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JOINT VENTURES BETWEEN AIRLINES IN THE LIGHT OF FULL-FUNCTIONALITY CRITERION IN EU MERGER CONTROL[*]

I. INTRODUCTION

Cooperation through joint venture agreements is a relatively new element of the global airline industry[1]. Its proliferation owes much to the fact that this form of cooperation is considered to be a success story from the airlines' standpoint. From the legal perspective the relevance of this issue stems from the anticompetitive potential of any collusion between previous competitors. In this respect the full-functionality criterion serves as a yardstick that allows distinguishing agreements that fall under the general rules of antitrust regulations and these that raise concentration concerns and will be assessed under Merger Regulation[2]. In other words, it is a tool to establish whether cooperation leads to *de facto* concentration.

Much has been said about the genesis and dynamics of cooperation in the airline industry[3]. Without going into details that are beyond the scope of this paper it is worth emphasising that the reasons why air carriers resort to cooperation are

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[1] Most prominent joint ventures exist between Lufthansa Group and United and Air Canada; Between Air France/KLM (together with Alitalia) and Delta Airlines; between IAG (British Airways, Iberia) and American Airlines. Additionally on Asiatic markets Lufthansa Group has signed joint venture with ANA; British Airways and Finnair with JAL Japan Airlines. Agreement between Lufthansa and Air China is currently being negotiated.

[2] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (hereinafter: Merger Regulation), OJ L 024, 29.01.2004, p. 1.

[3] See inter alia J.F. O'Connell, G. Williams (eds.), *Air Transport in the 21st Century: Key Strategic Developments*, Farnham 2011; S.D. Barrett, *Deregulation and the Airline Business in Europe: Selected Readings*, London and New York 2009; A. Cheng-Jui Lu, *International Airline Alliances: EC Competition Law / US Antitrust Law and International Transport*, Den Haag, London and New York 2003; P. Clark, *Stormy Skies. Airlines in Crisis*, Farnham 2010; B. Kleymann,

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twofold: The main economic rationale lies in the attempt to exploit economies of scale and of scope[4]. Like in all network industries there is a palpable synergetic effect achievable through an increase in scale of operations[5]. This allows to lower unit costs thus boosting company's competitive edge[6]. Additionally, a functional fusion of partner's hub-and-spoke networks (chiefly through coordination of schedules and code-sharing agreements) allows for a greater territorial coverage, at the same time providing vital feed for long-haul routes[7]. Furthermore, given cooperation may entail other aspects of airline operations such as maintenance, repair and overhaul (MRO), crew training or common purchases of fuel, parts etc.[8] Apart from these purely operations-related forms, the cooperation in question may feature sales-related components related to loyalty programmes and common marketing campaigns[9].

From this brief outline it becomes glaringly obvious that cooperation serves primarily as a vehicle for expansion[10]. This is chiefly due to technical reasons that stem from the very nature of hub-and-spoke system, because in order to financially sustain intercontinental long-haul connections it is crucial to have reliable feeder service on both endpoints[11]. However, the optimal solution would be to acquire a local carrier as full-fledged merger brings about higher synergies than the cooperation of two independent companies[12]. This brings up the second rationale for cooperation — the legal factors. Local airline sectors in practically every country in the world are shielded from foreign investments by protectionist barriers of the

H. Seristö, *Managing Strategic Airline Alliances*, Aldershot 2004; S. Truxal, *Competition and Regulation in the Airline Industry: Puppets in Chaos*, Farnham 2013.

[4] K. Iatrou, L. Mantzavinou, *The Impact of Liberalization on Cross-border Airline Mergers and Alliances*, [in:] D. Forsyth et al. (eds.), *Liberalization in Aviation. Competition, Cooperation and Public Policy*, Farnham 2013, p. 233.

[5] See DLR (Deutsches Zentrum für Luft- und Raumfahrt e.V.), *Analyses of the European Air Transport Market. Topical Report: Airline Business Models*, Köln and Porz 2008, p. 7.

[6] K. Iatrou, L. Mantzavinou, op. cit., p. 233 et seq; B. Kleymann, H. Seristö, op. cit., p. 47 et seq.

[7] At present joint ventures exist solely on a long haul routes. In case of short haul connections resorting to such form of cooperation is not necessary from an operational standpoint. Additionally expansion through mergers is possible due to lack of Control & Ownership restrictions. J. Kociubiński, "Dynamics of Interdependence: Interlinked Regulatory and Operational Stimuli of Airline Alliances", *Folia Iuridica Wratislaviensis*, 2014, vol. 3, no. 2, pp. 155–174.

[8] A. Cheng-Jui Lu, op. cit., p. 59 et seq.

[9] Ibid.

