01_Joint Ventures_june, july,august, september_2010_KG

Joint ventures are legal forms which become increasingly common in the business life of the Republic of Bulgaria and the European Union as a whole. Their establishment is most often determined by the need for join business activities, or by the specific features of the business which require the involvement of a strategic partner, or the need for bigger financial resources in the implementation of a project. Typically, undertakings pool their efforts together on the occasion of their participation in a public procurement procedure, in which it is only together that they can meet the requirements of the contracting authorities. In its Notice on the assessment of cooperative joint ventures under Article 85 (now Article 81) of the Treaty[1], the European Commission has identified also a number of economic reasons for the establishment of joint ventures, including for instance the development of research, production, sales and distribution.

The different reasons for the establishment of joint ventures determine also the differences in the way they function. On the one hand, they can be established as fixed-term legal entities for the implementation of a specific project or the conduct of research and development work. In other cases, they are established as autonomous legal forms for an indefinite period of time to engage in the activities for which they have been established. It is this specific feature that explains the different treatment of joint ventures in the Community competition law.

The term “joint ventures” covers various cases, ranging from the establishment of a co-owned company to the formation of cooperative undertakings like general partnerships and consortia. Although the establishment of these legal entities falls entirely within the domain of civil and commercial law, there are cases, in which the competition law regulates this process due to the possibility for collusive tendering of competitor undertakings.

First and foremost, unlike the conventional forms of business concentration, the establishment of a joint venture enables the participating undertakings to continue their functioning as autonomous business entities whose common interests in the joint venture may lead to coordination of their conduct also in matters beyond their pooled operations.

Next, there exists the possibility for restriction of the competition between the parent

CR legal DL 2018. Всички права запазени.

companies or between them and the joint venture in the course of the activities of the joint venture, which sometimes cannot be justified with the advantages created by the presence of the new business entity on the market. There exists also the threat of full elimination of competition on the respective market in the case of an oligopolistic market or a market in which the participating undertakings possess substantial market power.

In view of the need to protect full-fledged competition, the Treaty establishing the European Community envisages the use of two legal regimes regulating the establishment of such legal entities, i.e. the regime of antitrust rules and the regime of the control of concentrations of economic activity, depending on the type of the respective joint venture.

On the one hand, the creation of joint ventures performing on a lasting basis all the functions of an autonomous economic entity, or "full-function joint ventures" is considered from the perspective of the control of concentrations between undertakings.

On the other hand, joint ventures other than those defined as "full-functioning" are considered to be agreements between undertakings from the perspective of enforcement under Article 81 of the Treaty and then the appraisal is to establish whether the agreement has the object or effect of prevention, restriction or distortion of competition on the respective market and to see whether there exist the grounds for exemption under Article 81(3) of the Treaty or under any of the block exemption Regulations.

The possibility for the creation of a joint venture is fall within the scope of two different regulatory regimes makes it necessary to distinguish between them and to identify the advantages and disadvantages they may entail.

When the creation of a joint venture is regulated from the perspective of antitrust rules, there is no legal certainty as to whether the new legal entity falls within the scope of the ban under Article 81 of the Treaty or not. Since the adoption of Council Regulation (EC) No. 1/2003[2] undertakings have been deprived of the opportunity to notify agreements for the purposes of individual exemptions laid down in Article 83(1) of the Treaty. Therefore, at present, the only way to appraise whether the creation of a joint venture is within the scope of the ban or not is to refer to the case law and the Notices and Guidelines of the Commission on the application of Article 81 of the Treaty.

CR legal DL 2018. Всички права запазени.

At the same time, if the creation of the joint venture is within the scope of the Merger Regulation, the decision of the Commission to allow the concentration removes any legal uncertainty with regard to its compatibility with the European competition law and provides immunity against any subsequent decision of the national competition authority in a Member State that rules otherwise. Furthermore, it is important to note that there are quite short time limits within which the Commission examines and assesses the notifications of concentrations between undertakings filed under the Merger Regulation.

Therefore many participating market entities try to organize their joint ventures in a way that will fall within the control on concentrations and hence it is very important to determine whether the joint venture controlled in that way would be an agreement between independent undertakings to be examined under Article 81 of the Treaty.

In order for a joint venture to be notified as concentration between undertakings it has to meet the following requirements: to be “fully-functioning”, to have relevance to the Community which is called “Community dimension”, and to be jointly controlled by at least two persons or undertakings.

Pursuant to Article 3(4) of the Merger Regulation the creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity also constitutes a concentration. It is precisely this criterion that is applied to the appraisal whether the joint venture is fully-functioning or not, which is relevant to the applicability of Regulation No. 139/2004. The appraisal whether a joint venture is fully-functioning or not is based on the compliance with several conditions laid down by the Commission in its Notice on the concept of full-function joint ventures[3] as follows: the joint venture must operate on a market, performing the functions normally carried out by undertakings operating on the same market; have a management dedicated to its day-to-day operations and access to sufficient resources including finance, staff, and assets (tangible and intangible) in order to conduct on a lasting basis its business activities within the area provided for in the joint-venture agreement. Besides, it should be appraised to what extent the joint venture is dependent on the persons holding the control, for instance leading to substantial sales or purchases between the parent companies and the joint venture due to the string presence of the parent companies on the upstream or downstream markets.

