The attached note is submitted by the European Commission to the Committee on Competition Law and Policy FOR DISCUSSION at its forthcoming meeting on 24-25 October 2000.
I. Introduction

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

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

II. Full Function JVs vs Non-Full Function JVs

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

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

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

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

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

5. In 1997, the Merger Regulation was amended and now applies to “full function” JVs with a Community dimension. A JV is deemed to be “full function” whenever two or more companies set up a JV that performs “on a lasting basis all the functions of an autonomous economic entity”. The Commission Notice on the concept of full function JVs defines this as meaning that a JV must operate on a market, performing the functions normally carried out by undertakings operating on the same market. In order to do so the JV must have a management dedicated to its day-to-day operations and access to sufficient resources including finance, staff, and assets (tangible and intangible) in order to conduct on a lasting basis its business activities within the area provided for in the JV agreement.

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

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

III. Assessment of Full Function JVs

8. Three possible scenarios may arise:

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

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

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

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

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

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

2. **JVs within scope of Merger Regulation + co-ordination of competitive behaviour**

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

13. In making this appraisal, the Commission takes into account, in particular:
• whether two or more parent companies retain to a significant extent activities in the same market as the JV or in a market which is downstream or upstream from that of the JV or in a neighbouring market closely related to this market;

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

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

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

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

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

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

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

20. A case which demonstrates the application of Article 2(4) of the Merger Regulation is that of Canal+/CDPQ/BankAmerica. The JV concerned pay-TV in France. Competition problems were found to result in the market for the wholesaling of TV rights in Spain. In Spain, Canal+ had strong or dominant positions on the pay-TV market as well as on the upstream market for content. The notified transaction was found, through the balance of power in the JV, to give Canal+ a strong incentive to favour Cableuropa (controlled by CDPQ and BankAmerica) in the sale of Spanish pay-TV rights. The remedies adopted were designed to eliminate the possibility of discrimination against other competitors on the Spanish pay-TV market.  

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

3. **JVs with no Community dimension**

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

IV. **Assessment of non-Full Function JVs**

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

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

**R&D JVs**

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

26. The new draft R&D block exemption Regulation provides that R&D agreements will fall outwith Article 81(1) provided that a number of conditions are satisfied. These include the requirement that all the parties must have joint access to the results of the work (Article 2). In addition, where the participating undertakings are competitors the JV will be exempt if their combined market share does not exceed 25 percent on the relevant market (Article 3). However, the Regulation sets out a list of hard core restrictions which take an agreement outwith the scope of the block exemption. These include price fixing or the limitation of output or sales (Article 5). The Commission’s draft guidelines on horizontal restraints contain provisions on R&D agreements.

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

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

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

Production JVs

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

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

30. However, the recent proposal for the revision of Regulation 17 reserved the discussion of this issue for later:

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

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

32. Under the new draft block exemption Regulation on Specialisation Agreements specialisation agreements fall outwith Article 81(1) provided that the participating undertakings have a combined market share of not more than 20 percent on the relevant market (Article 3) and provided there are no hard core restrictions such as price fixing or market partitioning (Article 4). The Commission’s draft guidelines on horizontal restraints also contain provisions on production and specialisation agreements.

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

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

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

**Distribution/Commercialisation JVs**

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

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

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

39. For distribution arrangements that fall short of joint selling there will be two major concerns. The first is that the joint commercialisation provides a clear opportunity for exchanges of sensitive commercial information particularly on marketing strategy and pricing. The second is that, depending on the cost structure of the commercialisation, a significant input to the parties’ final costs may be common. As a result the actual scope for price competition at the final sales level may be limited. Joint commercialisation agreements therefore can fall under Article 81(1) if they either allow the exchange of sensitive commercial information, or if they influence a significant part of the parties’ final cost.
**Purchasing JVs**

40. Purchasing JVs between actual or potential competitors may restrict competition since they reduce the number of independent purchasers and lead to common purchase prices for products which may account for a significant proportion of demand. Therefore, such agreements may fall within Article 81(1). The possibility of exemption under Article 85(3) will depend on the extent of the restrictions as well as the market position of the parties. The Commission’s draft guidelines on horizontal restraints contain provisions on purchasing agreements.30

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

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

**De Minimis JV Agreements**

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

V. Commission Approach in a Number of Recent Cases

**SHELL/BASF (project Nicole)**

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

45. The JV was cleared after a Phase 1 investigation subject to a package of commitments offered by the parties. The combination of the two companies’ businesses raised horizontal competition issues in the markets for PP technology licensing, PP resins and PP compounds that were remedied by commitments to divest significant amounts of resins and compounds production capacity as well as BASF’s PP technology licensing business (Novolen). In addition, BASF held a suite of patents for the next generation of PP catalysts (metallocenes) that would have been strong enough to block others bringing any metallocene catalysts to the market.

