the market*”¹³⁸.

Therefore joint ventures, which activities will be limited to only one function, will not be “full-function”. Such “single function” entities are the research and development joint ventures, or those which are “*producing goods on behalf of the parents or principally acting as sales agents of the parents merely distributing the goods of its parents*”¹³⁹. The reason is that such an R&D joint venture will only exercise research and development, but will not further engage in production of the final product intended for resale to consumers, nor will it distribute or market these products¹⁴⁰. Another example of joint venture exercising one function for the parents is situation when the joint venture acts as a sales agency of its parents, i.e. distributing or selling the products developed and produced by the parent undertakings¹⁴¹.

2.3.3. Independence or Autonomous Economic Entity

An important element is the requirement of independence of the joint venture's operations from the parents. This requirement could be summarized as the requirement that the “*joint venture 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*”¹⁴². As it was concluded in the publication compiled by Barry E. Hawk, this requirement tries to eliminate from the scope of the EU Merger Regulation the joint ventures which are continuously dependent on the parent

¹³⁷ EU Consolidated Notice on Concentrations, par. 94.

¹³⁸ EU Consolidated Notice on Concentrations, par. 95.

¹³⁹ Mark Furse, *Competition Law of the EC and UK*, 5th Ed., Oxford University Press, 2004, 369; Paul M. Taylor, *EC & UK Competition Law & Compliance: A Practical Guide*, Sweet & Maxwell, 1999, 235.

¹⁴⁰ EU Consolidated Notice on Concentrations, par. 95.

¹⁴¹ EU Consolidated Notice on Concentrations, par. 95, 96 (referring to cases: Case IV/M.102, *TNT/Canada Post* etc. of 2 December 1991; case IV/M.929, *DIA/Veba Immobilien/Deutschbau* of 23 June 1997; case COMP/M. 3325, *Morgan Stanley/Glick/Canary Wharf* of 23 January 2004).

¹⁴² EU Consolidated Notice on Concentrations, par. 94.

undertakings. This publication further categorizes “dependence” as (i) contractual dependence (joint venture trades only or primarily with the parents), (ii) technological dependence (joint venture relies continuously on the parent(s) to provide it necessary technology), (iii) management dependence (relying on the parents for staff, funds, assets or premises) and (iv) dependence in the market (joint venture is selling its own products only together with those which were manufactured by the parent(s))¹⁴³.

2.3.3.1. *Management*

Consolidated Notice on Concentration mentions with regard to “full-function” joint ventures the requirement of “*management dedicated to its day-to-day operations*”¹⁴⁴ but later on does not outline it in more detail. According to Bent Iversen, the Commission does not analyze in detail this particular requirement in its decisions, even though the more recent decisions establish whether the proposed joint venture actually has its own “*management dedicated to its day-to-day operations*”¹⁴⁵.

Bent Iversen’s publication as well mentions that there are exceptions, i.e. the Commission analyzed in certain decisions this specific requirement in more detail. It was concluded in case ECT/PONL/EUROMAX that the management of joint venture, even if restrained by the need to obtain the consent of the supervisory board to proceed in certain issues, still retained direct influence over joint venture’s commercial relationships.¹⁴⁶

This element basically means that the day-to-day operations of the joint venture should be managed by the joint venture itself and “*should not be left entirely to a joint venture partner*”¹⁴⁷.

¹⁴³ Barry E. Hawk (editor), *FCLL: Mergers and Acquisitions / Joint Ventures*, Fordham Corporate Law Institute, 2004, 331.

¹⁴⁴ EU Consolidated Notice on Concentrations, par. 94.

¹⁴⁵ Bent Iversen, coll., *Regulating Competition in the EU*, DJOF Publishing, 2008, 324-5.

¹⁴⁶ Bent Iversen, coll., *Regulating Competition in the EU*, DJOF Publishing, 2008, 325 (referring to case COMP/M.3576, ECT/PONL/EUROMAX, decision of 22nd December 2002).

¹⁴⁷ Bent Iversen, coll., *Regulating Competition in the EU*, DJOF Publishing, 2008, 324.

2.3.3.2. *Sufficient Resources*

The requirement of sufficient resources is understandable as the joint venture shall be independent from the parent undertakings. Without sufficient finance, staff and assets (tangible and intangible), it would not be able to conduct its business activities on a lasting basis, it would be continuously dependent on the parent undertakings.¹⁴⁸ In other words, it would be “*dependent on credits and/or injections of cash from the joint venture partners*”¹⁴⁹.

i. Finance

The requirement of sufficient financial resources does not imply only the financial resources in the form of equity, i.e. initial contributions of the parent undertakings upon formation of the joint venture, but include as well subsequent investments “*to which the joint venture partners have committed themselves... as the need arises*”¹⁵⁰ (when it is not possible to obtain more advantageous financing from third parties). However, the Commission does not consider appropriate if the joint venture partners provide loans to the joint venture, but accepts when the joint venture partners help the joint venture to acquire financing from third parties.¹⁵¹

ii. Staff

In an ideal situation, the joint venture should have its own employees, recruited independently from the parent s. However, the Commission has accepted as well “full-function” joint ventures which did not have its own personnel, under the condition that this is the standard behavior in the given industry. It means that the Commission accepts “*if third parties*

¹⁴⁸ EU Consolidated Notice on Concentrations, par. 94.

¹⁴⁹ Bent Iversen, coll., *Regulating Competition in the EU*, DJOF Publishing, 2008, 323.

¹⁵⁰ Bent Iversen, coll., *Regulating Competition in the EU*, DJOF Publishing, 2008, 323 (referring to the case COMP/M.222, *Mannesmann/Hoesch*, OJ 1993 L 114/34, par. 8).

¹⁵¹ Bent Iversen, coll., *Regulating Competition in the EU*, DJOF Publishing, 2008, 323 (referring to following cases: COMP/JV.36, *TXU Europe/EDF-London Investment*, decision 3 February 2000, par. 17, involving the acquirement of loan from third parties via the support of the parent undertakings; COMP/M.722, *Teneo/Merill Lynch/Bankers Trust*, decision 15 April 1996, par. 14, finding that the established joint venture was not full-function due to insufficient resources when the parent undertakings provided the joint venture the subsequent financing (loan)).

*envisage the staffing under an operational agreement or if staff is assigned by an interim employment agency”*¹⁵². The Consolidated Notice on Concentrations as well states that “*the secondment of personnel by the parent companies may also be sufficient if this is done either only for a start-up period or if the joint venture deals with the parent companies in the same way as with third parties*”¹⁵³.

iii. Assets

The joint venture is only independent when it has sufficient assets. Usually, when the joint venture is provided by sufficient finance, the assets are subsequently obtained from these resources.¹⁵⁴

The Commission’s analysis focuses on the intangible assets, like intellectual property rights and know-how. The reason is that they can be obtained only from one of the parent undertakings.¹⁵⁵

If the Commission concludes that the creation of joint venture concerns exactly this kind of situation, it investigates whether the intangible assets are transferred or licensed to the joint venture. If the intangible assets are transferred to the joint venture and the parent undertakings cease to exploit them themselves, the Commission finds no competition problem.¹⁵⁶ However, the parent undertakings may not opt for transfer of intellectual property rights, as it is the interest of parents to retain the rights to grant subsequent exclusive licenses¹⁵⁷. If the parents decide to license the intangible assets to the joint venture, the Commission requires the

¹⁵² EU Consolidated Notice on Concentrations, par. 94.

¹⁵³ EU Consolidated Notice on Concentrations, par. 94 (This situation is conditioned by additional requirement that the “*joint venture deals with the parents at arm’s length on the basis of normal commercial conditions and that the joint venture is also free to recruit its own employees or to obtain staff via third parties*”).

¹⁵⁴ Bent Iversen, coll., *Regulating Competition in the EU*, DJOF Publishing, 2008, 323.

¹⁵⁵ Bent Iversen, coll., *Regulating Competition in the EU*, DJOF Publishing, 2008, 323.

¹⁵⁶ Bent Iversen, coll., *Regulating Competition in the EU*, DJOF Publishing, 2008, 323-4.

¹⁵⁷ Paul M. Taylor, *EC & UK Competition Law & Compliance: A Practical Guide*, Sweet & Maxwell, 1999, p. 236

transaction to be made irrevocably for predetermined period of time¹⁵⁸. To this is attached the requirement not to condition the license in such a manner that the joint venture's possibility to exploit these rights is significantly restricted.¹⁵⁹

2.3.3.3. Sale and/or Purchase Relations with the Parents

One of the element, the Commission investigates in detail, is the extent to which the joint venture maintains commercial relations with its parent undertakings, and that either in the upstream or downstream market¹⁶⁰. It means that the joint venture cannot be "full-function", if it is dependent to substantial extent on sales to its parents, i.e. being restricted to resell its products to other competitors.

The Commission does not require the joint ventures to be independent immediately upon their creation in the sense that they already should have built up customer or supplier relations. It is recognized that "*for initial start-up period, the joint venture relies almost entirely on sales or purchases from its parent companies*"¹⁶¹. The length of such "start-up" period should not be more than three years¹⁶².

i. Sales Relations with Parent Undertakings

It is natural that the parent undertakings create a joint venture in order to benefit them, e.g. either in order to further process the products they produce or to produce some important input for their production facilities. However, in order to determine whether a joint venture is

¹⁵⁸ Bent Iversen, coll., *Regulating Competition in the EU*, DJOF Publishing, 2008, 324 (referring to the following cases: COMP/M.1049, *AKZO/PLV-EPL*, decision 4 December 1997, par. 7 (10 years), COMP/JV.11, *Home Benelux B.V.*, decision 15 September 1998, par. 9).

¹⁵⁹ Bent Iversen, coll., *Regulating Competition in the EU*, DJOF Publishing, 2008, 324 (referring to the publication: Bernd Gerwing, *Kooperative Gemeinschaftsunternehmen im EWG-Kartellrecht unter besonderer Berücksichtigung der Abgrenzungsfrage*, 1994).

¹⁶⁰ EU Consolidated Notice on Concentrations, par. 97 ("*The strong presence of the parent companies in upstream or downstream markets is a factor to be taken into consideration in assessing the full-function character of a joint venture where this presence results in substantial sales or purchases between the parent companies and the joint venture*").

