

Luis Silva Morais, *Joint Ventures and EU Competition Law*. Oxford: Hart Publishing, 2013. 586 pages. ISBN: 978-1-84113-793-3. GBP 95.

This book provides an engaging interpretation of EU competition law's more economic orientation since the 1990s, and a fairly comprehensive and practically useful discussion of important competition law principles for analysing joint ventures. Wherefore "JVs"? Firstly, in their dazzling diversity they have become part and parcel of the post-modern dynamism of the global economy. Secondly, despite their ascendant use, JVs remain an ill-defined category. Thirdly, despite their key role in the evolved approach under Article 101 TFEU as a whole, they are sometimes overlooked or overshadowed in EU competition law discourses. Fourthly, they have been of great importance to the development of U.S. antitrust law, which allows for useful comparative reflections.

The book is emphatically normative. It presents a unified model by which the effects of JVs can be assessed under Article 101. The introduction argues that the treatment of specific issues raised by the behavioural-structural hybridity of JVs has been partly responsible for a "decisive change or evolution of the former methodology of almost per se prohibition [under Art. 101] of an appreciable part of cooperation processes between undertakings ... 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)". (p. 7) Substantive analysis has thus got better, a point also to be seen in light of case law post-dating the book (see Case C-67/13 P, *Groupeement des cartes bancaires (CB)*, where the ECJ's welcome refinements to the object-effect relationship led to something of an *acte clair* doctrine, though there are differences).

Chapter 1 contains a detailed discussion of the nature of JVs and of the complex contracts that underlie them. This will be useful for readers interested in business law in general. In this chapter Morais overcomes the above-mentioned conceptual imprecision deriving from the fact that, while the shifting forms of (non-collusive) cooperation among firms are limited only by the imagination, the law struggles to capture their myriad permutations. Morais conceptualizes JVs as falling between extremes of pure inter-firm (cooperative) interaction and complete

integration (concentration). So when is a joint venture a joint venture? In a two-step analysis, the first step imposes three basic conditions. Firstly, two or more mutually independent parents must jointly own a new structure, which need not be so autonomous as to constitute a separate undertaking. Secondly, each parent must transfer to the new structure significant entrepreneurial assets. And the third condition is that a legal entity must be established that is distinct from the parents. The new structure might not have direct access to a market: its functions might simply support the activities of the parents (e.g., by conducting R&D). The second step differs from the first in that it is not necessary to identify a structural dimension, but it is useful for the legal qualification of sub-categories of JVs (e.g., R&D, joint production, etc.). The question here is whether the new structure introduces new “enterprise capability”. This new capability could take the form of a new or improved product or productive process, new or improved technology or a similar additional value component. These two steps yield a definition of JVs neither so loose as to be vacuous nor so restrictive that it fails to capture the abundant variety of relevant business forms referred to above.

Chapter 2 presents a new global analytical model for assessing a JV’s competitive effects. Morais begins by identifying four main types of risks. Firstly, a JV may distort competition between the parties in the market of cooperation. Secondly, there may be spill over effects limiting competition upstream or downstream of that market, or in another related market. Thirdly, a JV may cause foreclosure. Finally, networks of JVs may generate “interlocking” effects. But the whole point of non-sham JVs is normally to generate efficiency, typically in the form of reduced transaction costs, dynamic efficiencies and so on. To take account of such mixed effects, Morais proposes a three-stage model. The first, tripartite stage is familiar: is the JV (a) unlikely to restrict competition (e.g., because only non-rivals are involved or because independent activity was infeasible), (b) very likely to restrict competition, or (c) neither of the above, in which case a more nuanced assessment is appropriate. The second stage is structurally oriented and takes account of the parties’ combined market shares. Rather than variable safe harbours, Morais prefers a uniform market share threshold to facilitate a preliminary assessment of market power which may then be adjusted by complementary analysis, in the third stage, of additional relevant factors. One can accept that a common threshold below which some sort of (soft) presumption of lawfulness would promote simplicity in this area. Since the complementary analysis remains as a corrective “backstop”, the suggestion of an across-the-board threshold of 25% of any affected relevant market (p. 285) seems reasonable. With regard to this backstop, adjustments can be made on the basis of the particular features that characterize functional sub-categories of JVs. This calls for an “analysis of the specific impact of the market power associated with these entities upon the concrete conditions of the functioning of the market, as influenced by the content and aspects involved in the type of cooperation pursued”, taking into account the relevant parameters of competition, i.e., price, quality, output, etc. (p. 205) The third stage can thus involve intricate assessments, which must be sensitive to the facts; furthermore, residual factors such as market structure and concentration levels may inform the analysis. The model thus expounded pursues the challenging twin aim of achieving both predictability (especially since guidance in the form of case practice exists but remains sparse) and flexibility given the diverse economic functions that may be relevant in a given case.