46. The Commission considered that the combination of this strong patent position with the position that the JV would have held in the traditional (Ziegler-Natta) catalysts and technology would have further
strengthened the parties’ dominance. To remedy these concerns, the parties committed to a package of measures involving licensing and non-assertion of these patent rights, as a result of which the JV’s ability to prevent the development of metallocene catalysts would be removed.

**BBL/BT/ISP**

47. The case involved the creation of an Internet service provider (ISP) JV in Belgium. A derogation from suspension was requested because Skynet, Belgacom’s Internet subsidiary, was about to launch a subscription free Internet product in Belgium. In the face of this, any delay in the implementation of the JV would have resulted in Belgacom achieving a very strong market share, causing significant damage to the parties. The Commission considered that the derogation from the suspension would not pose any threat to competition since the JV was a new entrant, which was supposed to challenge the incumbent Belgacom.

**FreeCom/Dangaard Holding**

48. The Commission approved the creation of a JV between the German companies BHS Holding GmbH & CoKG/Debitel AG and the Danish companies Fleggaard Holding AS/Fleggaard Partner AS. The parent companies transferred to the JV their respective wholesale businesses (FreeCom GmbH and Dangaard Holding AS) concerning mobile telecommunications devices, in particular mobile phones, and related value added services (e.g. hot-line and repair services, implementation of promotion programmes for retailers, packaging for retailers). The operation allowed the JV to offer its customers a pan-European company structure and to better face increasing competition from network operators and service providers in bringing mobile phones to the market.

49. The Commission, while considering it not strictly necessary to define in detail the relevant product market, tended towards considering the wholesaling and the provision of related value added services to be two distinct markets. The issue as to whether the geographical market was EU-wide or national could be left open. FreeCom had a well-established position on the German market while Dangaard was dominantly active in the Scandinavian markets and in Switzerland. Therefore, the activities of the two companies were to a large degree geographically complementary. In Germany, where the Parties’ activities overlapped, the resulting market share of the JV in the wholesale market did not exceed 15 percent.

50. The Commission concluded that the operation did not lead to the creation of a dominant position.

**The British Interactive Broadcasting Decision**

51. The Commission exempted on 15 September 1999 pursuant to Article 81 (3) of the EC Treaty the creation of a JV company, British Interactive Broadcasting Ltd (BiB, now named Open). Open’s parent companies are BSkyB Ltd, BT Holdings Limited, Midland Bank plc and Matsushita Electric Europe Ltd. Open is to provide a new type of service, digital interactive television services, to consumers in the United Kingdom. This involves putting in place the necessary infrastructure and services to allow companies, such as banks, supermarkets and travel agents, to interact directly with the consumer. The following services will form part of the Open digital interactive television service: home banking, home shopping, holiday and travel services, down-loading of games, learning on line, entertainment and leisure, sports, motor world, a limited collection of “walled garden” internet sites provided by a third party and e-mail and public services. An important element of this infrastructure is a digital set top box. Open will subsidise the retail-selling price of digital satellite set top boxes.
52. The Commission’s decision follows the substantial undertakings given by the parties to the Commission in order to ensure that the digital interactive television services market in the UK remains open to competition.

53. The Commission considered that the combination of the very significant market power of BT and in particular of BSkyB in related markets to that in which BiB will be active, such as the customer access infrastructure market, the technical services for pay-tv and digital interactive services market, the pay-tv market and the market for the wholesale supply of film and sport channels for pay-tv, risked eliminating a substantial part of competition on the markets for digital interactive TV services.

54. The main element of concern raised by the Commission pursuant to Article 81 EC was that the operation eliminated BT and BSkyB as potential competitors in the digital interactive television services market. Both had sufficient skills and resources to launch such services and both would be able to bear the technical and financial risks of doing so alone. The conditions imposed should ensure that this risk does not materialise and that, in particular, competition to BT comes from the cable networks, that third parties are ensured sufficient access to BiB’s subsidised set top boxes and to BSkyB’s films and sport channels and that set top boxes other that BiB’s set top box can be developed in the market, so that the digital interactive television services market remains open to competition.

P&W / GE

55. On 14 September 1999, the Commission adopted a Decision approving the creation of a JV between Pratt & Whitney (P&W) and General Electric Aircraft Engines (GE). The JV, called the Engine Alliance, was created to develop and sell a new jet engine intended for Airbus’ future, very large aircraft, known as the A3XX.

56. P&W and GE are two of the world’s three manufacturers of big jet engines, the third competitor being Rolls-Royce plc (RR). The Engine Alliance would be owned and run on an equal basis by P&W and GE and be responsible for the final assembly of the new engine and for the sales and marketing thereof.

