CO-OPERATIVE JOINT VENTURES
CO-OPERATIVE JOINT VENTURES - Key Issues: Aide Memoire

What does the economic assessment tell you? Will the joint venture (JV) have market power/dominance? If yes, will it have exclusionary effects? exploitative effects?

Do you have flexibility to structure the transaction, or has structure been decided?

If you have flexibility, do you want institutional assessment (e.g. by structuring the transaction as a merger and being assessed by e.g. European Commission, OFT, other) or self assessment (e.g. by structuring the transaction as a cooperative joint venture):

- institutional assessment
  - formal scrutiny by competition authorities
  - third party consultation
  - certainty
- self assessment
  - competition authorities not necessarily involved
  - third party intervention possibly more difficult
  - parties control process
  - no certainty

Whether or not you have flexibility to structure the transaction, consider next:

- Is the JV full function, performing all the functions of an autonomous economic entity, and involving structural change on a lasting basis, thereby giving rise to a Concentration i.e. a change of control on a lasting basis? (See European Commission Merger Regulation Art.3)
- Is there a community dimension? (See Merger Control Thresholds Schedule, attached. If no Community Dimension, consider all relevant national thresholds). **Note:** most EU jurisdictions now adopt the concentrative full function JV and cooperative effects approach but not all do so. For example, the UK is obviously an exception with its "enterprises ceasing to be distinct" test, which would not catch a JV where the parents do not contribute pre-existing businesses. So, a UK "greenfield" full function JV with no Community dimension would be dealt with under Competition Act 1998 (CA 98). (!)

**Note:** If the JV involves cooperative elements, i.e. *either* if it is full function but also involves cooperative elements, or *if* it is entirely cooperative in nature, then assessment will be necessary as a cooperative JV, under Article 81/ Chapter I, CA 98, etc., whether or not also as a merger/concentration.

Full Function Issues

When will the JV not be entirely full function:

- Is the JV operationally autonomous?
- Will the JV have an ongoing (say, more than three years) trading relationship with its parents?
- How much of the JV’s turnover will be with third parties? More than 50%?

(More details can be obtained from the EC’s (2007) Consolidated Jurisdictional Notice.)
Nature of Restrictions: Ancillary or Independent

Ancillary Restrictions, e.g.: Non compete obligations; Purchase and Supply Obligations; IP licenses.

When is a restriction ancillary?

- Does restriction affect parents and other 3rd parties, or only the JV?
  
  **Note:** If a restriction affects the JV's parents and/or other 3rd parties, it will not be ancillary UNLESS it is an inevitable consequence of the JV, and not separable

- Does it have a direct link with the JV?
- Is it secondary to the JV's main objective?
- Is it qualitatively different from restrictions which could be said to result from the JV
- Is it necessary to implement the JV?
- Is it proportionate?

Examples of:

- ancillary restrictions on a JV include:
  - defining objects of a JV;
  - possibly purchase or supply obligations at least during start up

- ancillary restrictions on parents include:
  - non competition with the JV, during lifetime of the JV

**Note:** Restrictions on 3rd parties, e.g. minority shareholders are unlikely to be ancillary.

Co-operative Joint Ventures (not involving a concentration)

Does the JV have an appreciable effect? (i.e. is it de minimis?)

- Is the combined market share of the parents less than 10%?
- If the parents are not competitors, is the individual market share of each less than 15%?

If the JV is not de minimis, is it likely to foreclose competition?

- Is the JV between non competitors?
- Is the JV between competitors who could not independently carry out the JV's activities?
- Will the JV influence the boundaries of competition?

The JV will be problematic if it involves:

- price fixing
- output quotas
- market or customer sharing
- exception: production JVs necessitating joint decision taking

The extent to which other JVs will be problematic (i.e. likely to be caught by Article 81(1), but may be exempt under Article 81(3)) will broadly depend upon:

- market position of the parties
- structure of the relevant market
- effect of the transaction on the market
Factors to be taken into account in making this assessment:

- will the JV increase or assist in maintaining the market power of the parties
- number of competitors
- market share stability, barriers to entry, potential competition, buyer power and product characteristics

If the JV is likely to be covered by Article 81(1), will it satisfy exemption criteria – self assessment?