¹⁶¹ EU Consolidated Notice on Concentrations, par. 97.

¹⁶² EU Consolidated Notice on Concentrations, par. 97 (referring, among others to cases: IV/M.560, *EDS/Lufthansa* of 11 May 1995; IV/M.686, *Nokia/Autoliv* of 5 February 1996; IV/M.904, *RSB/Tenex/Fuel Logistics* of 2 April 1997 and IV/M.979, *Preussag/Voest-Alpine* of 1 October 1997).

“full-function”, these relations with the parent undertakings must be “*truly commercial in character*”¹⁶³. It means that the joint venture should sell its products or offer its services to those undertakings who offer the highest price, i.e. whether they are parent undertakings or third persons. This means that the Commission will find a “full-function” joint venture in cases where the joint venture deals with its parents within arm’s length transactions¹⁶⁴.

The actual proportion of sales made with the parents does not automatically indicate independence from the parents, as the particular character of each sector has to be taken into consideration¹⁶⁵. For example, if the parent has monopoly on the downstream market, i.e. the parent undertaking is the sole customer of the joint venture, there still might be found “full functionality”¹⁶⁶. The Consolidated Notice on Concentrations states that if 50% of joint venture’s turnover is achieved with third parties, this should already indicate “full functionality” of the joint venture. It as well states that if the joint venture treats its parent companies at arm’s length basis, it will be sufficient if only 20% of sales are made to third parties¹⁶⁷.

ii. Purchase Relations with Parent Undertakings

Within the purchase relations of the joint venture and the parents is important to distinguish joint ventures which are closer to form “a joint sales agency” and those which are “full-function”, i.e. to distinguish situations when the “*joint venture is active in a trade market and performs the normal functions of a trading company in such a market*”¹⁶⁸. The sales agency joint venture is likely to be found when the joint venture does not add any value to the

¹⁶³ EU Consolidated Notice on Concentrations, par. 98.

¹⁶⁴ EU Consolidated Notice on Concentrations, par. 98.

¹⁶⁵ EU Consolidated Notice on Concentrations, par. 98 (“*Due to the particularities of each individual case, it is impossible to define a specific turnover ratio which distinguishes full-function from other joint ventures.*”).

¹⁶⁶ EU Consolidated Notice on Concentrations mentions in its footnote to par. 98 case where there was found “full-function” joint venture even if the parent undertaking held legal monopoly on the downstream market (“*A special case exists where sales by the joint venture to its parent are caused by a legal monopoly downstream of the joint venture, see Case IV/M.468 — Siemens/Italtel of 17 February 1995*”).

¹⁶⁷ EU Consolidated Notice on Concentrations, par. 98.

¹⁶⁸ EU Consolidated Notice on Concentrations, par. 101-2.

product, i.e. only resells it. But the joint venture will be considered “full-function” when it is required to *“have the necessary facilities and obtains a substantial proportion of its supplies... also from other competing sources”*¹⁶⁹. The term “necessary facilities” means investment made into facilities such as *“outlets, stockholding, warehouses, depots, transport fleets and sales and service personnel”*¹⁷⁰.

2.4. Assessment of Coordinated Practices in Joint Ventures

As it was already outlined in previous parts of this Chapter, the full-function joint ventures subject to pre-merger notification under EU Merger Regulation¹⁷¹, may be appraised by the Commission as well under the Art.101 (1) and (3) of TFEU within the same merger procedure¹⁷². The legislative basis for this appraisal is to be found in Art.2 (4) and (5) of the EU Merger Regulation.

The Art.2 (4) of the EU Merger Regulation requires the Commission to appraise joint ventures’ compatibility with the internal market in cases where there is present possible *“coordination of the behavior of undertakings that remain independent”*, and that *“in accordance with the criteria of Article 101 (1) and (3) of [TFEU]”*¹⁷³. In other words, the Commission is now required to assess the co-operative effects of “full-function” joint ventures under the Article 101 of TFEU within one procedure as opposed to the previous merger regulation which automatically excluded joint ventures with co-operative effects from the EU Merger Regulation¹⁷⁴.

¹⁶⁹ EU Consolidated Notice on Concentrations, par. 102 (referring to the case: Case IV/M.788, *AgrEVO/Marubeni* of 3 September 1996).

¹⁷⁰ EU Consolidated Notice on Concentrations, par. 102.

¹⁷¹ EU Merger Regulation, Art.4 (1) and subs.

¹⁷² Chalmers, D., Hadjiemmanuil, Ch., Monti, G., Tompkins, A., *European Union Law*, Cambridge University Press, 2006, 1075; Paul Craig, Grainne de Burca, *EU Law, Text, Cases and Materials*, 4th Ed., Oxford University Press, 2008, 1046-7.

¹⁷³ Richard Whish, *Competition Law*, 5th Ed., Butterworth, 2003, 801 (The Commission after introduction of this regime started to use different prefix (letters “JV”) for cases involving application of Art.2 (4) and (5) to “full-function” joint ventures).

¹⁷⁴ Joanna Goyder, Albertina Albors-Llorens, *Goyder’s EC Competition Law*, 5th Ed., Oxford University Press, 2009, 464.

The EU Merger Regulation further states in the Art.2 (5) that, when making this appraisal, the Commission shall, among others, take into account two criteria: (i) “*whether two or more parent companies retain, to a significant extent, activities in the same market as the joint venture or in a market which is downstream or upstream from that of the joint venture or in a neighboring market closely related to this market*” and (ii) “*whether the coordination which is the direct consequence of the creation of the joint venture affords the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products or services in question*”¹⁷⁵.

One of the first questions arises with the interpretation of the term “**undertakings which remain independent**”. The answer is partially contained in the first criteria contained in Art.2 (5) of the EU Merger Regulation. These undertakings are the parent undertakings as these are “independent” of each other, whereas the joint venture itself is “dependent” on each of its parents, and thus the “*likelihood of coordination between the joint venture and that parent*”, [retaining operation in one of the markets explained below], “*is taken for granted and it is not enough to warrant the application of Art.2 (4) and (5)*”¹⁷⁶. It means that the Commission will assess the joint venture’s establishment under the Art.2 (4) and (5) of EU Merger Regulation, only if at least two parent undertakings retain activities in the markets explained in the following paragraph.

The first criteria states that the coordinated practices might arise in cases where the parent undertakings pursue business (a) in the same relevant marker as the joint venture, or (b) in the market which is (i) upstream or (ii) downstream from the relevant market, or (c) in a “closely related market”, and that with respect to all abovementioned markets to a “significant extent”¹⁷⁷.

¹⁷⁵ EU Merger Regulation, Art.2 (5).

¹⁷⁶ Joanna Goyder, Albertina Albors-Llorens, *Goyder’s EC Competition Law*, 5th Ed., Oxford University Press, 2009, 474

¹⁷⁷ For further explanation of these markets see Joanna Goyder, Albertina Albors-Llorens, *Goyder’s EC Competition Law*, 5th Ed., Oxford University Press, 2009, 473

The Commission is likely to challenge the establishment of joint venture under Art.2 (4) of EU Merger Regulation, if the parents retain activities in one of the abovementioned markets and at the same time they possess significant market shares on respective markets¹⁷⁸. In case Telia/Sonera/Lithuanian/Telecommunications, the Commission stated that market share of less than 10% (of parents and the joint venture together) made coordination less likely¹⁷⁹.

Bent Iversen argues that the assessment under Art.2 (4) of EU Merger Regulation implies (i) first the need to assess “*whether coordination is **likely**, which suggests that the assumption must have a secure basis*”, (ii) second, finding that the coordination would be **appreciable**, and (iii) third, that there is “***causal connection**, i.e. the coordination must result from the creation of the joint venture*”¹⁸⁰. In order to come to the conclusion that the coordination between the joint venture and the joint venture parents is likely (i.e. within the first step), the Commission “*takes account of the following circumstances: 1) the structure of the candidate market, 2) the market shares of the parties on the candidate market, 3) the structural changes resulting from the creation of a joint venture*”¹⁸¹.

Richard Whish mentions as well three steps employed by the Commission, and that based on the case BT/AT&T¹⁸². However, (i) the first step concerns **identification of “candidate markets”** in which the coordination is possible, (ii) within the second step the Commission considers “*whether the coordination **would happen** as a result of the joint venture*” (i.e. whether coordination of behavior is likely), and (iii) “*whether any restriction of competition would be **appreciable***”¹⁸³. Goyder’s Competition Law outlines the assessment as involving (i) first, assessment “*whether it **would be possible** for the parents to utilize the joint venture to*

¹⁷⁸ Bent Iversen, coll., *Regulating Competition in the EU*, DJOF Publishing, 2008, 389-40 (referring to cases COMP/JV.7, COMP/JV.21, COMP/JV.1, COMP/JV.5).

¹⁷⁹ COMP/JV.7, *Telia/Sonera/Lithuanian/Telecommunications*, decision of 3rd December 1998, par. 31 (“*To the extent that the market for the provision of mobile telephony services should be European in scope, the market shares of LT and its two parent companies would be rather modest and in any event substantially below 10 %.*”).

¹⁸⁰ Bent Iversen, coll., *Regulating Competition in the EU*, DJOF Publishing, 2008, 388.

¹⁸¹ Bent Iversen, coll., *Regulating Competition in the EU*, DJOF Publishing, 2008, 388-9.

¹⁸² COMP/JV.1, *BT/AT&T* of 30th March 1999; http://ec.europa.eu/competition/mergers/cases/decisions/jv15_en.pdf.

¹⁸³ Richard Whish, *Competition Law*, 5th Ed., Butterworth, 2003, 848.

eliminate competition”¹⁸⁴, i.e. whether coordination would be likely, and (ii) second “*whether the coordination, which the operation of the joint venture would permit, will itself **actually enable such an elimination** of competition to which [Art.101 of TFEU] refers*”¹⁸⁵. Neither of these two publications mentions the need for showing the causal connection as outlined by Bent Iversen. However, Bent Iversen supports his division by reference to case Telefonica/Portugal Telecom/Medi Telecom¹⁸⁶, but at the same time adds that Commission only in some cases actually “*had the opportunity to make a closer examination of the requirement [of] causal connection*”¹⁸⁷.

¹⁸⁴ Joanna Goyder, Albertina Albors-Llorens, *Goyder's EC Competition Law*, 5th Ed., Oxford University Press, 2009, 473.