57. The Commission concluded that, although it might be economically more efficient for the parties to develop the new engine jointly, it would be technologically and economically feasible for both parties to develop it independently. The creation of the Engine Alliance appreciably restricted competition for the new engine, since it reduced the choice of engine suppliers from three potential suppliers to two. It was therefore caught by Article 81(1) However, the Commission considered that the JV fulfilled the conditions for exemption under Article 81(3). It enabled each of P&W and GE to concentrate on the specific elements where it had a technological advantage allowing the parties to jointly develop a new engine fulfilling stricter performance targets than any existing engine within a shorter time frame and at a lower cost than would otherwise have been possible. Competition would not be eliminated, since RR was able to offer its Trent engine in competition with the new engine.

58. The Commission was concerned that, since there were only three competitors on the market for large jet engines, the co-operation should not extend into other market segments where P&W and GE competed and where they both had high market shares. It considered that there was a risk that the JV would provide an incentive in the future for the parties to adapt the new engine for use on other aircraft instead of individually developing new engines. This would have the effect of reducing competition between the parties. Thus, the Commission granted exemption on condition that the co-operation remained limited to a specific engine that was exclusively intended for the A3XX aircraft and to any future, four-engine aircraft of Boeing, designed for more than 450 passengers. A number of other conditions were also
imposed in order to enable the Commission to monitor the parties’ compliance with the above condition. The parties also gave a number of undertakings. The exemption was granted for 15 years.

**KLM / Alitalia**

59. This was a JV in the airline sector. The Commission approved the operation subject to commitments and in view of the companies’ significant undertakings to promote the entrance of new competitors on two hub-to-hub routes, Amsterdam-Milan and Amsterdam-Rome, where the Commission found that the Alliance between Alitalia and KLM raised competition concerns. The Commission concluded in its investigation that the concentration would have created a monopoly on these routes. To overcome this anti-competitive situation, Alitalia and KLM proposed to take a set of measures that would facilitate the entrance of potential competitors. The extensive undertakings offered include a commitment to make slots available to existing competitors and new entrants who apply to operate on any of the two routes in question; a commitment to reduce the parties’ frequencies on the Amsterdam-Milan and/or Amsterdam-Rome routes when a new entrant airline started operations; a commitment to enter into interline agreements with the new entrant airline and to give the new entrant the opportunity to participate in KLM’s and Alitalia’s Frequent Flyer Programme; a commitment to refrain from tying travel agents and corporate customers in Italy and The Netherlands respectively with loyalty or other similar rebate schemes; and a commitment to ensure that, once a competing airline has entered on the route(s) in question, the first screen of the computer reservation system is not filled with the flights of the Alliance and that consumers will be informed about the precise code-share arrangements.

**BT/AT&T**

60. In this case, the Commission investigated possible co-ordination effects of the proposed JV between British telecom and the US company AT&T under Article 2(4) of the Merger Regulation. BT was, at the time, the fifth largest telecommunications operator. Its principal activity was the supply of telecommunications services and equipment in the UK. AT&T was the second largest telecommunications operator world-wide by turnover, and the largest US long distance telecommunications operator. AT&T was also active internationally, notably in the UK where it operated a group of wholly-owned subsidiary companies including AT&T Comms UK, and ACC Long Distance UK, a subsidiary of ACC Corp. There was a risk of parental co-ordination between ACC, a wholly-owned subsidiary of AT&T, BT and Telewest, in which AT&T through TCI held a 22 percent stake and regarding the distribution of AT&T/Unisource services in the UK.

61. The Commission raised concerns that the JV could lead to the co-ordination of the competitive behaviour of the parties. In order to remove the competition concerns AT&T offered to divest ACC UK. AT&T also committed itself to the creation of a greater structural separation between AT&T and Telewest and undertook to give another distributor the possibility to distribute AUCS services in the UK, as AT&T UK would be wound up. Subject to full compliance with these undertakings, the Commission declared the concentration compatible with the common market.

**Telia/Telenor/Schibsted**

62. Telia, the incumbent telecoms operator in Sweden, Telenor the Norwegian incumbent and Schibsted, a Norwegian publishing and broadcasting company, formed a JV to provide Internet gateway services and offer web site production services. Internet gateway services are designed to enable users of the Internet to access content more easily. This content may be provided by the gateway service provider
or other third parties and may be free of charge to the user (normally financed by advertising) or content for which the user has to pay for access ("paid-for content").

63. In its analysis of the case, the Commission found that the supply of gateway services in themselves did not amount to a market as such, but that advertising on web pages and paid-for content could be considered relevant markets. These two markets were relevant markets for the purposes of dominance, as was the production of web sites. Web site production was also considered to be a candidate market for the analysis of co-ordination under Article 2(4) as the JV and two of the parent companies (Telia and Telenor) were present on this market. The other candidate market was the provision of dial-up Internet access where both Telia and Telenor (through its stake in the Swedish telecommunications company Telenordia) were present.