Categories of Joint Venture:

**Commercialisation joint ventures**
- risks of competitor co-ordination on prices
- exchange of sensitive commercial information
- market partitioning

Generally, problematic particularly when involving JVs between producers of industrial goods supplied on a limited basis. Efficiencies need to be demonstrated.

**Purchasing Joint Ventures**

Viewed more favourably than commercialisation joint ventures, particularly if cost savings will result and will be passed on to a material extent to the consumer.

**Production joint Ventures**

Consider:
- Specialisation Block Exemption:
  - must relate to the production of goods or provision of services
  - combined market share (represented by the specialisation products and other products considered by users to be equivalent by reason of their characteristics, prices and intended use) must not exceed 20% NB a third party distributor cannot be a competing undertaking
  - there are requirements which must exist within the agreement as well as certain prohibited restrictions
  - Expiry Date – 31 December 2010
- if not applicable, consider whether improvements to production or other efficiencies will result; consider other Article 81(3) criteria
- will the production JV produce an input which is critical to the output of the parents? If so, will this have foreclosure effects?

**R&D Joint Ventures**

- Consider Research & Development Block Exemption:
  - the agreement must involve pre-commercialisation stage R&D therefore more likely to apply to an upstream rather than downstream JV
  - combined market share must not exceed 25% between actual or realistic potential competitors (if they are non-competing undertakings market share is irrelevant)
there are requirements which must exist within the agreement as well as certain restrictions which are prohibited

- Expiry Date – 31 December 2010

- if not applicable, Article 81(3) criteria. Generally viewed critically but positively.

Additionally:
Consider:

- Technology Transfer Block Exemption:
  - there must be an exploitation of the IP, therefore more likely to apply to an upstream (production) rather than downstream (distribution) JV
  - the agreement must be between only two undertakings – beware!
  - agreement between competing undertakings:
    - combined market share must not exceed 20%
    - for non-reciprocal agreements (parties only providing licences to each other or the JV relating to non-competing technology) there are fewer prohibited restrictions than for reciprocal agreements (where parties cross licence competing IP to the other/JV)
  - agreement between non-competing undertakings
    - individual market share must not exceed 30%
    - there are fewer prohibited restrictions on agreements between non-competing undertakings

- Expiry Date – 30 April 2014

- Vertical Agreements Block Exemption:
  - must be between parties which operate at different levels of the production or distribution chain (but may, in some cases, apply to supply and purchase agreements between the JV and its parents)
  - if the agreement contains exclusive supply provisions the buyer's market share must not exceed 30%
  - if the agreement does not contain exclusive supply provisions the supplier's market share must not exceed 30%
  - cannot be used or agreements relating to the licensing or assignment of intellectual property rights if those intellectual property rights provisions constitute the primary object of the agreement (or if it falls within another block exemption)

- Expiry Date – 31 May 2010

Addleshaw Goddard LLP
17/01/2008

Note: - The above is intended as an aide memoire only: it does not constitute legal advice and is not a substitute for, or an alternative to, such advice.
### MERGER CONTROL THRESHOLDS

<table>
<thead>
<tr>
<th>Country</th>
<th>Thresholds – (NB currency conversions are approximate only)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>EU and EEA</strong></td>
<td><strong>EITHER</strong> 1. The parties’ combined worldwide turnover exceeds €5 billion (£3.6 billion); and 2. EU turnover of at least two of the parties exceeds €250 million (£188 million); <strong>UNLESS</strong> each of the parties achieves more than two-thirds of its EU turnover in one and the same member state. <strong>OR</strong> 1. The parties’ combined worldwide turnover exceeds €2.5 billion (£1.9 billion); and 2. The EU turnover of at least two of the parties exceeds €100 million (£75.2 million); and 3. In each of at least three member states of the EU the combined turnover of all the parties exceeds €100 million (£75.2 million); and 4. In those three states, the turnover of at least two of those parties is more than €25 million (£18.8 million); <strong>UNLESS</strong> each of the parties achieves more than two-thirds of its EU turnover in one and the same member state.</td>
</tr>
<tr>
<td><strong>United Kingdom</strong></td>
<td><strong>EITHER</strong> There is the creation or enhancement of a combined share of supply in the UK exceeding 25%<strong>¹</strong>  <strong>OR</strong> The annual UK turnover of the enterprise being acquired exceeds £70 million.</td>
</tr>
<tr>
<td><strong>Austria</strong></td>
<td><strong>Austrian Cartel Act (1988)</strong> 1. The parties’ combined worldwide turnover exceeds €300 million (£255.6 million); and 2. The combined Austrian turnover of the parties exceeds €30 million (£22.5 million); and 3. Worldwide turnover of at least two of the parties exceeds €5 million (£3.8 million) each².</td>
</tr>
<tr>
<td><strong>Belgium</strong></td>
<td><strong>Protection of Economic Competition Law (1991)</strong> 1. The parties’ combined turnover in Belgium exceeds €100 million (£75.2 million); and 2. Each of at least two of the parties achieves turnover in Belgium of at least €40 million (£30.0 million)</td>
</tr>
<tr>
<td><strong>Bulgaria</strong></td>
<td>The aggregate Bulgarian turnover of the participants for the year preceding the concentration exceeds 15 million Bulgarian Levs (BGL) (£7.7 million /£5.8 million)</td>
</tr>
</tbody>
</table>

