The “Cooperative”/"Concentrative” Dilemma of EC Merger Control: - A Review of Commission Policy

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The "Cooperative"/"Concentrative" Dilemma of EC Merger Control: A Review of Commission Policy†

Frank L. Fine*

INTRODUCTION

As the United States pulls out of its current recession, one may expect U.S. companies, whether large or small, to exploit the unified market of the European Community (EC), formed in 1993. This wave of new investment coincides with the deepening economic malaise in Europe, but companies on both sides of the Atlantic may profit from their differing business climates. U.S. companies will find that joint ventures may provide a low-risk means of entering new geographic markets. European firms, on the other hand, may find their own profitability increased by broadening their product ranges, reducing over-capacity, and sharing technology and marks with their U.S. partners. Joint ventures also may serve as a temporary structure for long-term objectives, such as the eventual merger of the two partners or the acquisition of the venture's assets.

The EC Merger Control Regulation (MCR),† which entered into force on September 21, 1990, resulted in the EC antitrust clearance procedure applicable to certain joint ventures being simplified greatly. In effect, those "concentrative" joint ventures having a "Community dimension" fall within the exclusive jurisdiction of the MCR, thereby preempting the European Commission's (Commis-

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† Council Regulation 4064/89 on the Control of Concentrations Between Undertakings, 1990 O.J. (L 257) 14 [hereinafter MCR].
sion) enforcement of articles 85 and 86 of the Treaty Establishing the European Economic Community (EEC Treaty or Treaty), and the intervention of the Member States' antitrust authorities. Moreover, such transactions normally are cleared within four weeks after the Commission has been notified. At first glance, the “Community dimension” requirement may appear difficult for many companies to satisfy. According to the MCR, the combined worldwide turnover of the undertakings concerned must exceed 5 billion ECU (U.S. $5.6 million) and each of at least two of the undertakings concerned must have EC-wide sales exceeding 250 million ECU (U.S. $282 million). In practice, however, this requirement may not be as daunting as it seems because the turnover of the “undertakings concerned,” for the purpose of this calculation, includes not only the parties to the joint venture, but also their subsidiaries, parent companies, and all other subsidiaries of the parent companies.

Once it is clear that a joint venture has a “Community dimension,” the focus turns to whether the joint venture is “concentrative” rather than “cooperative.” This inquiry may appear somewhat metaphysical to U.S. lawyers, but it is taken seriously by the EC Merger Task Force (Task Force), which is responsible for resolving the issue in specific cases. The conceptual distinction between “concentrative” and “cooperative” joint ventures is quite vague. The problem lies in the criteria established by the Commission and in the ebb and flow of its decisions, which seem to reflect the on-going turf battle between the Task Force and the section of Directorate General IV (DG IV) which retains responsibility for “non-concentrative” agreements and corporate behavior. Until now, with the broad scope given to “concentrative” ventures, the Task Force seems to be the power-broker in this affair. This, however, is understandably good news to notifying companies.

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2 Id. arts. 21(1)-(2), 22(1)-(2). Article 85 prohibits agreements which have an appreciable effect on trade between Member States and competition within the EC or a substantial part of it, subject to the possibility of individual and group exemptions. See id. art. 85. Article 86 prohibits the abuse of dominant position held in the EC or a substantial part of it insofar as it may affect trade between Member States. Id. art. 86.

3 Id. art. 10(1). Formal decisions under articles 85 and 86, which are not subject to any time limitation, may take several years. Informal comfort letters may be obtained more rapidly, but companies are often wary of the fact that they do not bind the Commission.

4 MCR, supra note 1, art. 1(2)(a)-(b).

5 Id. art. 5(4).

6 The Merger Task Force, which is part of DG IV, the Directorate General responsible for competition, consists of approximately 50 officials, most of whom are either lawyers or economists.
This paper will shed light on the distinction between "concentrative" and "cooperative" joint ventures. Implicit in these terms is a common element of a "joint venture." Guidelines accompanying the MCR indicate that a joint venture must satisfy two conditions: (i) the venture must constitute an "undertaking," which is (ii) jointly controlled by two or more other undertakings. The test of whether a joint venture is "concentrative" is provided for in article 3(2) of the MCR, which states:

[t]he creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity, which does not give rise to coordination of the competitive behaviour of the parties amongst themselves or between them and the joint venture shall constitute a concentration within the meaning of paragraph 1(b).7

This paper examines the definition of a "concentrative" joint venture, which is reducible to the following elements: (i) an "undertaking" which is jointly controlled by two or more other undertakings (i.e., a joint venture); (ii) such joint venture must be established on a lasting basis; (iii) the joint venture must perform the functions of an "autonomous economic entity" (i.e., a so-called "full-function" joint venture); and (iv) the joint venture must not lead, actually or potentially, to the coordination of the parties' market behavior inter se or between any of the parties and the joint venture.

I. Elements of a "Concentrative" Joint Venture

A. Joint "Undertaking"

As in the case of "cooperative" joint ventures, a "concentrative" joint venture must be an undertaking jointly controlled by several other undertakings.8 For these purposes, the Commission has defined an "undertaking" broadly as "an organized assembly of human and material resources, intended to pursue a defined economic purpose on a long-term basis."9 In its MCR decisions on "concentrative" joint ventures, the Commission has not been obliged to determine the limits of this concept because most of the cases have involved the shared ownership of a pre-existing subsidiary or the

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7 These elements are elaborated upon in the Commission Notice Regarding Concentrative and Cooperative Operations, 11 15–36, 1990 O.J. (C 203) 10.
8 Id. ¶ 9.
9 Id. ¶ 8.
establishment of a joint venture company. In several decisions, the Commission indicated that a partnership may satisfy the requirement of an undertaking, but the question remains whether the Commission, for the purposes of the MCR, will expand the scope of an undertaking to include collaboration not involving a jointly owned legal entity.

Historically, the Commission’s policy has been that a “concentrative” joint venture could not occur unless the parties placed certain activities in the joint venture and withdrew permanently from these fields of activity. While several MCR decisions involve the transfer

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11 Cf. GEC-Weir Sodium Circulators, 1977 O.J. (L 327) 26, 31, 1 C.M.L.R. D42 (1978), in which the Commission held that a “cooperative” joint venture could arise “solely by contract.”

12 This view dates back to 1976, when the Commission offered this definition of a partial merger:

[even where the transfer of assets is limited only to a part of the total business previously engaged in independently by the parent companies, the transfer may in exceptional cases be treated in the same way as a merger. But such exceptional cases can be taken to arise only where the parent companies completely and irreversibly abandon business in the area covered by the joint venture, and provided that the pooling of certain areas of business does not weaken competition in other areas, and particularly in related areas, when the firms involved remain formally independent of each other.

COMM’N, SIXTH REPORT ON COMPETITION POLICY (1976), point 55. The above view of partial mergers was applied earlier in SHV/Chevron, 1975 O.J. (L 38) 14, 15, 1 C.M.L.R. D68 (1975) (“what is really happening is that the distribution side of Chevron’s and SHV’s business is being integrated into the new trading structure of the [new] Calpam subsidiaries”). The requirement of total withdrawal has been reinforced in subsequent cases. In De Laval-Stork, De Laval, a U.S. turbine manufacturer, remained in the turbine business despite the establishment of a Dutch joint venture for the production and distribution of the product. 1977 O.J. (L 215) 11, 2 C.M.L.R. D69 (1977). The Commission held specifically that the production joint venture did not amount to a partial merger because this was “not the case that at least one of the companies has completely and irreversibly abandoned business in the area covered by the joint venture.” 1977 O.J. (L 215) 11, 15–16. Similarly, in Iveco/Ford, Ford U.K. formed a joint venture with Iveco to take over Ford U.K.’s production of the Cargo line of heavy vehicles and to jointly distribute both Cargo and Iveco heavy vehicles in the United Kingdom. 1988 O.J. (L 230) 39, 4 C.M.L.R. 40 (1989). The Commission found that this joint venture was not “concentrative.” As the Commission stated:

[although the transfer of its previous heavy vehicle production to the JV means that Ford U.K. is withdrawing as a direct competitor, the Ford Group will continue to produce heavy vehicles in the relevant ranges in the United States and elsewhere overseas. Ford remains an important supplier there, and one which could also export to Europe.