¹⁸⁵ Joanna Goyder, Albertina Albors-Llorens, *Goyder's EC Competition Law*, 5th Ed., Oxford University Press, 2009, 473.

¹⁸⁶ COMP/JV.23, *Telefonica/Portugal Telecom/Medi Telecom*, decision of 17th December 1999.

¹⁸⁷ Bent Iversen, coll., *Regulating Competition in the EU*, DJOF Publishing, 2008, 391.

CHAPTER III - FORMATION OF JOINT VENTURES IN U.S. ANTITRUST LAW

3.1. Formation of Joint Venture in US Antitrust Law

The ABA Section of Antitrust Law sets out “*two significant antitrust-related issues facing any proposed collaboration*”¹⁸⁸ among competitors under the US antitrust law, and that (i) whether the proposed joint venture is subject to premerger notification under the Hart-Scott-Rodino Act and (ii)(a) whether the proposed joint venture is illegal under Section 7 of the Clayton Act or (ii)(b) Section 1 and 2 of the Sherman Act¹⁸⁹.

It seems that the issue which types of joint ventures should be analyzed under the merger rules, i.e. Section 7 of the Clayton Act, and/or under the Section 1 of the Sherman Act, was as well “hotly debated issue”. But the focus of the discussion was not directed as much to distinguish certain features of joint ventures which would deserve application of merger analysis. For example, no guidelines issued by FTC/DOJ, court decisions or literature deals in detail with this issue. However, FTC and DOJ briefly mention distinguishing features of “merger-like” joint ventures in their US Collaboration Guidelines¹⁹⁰. Some secondary sources define “fully integrated” joint ventures and state that their structure implies application of different legal regime¹⁹¹.

The reason for this is maybe different approach in analyzing joint ventures or antitrust issues in general. Under the US antitrust laws, the main issues discussed in connection with joint ventures were connected with the legality of the joint ventures, i.e. whether the establishment

¹⁸⁸ ABA Section of Antitrust Law, *Joint Ventures: Antitrust Analysis of Collaborations Among Competitors*, American Bar Association, 2006, 15.

¹⁸⁹ ABA Section of Antitrust Law, *Joint Ventures: Antitrust Analysis of Collaborations Among Competitors*, American Bar Association, 2006, 15.

¹⁹⁰ US Collaboration Guidelines, p. 5.

¹⁹¹ ABA Section of Antitrust Law, *Merger and Acquisitions: Understanding the Antitrust Issues*, American Bar Association, 2008, 337.

of the joint venture itself is legal or illegal under the per se rule or rule of reason¹⁹². Further, whether the corollary restraints involved in the joint venture agreements (between the joint venture and its parents or among the parents themselves) are to be condemned under the per se rule or whether the rule of reason analysis should apply due to their connection with the joint venture operation.¹⁹³ Among the other issues belongs question whether the conduct of a joint venture shall be considered as of a single entity (conduct of the joint venture itself) or of all the partners of the joint venture (multiple-entity conduct)¹⁹⁴.

These abovementioned issues were broadly discussed¹⁹⁵ in connection with the highly criticized decision of the Federal Circuit Court in *Dagher case*¹⁹⁶, where the court condemned pricing policy of a lawfully established fully integrated joint venture under the per se rule¹⁹⁷. Some authors opined that this decision, later overturned by the U.S. Supreme Court, represents a “*departure from modern joint venture analysis with serious potential implications for future antitrust enforcement*”¹⁹⁸. Various authors expressed the need for more

¹⁹² See for example ABA Section of Antitrust Law, *Joint Ventures: Antitrust Analysis of Collaborations Among Competitors*, American Bar Association, 2006; Thomas A. Piraino, Jr., *A Proposed Antitrust Approach to Collaborations Among Competitors*, 86 Iowa L. Rev. 1137 (2001).

¹⁹³ ABA Section of Antitrust Law, *Merger and Acquisitions: Understanding the Antitrust Issues*, American Bar Association, 2008, 374; Herbert Hovenkamp, *XIII Antitrust Law, An Analysis of Antitrust Principles and Their Application*, 2nd Ed., ASPEN Publishers, 2005, 15.

¹⁹⁴ See ABA Section of Antitrust Law, *Merger and Acquisitions: Understanding the Antitrust Issues*, American Bar Association, 2008, 374; Thomas A. Piraino, Jr., *The Antitrust Analysis of joint Ventures After the Supreme Court's Dagher Decision*, 57 Emory L.J. 741 (2008).

¹⁹⁵ Some of the authors discussing this decision: W. Stephen Smith, *Can a fully Integrated Joint Venture Be Per Se Unlawful? The Ninth Circuit's Decision in Dagher*, *Antitrust*, 19-SPG Antitrust 52 (2005); Thomas A. Piraino, Jr., *The Antitrust Analysis of joint Ventures After the Supreme Court's Dagher Decision*, 57 Emory L.J. 735 (2008); Jeffrey L. Kessler, David G. Feher, Robin L. Moore, *The Supreme Court's Decision in Dagher: Canary in a Coal Mine or Antitrust Business as Usual?*, 21-FALL *Antitrust* 40 (2006).

¹⁹⁶ [Dagher v. Saudi Ref. Co., 369 F.3d 1108, 1110 \(9th Cir. 2004\)](#), rev'd sub nom. [Texaco Inc. v. Dagher, 547 U.S. 1 \(2006\)](#)

¹⁹⁷ Joint venture in Dagher case was classified as a „fully integrated“ one by article of W. Stephen Smith, *Can a Fully Integrated Joint Venture Be Per Se Unlawful? The Ninth Circuit's Decision in Dagher*, 19-SPG Antitrust 52 (2005).

¹⁹⁸ W. Stephen Smith, *Can a Fully Integrated Joint Venture Be Per Se Unlawful? The Ninth Circuit's Decision in Dagher*, 19-SPG Antitrust 52 (2005), 52 (55 “*This reasoning diverges sharply from modern joint venture analysis. Courts now recognize that a fully integrated joint venture is, in substance, a merger of the parties' competing business lines, the very purpose of which is to end competition between the parties so as to enable them to compete more vigorously against other rivals. Once a court determines that a joint venture is not a pretext for price fixing, then (assuming no Section 7 issue) the elimination of competition inherent in the venture should be per se lawful.*”); Thomas A. Piraino, Jr., *The Antitrust Analysis of joint Ventures After the Supreme Court's Dagher Decision*, 57 Emory L.J. 735 (2008), 749 (Citing the Supreme court's decision in *Texaco Inc. v. Dagher*, 547 U.S. 1 (2006), 126 S.Ct. 1276 (2006): “*In this case, nothing more radical is afoot than the fact that an entity, which now owns all of the production, transportation, research, storage, sales and distribution facilities for engaging in the gasoline business, also prices its own products*”).

clear rules applicable to joint ventures, some of them driven by the abovementioned *Dagher decision*¹⁹⁹.

3.2. Pre-Merger Notification under Hart-Scott-Rodino Act

The pre-merger filing obligation under the Hart-Scott-Rodino Act²⁰⁰ applies as well to formation of joint ventures, established either in the form of corporation or partnership²⁰¹.

3.2.1. Concept of Control in Formation of Unincorporated Joint Ventures

Interesting is, that under the Hart-Scott-Rodino Act and its implementing federal regulations, the concept of control is applied only in connection with the unincorporated joint ventures. Thus, the notification of joint venture formation is obligatory if (i) the acquiring person acquires control of the newly formed unincorporated entity (acquired person)²⁰² and (ii) if the requirements of “size-of-transaction test” and “size-of-party test” are met²⁰³ and (iii) the transaction does not qualify for some exemption²⁰⁴.

¹⁹⁹ Thomas A. Piraino, Jr., *The Antitrust Analysis of joint Ventures After the Supreme Court's Dagher Decision*, 57 Emory L.J. 735 (2008), 735 (“Despite the prevalence of joint ventures, the antitrust enforcement agencies and federal courts have been unable to formulate consistent standards for determining their legality.”, referring to Dennis W. Carlton & Steven C. Salop, *You Keep Knocking but You Can't Come in: Evaluating Restrictions on Access to Input Joint Ventures*, 9 Harv.J.L. & Tech. 319, 320 (1996): “Current antitrust analysis of rules governing access to joint ventures is both confused and controversial.”), 738 (“The standards for judging cartels and mergers are clear, but the courts and enforcement agencies have been unable to articulate a consistent standard for analyzing joint ventures.”; referring to Howard H. Chang et al., *Some Economic Principles for Guiding Antitrust Policy Toward Joint Ventures*, 1998 Colum. Bus. L.Rev. 223, 225; Ernest Gelhorn & W. Todd Miller, *Competitor Collaboration Guidelines--A Recommendation*, 42 Antitrust Bull. 851, 853-54 (1997): “[T]he legal rules and policies applied to competitor collaborations often are confused and confusing Where competitor collaborations result in mergers, they are assessed under well-established rule of reason standards.... Where the combinations result in joint ventures, however,... the legal framework for analyzing joint ventures is neither consistent nor rational.”)).

²⁰⁰ 15 U.S.C. § 18a.

²⁰¹ ABA Section of Antitrust Law, *Mergers and Acquisitions: Understanding the Antitrust Issues*, American Bar Association, 2008, 323

²⁰² 16 F.C.R. § 801.1(b)(1)(ii): („Control. The term control (as used in the terms control(s), controlling, controlled by and under common control with) means: (1) Either (i) ...or (ii) In the case of an unincorporated entity, having the right to 50 percent or more of the profits of the entity, or having the right in the event of dissolution to 50 percent or more of the assets of the entity.”); ABA Section of Antitrust Law, *Premarmer Notification Practice Manual*, 4th Ed., American Bar Association, 2007, 99.

²⁰³ 16 F.C.R. § 801.50(b); Dale A. Oesterle, *Mergers and Acquisitions, In a Nutshell*, West Group 2001, 277; ABA Section of Antitrust Law, *Premarmer Notification Practice Manual*, 4th Ed., American Bar Association, 2007, 99.

²⁰⁴ 15 U.S.C. § 18a(c); 16 F.C.R. § 802; ABA Section of Antitrust Law, *Premarmer Notification Practice Manual*, 4th Ed., American Bar Association, 2007, 210.

