Introduction

1 Objectives of the Research in this Book

1.1 General Aspects of Joint Ventures in the Context of Cooperation between Undertakings

Cooperation and concentration between undertakings are realities which have been gaining increasing relevance worldwide.

In fact, the intense acceleration and globalization of economic activities,[1] which have acted as catalysts for profound changes in entrepreneurial activity, require to some extent the development of cooperation and concentration relations of growing complexity.

In this context, the entire logic of entrepreneurial growth appears transformed. Such transformation arises, inter alia, from a gradual replacement of entrepreneurial growth based on the expansion of individual corporations or based on the establishment of new corporations under full initial control by parent entities—which the so called 'multinational enterprises' have come to epitomize[2]—by models based on various forms of interplay between different groups of undertakings. Such interplay between groups of undertakings is typically structured around, either situations of cooperation between undertakings, in which each group or undertaking maintains its own individuality, or situations of concentration of undertakings, through which the participating undertakings lose their individuality and are diluted in a new entrepreneurial entity to be established *ex novo*.[3]

[1] On the acceleration and globalization of economic activities with profound repercussions on the relations between undertakings, see J Rodgers Hollingsworth and Robert Boyer (eds), *Contemporary Capitalism—the Embeddedness of Institutions* (Cambridge, Cambridge University Press, 1997). See also for a European perspective on those transformations of the conditions of economic activity, Karel Cool, Damien Neven and Ingo Walter (eds), *European Industrial Restructuring in the 1990s* (London, Macmillan, 1992).

[2] See, in general, on multinational enterprises and their influence in economic activities, as well as on their influence on the patterns of competition, Richard Caves, *Multinational Enterprise and Economic Analysis* (Cambridge, Cambridge University Press, 1996) esp 24ff and 83ff.

[3] The distinction between processes of cooperation between undertakings in which the individuality of each undertaking or group of undertakings is maintained and processes of concentration will be dealt with extensively throughout this book, especially as regards the characterization of the various categories of joint ventures under EU competition law and also through a comparative perspective with other competition laws. For an initial approach in this domain and in a competition law perspective, see, inter alia, Louis Vogel, *Droit de la Concurrence et de la Concentration Économique—Étude Comparative* (Paris, Económica, 1988) esp 60ff and A Edward Safarian, 'Trends in the Forms of International Business Organizations' in Leonard Waverman, William S Comanor and Akira Gotō, *Competition Policy in the Global Economy—Modalities for Cooperation* (London and New York, Routledge, 1997) 40ff—'During the 1980s there was increasing emphasis on international corporate alliances between independent firms' (at 40).

The interplay between undertakings or groups of undertakings may be developed through even more complex forms, as regards the variety and range of elements on the basis of which it is structured in the general field of legal transactions or in specific legal domains such as competition law. The alternative process frequently used for such more complex operations combines on a variable scale, on the one hand, elements of coordination or cooperation, and, on the other hand, elements of entrepreneurial integration or concentration and corresponds to the establishment of joint ventures (I shall provisionally use this qualification in these introductory remarks with the proviso that the legal foundations and the extent of the appropriate use of this *nomen juris* are issues which are themselves subject to considerable controversy in most legal systems).[4]

The central theme of this book is the study and analysis of the legal entity known as the joint venture and, in particular, of the main legal problems it gives rise to in the field of competition law. However, the elusive nature and relative vagueness of the concept of joint venture have led me, in a preliminary stage of analysis, to ascertain a broader legal categorization of such entities, as a peculiar system of contractual cooperation, taking into consideration the field of commercial law or, in even broader terms, of enterprise law.[5]

This goal of reaching a general legal understanding of the joint venture—on the basis of contracts known as enterprise contracts (or contracts of entrepreneurial organization)[6]—although somewhat secondary, is justified. This is not only because such general understanding has fundamental repercussions for the legal categorization of the joint venture in the field of competition law, which forms the bulk of this book, but also because that category has gradually come to represent the prevailing legal and economic process of expansion of entrepreneurial activity, replacing in that role the groups of undertakings based on full control or by reason simply of entrepreneurial concentration (which leads to the establishment of entrepreneurial structures controlled by a sole entity, either within a sole parent corporation, or within groups of undertakings functioning under full control of one entity or under less intense forms of control).

[4] See, on the lack of clarity surrounding the concept of the joint venture in the context of competition law and also in connection with other areas of law in which this classification—albeit with non-entirely coincidental content—may be used, Charles Weller, 'A new rule of reason from Justice Brandeis's "concentric circles" and other changes in law' (1999) *AB* 881ff. As suggested by Weller, 'For over 100 years, antitrust joint venture law has been a morass of confusion and ambiguity'. For a more general perspective on such lack of clarity and the many interpretations of the concept of joint venture, see Daniele Bonvicini, *Le 'Joint Venture': Tecnica Giuridica e Prassi Societária* (Milano, A. Giuffrè, 1977). See also for a general discussion of the concept and the *nomen juris* of 'joint venture', Luiz O Baptista and Pascal Durand-Barthez, *Les Associations d'Entreprises (Joint Ventures) dans le Commerce International* (Paris, Librairie Générale de Droit et Jurisprudence, 1991).

[5] In various legal systems of EU Member States the idea of a body of law that could be designated as enterprise law has been widely discussed, although many authors argue that it does not correspond to an autonomous body of law due to the heterogeneity of legal areas involved in it. In the context of German law, eg, the concept of '*Unternehmensrecht*' has been the subject of academic debate since the beginning of the twentieth century and the more recent discussion in this area even raises the question of a possible integration of company law in a new and wider enterprise law. See specifically on this latter discussion, Thomas Raiser, '*Die Zukunft des Unternehmensrechts*' in *Festschrift for Robert Fischer* (Berlin and New York, de Gruyter, 1979) 561 and, from the same author, 'The Theory of Enterprise Law in the Federal Republic of Germany' (1988) *Am J Comp L* 111ff. For the Italian position see, eg, Francesco Galgano, *Diritto Comerciale—L'imprenditore* (Bologna, Zanichelli, 2000–01) esp 9ff.

[6] On this category of enterprise contracts (or contracts of entrepreneurial organization) and relating it with the discussion on the joint venture contract as a form or subtype of contract of cooperation between undertakings, see Giovanni di Rosa, *L'Associazione Temporanea di Imprese—Il contratto di joint venture* (Milan, Giuffrè Editore, 1998). In fact, the category of enterprise contracts has been especially developed by Italian law.

In fact, if it is widely acknowledged that the basic legal structuring of enterprises has been relying to a lesser extent on the individual entrepreneur or in the individual corporation, and has been comprehensively replaced by the category of the group of undertakings[7]—regardless of the legal relevance '*de iure condito*' of such category in the various legal systems[8]—it can be seen that the profound changes to which the development of economic activities has been subject over recent years have determined the emergence of new, alternative ways of building the legal organization of enterprises. Such alternative options for the building of enterprises have consistently converged towards the adoption of hybrid structures of ever growing complexity, which combine, as mentioned above, situations of actual entrepreneurial integration, typically associated with the phenomenon of entrepreneurial concentration, with different forms or instruments of entrepreneurial cooperation (that permit, at least as regards certain areas of activity, the preservation of the legal individuality of the entrepreneurial groups involved in such transactions).

In the economic field, the growing internationalization of entrepreneurial activities—which has reached a new qualitative stage following the enhanced liberalization of capital transactions and movements in the last decade of the twentieth century;[9] the growing importance of access to information and of information technology, often requiring the convergence under innovative frameworks of different know-how techniques controlled by different players; the constant shortening of the life cycles of goods and services, and the consequent enhanced relevance of continual entrepreneurial innovation (with its associated costs) have, on the whole, been decisive factors for the expanding use of the joint venture.[10] This category or instrument of entrepreneurial organization carries with it—as

[7] For a general perspective of the alternative legal structuring of the reality of undertakings, see Karsten Schmidt, *Handelsrecht* 5. Aufl (Köln, Berlin, Bonn, München, Heymann, 1999) esp 63–87. This author is somewhat reticent on the feasibility of building a general legal concept of enterprise on the basis of the different concepts of enterprise in commercial law, corporate law and other bodies of law, but he does acknowledge the various areas of law such as eg competition law or the law of corporate groups which may to some extent point to the development of more general legal concepts of enterprise. For a discussion on the need to project the idea of enterprise in different legal structures—of which the corporate group represents a paradigmatic example in the current economic context—see Gunther Teubner, 'Enterprise Corporatism: New Industrial Policy and the "Essence" of the Legal Person' (1988) *Am J Comp L* 130ff, esp 146ff.

[8] For a general perspective on various contours of the law on groups of corporations, within multiple legal systems, and for a critical analysis of the key questions that must be taken into consideration in this legal area, see,KJ Hopt, *Legal issues and questions of policy in the comparative regulation of groups* in *I gruppi di società—Atti del Convegno internazionali di studi* Venezia, November 1995 (Milano, Giuffrè, 1996) vol 1, 45ff.

[9] On the absolutely decisive role of liberalization of financial services as a catalyst of the intense process of internationalization of economic activity, see, in general, Pierre Sauvé and Robert M Stern (eds), *Gats 2000—new directions in services trade liberalization* (Washington DC, Brookings Institution Press, 2000); see also Paul Hirst and Grahame Thompson, 'Globalization in Question: International Economic Relations and Forms of Public Governance' in Hollingsworth and Boyer *Contemporary Capitalism—the Embeddedness of Institutions* (n 1) 337ff.