Id. ¶ 24; see also Mitchell Cotts/Sofiltra, 1987 O.J. (L 41) 31, 4 C.M.L.R. 111 (1988). In this case, Sofiltra of France and M.C. Engineering of the United Kingdom formed a joint venture
of assets to a new joint venture and the withdrawal by the parents from the field, neither the MCR nor the guidelines would require such a transfer of assets or, for that matter, that the parties permanently withdraw from the field of the joint venture. Indeed, in its MCR decisions, the Commission, has shown great flexibility in carving out situations in which "concentrative" joint ventures may exist, thus blurring the line between not only "concentrative" and "cooperative" joint ventures, but also between "concentrative" joint ventures and other types of concentrations. For example, in a large number of cases, the Commission has found that "concentrative" joint ventures resulted from the change in control of operating enterprises, such as one undertaking's acquisition of a co-controlling interest in another undertaking's subsidiary, even where the parties did not withdraw from the field of the jointly controlled for the manufacture and distribution of air filters using glass fibers. Id. The Commission held that this joint venture was subject to article 85(1) because Sofiltra would remain an independent manufacturer of this product and was prohibited by the agreement from selling actively in the United Kingdom. Id. at 36.


The guidelines state that a joint venture may be "concentrative" in at least four situations: (i) where the parents transfer certain activities to the joint venture; (ii) where the joint venture undertakes new activities on behalf of the parents; (iii) when the joint venture enters the parents' market; and (iv) where the joint venture enters a market which is upstream, downstream, or neighboring that of the parents. Commission Notice Regarding Concentrative and Cooperative Operations, supra note 7, ¶ 24. Moreover, even in the first and third hypotheticals, it is possible for the joint venture to be "concentrative" where the parent companies remain permanently active on the JV's product or service market. Id. ¶ 29. In these situations, however, the guidelines require that the geographic markets of the parents and the joint venture be separated to such extent that competitive interaction between these markets is precluded. Id.

The Commission also has held that “concentrative” joint ventures could result from joint acquisitions of third undertakings, including joint “rescue” operations by which a group of creditor banks would acquire their common debtor jointly. Even joint ventures established to permit the parties to enter new product or geographic markets have been held to be “concentrative.”

B. Joint Control

The main common element of “cooperative” and “concentrative” joint ventures is the joint control by the parents of the venture. The guidelines accompanying the MCR state that joint control exists "where the parent companies must agree on decisions concerning the JV’s activities, either because of the rights acquired in the JV or because of contracts or other means establishing the joint control." Conversely, the guidelines provide that joint control does not exist where one of the parents alone may dictate the joint venture’s commercial activities. Broadly speaking, control is evaluated in

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16 See, e.g., Thomson/Pilkington, Comm’n Dec., 23 Oct. 1991, ¶ 9 (Thomson did not transfer any assets to the joint subsidiary and despite being in the same product market as the joint subsidiary, the Commission held that there was no likelihood of a coordination of their competitive behavior); see also Mondi/Frantschach, Comm’n Dec., 12 May 1992, ¶ 8.


19 See, e.g., Eucom/Digital, Comm’n Dec., 18 May 1992 (joint venture to provide a new information system for the management of freight operations was found “concentrative”); SPAR/Dansk Supermarked, Comm’n Dec., 3 Feb. 1992 (joint venture permitted SPAR to enter the “discount” food market).


21 Commission Notice Regarding Concentrative and Cooperative Operations, supra note 7, ¶ 11.

22 Id., ¶ 12. Conversely, where the minority shareholder has been offered more protection than that which is normally afforded to minority shareholders, this evidence would suggest that joint control exists. See Conagra/Idea, Comm’n Dec., 30 May 1991, ¶ 14; Elf/Enterprise, Comm’n Dec., 24 July 1991, ¶ 4; Ingersoll-Rand/Dresser, 18 Dec. 1991, ¶ 8.
accordance with four basic criteria: ownership of the joint venture assets; the right to appoint members of the managing and supervising boards; influence over the decisions of such bodies; and the right to otherwise manage—for example, by contract—the joint venture’s business. 23

The MCR decisions shed light on the way in which the Commission interprets joint control. As a starting point, the Commission has held that joint control may be direct or indirect. For example, if Companies A and B form a jointly owned and controlled holding company, C, for the purpose of acquiring Company D, the Commission most likely would consider that D is jointly controlled by A and B, even though C has direct or indirect “sole” control of D. 24 On the other hand, where Companies A and B form a jointly owned and controlled consortium, C, and Company C together with Company D establish a 50–50 percent joint operating company, E, which has as one of its objectives the acquisition of F, the Commission probably would consider whether E, rather than F, is controlled jointly because E will be characterized as the relevant joint venture. 25

A second interesting preliminary issue is whether all of the parent companies, in some way, must share in the decision-making affecting the joint venture. At first sight, such mandatory participation by each shareholder would not appear necessary because the only relevant dichotomy is between sole and joint, i.e., more than sole, control. The Commission confirmed this view in Gambogi/Cogei, in which Gambogi and Cogei, two Italian construction firms, formed

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23 Commission Notice Regarding Concentrative and Cooperative Operations, supra note 7, ¶ 10.
24 The hypothetical is based on UAP/Transatlantic/Sun Life, 17 Nov. 1991, where UAP and Transatlantic established a new holding company, Rockleigh, in which the two parents would hold equal voting rights. Rockleigh would, in turn, obtain a majority stake in Sun Life amounting to 59.9%. Furthermore, UAP and Transatlantic, presumably through Rockleigh, would have the right to appoint a total of six of Sun Life’s 14 directors and to appoint the chairman, who was responsible for the daily management of the company. On these facts, the Commission concluded that Sun Life would be jointly controlled by UAP and Transatlantic through Rockleigh. See also ASKO/Jacobs/ADIA, Comm’n Dec., 16 May 1991.
25 The hypothetical is based on ABC/Générale des Eaux/Canal +/W.H. Smith TV, Comm’n Dec., 10 Sept. 1991. That case concerned a complex operation by which ESPN, a subsidiary of Capital Cities/ABC, GdI, a subsidiary of Générale des Eaux, and Canal + agreed to establish two partnerships in order to acquire the television interests of W.H. Smith. The first partnership would be co-controlled by GdI and Canal +. This initial partnership would then enter into a second venture with ESPN, which would be co-controlled by ESPN and the first venture (between GdI and Canal +). Lastly, the second venture would obtain sole control of W.H. Smith’s television interests. In this case, the Commission considered that the second venture was the relevant operation since it constituted a “full-function, autonomous joint venture.” Id. ¶ 8. The Commission concluded that the second venture was jointly controlled by ESPN and by the partners of the first venture, GdI and Canal +. Id. ¶¶ 16–17.
a 50–50 percent joint venture, CIU, in Italy for the sole purpose of creating a joint venture in Hungary with a Hungarian firm, BV.\textsuperscript{26} The Italian consortium and BV would hold 51 percent and 49 percent respectively of the voting rights in the Hungarian venture.\textsuperscript{27} To determine joint control of the Hungarian venture, the Commission considered that Gambogi and Cogei would be acting as a single shareholder, because the major decisions of CIU had to be taken unanimously.\textsuperscript{28} The Commission then held that Gambogi and Cogei, through CIU, would have joint control of the Hungarian joint venture, because CIU had a majority of seats on the board of directors and all decisions would be taken by a majority.\textsuperscript{29} The Commission concluded that this Hungarian operation amounted to a “concentrative” joint venture despite the presence of a party, BV, which did not exercise joint control with the Italian consortium.\textsuperscript{30}

On the other hand, where the parties intend to attract new shareholders, the Commission may find that joint control is ephemeral and cannot form the basis of a “concentrative” operation. This view was expressed in \textit{EUREKO}, in which four insurance companies each took an initial 25 percent stake in their new joint venture company but intended to attract a number of additional shareholders.\textsuperscript{31} All important decisions affecting the joint venture were to be taken by a simple or super majority (more than two-thirds) vote.\textsuperscript{32} The Commission expressed its concern, however, that the eventual dilution of the four parties’ shares may have resulted in a loss of joint control.\textsuperscript{33} Although this point was not decided definitively, the Commission suggested that joint control, like the joint venture itself, must exist on a lasting basis.\textsuperscript{34}

The indicia of joint control are actually more complex than those listed in the MCR guidelines.\textsuperscript{35} The Commission generally examines a host of factors ranging from the relative shareholdings of the

\textsuperscript{26} Gambogi/Cogei, Comm’n Dec., 19 Dec. 1991; see also ASKO/Omni, Comm’n Dec., 21 Feb. 1991 (4% of shares in joint venture owned by third party); Metallgesellschaft/Safic Alcan, Comm’n Dec., 8 Nov. 1991 (Crédit Lyonnais would own 4.49% of the shares in the joint venture and the general public would own 5.08% of the venture’s shares).