---

¹ The 25% threshold can be based on any description of goods or services selected by the authorities. It is therefore not strictly a market share test.
² Turnover based on consolidated sales revenues in last completed financial year. Turnover for insurance companies is gross premium income. In the media sector, turnover thresholds are divided by 200 (€1.5 million instead of €300 million; £75,000 instead of €15 million).
<table>
<thead>
<tr>
<th>Country</th>
<th>Thresholds – (NB currency conversions are approximate only)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Cyprus</strong></td>
<td>1 The annual worldwide turnover realised by each of at least two participating businesses exceeds CYP2 million (£2.6 million / €3.4 million); and 2 At least one of the participating businesses is concerned with commercial activities within Cyprus; and 3 At least CYP2 million of the joint aggregate annual turnover of the participating businesses concerns the sale of goods or the supply of services within Cyprus</td>
</tr>
<tr>
<td><strong>Czech Republic</strong></td>
<td><strong>EITHER</strong> 1 Combined turnover of parties in Czech Republic exceeds CZK 1.5 billion (approximately £43 million / €57 million); and 2 Each of at least two parties has turnover in the Czech Republic of at least CZK 250 million (approximately £7.2 million / €9.6 million) <strong>OR</strong> 1 Turnover in the Czech Republic of the target company or one of the parties establishing a JV exceeds CZK 1.5 billion; and 2 the worldwide turnover of the purchaser or another JV party exceeds CZK 1.5 billion.</td>
</tr>
<tr>
<td><strong>Denmark</strong></td>
<td><strong>EITHER</strong> 1 Parties’ combined annual turnover in Denmark is at least DKK 3.8 billion (£510.3 million / €383.3 million); and 2 At least two of the parties have annual turnover in Denmark of at least DKK 300 million (£30.3 million / €40.3 million); <strong>OR</strong> 1 At least one of the parties has annual turnover in Denmark of at least DKK 3.8 billion; and 2 At least one of the other parties has annual worldwide turnover of at least DKK 3.8 million.</td>
</tr>
<tr>
<td><strong>Estonia</strong></td>
<td>1 The aggregated worldwide turnover of the concentration parties exceeds EEK 100 million (£4.8 million / €6.4 million); and 2 The turnover in Estonia of each of at least 2 of the parties exceeds EEK 30 million (£1.4 million / €1.9 million).</td>
</tr>
<tr>
<td><strong>Finland</strong></td>
<td>1 Parties’ combined worldwide turnover exceeds €350 million (£263.0 million); and 2 The turnover in Finland of at least two parties exceeds €20 million (£15.0 million); and 3 The target conducts business in Finland</td>
</tr>
<tr>
<td>Country</td>
<td>Thresholds – (NB currency conversions are approximate only)</td>
</tr>
<tr>
<td>--------------</td>
<td>---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
</tbody>
</table>
| France       | New code of commerce (NCC) Modified by the New Economic Regulations Act (NER) (2001)  
1 The aggregate annual worldwide pre-tax turnover of all the parties to the transaction exceeds €150 million (£111.3 million); and  
2 The aggregate annual turnover in France, exclusive of taxes of at least two of the parties to the transaction exceeds €50 million (£37.0 million). |
| Germany      |  
1 The parties' combined worldwide turnover exceeds €500 million (£371.0 million); and  
2 At least one party's annual German turnover exceeds €25 million (£18.5 million) (unless de minimis).  
NB: special rules exist for calculating turnover of banks, insurance companies and the media. |
| Greece       | Law 703/77 on the Control of Monopolies & Oligopolies & Protection of Free Competition  
EITHER  
3 Aggregate Greek turnover of the parties is at least €150 million (£111.3 million); and  
4 The Greek turnover of each of at least two of the parties exceeds €15 million (£11.1 million).  
OR  
Post merger filing if market share of the parties in Greece is at least 10% or aggregate turnover of the parties in Greece amounts to at least €15 million  
NB: Regarding credit and other financial institutions, the Law includes specific provisions re calculation of turnover. |
| Hungary      | Act LVIS The Competition Act (1996)  
www.gvh.hu  
Parties' and their groups' combined net sales revenues* exceed HUF10 billion (£26.3 million/ €39.1 million); and  
1 The net sales revenues* of the undertaking or the part thereof coming under control or being merged, or at least two of the merging undertakings, together with the undertakings under their control, exceeds HUF500 million (£1.5 million/ €2.0 million) or  
2 the condition under (a) is not fulfilled but the acquirer, the surviving entity in a merger or any of the merging undertakings having net sales revenues* exceeding HUF500 million performed or was involved in a concentration during the last two years, and the net sales revenues* of the undertakings(s) acquired or merged in the current transaction, together with the revenues* of the undertakings(s) acquired or merged during the last two years, including the revenues of undertakings under their control, exceeds HUF500 million.  
*That is net sales revenues in Hungary if foreign, and worldwide if Hungarian. |