[10] On the combination of this type of economic factor and its influence in the recurrent use of the joint ventures, see Michael Hergert and Deigan Morris, 'Trends in International Collaborative Agreements' in Farok Contractor and Peter Lorange (eds), *Cooperative Strategies in International Business* (Lexington MA, Lexington Books, 1988) 99ff. See also, for an analysis of those factors, suggesting that the emergence of these new qualitative conditions for developing economic activities originates from the transition to new global models of entrepreneurial organization essentially oriented towards a matrix of cooperation between undertakings, Peter Drucker, 'Peter Drucker on the New Business Realities' (1999) *AB* 795ff. In this study, Drucker considers in a peremptory manner joint ventures as 'the dominant form of economic integration in the world economy' (although he uses the concept of joint venture in a relatively wide manner). In another study, the same author maintains in even more emphatic terms that 'the greatest change in corporate structure and in the way business is being conducted may be the largely unreported growth of relationships that are not based on ownership but on partnership: joint ventures; minority investments cementing a joint-marketing agreement or an agreement to joint research; and

I shall reiterate throughout this book—fundamental elements of flexibility and an inherent capacity of perennial adaptation to evolving entrepreneurial goals, which have made it a prevailing way of structuring the legal and economic relationship between different undertakings.

1.2 How to Define the Category of Joint Venture in the Field of Competition Law and in Other Areas of Law

Although the possible conceptual autonomy, as such, of a legal category of joint venture, as regards the general legal structuring of enterprises (in the fields of commercial or enterprise law) is undeniably subject to controversy—with several authors maintaining that such entities may not be considered under a general legal type (even a non-normative type)—this category has clearly received autonomous treatment in the field of competition law (taking into consideration the pivotal competition law systems of the US and the EU).[11] Conversely, this self evident body of legal reasoning, positive norms and legal *praxis* concerning the joint venture as an autonomous or individual category in the field of competition law does not mean that the concept of joint venture is a well established one in this area of law.

On the contrary, defining the concept of joint venture for the purposes and in the context of the application of competition law corresponds to a first and fundamental legal problem as regards a proper understanding of such category in this area of law. It corresponds, in fact, a priori to a complex legal problem, which precedes the level of substantive assessment of joint ventures under competition law rules (meaning here the assessment of the effects of joint ventures on the conditions of effective competition). However, I admit that the high degree or intensity of legal analysis and categorization of joint ventures in the field of competition law—while associated with a particular area of law with its own teleology and legal methodology[12]—makes a fundamental contribution to a broader understanding of this category as regards the different processes of legal structuring and organizing entrepreneurial activities under commercial or enterprise law. Accordingly, without diminishing

semi-formal alliances of all sorts' (see Peter Drucker, *Managing in a Time of Great Change* (New York, Truman Talley Books, 1995) 69. A good critical synthesis of the economic factors that have influenced the evolution of the models or patterns of entrepreneurial organization may be also found in K Byttebier and A Verroken, *Structuring International Cooperation between Enterprises* (London, Graham & Trotman, 1995). These authors confront the economic conditions that characterized the 1960s and 1970s—a period of great development of huge multinational enterprises—with the conditions prevailing in a subsequent period characterized by more uncertainty, more technical complexity of the production processes, to be developed in the course of more accelerated cycles and with greater reliance on elements of information of different origins. On the whole, these new conditions led gradually to the emergence of more flexible forms of entrepreneurial organization and integration, of which joint ventures are a paradigmatic manifestation.

[11] On this view of US antitrust law and EU competition law as true fundamental systems and worldwide references, see Bruce Doern and Stephen Wilks (eds), *Comparative Competition Policy—National Institutions in a Global Market* (Oxford, Clarendon Press, 1996). The same conception is also shared by various studies of international organizations. See, especially, OECD, *Twenty-five Years of Competition Policy: Achievements and Challenges* (Paris, OECD, 1987).

[12] The specific scope or reach of the characterization of the concept of undertaking in the field of competition law will be examined below in ch 1. In any case, the intensity of the legal discussion of the concept of undertaking in this domain and, on the basis of it, of the concept of joint venture allows us to indentify relevant corollaries to other areas of law.

the main focus of my analysis throughout this book—which is clearly directed towards the understanding and assessment of joint ventures under competition law—I shall also endeavour to ascertain how the fundamental legal reasoning on joint ventures under competition law may provide a key input to a broader understanding of a general concept and *nomen juris* of joint venture in a larger horizon of building legal relationships and different ties between undertakings.

1.3 The Treatment of Joint Ventures under EU Competition Law

The analysis carried out throughout this book is essentially aimed at EU competition law (although occasionally bearing in mind certain aspects of national competition law of some EU Member States in the context of the wider soft harmonization procedure that these national systems of competition law have been undergoing). Furthermore, the core and the nature of my theme clearly demands a comparative law analysis, with its main focus lying in US antitrust law, not only for reasons which have to do with historic precedence of this legal system (at least in terms of positive law) and the worldwide reference it still provides, but also because the concept itself of joint venture may be deemed as having originated in the context of US law.[13]

As regards EU competition law, I shall identify some essential evolutionary stages in the treatment of joint ventures, while putting into perspective the broader evolution of this body of law, as one of the fundamental pillars for the gradual building of the European integration process and the current EU structures.[14]

Indeed, the core part of my study—namely, chapter two and, especially, chapter three, which cover the current competition law framework of joint ventures, both as regards the normative *de iure condito* dimension and an essential perspective of law in action concerned with the enforcement practice of the European Commission and the case law of the Court of Justice of the EU (henceforth CJEU) and of the General Court (henceforth GC)—allows us to verify that the specific legal features of joint ventures and the fundamental shifts that have taken place as regards their treatment under EU competition rules, have significantly influenced some major evolutions that this body of law has undergone in the course of recent years (as I shall illustrate in chapter four, the concluding chapter of this book).

[13] On the origin of the concept and *nomen juris* of joint venture in the US antitrust system, see Edgar Herzfeld and Adam Wilson, *Joint Ventures* (Bristol, Jordans, 1996). These authors also underline that the development and characterization of this concept after the Second World War was very imprecise and had very fluid contours. Also on the origin of the concept of joint venture, see Bonvicini, *Le 'joint venture': Tecnica giuridica e prassi societária* (n 4).

[14] On the idea of the EU (and before that, the EC) as a community of law of a complex nature, see JH Weiler, 'The Transformation of Europe' (1991) *YLJ* 2403ff. Also underlining the *sui generis* nature of this community of law in which the building of European integration is based, and its particularly complex nature, due to a dynamic interaction with the legal systems of the Member States—especially in the field of economic law, see Norbert Reich, 'Competition between Legal Orders: A New Paradigm of EC Law' (1992) *CMLR* 861ff. Other authors underline the deepening of such legal community that supports European integration as a basis for a process of constitutionalization (in terms to which we shall return below, ch 4). For that perspective, see Ernst-Ulrich Petersmann, 'Proposals for a New Constitution for the European Union: Building-Blocks for a Constitutional Theory and Constitutional Law of the EU' (1995) *CMLR* 1123ff. For a wider perspective of the development of the process of European integration based on a community of law, see Mauro Cappelletti, Monica Seccombe and Joseph Weiler (eds), *Integration Through Law—Europe and the American Federal Experience* (Berlin and New York, Walter de Gruyter, 1986–88) 4 vols, esp vol 1.

In fact, it has been widely accepted that competition rules typically include—in its *facti species*—elements concerning the behaviour of undertakings and elements concerning market structures, on the assumption that these later ones imply effects upon the functioning of the competition process that may, to a certain extent, be predictable. It may be deemed as a kind of *tertium genus* the combination in the abuse of dominant position regime—or in the monopolization regime under US antitrust rules—of structural conditions, referring to the existence of a dominant position in the market, and behavioural conditions, referring to abusive actions by dominant undertakings (although in my view, the behavioural elements will still prevail in those cases, since they will determine the application of the relevant competition rules).

That being so, one of the most striking features of joint ventures, which at the same time raises specific hurdles as regards the precise and stable definition of their framework under competition law, has to do with the fact that joint ventures combine behavioural and structural elements in a hybrid composition that does not easily allow an analytical distinction of such distinctive elements.

Regardless of the precise categorization of the concept of joint venture under competition law—that I shall attempt to establish below in chapter one—and provided one sets apart excessively broad definitions that dilute its conceptual autonomy and its analytical relevance for competition law evaluation purposes,[15] the legal category of joint venture encompasses, in its inner core, multiple and formally very diversified processes of entrepreneurial integration. At the same time, since such functional processes do not involve the termination of the individuality of the participating undertakings, they bring about, either in effective or potential terms, different forms of entrepreneurial coordination.

As such, joint venture analysis—although it has been subject over time to fluctuations under EU competition rules as regards its coverage either by the regime of cooperation between undertakings (on the basis of article 101 TFEU, former article 81 EC Treaty)[16] or by the concentration control regime—involves a unique and distinctive potential for the interaction of, on the one hand, legal criteria aimed at the evaluation of entrepreneurial coordination, which may induce negative effects for competition, and, on the other hand, of legal criteria aimed at the evaluation of particular changes in the structure of certain markets.

One may even add that, due to the original lack of a direct concentration control regime under the former EEC competition rules and the consequent comprehensive submission of joint ventures to the normative discipline of the coordination of the behaviour of undertakings—during a first stage of the evolution of the rules before the first EC Regulation on concentration control was adopted in 1989—conditions were created for the initial development of analytical parameters of joint ventures focused on the understanding of

[15] As I shall explain in ch 1, widely different definitions of joint venture have proliferated in the field of competition law (particularly of US antitrust law). In fact, as well as appreciably wide definitions one may find extremely wide definitions, which, as a result of their being so general, lose their analytical relevance. However, even some of the most influential authors in US antitrust doctrine, subscribe to such extremely wide definitions, as eg Herbert Hovenkamp. This author, in *Federal Antitrust Policy—the Law of Competition and its Practice* (St. Paul, Minn., West Publishing Co, 1994) defines the category of 'joint venture' as 'any association of two or more firms for carrying on some activity that each firm might otherwise perform alone' (at 185ff).