The acquiring person has control if it has the right to 50% or more of profits from the joint venture or has right to 50% or more of assets upon dissolution of the joint venture. Thus the maximum number of “controlling” persons is two.

3.2.1. “Size-of-Transaction” and “Size-of-Party” Test

To the establishment of joint venture in corporate form do apply only two types of requirements: (i) the requirements of “size-of-transaction test” and “size-of-party test” and (ii) possible exemptions as defined by the Hart-Scott-Rodino Act or Section 802 of the Code of Federal Regulations²⁰⁵. The pre-acquisition filing is required in cases where the joint venture formation occurs under following three circumstances:

- i. **16 C.F.R. § 801.40(b):** *“a collaborator will acquire an aggregate amount of voting securities and assets of the acquired person in excess of \$200 million”*²⁰⁶;
- ii. **16 C.F.R. § 801.40(c)(1):** *“a collaborator has more than \$ 100 million in total assets or annual net assets, the aggregate amount of voting securities and assets of the acquired person being acquired is being between \$50 and \$200 million, the venture will have at least \$10 million in total assets, and at least one other acquiring person has \$10 million in total assets or annual net sales”*²⁰⁷;
- iii. **16 C.F.R. § 801.40(c)(2):** *“a collaborator will acquire an aggregate amount of voting securities and assets of the acquired person between \$50 and \$200 million, the venture*

²⁰⁵ 15 U.S.C. § 18a(c); 16 F.C.R. § 802.

²⁰⁶ 16 F.C.R. § 801.40(b); ABA Section of Antitrust Law, *Joint Ventures: Antitrust Analysis of Collaborations Among Competitors*, American Bar Association, 2006, 17.

²⁰⁷ 16 F.C.R. § 801.40(c)(1); ABA Section of Antitrust Law, *Joint Ventures: Antitrust Analysis of Collaborations Among Competitors*, American Bar Association, 2006, 17.

will have total assets of at least \$100 million, and at least one other acquiring person has \$10 million in total assets or annual net sales”²⁰⁸.

Thus, the parents (engaged in joint venture formation in corporate form) will have to file pre-acquisition notifications if they meet the abovementioned thresholds, notwithstanding their ability to actually exercise control over the joint venture’s operation. The crucial factor is the size of the entities - both of the joint venture itself and its parents.

The Hart-Scott-Rodino Act states basically the same thresholds concerning the “size-of-transaction test” and “size-of-party test” for joint ventures formed in unincorporated form as for those formed in a corporate form²⁰⁹.

From the abovementioned follows that not all joint ventures can meet the criteria laid down by Hart-Scott-Rodino Act and its executive regulations and therefore only some joint venture formations will have to be reported to the Agencies.

The rules dealing with reporting obligations do not provide additional information regarding other elements that the newly formed joint ventures shall meet. As the FTC and DOJ provide informal advices to the competitors at the stage preceding the possible filing under the Hart-Scott-Rodino Act²¹⁰, it might be that only some types of joint venture formations must be reported. These informal advices are not available to public. Therefore is difficult to derive any principles distinguishing reportable “merger-like” joint ventures from other competitor collaborations. It might as well be that there are no special rules and thus all joint ventures

²⁰⁸ 16 F.C.R. § 801.40(c)(2); ABA Section of Antitrust Law, *Joint Ventures: Antitrust Analysis of Collaborations Among Competitors*, American Bar Association, 2006, 17.

²⁰⁹ See 16 F.C.R. § 801.50(b) compared with 16 F.C.R. § 801.40(b), (c)(1) and (c)(2).

²¹⁰ Introductory Guide 1 – What is the Pre-Merger Notification Program? An Overview, revised March 2009, 16, available at <http://www.ftc.gov/bc/hsr/introguides/guide1.pdf>.

passing the “size-of-transaction” and “size-of-party” test will have to be notified, whatever their form or structure.

3.3. Concept of “Fully Integrated” Joint Venture in US Antitrust Law

First, we should keep in mind that in US antitrust law, the term joint venture denominates any collaboration of the actual or potential competitors, whatever its legal form²¹¹. Therefore the term “fully integrated” joint venture will refer to competitor collaborations which involve the full integration of the parents’ assets in the relevant market²¹².

The term “fully integrated” joint venture is not used widely in the literature on US antitrust law dealing with joint ventures. Neither the US Collaboration Guidelines denominate the joint ventures treated as mergers as the “fully integrated” ones²¹³, nor the court decisions (stated in the publications of ABA Section of Antitrust Law within the sections dealing with “fully-integrated” joint ventures) denominate the respective joint ventures as being “fully integrated”²¹⁴. This term is to be found predominantly in the later publications, mainly those issued by the Antitrust Law Division of the American Bar Association²¹⁵.

ABA Section of Antitrust Law states in its publication on mergers and acquisitions that “*the structure of the venture, and hence the antitrust analysis of the joint venture’s formation,*

²¹¹ E.g. William J. Kolasky, *Antitrust Treatment of Joint Ventures*, 1738 PLI/Corp 129, 131 (2009); ABA Section of Antitrust Law, *Joint Ventures: Antitrust Analysis of Collaborations Among Competitors*, American Bar Association, 2006, 5.

²¹² See Thomas A. Piraino, Jr., *The Antitrust Analysis of Joint Ventures After the Supreme Court’s Dagher Decision*, 57 Emory L.J. 735, 757 (2008); ABA Section of Antitrust Law, *Joint Ventures: Antitrust Analysis of Collaborations Among Competitors*, American Bar Association, 2006, 7.

²¹³ US Collaboration Guidelines, 4-5.

²¹⁴ *United States v. Penn-Olin Chemical Company*, 378 U.S. 158, 84 S.Ct. 1710, 12 L.Ed.2d 775 (1964); *United States v. Ivaco, Inc.*, 704 F.Supp. 1409 (W.D. Mich. 1989); *Yamaha Motor Co., LTD., v. FTC, Brunswick Corp. and Mariner Corp. v. FTC*, 657 F.2d 971 (1981); *United States v. Franklin Electric Corp., INC.*, 130 F.Supp.2d 1025 (2000); *United States v. MCI Communications Corp.*, No. 94-1317, 1994 U.S. Dist. LEXIS 15346 (D.D.C. 1994); *United States v. Sprint Corp.*, No. 95-1304, 1996 U.S.Dist. LEXIS 13757 (D.D.C. 1996); *In re Lockheed Martin Corporation, The Boeing Company, and United Launch Alliance, LLC*, No. C-4188 (FTC May 1, 2007), available at: <http://www.ftc.gov/os/caselist/0510165/0510165do.pdf>.

²¹⁵ ABA Section of Antitrust Law, *Joint Ventures: Antitrust Analysis of Collaborations Among Competitors*, American Bar Association, 2006; ABA Section of Antitrust Law, *Merger and Acquisitions: Understanding the Antitrust Issues*, American Bar Association, 2008; W. Stephen Smith, *Can a Fully Integrated Joint Venture Be Per Se Unlawful? The Ninth Circuit Decision in Dagher, Interpreting Oracle: The Future of Unilateral Effect Analysis*, 19-SPG Antitrust 52 (2005); Mary L. Azcuenaga, John J. Fedele and James K. Kaleigh, *Overview of the Antitrust Analysis of Joint Ventures*, 1714 PLI/Corp 175, 182 (2009).

depends on the purpose of the joint activity”²¹⁶. It further argues that even if the ultimate purpose of each antitrust analysis is to find out, whether the joint venture’s creation can substantially lessen competition, there were evolved specialized analytical frameworks according to the “*venture’s structure and the competitive effects such a structure is likely (or unlikely) to produce*”²¹⁷.

ABA Section of Antitrust Law thus distinguishes five “most common” joint ventures, which were already mentioned in Chapter I of this thesis. One of such special type of joint venture is the “fully integrated” joint venture which is “*reviewed by antitrust enforcement agencies and courts under the same standards applicable to mergers or acquisitions under Section 7 of the Clayton Act*”²¹⁸.

It identifies a “fully integrated” joint venture as a joint venture which “*involves the integration of the entirety of the participants’ operations in a particular line of business, including manufacturing, distribution, marketing, and sales. It essentially constitutes a merger of the firms’ operations in the relevant market.*”²¹⁹ In other words, the joint venturers “*combine manufacturing, distribution, marketing, and sales operations to offer particular products or services*”²²⁰.

The ABA Section of Antitrust Law states that “*while a fully integrated joint venture may promise certain benefits, the combination may also result in an increase in market power*

²¹⁶ ABA Section of Antitrust Law, *Mergers and Acquisitions: Understanding the Antitrust Issues*, American Bar Association, 2008, 337.

²¹⁷ ABA Section of Antitrust Law, *Mergers and Acquisitions: Understanding the Antitrust Issues*, American Bar Association, 2008, 337.

²¹⁸ ABA Section of Antitrust Law, *Mergers and Acquisitions: Understanding the Antitrust Issues*, American Bar Association, 2008, 337.

²¹⁹ ABA Section of Antitrust Law, *Joint Ventures: Antitrust Analysis of Collaborations Among Competitors*, American Bar Association, 2006, 7 (referring to case *United States v. MCI Communications Corp.*, 1994-2 Trade Cas. (CCH) 70,730 (D.D.C. 1994)).

²²⁰ Mary L. Azcuenaga, John J. Fedele and James K. Kaleigh, *Overview of the Antitrust Analysis of Joint Ventures*, 1714 PLI/Corp 175, 182 (2009).

within the relevant market and could lead to anticompetitive effects”²²¹. Therefore the FTC and DOJ will have to weigh the efficiency-enhancing benefits of the joint venture against possible anticompetitive effects and thus “*a fully integrated joint venture will be deemed unlawful under Section 7 of the Clayton Act, if the effect of the collaboration may be substantially to lessen competition.*”²²²

Thus these “fully integrated” joint ventures should be then treated as mergers, being subject to Section 7 of the Clayton Act and possibly subject to pre-merger notification obligation under Hart-Scott-Rodino Act²²³.