\textsuperscript{28} Id. ¶ 5.

\textsuperscript{29} Id. ¶¶ 6–8.

\textsuperscript{30} Id.


\textsuperscript{32} Id. ¶ 10.

\textsuperscript{33} Id. ¶ 11.

\textsuperscript{34} Id. ¶¶ 11–12.

\textsuperscript{35} See \textit{supra} note 23 and accompanying text.
parties and their voting power in the meetings of shareholders and directors, to the particular business decisions which they are capable of influencing. As a general proposition, a 50–50 percent joint venture with equal representation on the board of directors, by which a majority or unanimous vote would carry the resolutions of shareholders and directors, is deemed to be jointly controlled. For various reasons, however, the parties may allocate their respective shareholdings differently, with the result that the approval of the minority shareholder, whether at shareholder or director level, is necessary for all important decisions concerning the joint venture. In such cases, the conclusion of joint control is inescapable. Clearly, the respective shareholdings of the parties are merely the starting point in the analysis of joint control. The key issue is the actual or potential influence which may be exercised by each party over the joint venture, which is essentially a function of voting rights and collateral agreements.

The Commission recognizes that certain decisions affecting the joint venture are more critical than others and therefore are more likely to confer joint control. For example, the consent of a parent to the joint venture’s annual budget or business plan would appear sufficient, standing alone, to confer joint control. Other joint de-


37 There have been numerous cases in which the minority shareholder reserved significant voting rights. The most striking examples are: Conagra/Idea, Comm’n Dec., 30 May 1991 (the two parties owned 74% and 26% of the relevant shares, but the minority shareholder, Conagra, maintained joint control of the venture by ensuring that a 75% majority vote was necessary for various key decisions); Apollinaris/Schweppes, Comm’n Dec., 24 June 1991 (the two parties held 72% and 28% of the shares in a joint venture, but various important decisions required the approval of Schweppes, the minority shareholder); Varta/Bosch, Comm’n Dec., 31 July 1991 (same protection afforded minority shareholder where shares were divided 65%-35% between the two parents); Elf/Enterprise, Comm’n Dec., 24 July 1991 (same result where shares were divided 66.6%-33.3%); Thomas Cook/LTU/West LB, Comm’n Dec., 14 July 1992 (same result where shares were divided 76%-%14%). See also Elf Atochem/Rohm and Haas, Comm’n Dec., 28 July 1992 (in addition to their joint venture, the parents set up a jointly owned and controlled company, which would own 1% of the shares in the joint venture; the remaining 99% of the shares to be split equally between the two parents; and the 1% joint company was responsible for most major policy decisions, which would have to be taken by a majority vote).

38 Influence also may be obtained by a voting agreement between shareholders. See TNT/Canada Post, Comm’n Dec., 2 Dec. 1991 (joint control would be exercised by one shareholder having 50% of the votes, together with five other shareholders holding cumulatively the remaining 50%, where these five minority shareholders would vote in block).

39 See, e.g., Sunrise, Comm’n Dec., 13 Jan. 1992 (consent on annual business plan apparently
cisions, in various combinations, also have been held to confer joint control. These include decisions in the following areas: significant investments or disposals;\textsuperscript{40} third party licenses;\textsuperscript{41} long-term strategic plans;\textsuperscript{42} changes in the objectives of the joint venture;\textsuperscript{43} increases in capital;\textsuperscript{44} loans;\textsuperscript{45} the payment of dividends;\textsuperscript{46} the launching of new products;\textsuperscript{47} marketing plans;\textsuperscript{48} the election of directors;\textsuperscript{49} the hiring of senior executives;\textsuperscript{50} and the termination of the joint venture.\textsuperscript{51} It would appear, however, that unless the parents must agree to the annual budget of the joint venture, the parties run the risk of the Commission finding that no joint control of the venture exists, even where several of the above decisions (apart from budget) must be taken jointly.\textsuperscript{52}

sufficient). In Conagra/Idea, the Commission stated that "the approval of the annual budget is especially important since it consists of a quantitative detailed expression of a plan of action summarizing the objectives of each department of the organisation (i.e. sales, production, distribution, and financing)." Comm'n Dec., 30 May 1991, ¶ 12. Indeed, shareholder consent on the annual budget or business plan has been the factor most frequently cited by the Commission as an indication of joint control. See, e.g., Varta/Bosch, Comm'n Dec., 31 July 1991 (annual budget); Conagra/Idea, Comm'n Dec., 30 May 1991 (annual budget and business plan); Dräger/IBM/HMP, Comm'n Dec., 28 June 1991 (annual budget and business plan); Apollinaris/Schweppes, Comm'n Dec., 24 June 1991 (annual budget and long-range business plan); Ericsson/Kolbe, Comm'n Dec., 22 Jan. 1992 (annual budget); Elf/Enterprise, Comm'n Dec., 24 July 1991 (annual budget); Lucas/Eaton, Comm'n Dec., 9 Feb. 1991 (annual budget); Ingersoll-Rand/Dresser, Comm'n Dec., 18 Dec. 1991 (annual business plan); Elf Atochem/Rohm and Haas, Comm'n Dec., 28 July 1992 (annual budget and business plan); Thomas Cook/LTU/West LB, Comm'n Dec., 14 July 1992 (annual budget and five-year plan).


\textsuperscript{47} Conagra/Idea, Comm'n Dec., 30 May 1991. Similarly, joint decisions on research and development have been held relevant to joint control. See generally Elf Atochem/Rohm and Haas, Comm'n Dec., 28 July 1992.


\textsuperscript{49} Varta/Bosch, Comm'n Dec., 31 July 1991.

\textsuperscript{50} Conagra/Idea, Comm'n Dec., 30 May 1991.


\textsuperscript{52} See PepsiCo/General Mills, in which PepsiCo retained the right to appoint four of the seven members of the board of directors of its joint venture with General Mills, with General
C. Lasting Basis

The MCR states specifically that a joint venture is “concentrative” only if it is capable of performing on a “lasting basis.” The Commission assesses the long-term staying power of the venture by examining several factors. First, the Commission will determine whether the joint venture is established on a long-term basis. In this regard, a duration of fifty years would appear adequate. Joint ventures established for an indefinite period, however, also have satisfied this test of longevity. The more decisive issue is whether the investment of the parent companies in the venture is of such a “nature and quantity as to ensure the JV’s existence and independence in the long term.” This almost always will be the case where the joint venture takes over certain activities from the parents and the parents withdraw entirely from the field occupied by the joint venture or from the European market. But absent total withdrawal, the Commission has indicated that the investment of substantial human and financial resources in the venture or its receipt of significant “know-how” from the parents may be sufficient to confer longevity.

D. Autonomous Economic Entity

One of the more difficult criteria to apply in practice to “concentrative” joint ventures is the MCR requirement that the joint venture...
perform “all the functions of an autonomous economic entity.”

The problem is due partially to the fact that the issue of autonomy overlaps somewhat with the test of “lasting basis” and the absence of coordination of competitive behavior. The other difficulty is that most of the MCR decisions have treated the question superficially. Nonetheless, there are certain points which appear to be well-settled.

As a starting point, the Commission decisions affirm the position of the MCR guidelines that a joint venture cannot be an autonomous economic entity unless it is a “full-function” venture which acts as “an independent supplier and buyer on the market.” This requirement ensures that the joint venture, as an undertaking, is distinct from its parents. This test implies that the joint venture would carry out the “full” range of functions normally attributed to a player in the market; that is, the development, production, and distribution of the relevant product. The test also assumes that the joint venture possesses the usual administrative apparatus of a fully-functioning company, i.e., that it has its own accounts, assets, staff, management, and board of directors.