[16] As regards this first quotation of articles from the Treaty on the Functioning of the European Union (TFEU), see the formal criteria and aspects stated above, in 'General Notes on the Text'.

coordination relationships (on the basis of the then article 85 EEC Treaty and current article 101 TFEU), which, at a later stage, were gradually subject to a structural analytical scrutiny, from the moment that some types of joint ventures have been submitted to the Regulation on concentration control (which fundamentally deals with the evaluation of repercussions of structural changes of the markets upon effective competition).

In my view, this very particular building process of analytical parameters of joint ventures under competition law, originally focused in the discipline of entrepreneurial coordination and successively combined with a structural analysis framework, has had a significant impact on some fundamental changes of the legal methodology used in the enforcement of competition rules applicable to undertakings (particularly in the area of cooperation between undertakings).

It is my assertion, therefore, that the treatment of joint ventures and the need to address the specific issues that arise as a result of the hybrid nature of the joint venture—with its unique combination of behavioural and structural aspects—has significantly influenced, as discussed throughout this book, a decisive change or evolution of the former methodology of almost per se prohibition of an appreciable part of cooperation processes between undertakings on the basis of the general prohibition rule of paragraph 1 of article 101 TFEU,[17] which relied heavily on a prevailing formalistic legal logic that underestimated the substantive perception of the actual economic functioning of the markets (and of the effects, at that level, of entrepreneurial cooperation).

This change involves, inter alia, the continuous introduction of key aspects of substantive evaluation of the markers, for the purposes of applying competition rules that discipline entrepreneurial cooperation, thus limiting or balancing in more economically reasonable terms the range of the general prohibition of cooperation processes that may restrict competition through a structural dimension of market analysis (traditionally observed in the context of US antitrust law, although with variable implications in different stages of evolution of those antitrust rules, but largely ignored or overlooked until more recently in the context of EU competition law).

Such a limitation or containment of the general prohibition on cooperation between undertakings is of paramount importance in order to correct what one may consider as an original normative distortion of EEC competition law, which corresponded to an excessive degree of public intervention through the conditioning and scrutinizing of entrepreneurial cooperation. The excess arose from the fact that a significant part of the cooperation processes between undertakings were deemed as potential infractions under the general prohibition established by paragraph 1 of article 85 EEC Treaty (current article 101 TFEU), which could only be rendered legal under particular forms of public scrutiny based on the application of the exemption criteria established by paragraph 3 of this article (thus conditioning or even predetermining the multiple possibilities of entrepreneurial cooperation through the lens of administrative scrutiny, based on the criteria of paragraph 3, which, in

[17] Such more formalistic methodology which implied a stricter reading of the general prohibition rule of article 101, para 1 TFEU, leading to the prohibition of an appreciable part of processes of cooperation between undertakings will be extensively discussed in the context of my in-depth analysis of joint ventures under article 101 TFEU, esp below, ch 3. For an initial view on that former approach that led to an almost per se prohibition of various forms of cooperation, see Margot Horspool and Valentine Korah, 'Competition' (1992) *AB* 337ff.

a somewhat paradoxical way, took the place of the free functioning of the market that was alleged to be ultimately safeguarded).[18]

1.4 The Treatment of Joint Ventures and Changes in EU Competition Law

1.4.1 The Various Phases of Evolution of EU Competition Law

This major shift of the legal methodology determining the interpretation and enforcement of competition regimes covering cooperation between undertakings, in part influenced by the specific requirements of joint venture analysis, has actually occurred in parallel with a fundamental transition of EU competition law to a new evolutionary stage. This transition—with multiple legal repercussions that are yet to be fully ascertained—is in itself significantly determined by the deepening of the EU process of economic integration after the consolidation of the internal market and in the context of the building of the economic and monetary union.

In reality, the special emphasis originally put on an overriding category of EU competition law goals associated with the fulfilling of economic integration targets—which was a distinctive feature of this body of law—has gradually diminished with the actual attainment of such targets. Conversely, a set of goals essentially linked to criteria of economic efficiency has gradually gained prominence. However, this growing acceptance of a prevailing aim oriented towards economic efficiency does not translate into the elimination of extensive legal and economic divergence as regards the way the guiding parameters of economic efficiency are to be conceived (in combination with other goals of public interest). Substantial grounds of divergence subsist, therefore, in this field, opposing theses sustained by the new institutional economics, by the price theory analysis as influenced by the Chicago School, or even theses still partially relying on structural approaches or those oriented towards the safeguard of goals of social utility in terms of economic equity (apparently overcome, but that may resurface to a certain extent following the systemic economic crisis of 2008–09).[19]

In any case, if, as I shall assess in the final chapter of this book—putting into perspective changes in some way associated with joint venture analysis—in teleological terms this

[18] It should be emphasized that such prevailing formal legal logic of systematic interpretation of paras 1 and 3 of article 85 EEC Treaty (current article 101 TFEU) was from an early stage criticized by some authors, although such criticism was not, at that time, reflected in the actual process of enforcement of EU competition rules. Conversely, the elimination of the mandatory notification procedure under article 101, para 3 TFEU, after the adoption of Regulation (EC) No 1/2003 (on implementation of the rules on competition laid down in Articles 81 and 82—OJ L1, 4.1.2003), did not eliminate, as such, the potential imbalances arising from an excessive reliance on the general prohibition rule of article 101, para 1 TFEU (as I shall emphasize throughout this book).

[19] For a global and succint perspective about different ways of conceiving the guiding parameters of economic efficiency in the context of competition law (a characterization to which I shall return in ch 4), envisaging new critical syntheses that may, to some extent, overcome those divergences, see Wenhard Möschel, 'The Goals of Antitrust Revisited' (1991) *JITE* 7ff. On the different perspectives on the contours of economic efficiency relevant for the purposes of competition law and policy, see also Massimo Motta, *Competition Policy—Theory and Practice* (Cambridge, Cambridge University Press, 2004) esp 40ff. Furthermore, in ch 4, I shall also attempt to balance the way in which goals of public interest, conceived in terms of economic equity that were apparently overcome after the Commission had embraced a new economic, effects based approach, may be resurfacing to a certain extent, following the systemic economic crisis of 2008–09 and the subsequent economic and financial crises, leading to a new mixed approach of combination with still pivotal goals of economic efficiency.

evolution of EU competition law brings it closer to the prevailing monist model based on an overriding goal of economic efficiency that has long characterized US antitrust law, I believe that, to a certain extent, a set of particular features of EU competition law may still be retained at such teleological level.

As regards the specific contribution of joint venture analysis to that evolution, attention should be paid to the fact that joint ventures have recurrently been associated with the production of various types of effects of economic efficiency, which typically represent a factor to justify those entities and their compatibility with competition rules in different situations, counterbalancing certain effects of restriction of competition arising from the same entities.[20] Accordingly, the consolidation of the dogmatic treatment of joint ventures is bound to produce repercussions in the process of gradual consolidation—still open to some uncertainty—of a new teleological model of EU competition law especially based on chief goals of economic efficiency (the legal reasoning about economic efficiency parameters for the purposes of evaluation of competitive effects of joint ventures therefore also plays a role in the clarification of efficiency models which may be put to a more general use in the context of the enforcement of multiple regimes of competition law).

In short, my central topic of study and analysis—the competition law framework of joint ventures—bears a twofold mark. On the one hand, it significantly illustrates a vast array of transformations of EU competition law, involving the emergence of a renewed method of legal and economic analysis; on the other hand, it represents a catalyst element for such a process of transformation of the legal methodology of EU competition law, which tends to imply the transition to an entirely new evolutionary stage of this body of law (while it has to be recognized that the shift in the legal methodology somehow started with the reform of vertical restraints in 1999,[21] and largely corroborated or consolidated with the new reform of the framework of vertical restraints at EU level in 2010,[22] joint venture analysis particularly in the broader context of horizontal agreements has undoubtedly been a major factor in this line of evolution).[23]

[20] On the recurrent justification of creation of joint ventures as compatible under competition rules on the basis of positive effects arising from it, that distinguish this category from other forms of cooperation, particularly developed in the US antitrust doctrine, see especially Gregory Werden, 'Antitrust Analysis of Joint Ventures. An Overview' (1998) *ALJ* 701ff. As Werden puts it, 'joint ventures are an important and distinct category for antitrust analysis because of their potential to bring about an efficiency-enhancing integration of economic activity. Many different forms of economic integration may be effected by joint ventures, and each may enhance efficiency in more than one way' (at 702).

[21] I refer here to the broad 1999 reform of the framework of vertical restraints framework through the adoption of Regulation (EC) No 2790/1999 (vertical agreements Block Exemption Regulation—OJ L 336/21, 29.12.1999) and of the 2000 Guidelines on Vertical Restraints (OJ C 291/1, 13.10.2000), in the wake of the 1996 Green Book on Vertical Restraints in EU Competition Policy—COM (96) 721 final.

[22] By this, I mean the second major reform of the EU framework of vertical restraints, which translated into the adoption of Regulation (EU) No 330/2010, on the application of Article 101(3) of TFEU to categories of vertical agreements and concerted practices, of 20 April 2010, OJ L 102/1, 23.4.2010, and of the 2010 Guidelines on Vertical Restraints, OJ C 130/1, 19.5.2010.