[10] B. Havel, *Beyond Open Skies. A New Regime for International Aviation*, Alphen aan den Rijn 2009, p. 12 et seq; M. Weber, J. Dinwoodie, "Fifth Freedoms and Airline Alliances. The Role of Fifth Freedom Traffic in an Understanding of Airline Alliances", *Journal of Air Transport Management*, 2000, no. 6, p. 55.

[11] See G. Burghouwt, *Airline Network Development in Europe and Its Implications for Airport Planning*, Aldershot 2007; G. Dobson, P.L. Lederer, "Airline Scheduling and Routing in a Hub-and Spoke System", *Transportation Science*, 1993, no. 23, pp. 281–297.

[12] S. Holloway, *Straight and Level. Practical Airline Economics*, 3rd edition, Aldershot 2008, pp. 5–49.

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so-called Control & Ownership clauses[13]. Although they are country-specific to a certain extent, the common feature is that they restrict the maximum allowed percentage of external capital in the ownership structure of the local airline[14]. Additionally, they prevent foreign nationals from effectively controlling and/or having decisive influence over management of an air carrier[15]. Therefore joint venture agreements are usually considered to be a workable second-best solution if a full-fledged concentration is not an option due to control and ownership restrictions[16]. At the same time they offer greater flexibility than that of a formal alliance[17].

II. JOINT VENTURES AS A NEW FORM OF COOPERATION IN THE GLOBAL AIRLINE INDUSTRY

At a certain level of generality one may define joint venture as an association of two or more companies engaged in a solitary business enterprise for profit

[13] J. Kociubiński, "Inwestycje linii lotniczych z państw trzecich w przewoźników z Unii Europejskiej w świetle ograniczeń kontroli i własności", *Europejski Przegląd Sądowy*, 2015, no. 2, pp. 15–21; I. Lelieur, *Law and Policy of Substantial Ownership and Effective Control of Airlines. Prospect of Change*, Aldershot 2003, pp. 23 et seq.

[14] The following ownership & control restrictions are in force worldwide (non-exhaustive list): Australia — 49% for international airlines and 100% for domestic airlines; Brazil — 20% of the voting equity; Canada — 25% of the voting equity and the maximum single holding in Air Canada by any investor is limited to 15%; Chile — designation as a Chilean carrier (domestic or international) has a principal place of business as the only requirement; China — 35%; Colombia — 40%; India — 26% for Air India and 40% for privately-owned domestic carriers; Indonesia — requires airlines designated under bilateral agreements to be substantially owned and effectively controlled by the other party; Israel — 34%; Japan — one third; Kenya — 49%; Korea (Republic of) — 50%; Malaysia — 45% for Malaysia Airlines, but the maximum holding by any single foreign entity is limited to 20% (following Malaysia Airlines financial downturn caused by losing of two aircrafts over a short period of time [Flight MH370 — missing over Pacific, MH17 — shot down over Donbas] Malaysia Airlines had been renationalized) and 30% for other airlines; New Zealand — 49% for international airlines and 100% for domestic airlines; Peru — 49%; Philippines — 40%; Singapore — none; Taiwan — one third; Thailand — 30%; US — 25% of the voting equity (source: C.J. Hsu; Y-C Chang, "The Influence of Airline Ownership Rules on Aviation Policies and Carriers' Strategies", *Proceedings of the Eastern Asia Society for Transportation Studies*, 2005, vol. 5, p. 558). In the European Union a maximum foreign holding is limited to 49%, additionally foreign party is not allowed to "effectively control" the so-called Community Carrier or have a "decisive influence" over it. See Article 4(f) of the Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community, OJ L 293, 31.10.2008, pp. 3–20.

[15] J. Kociubiński, "Inwestycje…", p. 15 et seq.

[16] W. Grimme, "The Growth of Arabian Airlines from a German Perspective — A Study of the Impacts of New Air Services to Asia", *Journal of Air Transport Management*, 2011, vol. 17, no. 6, pp. 333–338; B. Havel, op. cit., p. 12 et seq.; M. Weber, J. Dinwoodie, op. cit., p. 55.

[17] B. Vasigh, K. Fleming, T. Tacker, *Introduction to Air Transport Economics. From Theory to Application*, 2nd edition, Farnham 2013, pp. 189–214.

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without the actual partnership or incorporation[18]. However, one of the main problems in regulating joint ventures is that these agreements do not have a uniform legal form. And the term "joint venture" is not a strictly legal term but rather an umbrella category encompassing various agreements functioning under many legal regimes. For the purpose of this analysis it is necessary to emphasize that the aforementioned term does not present any distinct, autonomous legal category in the European Union's (EU) law. Joint ventures will either be assessed under antitrust law or under Merger Control Regulation[19].