3.4. “Merger-Like” Joint Ventures as Defined by US Collaboration Guidelines

The source which states the distinguishing features of joint ventures treated as mergers are the US Collaboration Guidelines. They claim that they treat competitors’ collaboration as a merger when following criteria are met:

- (a) *“the participants are competitors in that relevant market;*
- (b) *the formation of the collaboration involves an efficiency-enhancing integration of economic activity in the relevant market;*
- (c) *the integration eliminates all competition among the participants in the relevant market; and*

²²¹ L. Azcuenaga, John J. Fedele and James K. Kaleigh, *Overview of the Antitrust Analysis of Joint Ventures*, 1714 PLI/Corp 175, 182 (2009).

²²² Mary L. Azcuenaga, John J. Fedele and James K. Kaleigh, *Overview of the Antitrust Analysis of Joint Ventures*, 1714 PLI/Corp 175, 182 (2009).

²²³ W. Stephen Smith, *Can a Fully Integrated Joint Venture Be Per Se Unlawful? The Ninth Circuit’s Decision in Dagher*, 19-SPG Antitrust 52, 56 (2005) (“*In modern joint venture analysis, the lawfulness of fully integrated ventures among competitors—i.e., ventures such as Equilon and Motiva that combine all of the competitors’ operations in a line of business—are typically judged under the legal standards applied to mergers.*”).

- (d) *the collaboration does not terminate within a sufficiently limited period by its own specific and express terms*”²²⁴.

The interesting fact is that among the criteria established by US Collaboration Guidelines is not included the requirement that the joint venture should be fully integrated, i.e. there is no mentioning that the merger-like joint venture should integrate “*the entirety of the participants’ operations in a particular line of business, including manufacturing, distribution, marketing, and sales*”²²⁵. In general, under US antitrust law, the joint ventures are distinguished from mergers exactly by reference to the extent of asset integration, i.e. while joint ventures under US antitrust law represent partially integrated collaborations, the mergers are deemed to be completely integrated collaborations effectively terminating competition among the joint venture’s parents.²²⁶

The open issue thus remains whether the US antitrust agencies and courts will apply merger analysis as well to joint ventures which are not fully but only partially integrated. For example, the case involving formation of a plant by General Motors and Toyota Motors in California²²⁷ represents an example of production joint venture to which the merger analysis was applied by the Agency, specifically by the Federal Trade Commission.

Because of the reasons stated in the preceding paragraph, I will denote in this thesis the joint ventures fulfilling the criteria as set by the US Collaboration Guidelines as the “merger-like” joint ventures. The reason for this is to distinguish them from “fully integrated” joint ventures

²²⁴ US Collaboration Guidelines, 5.

²²⁵ ABA Section of Antitrust Law, *Joint Ventures: Antitrust Analysis of Collaborations Among Competitors*, American Bar Association, 2006, 7 (referring to case *United States v. MCI Communications Corp.*, 1994-2 Trade Cas. (CCH) 70,730 (D.D.C. 1994)).

²²⁶ See Thomas A. Piraino, *A Proposed Antitrust Approach to Collaborations Among Competitors*, 86 Iowa L. Rev. 1137, 1168 (2001).

²²⁷ Decision of Federal Trade Commission in the matter of General Motors Corporation, et al. of 11th April 1984, 103 F.T.C. 374, 1984 WL 565376 (F.T.C.).

as outlined in the previous section, mostly by reference to the publications of the ABA Section of Antitrust Law.

3.4.1. Permanency of Collaboration

The US Collaboration Guidelines state that the joint venture will be treated as a merger when, among other criteria, “*the collaboration does not terminate within a sufficiently limited period by its own specific and express terms*”²²⁸. It further states, in its footnotes, that the Agencies will, “[i]n general ... use ten years as a term indicating sufficient permanence to justify treatment of a competitor collaboration as analogous to a merger”²²⁹. The Agencies at the same time recognize that the 10 years period as an indication of permanence may be different in some cases, where the conditions of a sector or industry in question will require application of different approach. The US Collaboration Guidelines expressly mention that such permanency may depend on such “*industry-specific circumstances, such as technology life cycles*”²³⁰.

3.4.2. Parents are Competitors in Relevant Market

The US Collaboration Guidelines further state as one of the requirements for finding a “merger-like” joint venture that “*the participants are competitors in that relevant market*”²³¹. This means that the parents or joint venturers must be actual or potential competitors on the relevant market in which the joint venture will pursue its business.

As it is clear from the case *United States v. FCC*, 652 F.2d 72, 96-101 (D.C. Cir. 1980), which concluded that “*joint venture to construct a communication satellite network does not violate antitrust laws if parents were not actual or potential competitors in the relevant*

²²⁸ US Collaboration Guidelines, 5.

²²⁹ US Collaboration Guidelines, 5 (footnote).

²³⁰ US Collaboration Guidelines, 5 (footnote).

²³¹ US Collaboration Guidelines, 5.

markets”²³², the collaboration among non-competitors cannot create antitrust problems. Thus, in order to subject certain cooperation under US antitrust law, the collaborators must be at least potential if not actual competitors in certain relevant market.

3.4.3. Elimination of All Competition Among the Parents

The third requirement mentioned by the US Collaboration Guidelines is the requirement that the parents should transfer to the formed joint venture all their activities on the relevant market so that the joint venturers do not compete with each other and with the joint venture anymore. The US Collaboration Guidelines specifically state that the integration should “*eliminate all competition among the participants in the relevant market*”²³³.

3.4.4. Efficiency-Enhancing Integration of Economic Activity

The lastly mentioned element lies in the requirement that the collaboration among competitors comprises “*an efficiency-enhancing integration of economic activity in the relevant market*”²³⁴. In other words, the collaboration must bring about certain efficiencies which would not be achieved without the collaboration.

On the other hand, establishment of a “merger-like” joint venture may pose as well anticompetitive concerns connected with the increased market power of the joint ventures which must be weight against the efficiency-enhancing benefits²³⁵.

²³² ABA Section of Antitrust Law, *Joint Ventures: Antitrust Analysis of Collaborations Among Competitors*, American Bar Association, 2006, 338.

²³³ US Collaboration Guidelines, 5.

²³⁴ US Collaboration Guidelines, 5.

²³⁵ See US Collaboration Guidelines, 12, 23, etc.

CHAPTER IV - COMPARISON OF JOINT VENTURES' ELEMENTS WHICH ARE DECISIVE FOR APPLICABLE LEGAL REGIME

4.1. Joint Venture Formation: Approach of EU Competition Law and US Antitrust Law Compared

The aim of this thesis is not to provide the detailed assessment of joint ventures by various competition authorities under merger or cartel regulation, rather its aim is to describe the features or elements of joint ventures which are decisive for the applicable legal regime. It means that in this Chapter IV, I will try to describe and compare the elements of joint ventures which are taken into consideration by the competition authorities when deciding whether the joint venture will be assessed under the merger regulation, thus subject to possible pre-merger notification, or under the rules applicable to cartels.

The previous Chapter II contains description of the decisive concepts under the EU competition law, namely the concept of “joint control”, “full-functionality” and as well coordination of behavior of the parent undertakings. The Chapter III, dealing with US antitrust law, outlines conditions for pre-acquisition notification of joint venture’s formation and the concepts of “fully-integrated” and “merger-like” joint ventures. This Chapter compares the conditions for pre-merger notification of joint venture’s formation and then tries to compare the respective elements of “full-function”, “fully integrated” and “merger-like” joint ventures which are taken into consideration by competition authorities in EU competition and US antitrust law.

4.2. Obligation to File Pre-Merger Notification upon Joint Venture Formation

Under the EU competition law, the establishment of a joint venture will have to be notified with the European Commission prior to its effectiveness if following criteria are met: (i) the

acquisition pursuant to Art.3 (4) of the EU Merger Regulation has Community dimension, i.e. it meets the turnover thresholds stated either in Art.1 (2) or (3) of EU Merger Regulation, further (ii) the parent undertakings acquire either legal or *de facto* joint control over the newly formed joint venture pursuant to Art.3 (2) and (3) of the EU Merger Regulation and (iii) the joint venture in question meets the criteria of a “full-function” joint venture pursuant to Art.3 (4) of the EU Merger Regulation. The “full-function” joint venture shall (a) operate on a lasting basis, (b) pursue activities beyond one specific function for the parent undertakings (the joint venture shall take over “*all the functions of an autonomous economic entity*”²³⁶), and (iii) be independent from its parent undertakings with regard to its resources, management of day-to-day operations and extent of the sales and purchase arrangements with the parent undertakings²³⁷.

On the other hand, under US antitrust law, the joint ventures reportable under the Hart-Scott-Rodino Act will have to meet the requirement of (i) “size-of-transaction test” and (ii) “size-of-party test” and (iii) escape application of any exemption of this Act²³⁸. In addition, the joint ventures in the form of unincorporated entity must meet the criteria of control, i.e. at least one parent undertaking must exercise control over the joint venture pursuant to Section 801.1(b)(1)(ii)²³⁹. The control is defined in such a way that at any given time, only one or two parents will be able to control the joint venture²⁴⁰.

²³⁶ EU Merger Regulation, Art.3 (4).

²³⁷ Consolidated Notice on Concentrations, par. 91-105.

²³⁸ 15 U.S.C. § 18a; 16 F.C.R. § 801.40, 50(b); Dale A. Oesterle, *Mergers and Acquisitions, In a Nutshell*, West Group 2001, 277; ABA Section of Antitrust Law, *Premerger Notification Practice Manual*, American Bar Association, 4th Ed., 2007, 99.

²³⁹ 16 F.C.R. § 801.1(b)(1)(ii).

²⁴⁰ See 16 F.C.R. § 801.1(b)(1)(ii).

The requirement of control does not apply to the formation of joint venture in the form of corporate entity²⁴¹. Thus, if a parent undertaking fulfills the “size-of-party” test, i.e. achieves sufficiently high total assets or annual net sales, the parent undertaking will have to file the pre-merger notification with the Agencies²⁴² (provided as well the “size-of-transaction” test is met and no exemption applies).

The Code of Federal Regulation does not contain any special requirements applicable to the formation of joint ventures within Part 801²⁴³. Neither the Hart-Scott-Rodino Act itself contains any specific requirements with this regard. When compared with the EU competition law, any establishment of joint venture, whether “full-function” or not, would have to be reported under the Hart-Scott-Rodino Act once the size of the transaction and at least size of one party involved in the transaction (one of the acquiring persons) meets the given thresholds²⁴⁴. However, we cannot exclude the possibility that the FTC and DOJ apply certain principles to distinguish reportable and “un-reportable” joint ventures when providing informal advices²⁴⁵.