[23] The broader context of reform of the framework of horizontal restraints in 2000 and 2001 and of the subsequent reform in 2010 and 2011 played a significant role in the evolution of the treatment and assessment of joint ventures, as will be examined in detail below in chs 2 and 3. I refer here to the successive reforms developed through the adoption of Regulation (EC) No 2658/2000, Block Exemption Regulation on specialization agreements, of 29 November 2000, OJ L 304/3, 5.12.2000, of Regulation (EC) No 2659/2000, Block Exemption Regulation on research and development agreements, of 29 November 2000, OJ L 304/7, 5.12.2000, and of the 2001 Guidelines on the applicability of Article 81 of the EC Treaty to horizontal co-operation agreements—OJ C3/2, 6.1.2001 (henceforth, the 2001 Horizontal Cooperation Guidelines); subsequently, I refer to the adoption

This transition to what certain authors have termed a more mature evolutionary stage of EU competition law[24] also involves, under a different analytical perspective, a complex legal process at a dual level. It corresponds both to a consequence of entering a new, deeper phase of economic integration in the EU and to a response to this new legal and economic context (with the EU competition law system being construed accordingly, on the basis of its underlying systemic context of economic integration, taking a part in its building process and at the same time involving an active interplay with its content).

I refer here in particular to a logic of normative understanding and reasoning that takes into account particularly the systemic context of the rules in place at each given moment, which can be translated in the idea of law in context as formulated by Francis Snyder and others.[25] In fact, I believe that this idea of law in context will be especially meaningful and adequate to the development of legal analysis in the field of EU competition law, provided it is properly contained within the specific boundaries of legal reasoning. By this proviso, I mean that the justifiable relevance given to political, institutional and economic aspects to an interactive building process of legal values and categories of competition law should not make us underestimate the truly central role—as emphasized by Dieter Schmidtchen[26]—of normative evaluations and reasoning (and it is a fact that some perspectives of economic analysis of law and of law in context may result in methodological distortions, whenever they fail to recognize that central position of normative evaluations based on specific legal values that cannot be ascertained or depicted through merely economic considerations).

As a now consolidated area of law, EU competition law may have its teleological and normative programme periodically reviewed in light of its changing context without running the risk of becoming too unstable or facing some sort of dilution. In fact, as rightly

of Regulation EU No 1217/2010, of 14 December 2010, Block Exemption Regulation on research and development agreements (OJ L 335/36, 18.12.2010) of Commission Regulation EU No 1218/2010, of 14 December 2010, Block Exemption Regulation on specialization agreements (OJ L 335/43,18.12.2010) and of the Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, adopted in December 2010, OJ, C 11/1, 14.1.2011 (henceforth, the 2011 Horizontal Cooperation Guidelines).

[24] On this idea of transition to a new phase of consolidation of EU competition law corresponding to a more mature stadium, see, inter alia, Jonathan Faull, 'The Enforcement of Competition Policy in the European Community: A Mature System' in *Annual Proceedings of the Fordham Corporate Law Institute—EC and US Competition Law and Policy—1991* (Barry Hawk (ed), Fordham Corporate Law Institute, Transnational Juris Publications, Inc, Kluwer Law & Taxation Publishers, 1992) 139ff. As underlined by Faull with an absolute emphasis on the dimension of economic integration that even I deem somewhat excessive, 'the role of competition policy in the pre-1992 period has been to open national markets within the EC and ensure that competition be the principal driving force in the EC's. Thus competition policy has underpinned the drive towards the EC's single market' (at 140).

[25] On this logic of normative understanding of law in accordance with its systemic context, embodied in the idea of 'law in context' as envisaged by Francis Snyder and others, see Francis Snyder, *New Directions in European Community Law* (London, Weidenfeld Nicholson, 1990).

[26] See on this Dieter Schmidtchen, arguing for the central role of a dimension of normativity even in an area of law largely dependent on elements of economic analysis as is the case of competition law, 'The Goals of Antitrust Revisited—Comment' (1991) *JITE* 31ff. As this author notes, the possibility of economic criteria or propositions establishing normative rulings or defining the notion of competition relevant for the purposes of application of competition rules should be ruled out. Specifically it should be ruled out 'by the (meta-)rules of the economic rethorics game that are almost generally accepted and according to which economics cannot make any value judgments. The determination of the protective purposes of antitrust is a normative question. It can only be answered by a judgment that reflects the fundamental values of a society' (at 32).

emphasized by Wernhard Möschel,[27] the usual indeterminate nature of the key framework concepts of competition law, upon which this body of law is largely construed, is essentially connected with the dynamic nature of its object, corresponding to an economic process of market functioning in constant change.

It is thus understandable that even the competition law system which represents the most consolidated legal model internationally, with enforcement experience of more than one hundred years—US antitrust law—has not generated consensus about its chief goals or even about some of its key legal parameters.[28] On the contrary, the last three decades have been characterized by deep controversies—not satisfactorily resolved until now—on the underlying goals of US antitrust law, which have led to the challenging of assumptions that could be seen as a basic legal *acquis* of this body of law (starting from the critical movement originating with the Chicago School, involving reactions from the Harvard School and leading to many intermediate theoretical trends in the context of what has sometimes been termed a post-Chicago critical synthesis or review).[29] In this process, joint venture analysis has frequently been a key area for the re-evaluation of some of the essential legal parameters of US competition law.

One may, therefore, expect that the degree of consolidation already attained by EU competition law may provide the ground for a comparable process of critical re-evaluation of its core goals and for the qualitative renewal of its enforcement process (involving, in turn, a lesser degree of public, administrative intervention for purposes of antitrust scrutiny).

Such a comprehensive renewal of EU competition law—also influencing the dynamics of Member States competition laws in the context of their soft harmonization with EU law—has, inter alia, two intertwined pillars. These are, on the one hand, the decentralization of the enforcement of articles 101 and 102 TFEU (formerly articles 81 and 82 EC Treaty), following the adoption of Regulation EC No 1/2003 (in the wake of the 1999 White Paper on Modernization of EC Competition Law);[30] on the other hand, I refer here to a new legal reasoning as regards the reach and significance of the prohibition rule of article 101, paragraph 1 TFEU (and its interplay with paragraph 3 of the same article). The decentralization process paves the way for a gradual reinforcement of the judicial pillar for the development of EU competition law, through a greater involvement of national courts (henceforth called to apply paragraph 3 vis a vis paragraph 1 of article 101 TFEU), although the somehow disappointing recent Report on the Functioning of Regulation

[27] As submitted by Wernhard Möschel, 'antitrust law is based on vague legal concepts such as restraint of competition, unfair competition, monopolization, abuse of a dominant market position, unreasonable restraints and so on. This is no coincidence. This fact is closely tied to the dynamics of the object being regulated here—an economy that is in a constant state of change … The decisive element for clarifying these vague legal concepts for application in the real world is the protective purpose which underlies each piece of legislation in this area' (quoted in ibid 7).

[28] Something which has been underlined by several authors, as eg, Eric Furubotn and Rudolf Richter, 'The New Institutional Economics—New Views on Antitrust', Editorial Preface, Symposium June 1990—Walerfangen/Saar (1991) JITE 1ff. They note that, taking into consideration more than 100 years' application of the Sherman Act in US law, 'despite relatively lengthy experience with antitrust legislation, experts continue to disagree over such bedrock issues as the goals of the program. Serious questions also exist about the 'rules' that should be followed in antitrust cases and about the overall effectiveness of antitrust enforcement' (at 3).

[29] For an overview of the critical contribution of the Chicago School to the definition of teleological models of antitrust law, see Richard Posner, 'The Chicago School of Antitrust Analysis' (1979) *U Pa L Rev* 925ff. We shall focus later on various contributions to a post-Chicago critical synthesis or review, see esp ch 4.

[30] See 1999 White Paper on Modernization of the Rules Implementing Articles 81 and 82 of the EC Treaty, adopted on 28 April 1999 (Commission Program No 99/027—Brussels, 28.4.1999).

1/2003 still does not allow a comprehensive balance of the repercussions of this process.[31] The new legal methodology applied to the interplay of paragraphs 1 and 3 of article 101 TFEU, incorporating an effects-based analysis dependent on economic evaluations—whose development has been significantly influenced by joint venture analysis—carries with it risks to legal security and predictability.

While these risks associated with a more economic analysis of the prohibition rules applied to certain types of cooperation between undertakings have been effectively counterbalanced over the years in the US legal system, through a dense legal elaboration around the key categories of the prohibition per se and the rule of reason—with several intermediate categories progressively arising from the case law and enforcement practice—and through a greater use of econometric models, in the EU system the normative structure of article 101 TFEU and the first stages of its interpretation (at least in the first three decades of evolution of EU competition law) have not provided room for a rule of reason reasoning (although its possible transposition, with some adjustments, to the EU system has been periodically discussed by several authors).[32]

Accordingly, the shift to a new legal methodology of interpretation and enforcement of article 101 TFEU—in the context also of a greater involvement of national entities (courts and competition authorities)—requires a very sensitive hermeneutical equilibrium, so that the previously prevailing legal formalism is not replaced by an entirely casuistic analysis with an economic basis and devoid of acceptable patterns of legal security or predictability. I believe that the particular features underlying the competition law analysis of joint ventures—as identified and studied throughout this book—have significantly contributed to reach that sort of hermeneutic equilibrium, leading to a more flexible hermeneutical reading of article 101 TFEU which, in turn, is not based on an any kind of transposition of the rule of reason (since the evaluation of efficiency elements is somehow intrinsically incorporated in such analysis).