In order to analyse this somewhat elusive concept, it is necessary to briefly outline its structure in the airline industry. It goes without saying that specific provisions of business contracts between air carriers are confidential, but it is possible to reconstruct their mechanism based on their strategic objectives. As a point of note it has to be assumed for the purpose of this analysis that all participants are fully committed to common goals and do not engage in opportunistic behaviours.

At the very base of the cooperation in question lays the commonality of interest. Costs of operations on overlapping routes are being "pooled" and then divided between partners modified by surplus based on the scale of offering[20]. Analogously, the yields are divided proportionally to the scale of respective operations[21]. Of course, these generic arrangements are modified by the differences in actual costs incurred due to utilization of various aircraft types with different cost structures and class standards[22]. Additionally when a joint venture covers routes that are not directly overlapping, an algorithm for revenue shares will inevitably be more complex, but will not deviate from its underlying principle[23]. In a nutshell, an airline partner's revenue from joint ventures is independent of which airline actually flies the passenger[24]. This creates a service where the actual ownership of an aircraft involved in providing the service is not relevant to determining an airline's reve-

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[18] See inter alia K.R. Harrigan, *Managing for Joint Venture Success*, Lexington, MA 1986; C. Levins, J.S. Lawlor, "Legal Considerations of Joint Ventures", [in:] J.D. Carter, R.F. Cushman, C. Scott Hartz (eds.), *The Handbook of Joint Venturing*, Homewood 1988; R. Oczkowska, "Joint venture jako alians przedsiębiorstw na rynku międzynarodowym — rozważania terminologiczno-definicyjne", *Zeszyty Naukowe Akademii Ekonomicznej w Krakowie*, 2006, no. 720, pp. 121–137.

[19] I. Kokkoris, H. Shelanski, *EU Merger Control. A Legal and Economic Analysis*, Oxford 2014, pp. 141–145.

[20] B. Pearce, G. Doernhoefer, "The Economic Benefits of Airline Alliances and Joint Ventures", *IATA Economics Briefing*, 2012, pp. 2–3.

[21] Ibid.

[22] Ibid.

[23] See inter alia J.K. Brueckner, P.T. Spiller, "Economies of Traffic Density in the Deregulated Airline Industry", *Journal of Law and Economics*, 1994, vol. 37, no. 2, pp. 379–415; D.W. Caves, L.W. Christensen, M.W. Tretheway, "Economies of Density versus Economies of Scale: Why Trunk and Local Service Airline Costs Differ", *The RAND Journal of Economics*, 1984, vol. 15, no. 4, pp. 471–489.

[24] B. Pearce, G. Doernhoefer, op. cit., p. 2 et seq.

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nue[25]. Therefore all partners are equally interested in the performance of every air operation in a joint venture.

This differs greatly from code-sharing agreements, so prevalent in airline alliances, where an operating carrier retains much of the revenue and a marketing carrier receives only a minor commission[26]. If a route is commonly served by code-sharing partners, both carriers are still equally interested in its performance, but such commonality will not be the case where an airline remains a sole operator[27].

III. JOINT VENTURES UNDER EU COMPETITION LAW — A GENERAL ASSESSMENT

Article 101 of the Treaty on the Functioning of the European Union (TFEU) is a primary provision that deals with the impact on competition of contractual and consensual agreements between undertakings[28]. Therefore somewhat by default joint ventures in question will fall within the scope of this article.

For Article 101 TFEU to apply it is sufficient to establish if the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way[29]. Activity in question does not have to take any specific form. The form is in fact almost entirely irrelevant; it can well be oral, signed or unsigned, etc.[30] It is enough to establish if there is the "concurrence of wills", which is particularly easy to show in case of horizontal cooperation — between actual or potential competitors[31]. It goes without saying that joint ventures in airline industry fit neatly to that bill. Such agreements have high potential for distorting

[25] Ibid.

[26] See inter alia J.K. Brueckner, "International Airfares in the Age of Alliances: The Effects of Codesharing and Antitrust Immunity", *Review of Economics and Statistics*, 2003, vol. 85, no. 1, pp. 105–118; J.K. Brueckner, D.N. Lee, E.S. Singer, "Alliances, Codesharing, Antitrust Immunity and International Airfares: Do Previous Patterns Persist?", *Journal of Competition Law & Economics*, 2011, vol. 7, no. 3, pp. 573–602; S. Holloway, op. cit., p. 407 et seq.

[27] S. Holloway, op. cit., p. 407 et seq.

[28] Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, pp. 47–390.

[29] Case T-7/89 *SA Hercules Chemicals NV v Commission of the European Communities* [1991] ECR II-1711, para 2.