With regard to procedural aspects, the EU Merger Regulation provides for the possibility of appraisal of the reportable joint venture’s coordinated practices (cooperative effects) under Art.101 of TFEU²⁴⁶. Thus Commission has to assess the joint venture’s compatibility with the internal market applying both merger analysis and analysis under Art.101 of TFEU, i.e. the Commission has to appraise whether the arrangements involved in the joint venture’s

²⁴¹ 16 F.C.R. § 801.40; ABA Section of Antitrust Law, *Joint Ventures: Antitrust Analysis of Collaborations Among Competitors*, American Bar Association, 2006, 17.

²⁴² 16 F.C.R. § 801.40; See example provided at: <http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=2641055f76320d0e096fcc0b755e35b8&rgn=div8&view=text&node=16:1.0.1.8.83.0.46.17&idno=16>

²⁴³ http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&tpl=/ecfrbrowse/Title16/16cfr801_main_02.tpl.

²⁴⁴ 16 F.C.R. § 801.40, 50.

²⁴⁵ Introductory Guide 1 – What is the Pre-Merger Notification Program? An Overview, revised March 2009, 16, <http://www.ftc.gov/bc/hsr/introguides/guide1.pdf>.

²⁴⁶ EU Merger Regulation, Art.2 (4) and (5).

formation (creation of joint venture itself and additional agreements among the joint venture and parents or among the parents themselves) are illegal under Art.101 (1) of TFEU as agreement restricting competition or whether it can be exempted by application of the four criteria set in the Art.101 (3) TFEU. Such additional appraisal shall be done when the Commission deals with the establishment of reportable “full-function” joint venture, which gives rise to concerns about possible coordination of behavior of the parent undertakings. This appraisal shall be done within one procedure, i.e. the European Commission shall observe the time limits set in Art.10 of EU Merger Regulation²⁴⁷.

The joint ventures reportable under the Hart-Scott-Rodino Act might be as well challenged under Section 1 of the Sherman Act. The preconditions are that (i) the respective Agency has substantive antitrust concerns which justify issuance of the second request²⁴⁸, (ii) the parties to the transaction substantially comply with the second request (i.e. the parties to the transaction must submit to the respective Agency required documents and respond to interrogatories as stated in the second request)²⁴⁹ and (iii) the respective Agency nevertheless decides to challenge the proposed transaction under Section 7A(f) of the Clayton Act (Hart-Scott-Rodino Act), i.e. by initiating separate judicial procedure to be resolved by federal courts²⁵⁰. The Agencies may challenge the transaction if they believe it results in breach of Section 7 of the Clayton Act, Section 5 of the Federal Trade Commission Act or under Section 1 and 2 of the Sherman Act²⁵¹.

²⁴⁷ EU Merger Regulation, Art.10.

²⁴⁸ 15 U.S.C. § 18a(e); ABA Section of Antitrust Law, *Mergers and Acquisitions: Understanding the Antitrust Issues*, American Bar Association, 2008, 32 (in case “substantive antitrust concerns remain at the end of the initial waiting period”).

²⁴⁹ 15 U.S.C. § 18a(e); ABA Section of Antitrust Law, *Mergers and Acquisitions: Understanding the Antitrust Issues*, American Bar Association, 2008, 34.

²⁵⁰ 15 U.S.C. § 18a(f); ABA Section of Antitrust Law, *Mergers and Acquisitions: Understanding the Antitrust Issues*, American Bar Association, 2008, 34.

²⁵¹ 15 U.S.C. § 18a(f).

This kind of procedure seems to be less beneficial to the parties to the transaction. It is true that the Agencies have “*at most 30 days to bring an action to challenge the proposed transaction*”²⁵² after the parties fully complied with the second request, but the concise proceedings before Agencies seems to benefit only those parties which are not brought before court. Those parties which transaction is challenged, will have to defend their transaction in judicial proceedings, which usually tend to last longer than administrative proceedings statutorily limited in time.

4.3. Application of Merger Analysis to Joint Ventures

The following Section attempts to compare the abovementioned elements of “merger-like” joint ventures as defined by the US Collaboration Guidelines and “fully-integrated” joint ventures as defined by other publications with the elements of “full-function” joint ventures under the EU competition law. The elements covered hereunder follow in the order as already stated in Chapter II dealing with EU competition law²⁵³, further it continues by focusing on the requirements as set in the US Collaboration Guidelines²⁵⁴.

4.3.1. Operation on a Lasting Basis or Permanency

Both, EU competition law and US antitrust law require the joint venture to operate on a lasting basis in order to be brought under the merger analysis. The US Collaboration Guidelines refer to the period of 10 years “*as a term indicating sufficient permanence*”²⁵⁵ recognizing that in certain industries this period might be different. As well the Commission

²⁵² ABA Section of Antitrust Law, *Mergers and Acquisitions: Understanding the Antitrust Issues*, American Bar Association, 2008, 34.

²⁵³ Namely (i) the requirement of lasting basis, respectively permanency of collaboration, (ii) requirement that the joint venture pursues activities beyond one specific function of the parents, (iii) requirement of independency of the joint venture’s operation from the parents.

²⁵⁴ Namely (iv) the requirement that the parents are competitors, (v) that the formation of joint venture eliminates all competition among the parents in the relevant market and (vi) that the formation of joint venture comprises “*efficiency-enhancing integration of economic activities*”.

²⁵⁵ US Collaboration Guidelines, 5 (footnote).

expressed its view that sufficient minimum period for indicating lasting basis shall be not less than 10 to 15 years²⁵⁶. However, the Commission's decisional practice shows that even joint ventures operating for shorter period of time (5 or 6 and half years) were considered to operate on a lasting basis²⁵⁷.

The wording of this requirement contained in US Collaboration Guidelines (*"the collaboration does not terminate within a sufficiently limited period by its own specific and express terms"*) seems to indicate that similarly to EU competition law²⁵⁸, the joint ventures established for sufficient period of time which provide for the possibility of being wound up by the parents, will nevertheless be treated as mergers.

The element of permanency is thus present in both EU and US competition laws. It seems that in both legal systems the general period indicating permanency will be around 10 or more years, whereas the competition authorities may adjust this period in specific cases depending on specific features of the industry in question. Mainly, they might find permanency in cases where the joint venture will operate for shorter period of time in a dynamic industry.

4.3.2. Activities Beyond One Specific Function for the Parents

The EU competition law is clear with regard to this requirement: the EU Merger Regulation may be applied only to those joint ventures which are "full-function", i.e. which do not take over only *"one specific function within the parent companies' business activities"*²⁵⁹ but perform *"all the functions of an autonomous economic entity"*²⁶⁰. Thus from the scope of EU

²⁵⁶ EU Consolidated Notice on Concentrations, par. 103 (footnote); COMP/M.3858, *Lehman Brothers/Starwood/Le Meridien* of 20 July 2005.

²⁵⁷ Case COMP/M.970, *TKS/ITW Signode/Titan*, of 6th May 1998, par. 10; Case COMP/M.259, *British Airways/TAT*, of 27 November 1992, par. 10.

²⁵⁸ EU Consolidated Notice on Concentrations, par. 103, p C 95/26; Bent Iversen, coll., *Regulating Competition in the EU*, DJOF Publishing, 2008, 327

²⁵⁹ EU Consolidated Notice on Concentrations, par. 95.

²⁶⁰ EU Merger Regulation, Art.3 (4).

Merger Regulation are eliminated all research & development joint ventures, production joint ventures or sales agencies²⁶¹.

The US antitrust law seems to be less clear with regard to this issue. Whereas the ABA Section of Antitrust Law in its publications subjects “fully integrated” joint ventures to merger analysis (i.e. to Section 7 of the Clayton Act), the US Collaboration Guidelines do not mention at all this requirement for subjecting competitor collaboration to merger analysis.

Essentially, the basic requirement to integrate “*the entirety of the participants’ operations in a particular line of business, including manufacturing, distribution, marketing, and sales*”²⁶² are present both in EU competition law and as well US antitrust law when referring to “full-function” or “fully integrated” joint venture. The question is whether the Agencies, which are the antitrust enforcement agencies, place any importance to the fact that the collaboration in question integrates all assets within particular line of business or represents only partial integration of the assets. It seems that the Agencies will subject as well a partially integrated joint venture, like production joint venture, to merger analysis²⁶³.

The other open question is the approach of the courts – do they follow the US Collaboration Guidelines or their decisional practice is more consistent with the theory as outlined in the publications of ABA Section of Antitrust Law? Respectively, the question could be as well whether the US Collaboration Guidelines only restate the existing common law or represent only the view of the Agencies. Similarly to the practice of the Agencies, it does seem that the courts subject not only “fully integrated” joint ventures to the merger analysis but as well

²⁶¹ Mark Furse, *Competition Law of the EC and UK*, Oxford University Press, 5th Ed., Oxford University Press, 2004, 369; Paul M. Taylor, *EC & UK Competition Law & Compliance: A Practical Guide*, Sweet & Maxwell, 1999, 235.

²⁶² ABA Section of Antitrust Law, *Joint Ventures: Antitrust Analysis of Collaborations Among Competitors*, American Bar Association, 2006, 7.

²⁶³ Decision of Federal Trade Commission in the matter of General Motors Corporation, et al. of 11th April 1984, 103 F.T.C. 374, 1984 WL 565376 (F.T.C.).

those joint ventures, which partially integrated²⁶⁴ in the sense that they do not pool assets in “the entirety of the participants’ operations... including manufacturing, distribution, marketing, and sales”²⁶⁵ .

4.3.3. Independence

The elements of “full function” joint venture connected with its “autonomous” or “independent” capacity, like sufficient resources, inherent management and extent of purchase and sales relationships with parent undertakings, seem to be entirely lacking in US antitrust law. The publications describing “fully integrated” joint ventures do not mention these abovementioned requirements²⁶⁶. Neither the criteria set by the US Collaboration Guidelines include requirement that the merger-like joint venture should be in any respect “autonomous” or “independent” from its parents with respect to its commercial activities on the market.