1.4.2 The Treatment of Joint Ventures Before and After the Adoption of the EU Merger Control Regulation

The analysis of joint ventures developed in this book, although essentially focused on the current state of EU competition law and its evolutionary prospects, is also anchored in an historic perspective of the treatment of these entities in the wider context of the evolution of that body of law (and of the interaction between that global evolution and the treatment of joint ventures).[33] In fact, knowledge about the successive, different stages of treatment of joint ventures is relevant for a proper competition law understanding of these entities and,

[31] I refer here to the Report on the Functioning of Regulation 1/2003—Communication from the Commission to the European Parliament and the Council, Brussels, 29.4.2009, COM (2009) 206 final.

[32] I shall frequently return to these reference categories of per se prohibition and the rule of reason in the context of the analysis of joint ventures, and, especially, discussing their hypothetic application, even with adaptations, in EU competition law (that I shall, on the whole, reject). For an initial general approach to those categories and for a useful description of various intermediate categories between per se prohibition and rule of reason that have been contemplated more recently within US antitrust law, see Geert Wils, '"Rule of Reason": Une Règle Raisonnable en Droit Communautaire?' (1990) *CDE* 19ff. An overall critical balance on the applicability or not of rule of reason in EU competition law will be delineated below in ch 4.

[33] I refer here to an historic perspective on the process of formation of competition law rules, relevant for a proper overall understanding of certain categories and to reevaluate some of the essential normative coordinates of this body of law (in this case, of EU competition law), in a manner comparable to the perspective adopted by

in turn, it sheds light on the repercussions of such treatment for the significant changes the EU competition law system has undergone in recent years.

That perspective will lead to an identification of original stages of treatment of joint ventures in some ways characterized by a normative distortion in terms of EU competition law (at the time, EEC competition law). I refer here to a first stage of understanding and legal analysis of joint venture in the period of evolution of this body of law prior to the adoption of the first Regulation on concentration control in 1989.[34] In this period, the lack of rules on direct control of concentrations led to a competition law scrutiny of joint ventures exclusively based on the then article 85 EEC Treaty. This initial absence of a normative programme specifically addressing competition issues of a structural nature has led to profound distortions in the conception and treatment of joint ventures, which, though mitigated, have not been entirely eliminated up to the present date.

Thus, faced with this omission of rules on direct control of concentrations, the European Commission had frequently adopted a normative pre-understanding of joint ventures which overvalued the entrepreneurial cooperation elements that were identifiable in connection with the establishment and functioning of joint ventures (thus ensuring conditions for submitting those joint ventures to the discipline of then article 85 EEC Treaty, since a greater emphasis on structural elements associated with such entities, leading to their qualification as concentration phenomena, would ultimately correspond to an absence of competition law scrutiny of those entities).

The consequences of this type of normative distortion, originating in the lack of a body of rules of direct concentration control until 1989, were twofold. On the one hand, it prevented the development of a unitary body of analysis of joint ventures, comparable to the one which globally prevailed in the context of US antitrust law, thus reflecting the composite nature of these entities.[35] On the other hand, the legal categorization of joint ventures, required to determine their submission or not to then article 85 EEC Treaty, resulted in frequent overvaluation of the entrepreneurial cooperation elements of these entities (that justified such treatment of joint ventures under article 85). Essentially, the Commission then built a thesis that justified the submission, in general, to article 85 of joint ventures established by parent undertakings that would act as actual or potential competitors, except in two types of situations that required a different framework. These would correspond, first, to cases in which the parent undertakings had transferred all their assets to certain joint ventures, maintaining their individuality only for limited purposes of monitoring the activities of the joint ventures (almost as holding companies would do). It would correspond, secondly, to situations then qualified by the Commission as partial

Robert Bork in *The Antitrust Paradox—A Policy at War with Itself* (New York, Oxford, Singapore, Sidney, The Free Press, 1993) esp 15, 50ff.

[34] On the context of adoption of EC Regulation No 4064/89, of 21 December 1989 (first Council Regulation on the control of concentrations between undertakings—OJ L 395/1, 30.12.1989) and on the approach followed on joint ventures prior to the adoption of this Regulation, see, inter alia, James Venit, 'Oedipus Rex. Recent Developments in the Structural Approach to Joint Ventures under EEC Competition Law' (1991) *W Comp* 14ff.

[35] On the essentially unitary treatment of joint ventures that has prevailed under US antitrust law (although this body of law still has some areas of distinction between particular categories of joint ventures), see Barry Hawk, 'Joint Ventures under EC Law' in *Annual Proceedings of the Fordham Corporate Law Institute—EC and US Competition Law and Policy—1991* (n 24) 557ff.

concentrations.[36] In these situations parent undertakings would transfer a significant part of their assets to a joint venture and would entirely withdraw, in irreversible terms, from the joint venture market (provided no collateral coordinating effects would arise in the markets in which such parent undertakings would remain active). In both cases, these types of situations would not be subject to any particular form of competition law scrutiny, due to the absence, at that time, of rules on direct control of concentrations.

The approval of the first competition regime of direct control of concentrations—through Regulation EEC No 4064/89—marked the transition to a new stage in the treatment of joint ventures under EEC competition rules. Somewhat paradoxically, at a time in which the initial absence of rules on direct control of concentrations was overcome, the normative distortion in the treatment of joint ventures, associated with that lacuna, was not corrected. In fact, quite the contrary succeeded as the systematic division of joint ventures in two different sub-categories was maintained, if not reinforced, in the context of the new regime on direct control of concentrations. That happened because only certain types of joint ventures were included in the perimeter of concentration control. According to the initial text of paragraph 2 of article 3 of Regulation EEC No 4064/89, the joint ventures to be treated as concentrations and accordingly submitted to the Regulation were the ones that performed on a lasting basis all the functions of an autonomous economic entity and which did not give rise to coordination of the competitive behaviour of the parties amongst themselves or between them and the joint ventures at stake.

Thus a new problem of legal qualification of joint ventures was raised which would take precedence over all issues of competition law evaluation of these entities. I refer to the requirement, whenever the establishment of a joint venture was at stake, that the joint venture qualified as a concentrative entity (subject to concentration control regime) or as a cooperative entity (subject to the regime of then article 85 EEC Treaty).[37] As correctly noted by Barry Hawk, a concentrative-cooperative distinction of joint venture was established that was woefully inadequate.[38] In fact, that distinction served a mainly jurisdictional function, assigning certain joint ventures to different substantive and procedural systems. However, drawing such a distinction did not provide quick and predictable outcomes that require to be associated with jurisdictional rules. It involved an appreciable degree of legal conceptualism and the application of legal and economic tests whose outcome was rather uncertain. Furthermore, the adoption of an expedited regime for the evaluation of concentrations almost led to an inversion of the methodological assumptions of analysis of joint ventures. Contrary to what happened before the adoption of Regulation EEC No 4064/89, the Commission was now interested in facilitating the qualification of joint ventures as

[36] On this type of entity, see Karen Banks, 'Mergers and Partial Mergers' in Barry Hawk (ed) *Annual Proceedings of the Fordham Corporate Law Institute—North American and Common Market Antitrust and Trade Laws—1987* (New York, Matthew Bender, 1988), 404ff.

[37] For criticism of the requirement of prior qualification of joint ventures and on the normative distortions it induced, see Venit, 'Oedipus Rex. Recent Developments in the Structural Approach to Joint Ventures under EEC Competition Law' (n 34) 14ff.

[38] See Barry Hawk, 'Joint Ventures under EC Law' in *Annual Proceedings of the Fordham Corporate Law Institute—EC and US Competition Law and Policy—1991* (n 24). As Hawk notes, 'The concentrative-cooperative distinction serves a mainly jurisdictional function. It assigns a particular joint venture to different substantive and procedural systems. As a jurisdictional rule, the distinction is woefully inadequate. Jurisdictional rules must provide quick and predictable outcomes. In this respect the cooperative-concentrative distinction remains deeply flawed' (at 575).

concentrative entities, thus paving the way to their submission to the concentration control regime.

In fact, the legal criteria for the qualification of joint ventures delineated by the Commission in its 1990 Interpretative Notice on the distinction between concentrative and cooperative operations[39] were gradually subject to an evolutionary interpretation that underplayed the factors preventing their qualification as concentrative entities.[40] I refer here, in particular, to the negative condition for such qualification which corresponded to the absence of coordination between the parent undertakings and between these undertakings and the joint venture. The Commission, in its enforcement practice, gradually downplayed the factors that would prevent the verifying of this negative condition (eg, as regards the factor corresponding to the presence of one of the parent undertakings in the joint venture market, which could be deemed as almost irrelevant under a de minimis criterion, provided that continued presence was not very significant, or also developing the rather contradictory industrial leadership criteria, according to which the continued presence of a parent undertaking would not translate in behavioural coordination issues provided the undertaking assumed a leading strategic role in the joint venture).[41]

These hermeneutical trends in the qualification of joint ventures represented rather conceptualist answers on the part of the Commission to excessively formal legal parameters of qualification of joint ventures and also attempts to bring the evaluation of a larger group of joint ventures into the more straightforward and not so uncertain procedural regime of direct control of concentrations.

The Commission tried, in the meantime, to eliminate this type of conceptualism and this contradiction between the qualification parameters established in its own 1990 Interpretative Communication and the ones actually developed through its enforcement practice. It did so through its 1994 Interpretative Notice on the distinction between concentrative and cooperative joint ventures.[42] In fact, in this 1994 Notice the Commission developed a new orientation through which it considered not relevant the behavioural coordination between one or more than one of the parent undertakings and the joint venture established by such undertakings, except if that brought about any form of cooperation between the parent undertakings themselves. These hermeneutical changes globally reinforced the probabilities of qualifying joint ventures as concentrative entities subject to the concentration control regime. This step was later reinforced through the

[39] I refer to the first (1990) Interpretative Notice on the distinction between concentrative and cooperative operations, OJ L 395/1, 30.12.1989.