The second attribute of an autonomous economic entity is its ability to exercise its own commercial policy or its independence from its parents for the maintenance and development of its business. This test of “economic independence” is not satisfied where the joint venture obtains most of its supplies from its parents or vice

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61 MCR, supra note 1, art. 3(2).


64 Varta/Bosch, Comm’n Dec., 31 July 1991, ¶ 4; Elf Atochem/Rohm and Haas, Comm’n Dec., 28 July 1992. If the joint venture relies mostly on its parents or third parties as subcontractors for production, however, this may indicate that the joint venture is not fully functioning and, therefore, that it is not an autonomous economic entity. See Flachglas/Vegla, Comm’n Dec., 13 Apr. 1992 (reliance on parents and subcontractors); Baxter/Nestlé/Salvia, Comm’n Dec., 6 Feb. 1991, ¶ 6 (reliance on parents for R&D and production).


66 Commission Notice Regarding Concentrative and Cooperative Operations, supra note 7, ¶ 18.

67 Id., ¶ 16. This test also assumes that the joint venture would set its own pricing policy. See Lucas/Eaton, Comm’n Dec., 9 Feb. 1991, ¶ 12.

versa,\textsuperscript{69} or where the joint venture substantially integrates its facilities into those of the parents.\textsuperscript{70} Likewise, the joint venture usually would be prevented from exercising its own commercial policy where the parties remain in the market of the joint venture or a market which is upstream, downstream, or related to the joint venture’s market.\textsuperscript{71} A joint venture, however, does not lose its status as an autonomous economic entity where it obtains a marginal portion of its supplies of the relevant product from a parent,\textsuperscript{72} or uses its parents’ facilities for the distribution of products representing a small proportion of its total turnover.\textsuperscript{73} In addition, the commitment of the parties to supply the joint venture for a limited period with essential raw materials or components for the manufacture of the relevant product does not limit the venture’s autonomy, provided that the venture remains free to procure its supplies of such intermediate products from third party sources.\textsuperscript{74} Similarly, the parents’ lease of certain premises to the venture does not affect the latter’s autonomy where the venture owns the essential business assets, such as the plant, machinery, equipment, stock, and intellectual property.\textsuperscript{75} Nor is the autonomy of the joint venture compromised where the parent companies license their “know-how” to the joint venture in perpetuity, even if the license was revokable upon bankruptcy or termination of the joint venture.\textsuperscript{76} The Commission also held that agreements whereby the parents provide the joint venture with “administrative support services” (such as tax and legal assistance) and technical assistance for a limited period would not jeopardize the venture’s autonomy.\textsuperscript{77}

\textsuperscript{69} Commission Notice Regarding Concentrative and Cooperative Operations, \textit{supra} note 7, \textsection 16.

\textsuperscript{70} Id. \textsection 18.

\textsuperscript{71} Id. \textsection 19. \textit{See infra} text accompanying notes 93–128.

\textsuperscript{72} Lucas/Eaton, Comm’n Dec., 9 Feb. 1991, \textsection 12 (supplies of certain relevant products by Lucas to the joint venture only accounted for 1–2% of the venture’s turnover).

\textsuperscript{73} Id. (sales through Lucas represented only 15% of the joint venture’s total sales).

\textsuperscript{74} \textit{See} Rhône-Poulenc/SNIA, Comm’n Dec., 10 Aug. 1992, \textsection 5.2.1 (five-year supply arrangement); Elf Atochem/Rohm and Haas, Comm’n Dec., 28 July 1992, \textsection 9(b) (non-exclusivity of supply arrangement was emphasized).

\textsuperscript{75} Courtaulds/SNIA, Comm’n Dec., 19 Dec. 1991, \textsection 8; Rhône-Poulenc/SNIA, Comm’n Dec., 10 Aug. 1992, \textsection 5.2.1.

\textsuperscript{76} Lucas/Eaton, Comm’n Dec., 9 Feb. 1991, \textsection 12; Elf Atochem/Rohm and Haas, Comm’n Dec., 28 July 1992, \textsection 9(b). \textit{But cf.} Baxter/Nestlé/Salvia, Comm’n Dec., 6 Feb. 1991, \textsection 6 (licenses of patents, “know-how,” and trademarks to joint venture for a 21-year period did not result in a durable change in structure because the licenses were terminable by mutual consent of the parents at any time).

\textsuperscript{77} Courtaulds/SNIA, Comm’n Dec., 19 Dec. 1991, \textsection 8 (such assistance was provided for a
E. Absence of Coordination of Competitive Behavior

The tailpiece of article 3(2) of the MCR provides that a joint venture is deemed "concentrative" when it does not "give rise to coordination of the competitive behaviour of the parties or between them and the joint venture." The Commission in fact applied this same test to "partial mergers" under article 85 of the EEC Treaty. Under the Treaty, the Commission found this test to be satisfied only by the parent companies' withdrawal from the field of the joint venture.\footnote{See supra note 12 and accompanying text.} Under the MCR, however, the Commission considerably expanded the types of joint ventures which may be deemed "concentrative." As noted, the Commission's guidelines confirm that a joint venture, depending upon the circumstances, may be considered "concentrative" regardless of whether the parents initially are involved in, or remain in, the field of the joint venture.\footnote{See supra text accompanying notes 12-20.} This new Commission approach has increased significantly the number of joint ventures deemed "concentrative"—indeed, of the first thirty-three operations found to be "concentrative," only fourteen involved the parties' withdrawal from the market of the joint venture.\footnote{See supra note 13 and accompanying text.} The broad approach of the Commission, however, has complicated the analysis of the issues greatly and obscured the dividing line between "concentrative" and "cooperative" joint ventures.

1. Legal Test

The MCR guidelines state that a joint venture is not to be regarded as "concentrative" if, as a result of its establishment, it is "reasonably foreseeable" that the competitive behavior of a parent company or of the joint venture would be affected.\footnote{Commission Notice Regarding Concentrative and Cooperative Operations, supra note 7, ¶ 20.} For the most part, these competitive relationships are defined by the markets in which the parents and joint venture would be operating after the formation of the venture. This is not to say, however, that the intent of the parties is irrelevant. Indeed, the MCR guidelines state specifically that a joint venture only can be considered "concentrative"
if it does not have the "object or effect" of coordinating the competitive behavior of the parties.\textsuperscript{82}

Neither the MCR guidelines nor the Commission decisions reveal whether an anti-competitive object alone would be sufficient to place a joint venture in the "cooperative" camp. Both logic and practice under article 85, however, would suggest that an anti-competitive effect also must be reasonably foreseeable. In \textit{EUREKO}, the only case in which the "object" of the joint venture has been considered, the Commission indeed did find that the transaction had both the object and effect of coordinating the competitive behavior of the parties.\textsuperscript{83} The anti-competitive "object" was derived from both the shareholders' agreement and the brief submitted to the Commission.\textsuperscript{84} As a lesson for lawyers, the shareholders, which were four insurance companies, confessed in writing that the aim of the alliance was to "achieve increasingly close co-operation and interdependence" by ensuring that the existing and future shareholders would operate primarily in their domestic markets.\textsuperscript{85}

2. Framework for Assessing the Coordination of Competitive Behavior

Four issues must be addressed in determining whether a joint venture may lead to the coordination of the competitive behavior of the parents or between one of them and the joint venture. (i) First, whether, as the result of the joint venture, both parents will have withdrawn permanently from the field of the joint venture; (ii) if the answer to (i) is negative in that one or more of the parents remains in the field of the joint venture (or where the joint venture establishes a new enterprise in the field of one or more of the parents), the issue becomes whether there is any "competitive interaction" between the geographic markets of the joint venture and the parent concerned. (iii) Where one or more of the parents is in a market which is upstream or downstream from, or neighboring that of the joint venture, the Commission would examine the potential for spill-over effects and inquire whether either parent may enter the product market of the joint venture. (iv) Lastly, the Commission will examine any continuing "vertical" relationships between the

\textsuperscript{82} Id.
\textsuperscript{83} \textit{EUREKO}, Comm'n Dec., 27 Apr. 1992, ¶ 16(a).
\textsuperscript{84} Id.
\textsuperscript{85} Id.
parents and the joint venture, such as ongoing supply and distribution.

a. Total Withdrawal of the Parent Companies: Merger of Certain Activities

The Commission, in its enforcement of the MCR, has affirmed its historical position under article 85, that where the parties withdraw permanently from the field of the joint venture, and are not in markets upstream or downstream from, or neighboring that of the venture, there should be no risk of coordination of the competitive behavior between the parent companies or between a parent and the joint venture. The MCR decisions, however, have added a good deal of gloss to this basic test, particularly on the effect of a party’s failure to withdraw and the issue of when withdrawal is considered permanent. The rationale behind the withdrawal concept is to ensure that the competitive relationships between the parties themselves, and between the parties and the joint venture are not distorted in the wake of the joint venture. As a consequence, if one assumes that a joint venture has two parents, X and Y, and X withdraws from the field of the joint venture, and Y never has operated in the venture’s market or in an upstream, downstream, or related market, this should not impede a “concentrative” result. Further, even if Y remains in the same or related market as the joint venture, the Commission may find that there is no competitive interaction between the geographic markets in which Y and the joint venture would be operating.