The judgments of US federal courts show that application of merger analysis is not barred by the fact that the joint venture in question has commercial relations only with one of its parents²⁶⁷. In case *Yamaha Motor Co., LTD., v. FTC* the joint venture “*Sanshin was to produce outboard motors and sell its entire production to Yamaha. Some of the motors were to be sold by Yamaha under its own brand name, while the rest, physically identical, were to*

²⁶⁴ *United States v. Penn-Olin Chemical Company*, 378 U.S. 158, 84 S.Ct. 1710, 12 L.Ed.2d 775 (1964); *United States v. Ivaco, Inc.*, 704 F.Supp. 1409 (W.D. Mich. 1989); *Yamaha Motor Co., LTD., v. FTC*; *Brunswick Corp. and Mariner Corp. v. FTC*, 657 F.2d 971 (1981); *United States v. Franklin Electric Corp., INC.*, 130 F.Supp.2d 1025 (2000); *United States v. MCI Communications Corp.*, No. 94-1317, 1994 U.S. Dist. LEXIS 15346 (D.D.C. 1994); *United States v. Sprint Corp.*, No. 95-1304, 1996 U.S. Dist. LEXIS 13757 (D.D.C. 1996); *In re Lockheed Martin Corporation, The Boeing Company, and United Launch Alliance, LLC*, No. C-4188 (FTC May 1, 2007), available at: <http://www.ftc.gov/os/caselist/0510165/0510165do.pdf>

²⁶⁵ ABA Section of Antitrust Law, *Joint Ventures: Antitrust Analysis of Collaborations Among Competitors*, American Bar Association, 2006, 7.

²⁶⁶ ABA Section of Antitrust Law, *Joint Ventures: Antitrust Analysis of Collaborations Among Competitors*, American Bar Association, 2006; ABA Section of Antitrust Law, *Mergers and Acquisitions: Understanding the Antitrust Issues*, American Bar Association, 2008; W. Stephen Smith, *Can a Fully Integrated Joint Venture Be Per Se Unlawful? The Ninth Circuit Decision in Dagher, Interpreting Oracle: The Future of Unilateral Effect Analysis*, 19-SPG Antitrust 52 (2005); Mary L. Azcuenaga, John J. Fedele and James K. Kaleigh, *Overview of the Antitrust Analysis of Joint Ventures*, 1714 PLI/Corp 175 (2009).

²⁶⁷ *Yamaha Motor Co., LTD., v. FTC*; *Brunswick Corp. and Mariner Corp. v. FTC*, 657 F.2d 971 (1981); *Decision of Federal Trade Commission in the matter of General Motors Corporation, et al.* of 11th April 1984, 103 F.T.C. 374, 1984 WL 565376 (F.T.C.).

be resold by Yamaha to Mariner, to be marketed by it under the Mariner brand name”²⁶⁸. It means that 100% of its sales relations would be done with its parent undertaking. This type of joint venture would not be considered as “full-function” under the present EU competition law regime. Another, similar example, involves the General Motor and Toyota Motor case where the joint venture plant was established solely to manufacture motor vehicles in order to be sold to one of the parents or eventually to the other parent company²⁶⁹.

With regard to management of the joint venture’s day-to-day operations, whereas the EU competition law does not require the management members to be completely independent from the parent undertakings, it requires that its day-to-day operations are run by a management different from that of a parent.²⁷⁰ The first joint venture analyzed under the merger analysis in US antitrust history, the joint venture analyzed in Pen-Olin case²⁷¹, states that “*Pennsalt operates the plant and Olin handles the sales*”²⁷². The judgment itself does not outline in detail the management of the joint venture, but from the abovementioned wording could be deduced that the decision does not stress the importance of having a “*management dedicated to its day-to-day operations*”²⁷³ as it is required by the EU law.

4.3.4. Parents are Competitors in Relevant Market

The US Collaboration Guidelines require the joint venturers to be competitors in the relevant market in order to bring the establishment of joint venture under merger analysis²⁷⁴. This requirement seems to be lacking in the EU competition law for following two reasons. First, the definition of “full-function” joint venture contained in Art.3 (4) of EU Merger Regulation

²⁶⁸ *Yamaha Motor Co., LTD., v. FTC; Brunswick Corp. and Mariner Corp. v. FTC*, 657 F.2d 971 (1981).

²⁶⁹ *Decision of Federal Trade Commission in the matter of General Motors Corporation, et al.* of 11th April 1984, 103 F.T.C. 374, 1984 WL 565376 (F.T.C.) (“*The Joint Venture will manufacture new automobiles that will be designed by Toyota in consultation with GM and will be sold to GM, and may also manufacture new automobiles that would be sold to Toyota.*”).

²⁷⁰ Bent Iversen, coll., *Regulating Competition in the EU*, DJOF Publishing, 2008, 324.

²⁷¹ *United States v. Penn-Olin Chemical Company*, 378 U.S. 158 (1964).

²⁷² *United States v. Penn-Olin Chemical Company*, 378 U.S. 158, 163 (1964).

²⁷³ Consolidated Notice on Concentrations, par. 94.

²⁷⁴ US Collaboration Guidelines, 5.

does not mention or imply. Second, because the purpose of the EU Merger Regulation is to subject to merger analysis all mergers and acquisitions with Community dimension, including conglomerate mergers and acquisitions²⁷⁵.

Thus, if a joint venture company is established by two undertakings, which are not actual nor potential competitors, but (i) they both control the joint venture (joint control), (ii) the joint venture is “full function” and (iii) the turnover criteria are met (Community dimension), the formation of such joint venture will be reportable under the EU Merger Regulation and is subject to merger analysis under Art.2 (2) and (3) of EU Merger Regulation.

However, when we look at the Hart-Scott-Rodino Act and specifically to its regulations §§ 801.40 and 801.50, we neither find restriction with regard to parents being competitors²⁷⁶.

4.3.5. Elimination of All Competition Among the Parents

The US Collaboration Guidelines further require the “merger-like” joint venture to eliminate all competition among the parents in the relevant market²⁷⁷. This implies that the joint venturers should cease all their activities in the relevant market and transfer them to the joint venture, so that the parents do not compete with each other and with the joint venture in the relevant market anymore.

When compared with the wording of Art.2 (4) and especially Art.2 (5) of the EU Merger Regulation, it seems that the EU competition law does not require the joint venturers to cease their activities in the relevant market. If the establishment of joint venture does not eliminate all the competition among the parents in the relevant market, then the likely coordination of

²⁷⁵ See Joanna Goyder, Albertina Albors-Llorens, Goyder’s EC Competition Law, 5th Ed., Oxford University Press, 2009, 474

²⁷⁶ 15 U.S.C. § 18a; 16 F.C.R. § 801.40; 16 F.C.R. § 801.50; ABA Section of Antitrust Law, *Joint Ventures: Antitrust Analysis of Collaborations Among Competitors*, American Bar Association, 2006, 17.

²⁷⁷ US Collaboration Guidelines, 5.

parents' behavior is assessed pursuant to the Art.2 (4) of the EU Merger Regulation in accordance with the criteria of Art.101 (1) and (3) of the TFEU. Thus, the response of the EU law to possible cooperative effect of the joint venture's formation is to subject it to both merger analysis and the analysis under Art.101 of the TFEU.

The US law approach, on the other side, seems to exclude from the application of merger analysis all joint ventures which give rise to coordination of parents' behavior in the relevant market.

4.3.6. Efficiency-Enhancing Integration of Economic Activity

The US Collaboration Guidelines require the joint venture to involve an “*efficiency-enhancing integration of economic activity in relevant market*”²⁷⁸. In other words, the operation of joint venture must bring about some economies of scale or scope, or other efficiencies following from combination of different capabilities or resources²⁷⁹.

Under EU competition law, there is no express requirement for a “full-function” joint venture to result in efficiencies. However, such involvement of efficiencies could be implied as the main purpose of entering into any competitor cooperation, including establishment of a “full-function” joint venture, is undertaken for the purpose of achieving some kind of lawful objectives²⁸⁰. As well, the EU Merger Regulation mentions in its preamble that the European Commission considers “*appropriate to take account of any substantiated and likely efficiencies put forward by the undertakings concerned*”²⁸¹ when assessing mergers.

²⁷⁸ US Collaboration Guidelines, 5.

²⁷⁹ US Collaboration Guidelines, 6.

²⁸⁰ Joanna Goyder, Albertina Albors-Llorens, *Goyder's EC Competition Law*, 5th Ed., Oxford University Press, 2009, 460 (“*share opportunities and risks in particular project*”); ABA Section of Antitrust Law, *Joint Ventures: Antitrust Analysis of Collaborations Among Competitors*, American Bar Association, 2006, 5 (“*lower costs, provide economies of scale, increase production capacity..., commercialize new products,...*”).

²⁸¹ EU Merger Regulation, Note 29, p. L24/4.

CONCLUSION

At the time of joint venture formation, one of the primary competition law concerns of the parent undertakings is, whether they will have to file a pre-merger notification with the Commission or the Agencies.

Under EU Merger Regulation only those transactions will have to be reported with the Commission, which satisfy following three criteria:

- i. The formation of joint venture has a Community dimension, i.e. the parents exceed the turnover thresholds (worldwide and Community ones) stated in EU Merger Regulation in Art.1 (2) or (3)²⁸² (**size of transaction**);
- ii. There must be present acquisition of joint control over the joint venture by at least two parent undertaking(s) (**joint control**); and
- iii. In addition to finding the Community dimension and joint control, the joint venture itself has to be a “full-function” joint venture (**type of joint venture**).

The acquisition of control, either on a legal or *de facto* basis, over the joint venture is the basic requirement. In certain circumstances, the joint venture is created by more undertakings which are all minority shareholders, whereas none can exercise control over the decisive decisions of the joint venture. Such situation is known as the “changing coalition” where there is no strong common interest, which would ally some minority shareholders and give them incentives to act concurrently²⁸³. It means that even if there is established a “full-function”

²⁸² EU Merger Regulation, Art.1 (2) and (3) (Besides turnover criteria, it is relevant whether substantial part of the turnover was achieved by all the undertakings concerned only within one Member State).

²⁸³ Notice on Full-Function Joint Ventures, par. 13, C 66/2, (“*In the absence of strong common interests such as those outlined above, the possibility of changing coalitions between minority shareholders will normally exclude the assumption of joint control. Where there is no stable majority in the decision-making procedure and the majority can on each occasion be*”).

joint venture with Community dimension, the lack of acquisition of control would entail non-application of the EU Merger Regulation, i.e. no need to notify the transaction.