[40] See, on this topic, referring to an evolution of the criteria of qualification of joint ventures initially delineated in the 1990 Guidelines, in order to ensure that a more significant part of these entities was covered by the MCR, James Venit, 'The Treatment of Joint Ventures under the EC Merger Regulation—Almost through the Ticket' in *Annual Proceedings of the Fordham Corporate Law Institute—International Antitrust Law & Policy—1999* (Barry Hawk (ed), Fordham Corporate Law Institute, Juris Publishing, Inc, 2000) 465ff.

[41] The Commission decision of 1991 '*Pilkington/Thomson*' (JOCE No C 279/19, 1991) marked the beginning of this most debatable hermeneutical construction based on the idea of industrial leadership.

[42] Interpretative Notice on the distinction between concentrative and cooperative joint ventures, OJ C 385/1, 31.12.1994. In fact, from 1994 onwards a growing number of joint ventures qualified as concentrations with the corresponding submission to the regime of the MCR. For a quantitative perception of that trend, see Robert Snelders, 'Developments in EC Merger Control in 1995' (1996) *EL Rev* 21, 'Competition Law Survey—1996' *CC* 66ff. And from the same author, 'Developments in EC Merger Control in 1996' (1997) *EL Rev* 22, 'Competition Law Survey—1997' *CC* 75ff.

amendments introduced in 1997 to the then EC Regulation on concentration control.[43] This first adjustment to the Regulation basically eliminated the negative condition for qualification of joint ventures as concentrative entities related to the lack of any form of behavioural coordination between the entities involved in the establishment of a joint venture. It accordingly expanded the domain of joint ventures submitted to scrutiny under the concentration control regime and, additionally, it involved an adjustment of the legal tests established in that regime.

In fact, the submission to the concentration control Regulation of the category of joint ventures performing on a lasting basis all the functions of an autonomous economic entity—even when giving rise to coordination of competition behaviour between the parties—led to the cumulative establishment in that Regulation of two legal tests: (i) on the one hand, the core structural test specifically applied for the purpose of direct control of concentrations, corresponding until the 2004 reform of the MCR to an appraisal of creation or strengthening of a dominant position through the concentration operations (and, after such reform, to the still prevailing structural test of a significant impediment to effective competition in particular as a result of the creation or strengthening of a dominant position);[44] (ii) on the other hand, a legal test related to the behavioural coordinating effects arising from the joint ventures at stake, to be appraised on the basis of the criteria set under paragraphs 1 and 3 of article 81 EC Treaty (now paragraphs 1 and 3 of article 101 TFEU).

These 1997 and 2004 reforms of the concentration control regimes led to a new normative framework of evaluation of joint ventures that, in rather innovative terms under EU competition rules, combines analytical criteria predominantly related to structural elements with analytical criteria essentially connected with behavioural elements (leading to a possible interaction of such analytical criteria that may spill over to the scrutiny of joint ventures under article 101 TFEU, which, in turn, may gradually influence the comprehensive scrutiny of cooperation practices between undertakings under such regime).

That kind of evolution of the successive stages in the treatment of joint ventures—culminating in the 1997 and 2004 reforms and also in the resulting scrutiny practices under article 101 TFEU as well—is therefore relevant for the analysis developed throughout this book. While the core of my in-depth analysis of joint ventures—particularly throughout chapters two and three—is the scrutiny of joint ventures under article 101 TFEU, it also encompasses the contradictions introduced in the different stages of treatment of joint ventures in the context of the evolution of EU competition law (which thus represent a factor that has to be taken into account in the hermeneutical process).

[43] I refer here to the first reform the 1989 MCR which was adopted through Council Regulation (CE) No 1310/97, of 30 June 2007 (OJ L 180/1, 9.7.1997), which was preceded by the set of analyses contained in the Green Paper on the Reform of the Merger Regulation, Brussels, 31 January 1996 (COM(96) 19 final).

[44] On the adjustment of the core (structural) test specifically applied to concentrations, arising from the 2004 reform and the adoption of Regulation EC No 139/2004 (OJ L 24/1, 29.1.2004) see, inter alia, Alistair Lindsay and Alison Berridge, *EU Merger Regulation—Substantive Issues* (London, Sweet and Maxwell, 2012); Peter Christensen, Kyriakos Fountoukakos and Dan Sjöblom, 'Mergers' in Jonathan Faull and Ali Nikpay (eds), *The EC Law of Competition* (New York, Oxford, Oxford University Press, 2007) 421ff, Götz Drauz and Christopher Jones (eds), *EU Competition Law, Vol II, Mergers and Acquisitions* (A. V. Deventer, Claeys & Casteels, 2006) esp 245ff (key aspects of the substantive structural test on which concentration control is based that we shall not develop further in this book, since I shall focus my attention on joint ventures assessed under article 101 TFEU and, in that context, to the assessment of cooperation between undertakings in general, covered by such regime, although attention will be given incidentally throughout the book to the interplay between this test and the substantive regime applied to cooperation arrangements in general).

1.4.3 Treatment of Joint Ventures Focused on Article 101 TFEU

The critical analysis of joint ventures in chapters two and three—with global repercussions in terms of possible new trends of EU competition law discussed in chapter four—has its main focus on the chief subcategories of joint ventures that are most readily identifiable under article 101 TFEU and which still represent globally a larger share of the joint ventures potentially submitted to EU competition rules. In fact, several commentators agree that before the 1997 reform of the concentration control regime 'only a small percentage of joint ventures were reviewed under the merger Regulation',[45] and while that percentage has changed quite significantly since the reforms took place, there are reasons to believe that a majority of joint ventures still require to be scrutinized under article 101 TFEU (despite the fact that precise estimates of relevant shares of joint ventures potentially to be scrutinized under article 101 TFEU or under the merger control regime of Regulation No 139/2004 are difficult to establish, since only a tiny fraction of joint ventures which do not qualify for notification under this Regulation are the object of formal decisions of the Commission or of national competition authorities of the Member States or, indeed, are even brought to the attention and examination of these authorities).[46]

1.5 The Building of a General Model of Evaluation of Joint Ventures under Competition Law Rules and the Transition to a New Stage of EU Competition Law

While focusing my attention on the treatment of joint ventures submitted to the article 101 TFEU regime, I shall endeavour to anticipate, on a prospective basis, further steps towards a growing unitary analysis of joint ventures (thus overcoming the historic distortion in the treatment of these entities under EU competition rules, arising from the initial lack of rules on direct concentration control and also from the lack of an effective structural dimension for the analysis of hybrid processes of entrepreneurial cooperation, including elements of integration between undertakings and elements of behavioural coordination).

Accordingly, I shall critically analyse the evaluation of joint ventures submitted to article 101 TFEU, taking into consideration where relevant elements of evaluation of full

[45] See, on this point, John Anthony Chavez, 'Joint Ventures in the European Union and the US' (1999) *AB* 959ff. As this author notes, 'Before the expansion of the merger regulation [1997 reform], only a small percentage of joint ventures were reviewed under the merger regulation. In 1997, one commentator estimated that 95% of the joint ventures subject to the European Community's competition law were governed by article 85' (at 966). Despite the undeniable growth of joint ventures covered by the MCR after the 1997 reform, I consider that, on the whole, a still larger proportion of joint ventures continue to be covered by article 101 TFEU. Nevertheless, I have to acknowledge the difficulty in establishing an exact or even close estimate of the precise numbers, since only an extremely limited number of such entities of those joint ventures that do not qualify as concentrations have been object of formal decisions of the Commission or even been made known to the Commission. In this domain, as in others, the 'decentralization' process in enforcement of EU competition law developed through Regulation (CE) No 1/2003 should have created adequate conditions for the Commission to scrutinize *ex officio* a larger number of joint ventures raising potentially significant repercussions to competition in terms of application of article 101 TFEU. However, as I shall explain later, this did not actually happen since the Commission has pursued an extremely limited number of cases in the field of article 101 TFEU, apart from those concerning cartels (with negative consequences in my view for the hermeneutical clarification of that legal regime).

[46] See on this the latest Reports on Competition Policy of the European Commission (eg in the period between 2001 and 2012).

function joint ventures leading to behavioural coordination (treated under the framework of Regulation No 139/2004, in particular under the dual structural and coordination tests of, respectively, paragraphs 2, 3 and 4 of article 2 of the Regulation). This critical analysis will be aimed towards building and identifying stable legal and economic appraisal criteria which, together, may form a general analytical model of evaluation of joint ventures (that may lead to acceptable levels of predictability as regards the outcome of these analyses).

The identification of suck key appraisal criteria will be structured on the basis of a proper understanding and evaluation of the prevailing economic goals or functions carried out through different joint ventures.[47] Regardless of their legal form or organization, I shall then assess some typical economic functions of different joint ventures, in light of the effects arising from these on the competition process and as perceived through the lens of competition law. This methodological approach will lead to the identification of four basic subcategories of joint ventures that will be the object of my in-depth analysis, namely (i) research and development joint ventures, (ii) production joint ventures, (iii) commercialization joint ventures and (iv) purchasing joint ventures (with a particular emphasis on the first two categories from which certain essential corollaries may be established for the other two).