Chapter 3 builds on the previous chapter by applying the three-stage analysis to common types of cooperation, beginning with R&D and production JVs. To these Morais adds commercialization and purchasing JVs. Looser forms of collaboration are not discussed, although similar principles may apply by analogy. The very detailed analyses of the JV types show how this model can support an integrated assessment under Article 101(1) (e.g., where a globally pro-competitive commercialization JV involves joint pricing). With regard to the benefits of JVs, Morais speaks of *pre-competitive* elements, e.g. where cooperation facilitates market entry. This is not really a “rule of reason”, which has never been apt for wholesale transposition to Article 101 given its mosaic-like normative structure (which some of us consider overdue for an update). While the discussion in Chapter 3 is organized according to the economic functions of different JV types, Morais demonstrates that the same unified analytical

steps can be followed where “mixed” JVs combine diverse functions. The chapter also prophetically includes: (i) analysis of JVs in the financial services sector (pp. 440–450 and 462–68, prefiguring current discussions on payment systems – a very hot topic given important new case law and impending caps on interchange fees); and (ii) a discussion of minority shareholdings (pp. 481–494), which anticipates the current policy review of this subject. Throughout this chapter and others, Morais draws from but also critiques and diverges from the principles and methods developed in the relevant Commission Guidelines, most recently updated in 2010–2011.

In Chapter 4, Morais argues that the competition law treatment of JVs has made a major contribution to the transformation(s) of EU competition law. He begins by wading into the debate on the proper roles and *raison d'être* of this field of law – a necessary debate about essentially contested concepts. The discussion is not excursive: JVs are precisely the kind of complex commercial phenomena that have required some teleological introspection. The shift in teleology has proceeded in tandem with the methodological shift traced in Chapter 3, in particular as regards the lateral scope of Article 101(1) in JV cases, and the tendency to recognize, under that first paragraph, the efficiency of certain kinds of JVs. This leads Morais to claim that “the systematic consideration of different factors largely aimed at some form of predominance of the elements of economic efficiency – induced by joint venture assessment together with other areas of enforcement of competition rules – has therefore influenced a progressive adaptation of the ways of combining different goals on the basis of EU competition law (p. 501)”. Morais is careful to specify that his conclusions regarding “some form of predominance” do not reflect a consensus view; but few could deny that the relative weight between efficiency-based values and values attached more to formalism and categorical thinking has changed considerably in the last 20+ years. In a “new methodological synthesis” (p. 512), structural factors and market power have emerged as essential counterparts to pure behavioural factors. The advocated global analytical model is designed in part to operationalize that synthesis and, again, to achieve as much predictability as possible. In the last 13 pages of the book, Morais follows the logic of the flexibilization of the first paragraph of Article 101, and discusses one of its significant implications: a re-shaped logic for the systematic interpretation and respective roles of the first and third paragraphs of the provision. This leads him to the possibility of a “double balancing exercise” (p. 519), and he explains how this double balancing is compatible with both the *Métropole* (2001) and *Wouters* (2002) judgments. He also explains how it is to be understood differently from Odudu’s more clear-cut division of allocative and productive efficiency. With regard to Article 101(3), Morais believes that non-economic factors may properly be considered, subject to important limiting principles (though he notes that further clarification is needed). Accordingly, he urges the Commission to retreat from its position in the 2004 Guidelines on (then) Article 81(3) and to test a broader approach in some Article 10 decisions under Reg. 1/2003 – thereby possibly paving the way for additional authoritative guidance from the EU Courts. Other relevant cases might of course reach the Courts by other means.

Overall assessment. This book emerges as a lonely monograph in a rather barren field. Book-length discussions of the application of EU competition law to joint ventures have been rare since the 1990s. This alone would make the book valuable. But this superb monograph also deserves credit for being well and eclectically-researched; cohesive and fully thought-through; and generously endowed with insights and doctrinal originality. While the focus is EU law, it draws where appropriate on the U.S. tradition and on national experiences within Europe. Some readers may not want to read the book from cover to cover, but if they seek mature reflections on the kinds of JVs Morais discusses, they will not be disappointed. There is a bit of repetition occasionally, and the text could have stood an additional copy edit review. These niggling reproaches are however easily forgotten. Morais has delivered great depth and quality in this major work.

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