The “full-function” joint venture is found when the joint venture satisfies the definition of Art.3 (4) of EU Merger Regulation, i.e. if it “*performs on a lasting basis all the functions of an autonomous economic entity*”. The elements taken into consideration by the Commission are: (i) lasting basis, (ii) activities beyond one specific function for the parents, (iii) sufficient resources, (iv) management dedicated to its day-to-day operations, (v) extent of sale and/or purchase relations with the parents.

In US antitrust law, the joint venture formation has to be notified with the Agencies, if there are met following criteria:

- i. The “size-of-transaction” and the “size-of-party” tests are met, and that with regard to both joint ventures created in corporate and unincorporated form (**size of transaction**);
- ii. To joint ventures formed in unincorporated form applies additional criteria – the control over the joint venture exercised by one or two parent undertakings (**control**).

It seems that the requirements set by US antitrust law “catch” more transactions as they are aimed to assess all joint venture formations with substantial size, whatever is the structure or purpose of the joint venture itself. The policy of EU competition law, on the other hand, is to subject to EU Merger Regulation notification system only those joint ventures which are autonomous economic entities, i.e. “full function”. Thus, in US antitrust law would be

any of the various combinations possible amongst the minority shareholders, it cannot be assumed that the minority shareholders (or a certain group thereof) will jointly control the undertaking.”; reference made to the decision of the European Commission IV/JV.12, Ericsson/Nokia/Psion/Motorola, of 22 December 1998).

notified even R&D, production or “sales agent” joint ventures with the Agencies (once they involve substantial assets), whereas in EU competition law they would not.

What regards the “control” requirement, the US antitrust law gives in my opinion more certainty to the parties. The requirement of control is entirely missing in corporate joint venture context. The reason for this might be that the shareholdings tend to be spread among numerous shareholders and in addition they constantly change, so the situation at the time of formation might be substantially different after the stocks start to be traded. With regard to unincorporated joint ventures, the criteria for finding control are unambiguous and they eliminate application of concepts similar to EU competition’s “changing coalition” which might be burdensome to inspect.

From the EU Merger Regulation follows that a joint venture (enterprise established and jointly controlled by parent undertakings) might be subject to three different legal regimes:

- i. it may be regarded as a mere agreement restricting competition, being subject to prohibition of the Art.101 (1) of TFEU and possibly exempted under Art.101 (3) of TFEU (evaluating creation of a joint venture as a behavioral competition problem),
- ii. it may be regarded as a merger pursuant to EU Merger Regulation and thus subject to the pre-merger notification obligations, if the turnover criteria are met (evaluating creation of a joint venture as a structural problem), and lastly
- iii. if it is regarded as a merger subject to pre-merger notification obligation, which gives rise as well to concerns about coordination of competitive behavior of the parent undertakings, the EU Merger Regulation together with Art.101 of TFEU will be

applied during the pre-merger assessment procedure (evaluating creation of a joint venture as both a behavioral and structural problem).

The establishment of a joint venture controlled by two or more undertakings, which are actual or potential competitors on the relevant market, will be subject to Art. 101 of TFEU under two circumstances: (i) if it does not satisfy the requirements of “full-function” joint venture, or (ii) even when it is a “full-function” joint venture but does not meet the turnover criteria for a merger with Community dimension.

In the first case, the “non-full-function” joint ventures will usually involve the research and development or production joint ventures²⁸⁴, where the joint venture itself does not have direct access to the market and instead the parents engage in commercial relations with the customers (i.e. they perform only single function for its parents)²⁸⁵. Further, joint ventures which have access to the market may still fall short of other requirements for finding a “full-function” joint venture when they are formed for short period of time or are continuously dependent on the parents.

Under the present EU competition law regime, the fact that a “full-function” joint venture comprises as well co-operative elements does not bar the application of EU Merger Regulation²⁸⁶. Rather it will imply the concurrent application of Article 101 of TFEU. Thus, the creation of “full-function” joint venture with Community dimension entailing acquisition of joint control and at the same time entailing certain co-operative effects, will be subject to

²⁸⁴ *Merger Control in Europe, EU, Member States and Accession States*, edited by Peter Verloop, Valerie Landes, 4th Ed., Kluwer Law International, 2003, 32-33 (“A joint venture that only performs one of the business activities of the parent companies, such as research and development, production or distribution, is not a full-function joint venture.”).

²⁸⁵ Notice on Full-Function Joint Ventures, par. 13, C 66/2, (“A joint venture is not full-function if it only takes over one specific function within the parent companies’ business activities without access to the market. This is the case, for example, for joint ventures limited to R & D or production”).

²⁸⁶ Joanna Goyder, Albertina Albors-Llorens, *Goyder’s EC Competition Law*, 5th Ed., Oxford University Press, 2009, 462-463 (Prior to adoption of the amending Regulation No. 1310/1997 to the Merger Regulation No.4064/1989 (preceding the current EU Merger Regulation) was important to distinguish so called “co-operative” and “concentrative” joint ventures, as this classification determined the applicable legal regime).

both merger (i.e. under EU Merger Regulation) and cartel analysis (assessment under Art.101 of TFEU). The legislative basis for this treatment is contained in Art.2 (4) and (5) of the EU Merger Regulation. As it was already stated, this means that the Commission appraises the concentrative aspects of “full-function” joint venture under the EU Merger Regulation and at the same time appraises its co-operative aspects under Art.101 of TFEU within one procedure²⁸⁷.

It seems that in US antitrust law there exist two different concepts, which subject certain types of joint ventures to merger analysis and others to analysis under Section 1 of the Sherman Act. The first concept is predominantly found in the publications of the American Bar Association. It distinguishes so called “fully integrated” joint ventures which are subjected to Section 7 of the Clayton Act analysis. The basic delimitation of such joint ventures is “*the integration of entirety of the participants’ operations in a particular line of business, including manufacturing, distribution, marketing and sales*”²⁸⁸.

The second concept is found in the US Collaboration Guidelines which states four criteria for finding a “merger-like” joint venture, namely: (i) the parents are competitors in the relevant market, (ii) the formation of joint venture involves an efficiency-enhancing integration of economic activity, (iii) the integration eliminates all competition among the parents in the relevant market; and (iv) the collaboration is permanent²⁸⁹.

²⁸⁷ *Merger Control in Europe, EU, Member States and Accession States*, edited by Peter Verloop, Valerie Landes, 4th Ed., Kluwer Law International, 2003, 33 (“*In other words, these joint ventures are subject to a double test: the establishment of the joint venture itself will be subject to the dominance test whereas the co-ordination between the parents will be assessed under Article 101.*”).

²⁸⁸ ABA Section of Antitrust Law, *Joint Ventures: Antitrust Analysis of Collaborations Among Competitors*, American Bar Association, 2006, 7

²⁸⁹ US Collaboration Guidelines, 5.

From the decisional practice of the Agencies and US federal courts²⁹⁰ follows that they apply merger analysis not only to the “fully integrated” joint ventures but as well to the joint ventures which could be characterized as mere production joint ventures pursuant to EU competition law.

With regard to the application of Section 1 of the Sherman Act, the cartel analysis “*clearly can be applied to the formation and operation of a joint venture given that the essence of such a venture is collaboration among its participants*”²⁹¹. The cartel analysis of the joint venture’s formation is focused on the lawfulness of the collaboration itself or on the collateral restraints involved in the transaction²⁹². They are evaluated either based on the per se rule (automatically condemned without detailed investigation) or the rule of reason (analysis of the market conditions comprising weighing of the pro-competitive benefits against the anticompetitive concerns)²⁹³.

It seems that the Agencies and the US federal courts are to considerable extent free to decide whether to apply merger analysis or cartel analysis as there is no statute which would delimitate the scope of application of either of the abovementioned analyses and the federal court decisions do not provide detailed guidance in this respect. As the ABA Section of Antitrust Law states in its publication on mergers and acquisitions, the purpose of each antitrust analysis is to “*determine whether the venture is likely to result in substantial lessening of competition*”²⁹⁴. It seems as well that the Agencies and courts are free to apply

²⁹⁰ E.g. *Decision of Federal Trade Commission in the matter of General Motors Corporation, et al.* of 11th April 1984, 103 F.T.C. 374, 1984 WL 565376 (F.T.C.); *United States v. Penn-Olin Chemical Company*, 378 U.S. 158, 84 S.Ct. 1710, 12 L.Ed.2d 775 (1964); *Yamaha Motor Co., LTD., v. FTC*; *Brunswick Corp. and Mariner Corp. v. FTC*, 657 F.2d 971 (1981).

²⁹¹ ABA Section of Antitrust Law, *Joint Ventures: Antitrust Analysis of Collaborations Among Competitors*, American Bar Association, 2006, 19.

²⁹² See Thomas A. Piraino, Jr., *The Antitrust Analysis of Joint Ventures After the Supreme Court’s Dagher Decision*, 57 Emory L.J. 741 (2008).

²⁹³ See Thomas A. Piraino, Jr., *The Antitrust Analysis of Joint Ventures After the Supreme Court’s Dagher Decision*, 57 Emory L.J. 741 (2008); US Collaboration Guidelines.

²⁹⁴ ABA Section of Antitrust Law, *Mergers and Acquisitions: Understanding the Antitrust Issues*, American Bar Association, 2008, 19.

within one proceeding both analyses, if they consider it sound or necessary in specific situation.

The scope of this thesis was to describe and compare the decisive elements of joint which determine the applicable legal regime. It appears in general that the joint ventures which perform more functions and are established for longer period of time are analyzed under merger laws, i.e. treated as a structural problem both in EU competition and US antitrust law. However, there are differences when looking at various concepts in detail (as it was described in Chapter IV). From this comparison follows that the EU competition law is more concerned with formal elements of joint ventures (requirement of sufficient resources, management or the extent of business relations with parents).

These elements could be analyzed even in more detail, upon careful analysis of cases decided by Commission, Agencies and respective courts. Such detailed analysis could serve to further clarify the competition law applicable to joint ventures at the time of their formation and later during their operation, including clarification of circumstances when the term “joint venture” itself should be used when referring to certain type of competitor collaboration.

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