Where the withdrawal of a parent is relevant to identifying the joint venture as “concentrative,” the key issue is whether the withdrawal is permanent. The MCR guidelines have borrowed, as a test of permanence, the concept of potential competition as established in the Commission’s practice under article 85. For these purposes, the critical question is whether the withdrawing parent is capable of re-entering the market. According to the guidelines, a joint venture

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86 See supra note 10 and accompanying text.
87 Commission Notice Regarding Concentrative and Cooperative Operations, supra note 7, ¶ 20.
89 See infra notes 112–116 and accompanying text.
90 Commission Notice Regarding Concentrative and Cooperative Operations, supra note 7, ¶ 25.
91 Id.
would be presumptively "cooperative," i.e., "non-concentrative," if the withdrawing party's re-entry in the field was "a realistic option and represent[ed] a commercially reasonable course in the light of all objective circumstances."92

In practice, the likelihood of re-entry or, conversely, the permanence of withdrawal, largely depends on the existing economic, legal, and technical barriers. Examples of permanent withdrawal include the Thomson/Pilkington case, and the Dräger/IBM/HMP case.93 In Thomson/Pilkington, pursuant to its joint venture with Thomson, Pilkington would transfer to the joint venture its entire optronics business, including patents and "know-how." In the view of the Commission, it was not likely that Pilkington would re-enter this market because: (i) the technology evolved rapidly, which would pose a high technological barrier to a company having abandoned the field; (ii) a period of five to seven years would be needed for a new optronics product to become profitable; (iii) a group of highly-qualified scientists and technicians would have to be identified and hired; and (iv) substantial investment would be necessary to build and equip a suitable plant.

In Dräger/IBM/HMP,94 Dräger, IBM and HMP formed a joint venture to develop and market hospital software which would link patient data with medical workstations. Both Dräger and HMP would transfer their relevant assets to the joint venture. IBM had withdrawn from manufacturing biomedical systems in 1984 and its hospital software subsequently was limited to general information systems. In the Commission's view, it was not likely that IBM would re-enter the field of the joint venture even though it possessed the technical and financial means to do so. In part, the Commission relied upon IBM's withdrawal in 1984. The Commission also stressed, however, the commercial improbability of IBM's re-entry due to the substantial costs of developing such software for what was, in reality, a limited market.

Apart from economic, legal, and technical barriers, there are several other factors relevant to determining whether a withdrawal from the market is permanent. As indicated in Dräger/IBM/HMP, the Commission may attach importance to an undertaking's earlier, independent decision to withdraw when it lacks an economic means or incentive to remain in the market. Additionally, the Commission

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92 Id.
may consider whether non-competition clauses in the agreement reinforce the permanent or ephemeral nature of the party’s withdrawal. It would appear, for example, that where a joint venture is established on a lasting basis, a clause preventing a parent from competing with the joint venture during the duration of the party’s participation in the venture\(^95\) or for an indefinite period\(^96\) would support the determination of permanent withdrawal. On the other hand, if the clause prohibits competition with the venture for only several years\(^97\) or allows one parent to re-enter the market of the venture with the consent of the other parent or the venture,\(^98\) the Commission has found that this indicates a lack of intent to withdraw from the field of the venture.

b. Parents’ Partial Withdrawal from the Market

Where one or both of the parents of a joint venture fail to withdraw entirely from the field of the joint venture, it is possible that the parties, inter se or in relation to the joint venture, remain actual or potential competitors. As the Commission noted in its MCR guidelines, however, the potential for the coordination of competitive behavior may be remote, even in these circumstances, depending on the “competitive interaction” of the geographic markets in which the parties are operating.\(^99\) In such cases, the possibility that a joint venture may be “concentrative” would not be excluded. As noted in the MCR guidelines, however, “the markets in question must be so widely separated, or must present structures so different, that, taking account of the nature of the goods or services concerned and of the cost of (first or renewed) entry by either into the other’s market, competitive interaction may be excluded.”\(^100\) Several fact scenarios may constitute partial withdrawal. First, Parent X may transfer some of its activities to the joint venture, but retain other


\(^{97}\) See Herba/IRR, Comm’n Dec., 28 Apr. 1992, ¶ 9 (agreement of parent not to compete with joint venture for five-year period reinforced the “cooperative” nature of the venture). But cf. Dräger/IBM/HMP, Comm’n Dec., 28 June 1991, ¶ 12, in which an 18-month non-competitive clause was found to have reinforced the “concentrative” nature of the operation.

\(^{98}\) EUREKO, Comm’n Dec., 27 Apr. 1992, ¶ 16(b).

\(^{99}\) Commission Notice Regarding Concentrative and Cooperative Operations, supra note 7, ¶ 29.

\(^{100}\) Id.
operations in the field of the venture. In this first setting, Parent X indeed may be said to have withdrawn partially, even where Parent Y has transferred its relevant activities to the joint venture and withdrawn permanently. In the second scenario, however, Parent Y would have transferred its relevant activities to the joint venture (so-called permanent withdrawal), but Parent X would not have transferred any activities in the field of the joint venture to the venture.

In each of the above scenarios, the test applied by the Commission is whether there is competitive interaction between the market of the joint venture and that of the parent which has not withdrawn permanently. In practice, this test functions very much like the test of "permanent" withdrawal, which is essentially the familiar concept of potential competition. As will be shown in the following examples, barriers to entry are critical to these evaluations, although a parent’s past abandonment of activities in the market of the joint venture also may be relevant.

In *Lucas/Eaton*, a joint venture between Lucas and Eaton was intended to combine their assets in heavy duty braking systems. Lucas, however, would continue manufacturing most of these products in the United States. The Commission nevertheless held that Lucas was unlikely to re-enter the EC market because (i) due to technical differences between such systems in the United States and the EC, Lucas’s products were not “directly and immediately substitutable for those in the Community,” and (ii) in the late 1970s, Lucas had attempted to market heavy duty braking systems in the EC, but failed and withdrew.

Similarly, in *Sanofi/Sterling Drug*, Sanofi and Sterling Drug were to combine their ethical and over-the-counter (OTC) pharmaceutical operations. Although the OTC venture did not include Sterling Drug’s U.S. operations (where a majority of its sales occurred), the Commission concluded that there was no realistic possibility of Sterling Drug re-entering the EC market. The Commission’s rationale was that Sterling Drug had transferred all of its European OTC assets, including trademarks and product registrations to the joint venture. This transfer legally did not prevent Sterling Drug from

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102 *Id.* ¶ 37(a).
103 *Id.*
105 *Id.*
exporting the same OTC products to the EC under different trademarks, however, as pharmaceuticals often become OTC products precisely because they are no longer patented. Therefore, one must presume that the Commission relied upon trademark loyalty as an economic barrier to the marketing by Sterling Drug of competing OTC products in the EC.