The global analytical model of joint ventures presented in this book—and initially described in general in chapter two—will be fundamentally anchored in the interplay of three reference parameters (which may, in turn, interact with complementary and variable criteria of a more complex nature). Such parameters will correspond to (a) the type of economic relationship between the participating undertakings in the joint venture, (b) the type of relationship between the markets in which the parent undertakings operate and the joint venture market, and (c) the effects arising from the establishment and functioning of a joint venture on third parties (particularly effects that may lead to the foreclosure of certain markets to third parties).

Building such a global analytical model of joint ventures, fundamentally based on the chief economic effects arising from the establishment and functioning of these entities is undoubtedly a complex task. That complexity is highlighted, due to the interdependence between the three key parameters at stake (as identified above, (a), (b) and (c)). Furthermore, each of those parameters may encompass variable situations, which, in turn, multiply the relevant analytical levels (to take into consideration).

I shall apply the analytical model presented in chapter two throughout chapter three—which represents the core of the book—to the four subcategories of joint ventures identified above that are to be associated with particulars risks of distortion of competition. My purpose is to establish a set of quasi-presumptions or, at least, indicative criteria leading to the identification, on a fairly predictable basis, of the probable occurrence of unacceptable situations of competition distortion. This will allow me to build an analytical methodology particularly tailored to joint venture evaluation. Such methodology will ideally lead to an

[47] I consider here effects of joint ventures on the competition process from a standpoint that is shared by other commentators such as John Temple Lang in his study, 'International Joint Ventures under Community Law' in *Annual Proceedings of the Fordham Corporate Law Institute—International Antitrust Law & Policy—1999* (n 40) 381ff, esp 395. To some extent, what is at stake is to build a typology of standard economic goals of different subcategories of joint ventures as a basic matrix for the competition law assessment of those joint ventures. As suggested by Temple Lang, 'the nature of the effects which a joint venture may have on the behaviour of the parents depends on what the joint venture will do' (at 395). It must be noted, however, that starting from this common assumption aimed at economic functions carried out through different types or subcategories of joint ventures, different analytical models of joint ventures may be conceived.

identification—at a first stage of analysis—of standard situations of predictable restriction of competition in connection with each subcategory of joint ventures (always dependent, however, on specific factors that may arise from casuistic analysis of the market situations at stake).

Going on to a second stage of analysis, one may evaluate elements of adjustment of the content and functioning of the joint ventures at stake, which, without affecting the efficiency factors underlying those joint ventures, may neutralize those risks to a certain extent (therefore introducing in the analytical equation of these situations incentive modifying remedies that may conciliate the efficiency effects of some joint ventures with the prevention of distortions of competition,[48] in line mutatis mutandis with some analytical paradigms developed in the context of US antitrust law, but not yet actually explored in the field of EU competition law).

In building this analytical model, I shall take into consideration the EU (Commission) 'Guidelines on the Applicability of article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-Operation Agreements', fully revised and updated in 2010.[49] In fact, if these Guidelines develop a broader perspective on the general horizontal cooperation between undertakings, factors which are particularly relevant for joint venture analysis may arise from it (while also attracting, in my view, some criticism in the context of the comprehensive analytical parameters I am designing in this book).

1.6 Particular Features of Joint Ventures in the Financial Sector

In the context of my analysis of joint ventures systematically aligned with their prevailing economic functions and effects (to be developed in chapter three), I refer to some particular issues that may arise in the field of joint ventures—or comparable entities—established in the financial sector.[50] Accordingly, this segment of specific analysis of joint ventures in the financial sector will be included in the section of Chapter 3 dealing with the type of the commercialization joint ventures.

[48] On incentive modifying remedies see, in particular, the analytical model designed by Joseph Brodley in his seminal work, 'Joint Ventures and Antitrust Policy' (1982) *Harv L Rev* 1523ff. I purport to adapt and develop in the context of EU competition law Brodley's analysis of those incentive-modifying remedies, suggesting several paradigmatic forms of adjustment of the structures of joint ventures that may prevent the occurrence of some of the more common anticompetitive effects of certain joint ventures (see Brodley, 1544ff).

[49] See Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-Operation Agreements, fully revised and updated in 2010, replacing the former 2001 Horizontal Cooperation Guidelines.

[50] I refer here to the financial sector in rather broad terms. Multiple problems of potential distortion of competition, including of course those related to the establishment and functioning of joint ventures, assume specific features in this sector. See for a general perspective on some of those particularities that should be taken into consideration for the purposes of establishing a coherent competition policy addressing the financial sector, Luc Gyselen, 'EU Antitrust Law in the Area of Financial Services—Capita Selecta for the Cautious Shaping of a Policy' in *Annual Proceedings of the Fordham Corporate Law Institute—International Antitrust Law & Policy—1996* (Barry Hawk (ed), Fordham Corporate Law Institute, Juris Publishing, Inc, 1997) 329ff. Furthermore, in the current operating conditions of the more developed financial sectors, the establishment of joint ventures, combining in an innovative way fundamental specialized know how and expertise of financial institutions and of entities operating in other economic sectors has become an important element of the growth and diversification strategy of financial groups. See, in that sense, the analysis of Peter Drucker, underlining the importance of 'banking joint ventures that gain access to new investment markets by going into partnership with small independent asset managers' (Drucker, *Managing in a Time of Great Change* (n 10) 70ff).

The option underlying this focus given to joint ventures in the financial sector has to do with some peculiar factors to be found in this sector. First, I am interested in an implicit dimension of entrepreneurial cooperation that is somehow required by the functioning of the financial sector (at least, as regards some of its constituent parts). In particular, I shall address analytical issues raised by certain areas of the financial sector that require the organization and operation of network systems, as it characteristically happens in the payment cards area. Secondly, attention will be focused on the especially dynamic nature of the financial sector (and, in particular, of certain of its segments).

In fact, considering that joint ventures competition law analysis combines, in a perhaps unique way, structural elements—to be assessed through prospective evaluations, related to the perception of market dynamics generated by the establishment of these entities—and behavioural elements (related to the potential coordination of behaviours), it may be safely assumed that such analytical interplay will produce some of its most interesting results in particularly dynamic markets and those dependent on a high degree of innovation (as it is clearly the case with the financial sector and in particular, the area of payment cards within that sector). Further, in response to the huge changes in the financial sector, following the introduction of the Euro in the various EU Member States, financial undertakings have frequently used the joint venture as an important instrument for their readjustments and changing strategic alliances (due, in part, to its considerable flexibility). This also raises new issues of relevance for the treatment of (commercialization) joint ventures.

These joint ventures—or comparable entities—in the financial sector also correspond, in some cases, to innovative combinations between several areas of the financial sector (banking, insurance and securities) and other areas of economic activity (integration of financial and non-financial activities gradually brought about by new information technologies that imply new parameters of organization and functioning for activities traditionally forming the core of financial intermediation).[51] This recent proliferation of joint ventures in the financial sector calls for a global rethinking, in various segments of the sector, of the acceptable frontiers—in terms of competition law analysis—for the implicit dimension of entrepreneurial cooperation that is inherent to financial activity. Accordingly, I shall pay particular attention to the network cooperation issues related to the functioning of payment cards systems—as an area that epitomizes the cooperation dimension inherent to various areas of financial activity—taking into consideration the latest developments in this field, both at US and EU level (which involve entities and forms of organization that have significant elements in common with joint ventures).

2 Methodology

This book is clearly based on an interdisciplinary—legal and economic—research methodology, which is characteristic of competition law analysis. Economic analysis is, therefore, a necessary component of my research, although the book is intentionally

[51] See, in general, on these developments, M Bettzüge and T Hens, 'An Evolutionary Approach to Financial Innovation' Discussion Paper, University of Bonn, 1997; Günter Franke, 'Transformation of Banks and Bank Services' (1998) *JITE* 109ff.

anchored in a predominantly legal methodology. My purpose is to develop a comprehensive legal study oriented towards the application of rules and key principles of competition law—chiefly EU competition law—to the establishment and functioning of joint ventures. Taking into consideration the peculiar features of joint ventures, involving to a certain extent an evaluation of market structures and its prospective evolutions in the context of situations of entrepreneurial integration and cooperation, the research presented throughout the book will also call for a dimension of modern industrial organization (which is a relevant part, nowadays, of competition law analysis).[52]

In general, competition law—in light of its more recent developments both in the US and the EU—relies heavily on the use of economic concepts and economic evaluations and I shall not evade that necessity throughout the book. From a different standpoint, I purport to extract from prospective economic evaluations encompassed by competition law evaluations of joint ventures and in the comprehensive analytical model that I devise, certain repercussions in terms of global evolutionary trends of EU competition law, that are to be presented in chapter four.

However, this interdisciplinary component (relying on economics) of the legal methodology to be used in competition law analysis of joint ventures should not cause us to overlook the fact that my core body of analysis has a fundamentally normative nature to which apply the specific elements of logic and discourse related to what Habermas defines as '*Rechtsinstitutionem*' (involving a particular 'normative intention' and 'normative form' normally related to mechanisms for applying sanctions).[53]

In fact, regardless of the degree and the extent to which it relies on economic concepts and evaluations—a degree that may be debated—competition law and its treatment of joint ventures are based on normative judgements containing an inner core that precedes economic analysis and assumptions and may not be reduced to it.[54] To a large extent, competition law involves the legal assimilation of economic or social concepts and their subsequent application in the context of the enforcement of normative regimes that require the apprehension of factual data ('*realdaten*'), as it tends to happen in all legal constructions according to the *Theory of Law Structuring* ('*Strukturierende Rechtslehre*') developed by Friedrich Müller (to which I largely subscribe).[55]

This normative process is found at its fullest expression in the field of competition law, which particularly requires the definition of legal rules as a dynamic process of individualization of normative commands on the basis of casuistic situations. In this context, the legal rules at stake generally correspond to a reference model that is factually conditioned ('*sachbestimmtes Ordnungsmodell*');[56] in other words, a normative model that has to be fully determined or established through its application to the economic reality that such model is supposed to ordain.