64. In its analysis of the operation, the Commission had two distinct situations to assess under Article 2(4). First, the web site production market involved the presence of the JV and two of the parent companies on the same market. The combined market share of the parent companies and the JV was less than ten percent on the narrowest possible and most unfavourable market definition to the parties. Accordingly, the Commission concluded that, even if the parent companies were to co-ordinate their activities on this market, it would not amount to an appreciable restriction of competition. In the second part of its Article 2(4) reasoning, on the dial-up Internet access market in Sweden, the Commission found that that market was characterised by high growth, relatively low barriers to entry and low switching costs. The market shares which Telia and Telenordia enjoyed on this market were 25-40 percent and 10-25 percent respectively, but the Commission found that these market shares were of limited significance in such a growing market and, therefore, the market structure was not conducive to the co-ordination of competitive behaviour. In addition, the likelihood of co-ordination was reduced further by the relative size of the dial-up Internet access market (which accounted for over 90 percent of Internet revenue in Sweden) compared with the size of the other markets on which the JV would be active. The Commission therefore concluded that there would be no likelihood of the parent companies co-ordinating their behaviour on this market.
NOTES

1. Article 3(1)(b) of the Merger Regulation. The concept of control is set out in Article 3(3). This provides that control is based on the possibility of exercising decisive influence over an undertaking, which is determined by both legal and factual considerations (See Commission Notice on the concept of full-function joint ventures under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings OJ C 066, 02/03/1998 p.1.)

2. See Annex 1.


6. Article 3(2).


9. Article 2(1) (a) and (b).

10. Article 2(2) and (3).

11. Article 2(4) states that:

“To the extent that the creation of a joint venture constituting a concentration pursuant to Article 3 has as its object or effect the coordination of the competitive behaviour of undertakings that remain independent, such coordination shall be appraised in accordance with the criteria of Article 85 (1) and (3) of the Treaty, with a view to establishing whether or not the operation is compatible with the common market.” In 1999, 19 such cases were investigated and 15 decisions taken. Four cooperation cases were cleared only after the parties submitted undertakings. See Part V of this paper.

12. Article 2(4).


15. See Commission Notice on the concept of full-function joint ventures, OJ C 066, 02/03/1998 p.1 at paragraph 16; see also Commission Notice regarding restrictions ancillary to concentrations OJ No C 203, 14.8.1990, p. 5; note: the Commission has recently issued a proposed new Notice on ancillary restraints which can be found at:

http://europa.eu.int/comm/competition/mergers/legislation/draft_notices/

16. An example can be found in Yoplait/Valio, June 23 1999, IP/99/420; where the 50:50 control of a JV between competitors was changed to 51:49 control in order to ensure the JV’s independent competitive force and to avoid anti-competitive co-ordination between the parents and the JV. See also BT/AT&T, Case IV JV 15, March 30 1999, at:

http://europa.eu.int/comm/competition/mergers/cases/index/by_nr_jv_0.html#jv_15


http://europa.eu.int/comm/competition/mergers/legislation/draft_notices/

18. Case No. IV/M.1327 at:

http://europa.eu.int/comm/competition/mergers/cases/decisions/m1327_en. pdf


http://europa.eu.int/comm/competition/antitrust/others/horizontal/reform/consultation/

20. Draft Guidelines on the applicability of Article 81 to horizontal co-operation agreements, at:

http://europa.eu.int/comm/competition/antitrust/others/horizontal/reform/consultation/

21. OJ C 43, 16.2.1993, p. 2

22. OJ C 75, 29.7.1968

23. See points 40-73.


26. See points 74-105.


28. Notice concerning agreements, decisions and concerted practices in the field of cooperation between enterprises, OJ C 75, 29.7.1968, p. 3, point II 6 (a).
29. See points 131-150.

30. See points 106-130.


32. Case No.IV/M.1667 at; see Competition Policy Newsletter 2000 Number 1 February.


34. Case No IV.36.539-British Interactive Broadcasting/Open; see Competition Policy Newsletter 1999 Number 3 October.


37. Case IV JV 1, 27.05.1998 at:

http://europa.eu.int/comm/competition/mergers/cases/decisions/jv1_en.pdf
ANNEX 1

A JV has a Community dimension if it satisfies the following thresholds set out in Article 1 of the Merger Regulation:

“(2) For the purposes of this Regulation, a concentration has a Community dimension where;

(a) the aggregate world-wide turnover of all the undertakings concerned is more than ECU 5 000 million, and

(b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than ECU 250 million,

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

(3) For the purposes of this Regulation, a concentration that does not meet the thresholds laid down in paragraph 2 has a Community dimension where:

(a) the combined aggregate world-wide turnover of all the undertakings concerned is more than ECU 2 500 million;

(b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than ECU 100 million;

(c) in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than ECU 25 million; and

(d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than ECU 100 million,

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.”