The Commission found additional barriers to entry which precluded the coordination of competitive behavior where the parent concerned continued operating in the field of the joint venture either from a distant or adjoining geographic market. Examples include: (i) a construction firm would be impeded by high transport costs from shipping bricks from the United States to the United Kingdom;\textsuperscript{106} (ii) a French defense contractor was not likely to compete with a joint venture formed with Pilkington and intended to operate in the U.K. market due to the U.K.'s "local" procurement patterns;\textsuperscript{107} (iii) a French composite insurer (i.e., providing life and non-life coverage) was not likely to compete with a U.K.-based joint venture formed to provide life coverage due to the structural barriers posed by the United Kingdom to foreign life insurers, which would have involved substantial time and costs to overcome;\textsuperscript{108} (iv) a Brazilian affiliate of a French textile manufacturer was unlikely to export polyamide thread and fiber to the EC and thereby compete with the joint venture due to the need for physical proximity to clients and to a 9 percent Community tariff barrier;\textsuperscript{109} and (v) U.K. and German travel operators were not likely to compete with each other due to cultural barriers, such as the language differences of the countries concerned, and the added cost to the consumer of booking voyages in another country.\textsuperscript{110}

On the other hand, where the partial withdrawal of the parent

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\textsuperscript{106}Steeley/Tarmac, Comm'n Dec., 12 Feb. 1992, ¶ 9. This was presumably the rationale for the Commission's holding in Mondi/Frantschach, regarding the import of wood pulp into the EEC from South Africa. See Mondi/Frantschach, Comm'n Dec., 12 May 1992, ¶ 21.


\textsuperscript{108}UAP/Transatlantic/Sun Life, Comm'n Dec., 17 Nov. 1991, ¶ 15. Cf. EUREKO, Comm'n Dec., 27 Apr. 1992, ¶ 16(b), in which the Commission found that barriers did not exist as regards large-risk non-life insurance since industrial companies "do not depend necessarily on national insurance companies."


\textsuperscript{110}Thomas Cook/LTU/West LB, Comm'n Dec., 14 July 1992, ¶ 10. But it should be noted
leaves it not only in the product market of the joint venture, but also without significant geographic barriers to entry, it is highly unlikely that the joint venture would be considered “concentrative.” This was essentially the Commission’s conclusion in Apollinaris/Schweppes, in which Brau and Brunnen (BB) of Germany and Cadbury Schweppes (CS) of the United Kingdom formed a joint venture to produce and distribute soft drinks and mineral water beverages, which both parents had been producing.\textsuperscript{111} The joint venture would have produced and marketed certain of BB’s brands in Germany, Austria, and other European markets, and CS’s brands in Germany and Austria. Both BB and CS, however, intended to transfer only part of their soft drink and mineral water businesses to the joint venture. BB would remain in both the product and geographic markets of the joint venture, whereas CS would transfer its German and Austrian beverage business to the joint venture, but would sell mineral water and soft drinks independently in the remainder of the Community. Due to the nature of these products and the absence of significant barriers facing them, the Commission held that CS had “the realistic option to re-enter the German market.”\textsuperscript{112} Since this situation could have led to the coordination of the parties’ competitive behavior \textit{inter se} and with the joint venture, the operation was not deemed “concentrative.”\textsuperscript{113}

c. Establishment of a New Enterprise

Under the Commission’s broadly-framed MCR guidelines, a joint venture to establish a new enterprise may be considered “concentrative,” provided it satisfies all of the elements of the article 3(2) tailpiece.\textsuperscript{114} Where the parties intend to expand rather than combine their existing activities, however, their withdrawal from the field of the joint venture is not expected. Nevertheless, the Commission believes that coordination of the competitive conduct of the parties and joint venture may be ruled out in these situations provided that the joint venture is established in a geographic market which has no

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\textsuperscript{112} Id. ¶ 9.

\textsuperscript{113} Commission Notice Regarding Concentrative and Cooperative Operations, supra note 7, ¶¶ 31–32.

\textsuperscript{114} Id. ¶ 31.
“competitive interaction” with that of the parents.\textsuperscript{115} This test, as was shown earlier, is applied by the Commission in cases of partial withdrawal.

In this context, the Commission has focused on the unique competitive conditions existing in the joint venture’s geographic market of, and on, barriers to entry. For example, in \textit{BNP/Dresdner Bank (CSFR)}, Banque Nationale de Paris (BNP) and Dresdner Bank established a joint venture for the financing of trade with and investment in Czechoslovakia.\textsuperscript{116} The Commission observed that the Czech government imposed unique conditions for establishing foreign banks, which were the result of the gradual privatization of its state-controlled economy.\textsuperscript{117} Since these legal barriers effectively would have precluded market entry by the parent banks outside the framework of the joint venture, the Commission ruled out the possibility of a coordination of their competitive behavior either between themselves or the joint venture.\textsuperscript{118}

Conversely, where there are no real barriers separating the parents’ market and their joint venture, the venture may be “cooperative” in character. For example, in \textit{BSN-Nestlé/Cokoladovny}, BSN and Nestlé formed a joint venture in Czechoslovakia for the production and distribution of biscuits, candy (sugared and chocolate), and chocolate.\textsuperscript{119} The Commission did not indicate that barriers existed in Czechoslovakia which would have prevented BSN and Nestlé from exporting products there in direct competition with the joint venture. Moreover, although the joint venture was, at the time, unlikely to export to the EC due to differences between Czechoslovakia and the EC in tastes and standards, these barriers gradually would be removed. Therefore, the Commission could not exclude the possible coordination of the competitive behavior of the parents and the joint venture.\textsuperscript{120}

\textsuperscript{115}Id.
\textsuperscript{117}Id. \S 4.
\textsuperscript{118}Id.; see also Gambogi/Cogei, Comm’n Dec., 19 Dec. 1991. In this decision, the establishment of a Hungarian joint venture by two Italian construction firms for the purpose of penetrating the Hungarian building market was held not to pose a risk of coordination of competitive behavior. \textit{Id.} \S 8. \textit{Cf. Elf/BC/CEPSA}, Comm’n Dec., 18 June 1991.
\textsuperscript{120}Id. \S 14.
d. Establishment of Joint Venture in the Market of the Parent Companies

Another potential scenario arises where the joint venture is established within the geographic market of the parents to perform virtually the same activities as the parents. In these situations, the potential coordination of competitive behavior is presumed. An example of the Commission's approach was provided in Elf/Enterprise, in which Enterprise Oil of the United Kingdom sought to obtain joint control with Elf Aquitaine of E.E. Petroleum (EEP), Elf's U.K. subsidiary.\(^{121}\) Both Enterprise and Elf would remain active in the market of their joint subsidiary, which was to explore, produce, and market crude oil and natural gas. Moreover, both parent companies held licenses to engage in these activities in the geographic market of the joint venture, the U.K. section of the North Sea. In view of the potential coordination of the parents' competitive conduct, the Commission held that the joint venture was not "concentrative."\(^{122}\)

On the other hand, the Commission has held that a joint venture may operate in the same product and geographic markets of a parent company, without posing a risk of market coordination between the joint venture and parent, where the parent's sales in the geographic market of the joint venture have been nominal historically, and it would be commercially impractical for the parent to compete with its own joint venture. This point was illustrated in Mondi/Frantschach, in which the Hartmann/Kaufmann family of Austria and Mondi Holding, a German subsidiary of Mondi Paper Company Limited of South Africa, entered into an agreement, whereby Mondi Holding would obtain 50 percent of the shares of Frantschach, which was controlled by the Hartmann/Kaufmann family.\(^{123}\) The Hartmann/Kaufmann family would then withdraw from the paper and pulp businesses because these activities, which

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\(^{122}\) Id. ¶ 6; see also Sunrise, Comm'n Dec., 13 Jan. 1991, ¶ 30 (a five-way joint venture to obtain joint control of Sunrise Television of the United Kingdom was found not to be "concentrative" because some of the parent companies were active in the market of the joint venture); DuPont/Merck, Comm. Press Release IP(91)381, 6 May 1991 (Merck remained in the field of its pharmaceutical joint venture with DuPont, which led the Commission to conclude that the joint venture was "cooperative"). In Baxter/Nestlé/Salvia, Comm'n Dec., 6 Feb. 1991, ¶ 9, the Commission found that the parents also may remain in the market of their joint venture, thereby preventing it from being "concentrative," where these activities are conducted through an earlier, continuing joint venture between the same parents.