[30] Cases 41-69 *ACF Chemiefarma NV v Commission of the European Communities* [1970] ECR 661; 28/77 *Tepea BV v Commission of the European Communities* [1978] ECR 1391 and Commission's Decisions IV/29.021 — *BP Kemi / DDSF*, OJ L 286, 14.11.1979, pp. 32–52; IV/29.525 and IV/30.000 — *SSI*, OJ L 232, 6.8.1982, pp. 1–38; IV/30.804 — *Nuovo CEGAM*, OJ L 99, 11.4.1984, pp. 29–37; IV/34.237/F3 — *Anheuser-Busch Incorporated — Scottish & Newcastle*, OJ L 49, 22.02.2000, pp. 37–44.

[31] Communication from the Commission — Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements OJ C 11, 14.01.2011, pp. 1–72.

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competitive process, thus case-law embraces a wide concept of material scope of Article 101 TFEU that covers all behaviours that lead the undertakings concerned to "conduct themselves on the market in a specific way"[32].

Therefore as a rule cooperative joint ventures are assessed pursuant to Article 101 TFEU[33]. At the same time, the European Commission (EC) expressed the view that joint ventures may amount either to a form of restrictive practice or to a merger[34]. Distinction is to be drawn in the light of specific circumstances on a case-to-case basis but the key concept is the full-functionality criterion. 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 shall constitute concentration within the meaning of paragraph 1(b) [of the Merger Regulation — J.K.]"[35]. The criterion in question is further described in the Consolidated Jurisdictional Notice as the ability to "operate on a market, performing the functions normally carried out by undertakings operating on the same market"[36]. Joint venture will pass a full-functionality test if the following cumulative criteria are met: must have operational autonomy from its parent companies; it must have sufficient resources to carry out independent market operations, and it must be established on a lasting basis. These will be further discussed.

IV. AUTONOMY

The criterion of full functionality requires that the joint venture be autonomous from its parent companies in the operational sense[37]. On the other hand, strategic autonomy is not required as otherwise this would negate the whole purpose of control since no jointly controlled entity would ever fulfill the condition set out

[32] Cases C-49/92 P *Commission of the European Communities v Anic Partecipazioni SpA*. [1999] ECR I-4125, para 115; T-99/04 *AC-Treuhand AG v Commission of the European Communities* [2008] ECR II-1501, paras 118, 122 and 125.

[33] L. Nouvel, "The New European Treatment of Joint Ventures: A Shift Towards a More Economic Approach", *Revue de droit des affaires internationals/International Business Law Journal*, 2002, no. 2, pp. 511–556.

[34] This view had been expressed for the first time in Sixth Report on Competition Policy, Brussels, Luxembourg 1977, para 53.

[35] Merger Regulation distinguishes between two types of concentration: merger of two independent undertakings and acquisition of control. Article 1(b) of the Merger Regulation describes the latter.

[36] Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ C 95, 16.4.2008 p. 1 (hereinafter: Consolidated Jurisdictional Notice), para 94. This interpretation had been previously expressed in Notice on the concept of full-function joint ventures, OJ C 66, 2.03.1998, p. 1.

[37] Consolidated Jurisdictional Notice, para 93.

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in Article 3(4) of the Merger Regulation[38]. Additionally, in order to autonomously operate on a market, an entity must have sufficient assets at its disposal, i.e. financial or staffing[39].

The assessment of the level of autonomy hinges heavily on the nature of relations that a joint venture retains with its parent companies[40]. Generally the full function will not exist if it only takes over one specific function within the parent companies' business activities without individual commercial existence and market presence[41]. If the level of exchange between parents and joint venture in question is decisive for the financial performance of the latter, its autonomy is unlikely[42]. If, on the other hand, the share of joint venture's supplies coming from the parent companies is relatively low and the amount of trade between them is insignificant, this will be considered as an indication of full-functionality[43]. It goes without saying that the parent companies can initially provide assets necessary for the joint venture to run its activity but in terms of full-functionality assessment such lifeline should be limited to a start-up period[44].

If one extrapolates these on joint ventures in aviation sector, it has to be noted that this cooperation has a horizontal nature. There is, however, a possibility for a vertical relationship through collaboration in various auxiliary activities such as MRO or ground handling[45]. But even if one assumes that a joint venture in these auxiliary activities will amount to concentration, it would still not be directly related to core business[46]. Downstream sectors had been fully liberalized and are highly competitive, therefore vertical separation as a result of creation of

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[38] M. Rosenthal, S. Thomas, *European Merger Control*, München 2010, p. 42. See also Case T-282/02 *Cementbouw Handel & Industrie BV v Commission of the European Communities* [2006] ECR II-319, para 62.

[39] I. Kokkoris, H. Shelanski, op. cit., s. 146.