---

3 Foreign mergers are subject to German control if they have an "effect in Germany". "Effect" is given a broad interpretation.  
4 De minimis exception if Seller's group has worldwide turnover of less than €10 million or total value of product market is less than €15 million and market has been in existence for at least five years.  
5 For merging credit institutions, 10% of the balance sheet total is taken into account. For investment firms and funds, the threshold is calculated on the revenue from investment services/membership fees. For insurance companies, the threshold is calculated on the value of the secured gross insurance premium.
<table>
<thead>
<tr>
<th>Country</th>
<th>Thresholds – (NB currency conversions are approximate only)</th>
</tr>
</thead>
</table>
| Ireland | 1 The worldwide turnover of at least two undertakings is not less than €40 million (£29.7 million); and  
2 At least two of the undertakings carry on business in the island of Ireland (north and south). This means that the undertakings have a physical presence in Ireland or that they made sales of at least £2 million in the previous financial year; and  
3 The turnover in the Republic of Ireland of any one of the undertakings is not less than €40 million.  

NB: Turnover thresholds disapplied to media mergers. They are automatically notifiable regardless of turnover. |
| Italy | EITHER  
Combined Italian turnover of the parties exceeds €432 million (£320.4 million).  
OR  
Target's Italian turnover exceeds €43 million (£31.9 million). |
| Latvia | EITHER  
The combined turnover of the parties in Latvia is at least LVL 25 million (£27 million/€35.8 million).  
OR  
Total market share of the parties in Latvia exceeds 40%. |
| Lithuania | 1 The combined aggregate income in Lithuania if foreign, worldwide if Lithuanian, of all participating undertakings (including their associated undertakings) exceeds LTL30 million (£6.5 million/€8.7 million); and  
2 Total income in Lithuania if foreign, worldwide if Lithuanian, of each of at least two of the participating undertakings (including their associated undertakings) exceeds LTL5m (£1.1 million / €1.4 million). |
| Luxembourg | The Law does not contain any specific thresholds for merger control. |
| Malta | Combined Turnover in Malta of 2 of the parties exceeds MTL750,000 (£1.3 million / €1.7 million)  
NB: Mergers of one or more competitors which have a dominant position or the acquisition by a dominant undertaking are prohibited if they amount to an abuse of dominance. Accordingly such merger are acquisitions need negative clearance from the Office of Fair Competition. |
<table>
<thead>
<tr>
<th>Country</th>
<th>Thresholds – (NB currency conversions are approximate only)</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Netherlands</td>
<td>1 The total worldwide turnover of the undertakings concerned exceeds €113.45 million (£83.8 million); and</td>
</tr>
<tr>
<td>Dutch Competition Act (1997)</td>
<td>2 The turnover in the Netherlands of each of at least two of the undertakings concerned is at least €30 million (£22.3 million).</td>
</tr>
<tr>
<td>NB: The turnover of credit/financial institutions is replaced by 1/10 of the fixed and current assets at the end of the preceding financial year, with at least €22,690,000 (£16.8 million) of tangible fixed assets being held in the Netherlands.</td>
<td></td>
</tr>
<tr>
<td>Poland</td>
<td>1 The parties have a combined annual worldwide turnover exceeding €50 million (£37.08 million); and</td>