CR legal DL 2018. Всички права запазени.

It should be noted that the full-function character of the joint venture does not require its full autonomy right from the outset. In its practice, the Commission has accepted that the support of the parent companies for a start-up period of up to three years does not normally affect the full-function character of the joint venture. However, there must be signs that the joint venture will become fully-functioning in its operations as early as the time of its creation[4]. As to the criterion of operating on a lasting basis, the Commission requires either creation for an indefinite period of time or for a fixed initial period with a renewal option.

Furthermore, the scope of the Merger Regulation covers the concentration between undertakings in the form of a full-function joint venture, where it has a Community dimension. This criterion is appraised by calculating the turnover of the participating undertakings to see whether it reaches the thresholds under Article 1(2) or 1(2) of the Merger Regulation.

Another condition which has to be met for a joint venture to be considered a concentration between undertakings is the existence of joint control. The joint control may be expressed either in the acquisition of shares of an existing company held by another undertaking or in the creation of an entirely new entity. In accordance with the Commission Notice on the concept full-function joint ventures, a joint venture may be considered to be concentration within the meaning of the Merger Regulation, where joint control is acquired by two or more parent companies.

The concept of joint control is defined in Article 3(3) of the Merger Regulation on the basis of the possibility of exercising decisive influence over an undertaking, which is determined by both legal and factual considerations. The establishment of joint control does not necessarily imply that two or more persons or undertakings are holders of a total of 50 % or more of the votes in the general meeting of the joint venture. It is sufficient to have two or more persons or undertakings capable of reaching some key decisions on the operation of the joint venture only on the basis of their consensus due for instance to their right to veto on the adoption of the annual business plan or budget of the joint venture or on the appointment of managerial staff.

If the joint venture fails to meet any of the above criteria, it may fall within the scope of

CR legal DL 2018. Всички права запазени.

Article 81(1) of the Treaty and then it will be appraised from the viewpoint of whether it constitutes an agreement between undertakings that may produce a substantial effect on the trade between Member States and whether it has as their object or effect the restriction or prevention of competition on the Community market. If the applicability of Article 81(1) of the Treaty is established, the appraisal should focus on the possible existence of the preconditions for exemption under paragraph 3 of the same Article, i.e. whether it contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit and does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives or afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

As stated earlier, prior to the entry into force of Regulation No. 1/2003 it was possible for a joint venture outside the scope of the Merger Regulation to be notified before the European Commission for the purpose of obtaining an individual exemption under Article 81(1) of the Treaty. This opportunity does not exist any longer[5], and for some types of joint ventures certainty may be sought in the case law of the Court of Justice and also in the Block Exemption Regulations of the Council and of the European Commission, such as the Regulation on the block exemptions of categories of research and development agreements[6]and the Regulation on specialization agreements[7]. Thus agreements in the firm of joint ventures falling within the scope of any of these two Regulations are automatically exempted from the application of Article 81(1) of the Treaty.

However, the appraisal as to whether a joint venture is “fully-functioning” or falling within the scope of Article 81(1) of the Treaty is a difficult exercise because of the chameleon-like nature of these entities. It is precisely because, in many cases, joint ventures combine both elements of concentration and elements of concerted operation of independent competitor undertakings that they continue to be “the problem children” of the Community competition law.

At the Community level, this had led to the development of artificially established criteria to distinguish among joint ventures in the attempt of fitting them into the existing legal framework of the Community competition law. This process, however, has not been

CR legal DL 2018. Всички права запазени.

completed yet insofar as the day-to-day practice of the European Commission and of the Court of Justice continues to develop the concept of a “full-function” joint venture and the requirements for exemption from the application of Article 81(1) of the Treaty to those which do not fall within the scope of this concept.

[1] Published in The Official Journal of the European Union 1993, OJ, (C 43) 2;

[2] Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty published in The Official Journal of the European Union OJ L 1, 4.1.2003, p.1;

[3] Commission Notice 98/C 66/01 on the concept full-function joint ventures under Council Regulation (EEC) No. 4064/89 on the control of concentrations between undertakings (repealed by Council Regulation No. 139/2004 on the control of concentrations between undertakings)

[4] In this regard, see the Judgment in Case№ COMP/M.4139 – Sony/NECof 31 March 2006, paragraph 10

[5] Except for the cases, in which there is real uncertainty because they might pose new or unsettled questions as to the application of Article 81of the Treaty, and then the undertakings may approach the European Commission for unofficial guidelines

[6] Commission Regulation (EC) No. 2659/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of research and development agreements (OJ L 304, 5.12.2000, p. 7)

[7] Commission Regulation (EC) No. 2658/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of specialisation agreements (OJL 304/3, 5.12.2000, p. 78)

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