[40] M. Rosenthal, S. Thomas, op. cit., s. 43.

[41] Consolidated Jurisdictional Notice, para 102 and Commission's Decision IV/M.168 — *Flachglas/Vegla*, OJ C 120, 12.05.1992, p. 30. See also J. Venit, "The Joint Venture Conundrum: Is a Purely Structural Analysis Enough?", *International Company & Commercial Law Review*, 1993, vol. 3, no. 11, pp. 377–384.

[42] Commission's Decisions IV/M.560 — *EDS / Lufthansa*, OJ C 163, 29.06.1995, p. 8; COMP/M.2403 — *Schneider/Thomson Multimedia/JV*, OJ 251, 11.09.2001, p. 3; COMP/M.2645 — S*aab/WM-Data AB/Saab Caran JV*, OJ 34, 7.02.2002, p. 12; COMP/M.4912 — *Calyon/Société Générale/Newedge*, OJ C 35, 8.02.2008, p. 5; COMP/M.3099 — *Areva/Urenco*, OJ L 61, 2.03.2006, p. 11.

[43] Commission's Decision IV/M.527 — *Thomson CSF / Deutsche Aerospace*, OJ C 65, 16.03.1995, p. 4, para 11.

[44] Commission's Decisions IV/M.168 — *Flachglas/Vegla* and COMP/M.4288 — *SAAB/ EMW*, OJ C 251, 17.10.2006, p. 1. See also L. Nouvel, op. cit., p. 511 et seq.

[45] See inter alia K. Iatrou, L. Mantzavinou, op. cit., p. 233 et seq.

[46] For the purpose of competition assessment these are considered to be separate relevant markets.

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a full-function joint venture will have a minimal potential of changing the competitive situation in main transport activities[47].

The fulfillment of a condition of real commercial presence seems equally problematic. It is established that full-functionality is less likely to occur when there is no "added value" to the products concerned before as it could be argued that it resembles joint sales agency which would generally not be considered a concentration[48]. It is *prima facie* true that a joint venture in air transport sector will not generate a new product because cooperation features pre-existing networks (and its dedicated fleets). So in this vein it could be argued that from the passenger standpoint the standard of offering in terms of schedules, classes and tariffs remains unchanged. Following this line of reasoning, benefits of cost and revenue sharing are irrelevant from the demand-side perspective. This argument is only partially valid. It is true that in purely numerical terms a joint venture will not bring about any changes in offering, however the coupling of sales systems that allow for multi-leg trip on one ticket provides increased convenience of seamless travel[49]. The only difference from a pure code-sharing is the mechanism of revenue sharing, but from the consumers' standpoint this is completely irrelevant, what matters is that the catalogue of destinations available is multiplied by all locations served by the joint venture partners[50].

However, joint venture-specific benefits do not equal real market presence and by that its autonomy remains problematic. Even if there is a positive synergetic effect, it is not achieved by the joint venture in itself but through its individual components. In other words, there is no separate identity of a joint venture in question.

V. SUFFICIENCY OF RESOURCES

This issue is inherently linked with the requirement of joint venture to have all the resources sufficient to operate a business activity independently on a mar-

[47] See Council Directive 96/67/EC of 15 October 1996 on access to the groundhandling market at Community airports, OJ L 272, 25.10.1996, pp. 36–45. See also C. Templin, "Deregulating Ground Handling Services in Europe — Case Studies on Six Major European Hubs", [in:] D. Forsyth et al. (eds.), op. cit., pp. 299–324.

[48] Consolidated Jurisdictional Notice, para 101. See also Commission's Decisions IV/M.511 — *Texaco / Norsk Hydro*, OJ C 23, 28.01.1995, p. 3, para 7–10; IV/M.788 — *AgrEVO / Marubeni*, nyr, para 9 and 10.

[49] G. Doy, "The Quality of Service Index and Passengers Attitudes to Airline Service Levels", *Working Paper No. 6, Plymouth Polytechnic, Department of Shipping And Transport*, Plymouth UK 1985; M. Weber, J. Dinwoodie, op. cit., p. 53; T.H. Oum, A. Taylor, "Emerging Patterns in Intercontinental Air Linkages and Implications for International Route Allocation Policy", *Transportation Journal*, 1995, vol. 34, no. 4, p. 6.

[50] Quality of service will additionally be boosted if cooperation covers frequent flyers programmes.

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ket[51]. In well-established case-law the Commission concluded that a joint venture constitutes an autonomous economic entity when it has resources, including finance, tangible and intangible assets, and intellectual property right necessary to carry on its business activities independently[52]. The staff, however, needs not to be employed by the joint venture itself[53]. It goes without saying that in the sector concerned the key tangible asset is the fleet while slots are crucial intangible assets[54]. Any other resources are of a secondary nature.