</tr>
<tr>
<td>Act on the Protection of Competition and Consumers (2000)</td>
<td>2 the turnover of seller's group in Poland in both of the two preceding years exceeds €10 million (£7.4 million).</td>
</tr>
<tr>
<td>Portugal</td>
<td>EITHER</td>
</tr>
<tr>
<td></td>
<td>Parties' combined market share exceeds 30% in the relevant market in Portugal or a substantial part of it.</td>
</tr>
<tr>
<td></td>
<td>OR</td>
</tr>
<tr>
<td></td>
<td>Parties' combined after tax turnover in Portugal and/or relating to the Portuguese territory exceeds €150 million (£101,450k), provided that the turnover individually generated in Portugal by, at least, two of the involved undertakings is greater than €2 million (£1352k) (in the banking and insurance sectors the “turnover” is substituted by the items mentioned in article 10 of the Act).</td>
</tr>
<tr>
<td>Romania</td>
<td>If the Romanian turnover of the merging companies of ROL100 billion (£2100k)) or higher.</td>
</tr>
<tr>
<td>Slovak Republic</td>
<td>EITHER</td>
</tr>
<tr>
<td></td>
<td>1 The parties’ combined worldwide turnover exceeds SKK1.2 billion (approximately £27.0 million / €35.9 million); and</td>
</tr>
<tr>
<td></td>
<td>2 each of at least two parties achieve a turnover in the Slovak Republic of SKK 360 million (approx £8.1 million / €10.8 million).</td>
</tr>
<tr>
<td></td>
<td>OR</td>
</tr>
<tr>
<td></td>
<td>3 Worldwide turnover of one party exceeds SKK1.2 billion; and</td>
</tr>
<tr>
<td></td>
<td>4 at least one other party achieves a turnover in the Slovak Republic of SKK500 million (approx £11.3 million / €14.9 million).</td>
</tr>
<tr>
<td>Slovenia</td>
<td>EITHER</td>
</tr>
<tr>
<td></td>
<td>The parties’ combined aggregate annual turnover in Slovenia exceeds SIT8 billion (£22.2 million / €33.4 million)</td>
</tr>
<tr>
<td></td>
<td>OR</td>
</tr>
<tr>
<td></td>
<td>The parties’ combined market share exceeds 40% in Slovenia.</td>
</tr>
</tbody>
</table>

6 The vendor group is normally included as a party in calculating combined worldwide turnover.
7 Even if the second requirement is not met there may be requirements if the transaction creates or strengthens a dominant position on the market. Exemption is available for takeovers and acquisitions but not for mergers in a narrow sense.
<table>
<thead>
<tr>
<th>Country</th>
<th>Thresholds – (NB currency conversions are approximate only)</th>
</tr>
</thead>
</table>
| Spain     | EITHER  
|           | The parties’ combined market share exceeds 25% of the Spanish market; OR  
|           | The parties’ combined Spanish turnover exceeds €240 million (£170.3 million) provided that the Spanish turnover of at least 2 of the undertakings involved exceeds €60 million (£44.5 million). |
| Sweden    | 1 The parties’ combined worldwide turnover exceeds SKr4 billion (£320.2 million / €424.7 million); and  
|           | 2 The Swedish turnover of at least two of the parties exceeds SKr100 million (£8 million / €10.6 million).  
|           | **Note:** Even if the second threshold is not met, notification may be necessary due to special circumstances. For example where a strong market operator acquires its smaller competitors through successive purchases. |

**Sources:**  
Getting the Deal Through 2007  
The International Comparative Legal Guide to: Merger Control 2007  
Global Competitive Forum (online)  

**NB:** merger control regulations in all other relevant jurisdictions should also be considered