[52] For a general perspective on the content and global reach of industrial economics for the purposes of developing competition rules, see, inter alia, Dennis Carlton and Jeffrey Perloff, *Modern Industrial Organization* (New York, HarperCollins College Publishers, 1994).

[53] See Jürgen Habermas, *Theorie des Kommunikativen Handelns* (Frankfurt, Suhrkamp, 1981).

[54] I refer here, once more, to the irreplaceable requirements of the development of normative judgements, as asserted by Dieter Schmidtchen in terms that I generally follow. See Schmidtchen, 'The Goals of Antitrust Revisited—Comment' (n 26) 31ff.

[55] See, on that point, Friedrich Müller, *Strukturierende Rechtslehre* (Berlin, Duncker and Humblot, 1994) 17ff.

[56] See ibid. See also Ralph Christensen, 'Das Problem des Richterrechts aus der Sicht der Strukturienden Rechtslehre' (1987) *Archif für Rechts und Sozialphilosophie*, pp. 73 ff., esp 75ff.

The peculiarity that may be found at the level of competition law has to do with the special intensity of the factual data ('*realdaten*') or economic elements contribution to the structuring of the normative programme of its rules. In turn, that peculiar feature of competition law requires a specialized analysis supported by economic science or, at least, an empirical evaluation of certain economic data to fully establish the normative programme of certain regimes and its legal effects when applied to certain situations and entities. Notwithstanding this peculiarity, one must not lose sight—as may be the case with certain analysis more heavily indebted to economics and to economic analytical models, in recent years—of the basic notion that enforcing competition law requires normative judgements that do not arise from pure economic criteria. Those judgements depend on value structures and on a correspondent normative reasoning that may not be simply circumscribed to economic notions or elements pertaining to economic reality.

On this basis, my methodological approach throughout the book has a predominantly legal nature, while recognizing the need to incorporate elements of economic analysis in the establishment of normative evaluations required in applying competition law rules. If, as has been observed, competition policy inhabits something of a no-man's land between the territories of economics and law,[57] my purpose throughout this book is to somehow bridge that gap while assuming at the same time as a starting point the criteria and elements of normative reasoning. Globally, my use of analytical tools of economics in the context of a predominantly legal analysis will not differ much from the characterization presented by the economist, Maureen Brunt, when evaluating the role of economics evaluations in antitrust court proceedings. As far as Maureen Brunt is concerned, while it would be 'tempting for an economist' to refer to competition law as a 'blend of law and economics', such a view would be 'misleading', since it should be recognized that 'economic concepts are absorbed or assimilated by the law' in an overall framework where 'the law must be the dominant partner'.[58] Therefore, my analysis, while permeated by economic factors or elements, will be anchored in an interdisciplinary perspective that will assume law and the corresponding normative reasoning to be the dominant partner (even if aiming towards a particular normative perspective of law in context,[59] bearing in mind the economic and market environment that influence and condition the normative reasoning in the field of competition law). In fact, I consider that a pervasive use of economics and of economic analytical models, for the purposes of understanding competition law rules—under the influence of the Chicago School or even of post-Chicago schools of thought[60]—has led to certain excesses and to a lack of predictability in the enforcement of such rules (which does not, however, rule out the need for economic tools intermingled in the normative reasoning).

[57] This observation is from Tim Frazer. As stated by this author, 'competition policy inhabits something of a no-man's land between the territories of economics and law. Lawyers trained in traditional legal scholarship are perhaps disquieted by the need to take account economic principles and economists are deterred by legal methodology'. See Tim Frazer, *Monopoly, Competition and the Law* (New York, London, Harvester, Wheatsheaf, 1992) xi.

[58] See Maureen Brunt, 'Antitrust in Courts: The Role of Economics and Economists' in *Annual Proceedings of the Fordham Corporate Law Institute—International Antitrust Law & Policy*—1998 (Barry Hawk (ed), Juris Publishing, Inc, 1999) 356ff.

[59] I refer here to the idea of law in context as characterized, inter alia, by Francis Snyder. See, on this point, Snyder, *New Directions in European Community Law* (n 25).

[60] See, on those views of the Chicago School and of subsequent approaches that may be rather loosely be referred as post-Chicago theoretical approaches, inter alia, J Brodley, 'Post-Chicago Economics and Workable Legal Policy' (1995) *ALJ* 683ff; Lawrence Sullivan, 'Post-Chicago Economics: Economists, Lawyers, Judges and Enforcement Officials in a Less Determinate Theoretical World' (1995) *ALJ* 669ff.

Furthermore, taking into consideration the inescapable casuistic dimension of competition law analysis, my evaluation of joint ventures and of the competition law treatment of comparable entities will be largely based on a critical evaluation and review of relevant precedents (including selected decisions of the European Commission and case law from the CJEU and the GC (former Court of First Instance of the EU) and also, albeit on an exceptional basis, decisions of national competition authorities of EU Member States and of national courts). That methodology will be especially developed in one of the core chapters of the book—chapter three, incorporating an extensive analysis of the substantive assessment of different types of joint ventures under article 101 TFEU—but, on the whole, it heavily influences the remainder of my analysis.

My purpose in this critical hermeneutical reading of competition law applied to joint ventures, through the casuistic lens of selected case law, is twofold. On the one hand, I aim to present readers with a comprehensive and updated statement of the actual treatment of different types of joint venture under EU competition law (and national competition law of Member States, due to the soft harmonization process that has occurred in recent decades). On the other hand, and more fundamentally, I aim through that critical review of selected case law to identify the essential guiding principles ('*Leitsätze*')[61] that govern the normative options concerning the treatment of joint ventures under EU competition law.

Although EU case law is sometimes conspicuous in its lack of enunciation of reasons of policy underlying certain judgments—compared for instance with the case law from the US Supreme Court and from German courts[62]—I purport to identify some of those reasons of policy and guiding principles underlying the treatment of joint ventures. It is in that context that I try to build a global analytical model of joint ventures offering some predictability to undertakings and allowing in principle the identification, on the basis of recurring analytical criteria, of (i) situations related to the establishment and functioning of joint ventures that do not usually generate appreciable negative effects for competition; (ii) situations that tend to produce unacceptable negative effects on competition; and (iii) situations whose actual impact on competition requires a more developed legal and economic analysis.

3 Structure of the Book

As explained earlier in this Introduction, the object of my research in the field of joint ventures and my methodological approach, determine the plan and analytical sequence of the book.

I begin with a chapter on the concept of joint venture in EU competition law (while also providing a comparative perspective with US antitrust law). In chapter one, while recognizing the inherent vagueness of the concept of joint venture in competition law I try to capture the basic elements which define this legal category (avoiding some of the

[61] See, on the function of such '*Leitsätze*', Müller, *Strukturierende Rechtslehre* (n 55).

[62] See for an incisive comparison in this area, Valentine Korah, 'Future Competition Law—Community Courts and Commission Not Consistently Analytical in Competition and Intellectual Property Matters' in Claus-Dieter Ehlermann and Laraine Laudati (eds), *European Competition Law Annual 1997, the Objectives of Competition Policy* (Oxford, Hart Publishing, 1998).

uncertainty that has characterized the qualification of certain entities as joint ventures). This conceptual clarification addresses the competition law treatment of joint ventures, but I also, however briefly, revisit in chapter one, the different legal models of structuring cooperation links between undertakings that may be covered by the rather broad *nomen juris* of joint venture.[63]

In chapter two, I present the basis of a global analytical model for the assessment of joint ventures under EU competition law (especially focused on the assessment of joint ventures under article 101 TFEU), relying on the methodological approach previously described in this Introduction.

Chapter three, which stands at the analytical core of the book, applies the global analytical model of assessment of joint ventures, as generally characterized in chapter two, to the substantive assessment of different types of joint ventures, individualized according to their prevailing economic function (and also bearing in mind the most common types of joint ventures in the entrepreneurial praxis).

In chapter three, I examine in turn research and development (R&D) joint ventures, production joint ventures, commercialization joint ventures, and purchasing joint ventures. In so doing, I present a common analytical framework of joint ventures in action, while identifying how to adapt some of the key analytical criteria to the specific economic elements that tend to intervene in each of those types of joint ventures (offering as large a degree of predictability as possible both to competition law enforcers and to all the relevant stakeholders in this area, including of course the undertakings at stake).

Building on the analysis developed in chapters two and three, the final, concluding chapter of the book (chapter four) is aimed at an evaluation of how competition law assessment of joint ventures has contributed to the major recent changes in EU competition law. I consider in this concluding chapter the redressing of the teleological priorities of EU competition law, the gradual renewal of its legal methodology and also, briefly, the transformation of the institutional model of organizing the EU competition law system.

[63] To some extent, this attempt at identifying, under a general legal perspective that goes beyond competition law, different models for structuring cooperation links between undertakings, which may be covered by the rather broad *nomen juris* of joint venture, that is undertaken in ch 1 (esp at 2.4), while relevant to provide an overall understanding of the use of the legal category of joint venture in business and corporate law, may be skipped by readers more directly focused on competition law (although I also intend to construe a contribution of the more intensive use of the category of joint venture under competition law to build a general concept of joint venture under commercial or business law, as well as an interplay between the more general concept of joint venture used in certain areas of law, and the more specific notion of joint venture, pertaining to competition law, clearly at the core of this book).