In light of this, it is very dubious whether one may adjudge joint venture's autonomy from its parent companies. This is based on the fact that no resources are specifically dedicated for joint operations and by that no assets are formally separated. So any resources-related interactions within the analyzed structure are on the line partner airline *vis-à-vis* partner airline. But in order to truly confirm (or deny) the assumption of the lack of resource autonomy, it is necessary to establish the degree of control that parents retain over their assets dedicated (not exclusively) to joint venture's operations.

It is imperative because the allotment of resources associated with changes in their ownership structure is not a necessary condition for establishing the existence of full-functionality[55]. Consolidated Jurisdictional Notice offers little guidance here but from a purely lexical standpoint the term "access" indicates that it would be sufficient to have certain resources at the disposal of a joint venture on an *ad hoc* basis[56]. One may then argue that due to a contractual nature of joint venture potentially all resources of cooperating carriers are "at its disposal". But in that case the existence of distinct commercial presence will be excluded.

Nevertheless in case of joint ventures the aforementioned resources are not directly subordinated to a common managerial structure. Unlike airline alliances where there is a managerial structure which is separated and external from partners (although it is not management *sensu stricto*, rather strategic guidance and coordination platform), in case of joint ventures such organizational setup is nonexistent. It stems directly from a contractual nature of agreements in question where commonality of wills is achieved by relevant managements and is later implemented

[51] Consolidated Jurisdictional Notice, para 94. See also Commission's Decision IV/M.904 — *RSB/Tenex/Fuel Logistic*, OJ C 168, 3.06.1997, p. 5, paras 8–10.

[52] Commission's Decisions IV/M024 — *Mitsubishi/UCAR*, OJ C 5, 9.01.1991, p. 7; IV/M058 — *Baxter/Nestle/Salvia*, OJ C 37, 13.02.1991, p. 11; IV/M.072 — *Sanofi/Sterling Drug*, OJ C 156, 14.06.1991, p. 10; IV/M.160 — *ELF Atochem / Rohm & Haas*, OJ C 201, 8.08.1992, p. 27; IV/M.285 — *Pasteur-Merieux / Merck*, OJ C 188, 10.07.1993, p. 10. See also J. Venit, op. cit., p. 377 et seq.; T. Xiong, J. Kirkbide, "The European Control of Joint Ventures: An Historic Opportunity or a Mere Continuation of Existing Practice?", *European Law Review*, 1998, vol. 23, no. 1, p. 3749.

[53] Consolidated Jurisdictional Notice, para 94.

[54] B. Vasigh, K. Fleming, T. Tacker, op. cit., pp. 97–133.

[55] Consolidated Jurisdictional Notice, para 94. See also Commission's Decision IV/M.904 — *RSB/Tenex/Fuel Logistic*, paras 8–10.

[56] Ibid.

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directly by these bodies. At the same time this is the case against operational autonomy of a joint venture entity but it may serve as an indication of strategic subordination (which is of no relevance when assessing full-functionality).

Similar controversies exist over whether it could be assumed that the activities of a joint venture go beyond those typical of its parent undertaking. In case of the airline industry, the situation is completely opposite as given agreement, almost by default, covers airlines' core business[57]. It has been said that there is a possibility that a joint venture would encompass airlines' auxiliary activities but at this stage it is purely theoretical.

VI. LASTING BASIS

For the full-functionality to exist a joint venture must be intended to operate on a lasting basis[58]. This condition is deemed fulfilled where parent companies commit (in a broad sense as discussed above) to it the resources required for the common operation to take up its business activities[59]. Although there is no predefined threshold of a required time frame, *a contrario* joint ventures established for a finite duration and specific purpose, such as achieving a certain superficially defined business objective, will not be considered as operating on a lasting basis[60]. Generally, the cooperation must take enough time to bring about a lasting change in the structure of the undertaking concerned[61]. It does not automatically exclude the agreements that specify a period for the duration of a joint venture but it has to be "sufficiently long"[62]. This is especially the case where the agreement provides for the possibility of its continuation beyond the specified period[63].

In case of the airline industry this condition is the least controversial. Primarily they do not specify any business objective. Transport services have a continuous nature and it seems problematic what kind of a business goal defined in absolute terms could be established. The only realistic endpoint would be a specific time

[57] Consolidated Jurisdictional Notice, para 95.

[58] Ibid., para 94.

[59] Ibid., para 103.