\(^{123}\) Supra note 15 and accompanying text.
previously had been undertaken by Frantschach, were assimilated by the joint venture. But Mondi Paper did not intend to transfer its activities to the joint venture, resulting in Mondi Paper remaining in the paper and pulp businesses. This raised the issue of whether Mondi Paper was a potential competitor of the joint venture. The Commission concluded that such a risk did not exist because Mondi Paper’s exports of pulp to the Community amounted to less than 2 percent of all EC pulp sales, and it was more “reasonable to suppose that Mondi [would] develop its future European operations through the joint venture.”

e. **Joint Venture Operates in Upstream, Downstream, or Neighboring Market**

The absence of coordination of the competitive conduct of the parties or between them and the joint venture in the joint venture’s product market does not preclude the possibility of such coordination in markets upstream, downstream, or neighboring that of the joint venture. Where the parents are competitors in a market upstream or downstream from, or neighboring that of the joint venture, the Commission applies its traditional doctrine of spill-over effects. In these cases, the parents’ explicit or tacit exclusion of these related fields from the activities of the joint venture has been held to amount, in itself, to an allocation of markets between the

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125 Id. ¶ 8; see also Elf/BC/CEPSA, Comm’n Dec., 18 June 1991, ¶ 17 (no risk of coordination between Elf and CEPSA, despite nominal sales of each party in the home market of the other); Generali/BCHA, Comm’n Dec., 6 Apr. 1992, ¶ 21 (minor presence and market share of Generali in Spain did not pose risk of coordination with Spanish joint venture).
126 Commission Notice Regarding Concentrative and Cooperative Operations, supra note 7, ¶¶ 34–36.
127 The Commission held that for the purpose of article 85(1), competition between the parties to a joint R&D or production agreement may be restricted implicitly outside the field of the agreement. Such “spill-over” or “group” effects require that two or more of the parties continue to operate in a market which is upstream or downstream from, or neighboring that of the agreement, or the joint venture. As the Commission explained in GEC/Weir Sodium Circulators:

> [t]he existence of a joint venture in one field is likely to provide opportunities and inducements to parent companies, who each have related interests also in other areas, to enlarge their common activities and impair free competition between them in those areas. . . . Through their continuing association with each other within the joint venture, the coincidence of interests of the parties in other areas can be expected to lead to an impairment of competition between them also in these other areas.

1977 O.J. (L 327) at 32 (emphasis added).
parents and the joint venture. Where the parents are not competitors in an upstream, downstream, or neighboring market, the Commission nevertheless may examine whether the operation of a parent and the joint venture in related product markets may lead to the coordination of their market behavior. For example, the Commission may examine whether the products of a parent and the joint venture compete with each other and, if so, whether there is competitive interaction between their geographic markets. Specifically, the Commission may examine whether the parent potentially may enter the geographic market of the joint venture.

In considering whether the products of a parent and the joint venture compete with each other, the Commission may examine several factors, such as the varying conditions of competition for the products, their technical differences, their complementary value, and, it would appear, differences in consumer demand. In short, the Commission has availed itself of the various tools that it traditionally has employed under articles 85 and 86 in ascertaining the scope of the product market.

If the products of a parent and the joint venture do not compete with each other, and it must be determined whether the parent concerned may enter the product market of the joint venture, the Commission examines whether there are any economic, legal, and technical barriers existing. An interesting example of the test was provided in *Herba/IRR*, in which Herba, part of a leading Spanish

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129 Lucas/Eaton, Comm’n Dec., 9 Feb. 1991. In this decision, the Commission held that the conditions of competition differed between the joint venture’s market for heavy-duty braking systems and in the car brake market, in which the parents remained active. *Id.* ¶ 16. As noted by the Commission: “[t]he market for braking systems for cars requires large volumes of standardized product, whereas the heavy duty market requires lower volumes of production with a much higher degree of flexibility. Customers split operationally their car and truck activities into separate divisions.” *Id.*
130 *Id.* ¶ 17 (difference in laden and unladen weight between cars and trucks has led to different braking systems for these two types of vehicles); see also Ingersoll-Rand/Dresser, Comm’n Dec., 18 Dec. 1991, ¶ 9 (“niche” pump operations retained by the parents did not compete with industrial pump activities of the joint venture).
131 Thomson/Pilkington, Comm’n Dec., 23 Oct. 1991, ¶ 12(a) (the Commission concluded that the optronics products of the joint venture and the high-technology products manufactured by Thomson, one of the parents, were complementary, and this was a factor in the Commission’s holding that there was no danger of market coordination between these two parties).
132 ABC/Générale des Eaux/Canal +/W.H. Smith TV, Comm’n Dec., 10 Sept. 1991, ¶ 9(a) (Commission held that pay and free-access television were distinct product markets since the former, due to the requirement of a subscription fee, is tailored to the needs of specific audiences).
agro-food group, Bro-Agricolas, planned to acquire 50 percent of IRR, an Italian firm which was part of the Feruzzi Group. Herba involved itself mainly in the processing and marketing of rice, and hoped to expand these activities through IRR, which, prior to the joint venture, involved itself in cereals other than rice. In evaluating the potential coordination between the Feruzzi Group and the joint venture, the Commission observed that Feruzzi would remain in the cereal market, but that it foreseeably could enter the rice market independently. In this regard, the Commission cited Feruzzi’s financial strength, the “modest” entry requirements, and the availability of necessary assets through acquisition in the market. As a result, the acquisition was deemed to be “non-concentrative.”

f. Continuing Vertical Relationships

The MCR guidelines on “concentrative”/“cooperative” arrangements briefly allude to supply and distribution links between the parents and the joint venture as potentially leading to the coordination of their competitive behavior. Far from defining when such arrangements may preclude a “concentrative” joint venture, the guidelines actually risk confusing companies on the ancillarity of such links. Indeed, the MCR guidelines regarding ancillary restrictions should be viewed as providing a limited tolerance of links which do, to some extent, involve parent-joint venture coordination.

133 Comm’n Dec., 28 Apr. 1992; see also Northern Telecom/Matra Telecommunication, Comm’n Dec., 10 Aug. 1992, ¶ 10 (no danger of coordination existed between the telecommunications joint venture concerned and a pre-existing venture between one of the parents, Matra, and a third party, Ericsson, for the provision of public digital switching in France, because France Telecom’s demand was satisfied by the existing Matra-Ericsson supply arrangement).


135 Id. But see Varta/Bosch, Comm’n Dec., 31 July 1991; Courtaulds/SNIA, Comm’n Dec., 19 Dec. 1991. In these cases, the Commission found that there was no danger of coordination resulting from the parent companies remaining in related markets since they were not in the relevant product market of the joint venture.

136 Commission Notice Regarding Concentrative and Cooperative Operations, supra note 7, ¶¶ 28, 35.

137 With regard to joint ventures that take over pre-existing activities of the parents, the MCR guidelines state that the parents should be allowed a “short transitional period” not normally exceeding one year to overcome bottlenecks in production or supplies. Id. ¶ 28. As regards joint ventures operating in upstream, downstream, or neighboring markets, the guidelines state that where the parents are not competitors, there may exist a risk of market coordination between the parents and joint venture where the joint venture’s sales or purchases are made in “substantial measure” with the parent companies. Id. ¶ 35. It should be noted that the guidelines do not deal specifically with exclusive or quasi-exclusive supply or distribution arrangements.
Fortunately, until now, such analytical conflicts have been avoided in the Commission decisions because none of the vertical links considered were deemed to pose a risk of market coordination. The two cases examined thus far involved supply and distribution arrangements, which will now be reviewed below.

i. Supply links

Until now, Commission decisions pertaining to supplying the joint venture’s product to the parents have involved only non-exclusive agreements having no definite duration. Within this context, the Commission has held, on one occasion, that the non-exclusivity of the supply commitment, which gave the joint venture liberty to supply the relevant product to third parties, eliminated the possibility of coordination between the joint venture and the parent to be supplied.\(^{138}\) In a subsequent case, the Commission examined not only the percentage of the joint venture’s production to be supplied to the parents, but also the percentage of the parents’ purchases of the relevant product from the joint venture, and concluded that there was no risk of market coordination.\(^{139}\)

ii. Distribution

In several cases, the Commission considered whether the distribution of the joint venture’s product by one of its parents may lead to market coordination between the venture and such parent. In *Lucas/Eaton*, the parent concerned would distribute no more than 15 percent of the joint venture’s total sales.\(^{140}\) In *Varta/Bosch*, the parent concerned would act as a commissioned agent for some of the joint venture’s products, but only upon the specific authorization of the venture.\(^{141}\) In each instance, the Commission held that such vertical links did not pose a risk of coordination of the competitive behavior of the parent concerned and the joint venture.