[60] See Commission's Decisions COMP/M.2632 — *Deutsche Bahn/ECT International/United Depots/JV*, OJ C 81, 4.04.2002, p. 18, para 10 (contract duration of 8 years was considered sufficient); COMP/M.2903 — *DaimlerChrysler/Deutsche Telekom/JV*, OJ L 300, 18.11.2003, p. 62, paras 9–13 (contract duration of 12 years was considered sufficient); COMP/M.3858 — *Lehman Brothers/SCG/Starwood/Le Meridien*, OJ C 203, 19.08.2003, p. 3 (contract duration of 10–15 years was considered sufficient, but 3 years was not); COMP/M.4640 — *BAE Systems/VT/JV*, OJ C 307, 18.12.2007, p. 313 (contract duration of 12 years was considered sufficient) and Consolidated Jurisdictional Notice, para 104.

[61] Consolidated Jurisdictional Notice, para 103.

[62] Ibid.

[63] Ibid.

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frame. But these specific joint ventures are generally signed for an indefinite period of time.

VII. CONVERSION INTO FULL-FUNCTIONALITY

Additionally, a joint venture that initially fails to fulfill a full-functionality test may at the later stage give rise to concentration concerns if the parent companies decide to expand its scope[64]. The conversion of a joint venture from non-full-function to full-function could occur through the transfer of additional assets, know-how and rights, provided that it would lead to an extension of its operations into a new product and/or geographic markets[65]. It stands to reason that analogous expansion without any transfer of resources will also be considered to be a new concentration[66]. Additionally, full-functionality may be achieved when organizational changes in a joint venture lead to severing links with its parent companies. This may be the case if an entity that previously only supplied its parents subsequently starts a significant market activity and establishes a separate commercial presence[67].

The issue of "creeping" undetected concentration is relevant in air transport because there is an observable tendency of the gradual strengthening of cooperation over time[68]. Due to complex interdependencies cooperation as such is endemic in the industry[69]. But any involvement in collaboration associated with risk sharing like joint ventures in question requires mutual trust between business partners[70]. Of course, the level of interdependencies will to a certain extent serve as a deterrent against opportunistic behavior but the stability of cooperation over time serves as a primary trust building tool[71]. So the deep cooperation with all full-function features is likely to occur at some later stage of contact between business partners[72].

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[64] M. Rosenthal, S. Thomas, op. cit., s. 43. The notification requirement exists only if the enlargement entails the acquisition of the whole part of another undertaking from its parent company which would separately anyway constitute a concentration. See Consolidated Jurisdictional Notice, para 106.

[65] Consolidated Jurisdictional Notice, para 107.

[66] Ibid.

[67] See inter alia Commission's Decision COMP/M.2276 — *The Coca-Cola Company/Nestle/JV*, OJ C 308, 1.11.2001, p. 13, paras 9–4.

[68] Iberia and British Airways serve as a prime example. See Commission's Decision COMP/D2/38.479 — *British Airways/Iberia/GB Airways*, OJ C 217, 12.09.2003, p. 2.

[69] J. Kociubiński, "Dynamics of Interdependence…", p. 155 et seq.

[70] B. Kleymann, H. Seristö, op. cit., p. 47 et seq.

[71] Ibid.

[72] See Commission's Decision COMP/M.5747 — *Iberia/British Airways*, OJ C 241, 8.09.2011, p. 1. Successful cooperation has led to a next logical step — merger. In this case carriers were not limited by the control & ownership clause, therefore a full-fledged merger was a preferable option.

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This raises specific challenges for a merger control mechanism as controversies arise whether the substantive analysis should be limited resulting from the change in the activities that brought about the full-functionality or rather comprise all the effects of a given cooperation from its onset[73]. Since cooperation started much earlier the former is problematic because it is likely that the agreement had already been subjected to proceedings under Article 101 TFUE and had been cleared (possibly conditionally)[74]. Thus if the cooperation had been cleared before, that implies that there were no competition concerns left unaddressed.

The argument runs that the Commission should focus only on the immediate effects of conversion to full-functionality as only these give rise to concentration concerns. However, according to the so-called one-stop-shop principle, if effects that relate to the previous non-full function activities had not been cleared and substantive assessment under Merger Control Regulation takes under consideration only effects directly linked with a recent expansion of a joint venture's scope, previous anticompetitive concerns will become unchallengeable. Application of Merger Control Regulation excludes a possibility to assess a given situation under antitrust law.

The Commission's case-law is blurry on this point but from the dogmatic standpoint substantive assessment should only be limited to those acts that trigger the notification requirement[75]. Following this line of reasoning the Commission should not venture into invoking various theories of harm based on effects that resulted from the creation of the original joint venture but only focus on a direct effect of the creation of full-functionality.

VIII. CONCLUSION

Analysis has shown that there are strong economic reasons for the airlines to engage in joint ventures. At the same time there is a convincing body of data showing generally positive effects of these agreements to consumers. Yet concurrently these agreements, like all situations where previous competitors decide to start cooperating, have potential of causing harm to the market. Therefore it stands to reason that from the regulator's perspective it is necessary to have a robust control/assessment mechanism.

The significance of the full-functionality criterion therefore stems not from the question "if" agreements in question should be subjected to regulatory over-

[73] M. Rosenthal, S. Thomas, op. cit., s. 46.

[74] See Commission's Decision COMP/D2/38.479 — *British Airways/Iberia/GB Airways* and later Commission's Decision COMP/M.5747 — *Iberia/British Airways.*

[75] Consolidated Jurisdictional Notice, para 109.

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sight but rather under which component of EU competition law substantive assessment should be made — antitrust or merger control.

Joint ventures so prevalent in airline industry will unlikely fulfill all described criteria of full functionality. One may even venture to argue that this criterion is by its very nature poorly suited to the sector concerned. The argument runs that full-functionality test focuses on the assessment of joint venture's relations with its parents companies, not of the extent of cooperation. Merger Regulation explicitly states that concentration through a fully-functional joint venture is to be regarded as an "acquisition of control". This concept hinges heavily on the assumption that there is a "controlled" and "controlling" party, while gradual development of cooperation between business partners that would eventually lead to concentration bears resemblance to merger. The component of hierarchical subordination, crucial for the "acquisition of control" will be absent. Even if no new legal entity is created due to Control & Ownership restrictions, there is a well established body of case-law that allows merger to be conducted on the *de facto* basis[76]. Therefore the practical relevance of the issue of identifying concentration as a result of creation of a fully-functional joint venture stems primarily from the fact that it may be prohibited outright as per Control & Ownership clause[77]. Because if one analyses only the potential for preventing its possible anticompetitive effects, both antitrust law and merger control are equally suited for the job, especially given that Article 102 TFEU will always be applicable.

POROZUMIENIA *JOINT VENTURES* MIĘDZY LINIAMI LOTNICZYMI W ŚWIETLE KRYTERIUM PEŁNEGO ZAKRESU FUNKCJI W KONTROLI KONCENTRACJI W PRAWIE UE

Streszczenie

Porozumienia joint ventures zawierane między przewoźnikami stanowią relatywnie nową formę kooperacji w sektorze, której znaczenie stale rośnie. Z perspektywy regulacji rynku każda forma współpracy pomiędzy podmiotami będącymi dotychczas konkurentami niesie z sobą ryzy-

[76] Conceptual framework of *de facto* merger is based on Single Entity Doctrine from antitrust law. See primarily Cases 48–69, *Imperial Chemical Industries Ltd. v Commission of the European Communities (Dyestuffs)* [1972] ECR 619 and 22–71 *Béguelin Import Co. v S.A.G.L. Import Export* [1971] ECR 949. In the context of merger control see Consolidated Jurisdictional Notice, para 10 and Cases 170/83 *Hydrotherm Gerätebau GmbH v Compact del Dott. Ing. Mario Andreoli & C. Sas.* [1984] ECR 2999; C-73/95 P *Viho Europe BV v Commission of the European Communities* [1996] ECR I-5457; T-102/92 *VIHO Europe BV v Commission of the European Communities* [1995] ECR II-17; C-279/06, *CEPSA Estaciones de Servicio SA v LV Tobar e Hijos S,L* [2008] ECR I-6681 alsoCommission's Decisions IV/M.660 — *RTZ/CRA*, OJ C 22, 23.01.1996, p. 10; COMP/M.3071 — *Carnival Corporation/P&O Princess (II)*, OJ C 42, 21.02.2003, p. 7.

[77] Analysis of economic and political rationale of this clause is beyond the scope of this paper. See further J. Kociubiński, "Inwestycje…", pp. 15–21.

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ko zaburzenia równowagi konkurencyjnej na rynku i w efekcie pogorszenie sytuacji odbiorców końcowych.

Joint ventures nie stanowią odrębnej kategorii w prawie konkurencji Unii Europejskiej. Porozumienia te co do zasady będą oceniane pod kątem kryteriów sformułowanych w tzw. ogólnym prawie konkurencji, natomiast pod pewnymi warunkami mogą zostać uznane za koncentrację. W takim przypadku rozporządzenie 139/2004 w sprawie kontroli koncentracji stanie się jedynym aktem właściwym do oceny przedmiotowych porozumień. Tytułowe kryterium pełnego zakresu funkcji stanowi element przesądzający o możliwości uznania danej kooperacji za koncentrację. Niniejszy artykuł przedstawia analizę przesłanek wystąpienia pełnego zakresu funkcji w kontekście specyficznych form kooperacji występujących w sektorze transportu lotniczego.

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