\(^{138}\) *Courtaulds/SNIA*, Comm’n Dec., 19 Dec. 1991, ¶ 7 ("because of its non-exclusive nature, this [supply] agreement is not expected to limit the autonomy of the joint venture").

\(^{139}\) *Volvo/Atlas*, Comm’n Dec., 14 Jan. 1992. In this case, the joint venture was to acquire the hydraulic component operations of Volvo and Atlas and, subsequently, was to supply its parents with limited quantities of these components amounting to between 5-11\% of the joint venture’s sales of these products and less than 0.5\% of the purchases of each of the parents. The vertical relationships were therefore deemed insignificant. Id.


III. COMMENTARY

The Commission's widening of the scope of "concentrative" joint ventures is likely to have serious consequences, some more obvious than others. From a public relations standpoint, the Commission is sending a message that some joint ventures which ordinarily would have been "cooperative" in nature, and therefore subject to article 85, may now be judged exclusively by the MCR. This is probably welcome news to most companies seeking quick and efficient clearance of their joint ventures. It must be kept in mind, however, that applying the MCR to "concentrative" joint ventures also entails a mandatory notification to the EC Merger Task Force.142 Therefore, in exchange for obtaining the security of the MCR, companies would relinquish their freedom not to notify those joint ventures which have become "concentrative" as a result of the MCR.

More importantly, however, the Commission's new tendency to characterize joint ventures as "concentrative" threatens to destroy the boundary line between "concentrative" and "cooperative" full-function joint ventures. In BAT v. Commission (the Philip Morris judgment),143 which involved the acquisition by Philip Morris of a minority shareholder of its competitor, Rothmans International, the European Court of Justice (ECJ) held that article 85(1) applied to such acquisitions where the agreement "provides for commercial cooperation between the companies or creates a structure likely to be used for such cooperation."144 This approach could be traced back to the 1966 Memorandum of the Commission145 in which it stated that article 85(1) applied to both acquisitions and joint ventures that result in "no permanent change in the ownership but a coordination of the market behaviour of firms remaining economically independent."146 The Commission's subsequent policy was to regard joint ventures as "concentrative" only where both parents had merged one or more of their existing activities and withdrawn permanently and irreversibly from such activities.147 If either parent company failed to withdraw, the Commission viewed it as a potential competitor of the other parent or of the joint venture, thereby

142 MCR, supra note 1, art. 4(1).
144 Id. (emphasis added).
146 Id. at Part III, ¶ 14–15.
placing the agreement within the ambit of article 85(1). For these purposes, it did not matter whether the non-withdrawing parent operated in a geographic market distant from that of the other parent or the joint venture. In the Commission’s view, the coordination of competitive behavior was possible because a working structure already existed.

In its practice under the MCR, the Commission has been applying a commercial realism approach in determining the potential for market coordination between the parent companies or between one of them as the joint venture. The Commission’s results have been inconsistent and confused, however. In cases such as Steetley/Tarmac and Sanofi/Sterling Drug, the Commission emphasized the existence of technical and economic barriers which discouraged exports from the United States to the EC. It is questionable, however, whether the existence of barriers which may be overcome by determined competitors is sufficient to justify a “concentrative” characterization of a joint venture. For example, in Steetley/Tarmac, the unreasonable transport costs incurred in shipping bricks from the United States to the EC could have been overcome by the construction of manufacturing facilities in the Community. Similarly, a high tariff barrier imposed on Japanese photocopiers as the result of an anti-dumping investigation should not eliminate Japanese producers as potential competitors, particularly when direct investment in the EC is a foreseeable option. Likewise, Sanofi suggests that customer loyalty to certain OTC trademarks could pose an economic barrier to a U.S. drug manufacturer re-entering the EC market, even though such loyalty is not an insuperable barrier.

It is submitted that the Commission’s reliance on barriers to entry in determining whether joint ventures are “concentrative” intellectually is flawed. This test, which is well-suited for determining whether conditions of competition are homogeneous, is not appropriate for assessing the likelihood of residual coordination between the parties to a joint venture or between one of them and the joint venture. The Commission’s fluid approach also has opened the door to further deterioration of the “concentrative”-“cooperative” line, as is reflected in Mondi/Frantschach. Here, one of the parents, Mondi, was in the same product and geographic market as the joint

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150 Id.
venture. The Commission cited Mondi's nominal sales in the EC and South Africa and concluded that Mondi would not continue selling the product in the Community. The Commission did not consider that Mondi had the choice of increasing its exports to the Community.\textsuperscript{152} Indeed, contrary to the Commission's view, it would seem that Mondi's arrangement with the Hartmann/Kaufmann family enabled Mondi to share markets with the joint venture. On the other hand, in \textit{Apollinaris/Schweppes},\textsuperscript{153} the Commission found that absent barriers to entry, Cadbury Schweppes could have re-entered the German mineral water market from the United Kingdom. Based on \textit{Mondi}, however, the Commission could have held the joint venture was "concentrative" because it was unlikely that Cadbury Schweppes would have competed with its own joint venture.

The Commission's lack of coherence in applying the article 3(2) tailpiece coincides, unfortunately, with the prevailing lack of reliable criteria for determining whether parties to a "cooperative" joint venture are, under article 85(1), potential competitors.\textsuperscript{154} In both cases, the Commission has abandoned transparent tests in favor of some loose concept of commercial realism. The result has been the kind of circular reasoning shown in decisions such as \textit{BBC Brown Boveri}.\textsuperscript{155} In that case, NGK, a Japanese ceramics manufacturer, was deemed a potential competitor of its battery joint venture with BBC Brown Boveri on the ground that NGK would have obtained access to the battery technology from the joint venture itself.

In its calibration of the MCR to apply to greater numbers of joint ventures, as in its unpredictable application of the notion of potential competition under article 85(1), the Commission sends the wrong signals to companies planning joint ventures. While providing greater access to the more swift and certain procedure of the MCR, the Commission is undermining the Regulation by placing jurisdictional questions on a foundation of shifting sands. This is not only undesirable for purposes of the reliable application of the MCR, but also paves the way for the intrusion of arbitrary decision-making. The other side effect of the Commission's new policy is that it places "concentrative" joint ventures not having a "Community dimension" outside the scrutiny of the Commission, even though

\textsuperscript{152} \textit{See id.}

\textsuperscript{153} \textit{Appollinaris/Schweppes, Comm'n Dec., 24 June 1991, ¶ 222.}

\textsuperscript{154} \textit{See Fine, EC Commission's Guidelines for Joint Ventures: In Search of a Cohesive Policy, INT'L BUS. LAWYER 351 (July/Aug. 1992).}

\textsuperscript{155} 1988 O.J. (L 301) 68.
the transaction may have significant anti-competitive effects in several Member States. Many smaller joint ventures which have become "concentrative" only as the result of the new Commission policy would have been subject to article 85 in pre-MCR practice.

CONCLUSION

Since it is now inconceivable that the Commission would place its "concentrative" genie back into a "cooperative" bottle, it should work toward providing a more cogent means of distinguishing "concentrative" and "cooperative" joint ventures. How far beyond the historical concept of partial mergers may the definition of "concentrative" joint ventures be stretched and still remain credible? Part of the solution may be to exclude the application of the MCR to joint ventures. For example, in Elf/Enterprise, one or more parents remained in the same product and geographic markets as the joint venture. The problem then becomes how to treat situations in which one (or both) of the parties remains in the same or neighboring product market of the joint venture, but is in a different geographic market. Where there are no barriers to entry, the logic of Apollinaris/Schweppes should apply to characterize the joint venture as "cooperative." Is the mere existence of technical, legal, or economic barriers sufficient to guarantee the absence of coordination of the competitive behavior of the parties? In theory, there are no such assurances, and in such cases, a transmutation of "cooperative" joint ventures into "concentrative" operations will have taken place. The best that one could hope for in such cases is that the Commission would apply hard, transparent criteria. This at least minimizes the probability of a party overcoming the applicable barrier to entry and, at the same time, safeguards the integrity of the Commission’s new commercial realism approach. Such a compromise, however, is not likely to satisfy the purists, and pragmatists may soon find that the only barrier separating "cooperative" and "concentrative" ventures is a Chinese wall.