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## Cooperative Joint Ventures in European Community Competition Law

Paul J. De Rosa

*University at Buffalo School of Law (Student)*

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## COMMENT

# Cooperative Joint Ventures in European Community Competition Law

PAUL J. DE ROSA\*

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\* J.D. Candidate, University at Buffalo School of Law, May 1993.

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## INTRODUCTION

A joint venture is a form of business association used by corporations to advance a variety of strategic objectives. By facilitating cooperation between partners with complementary goals, they have been employed to increase access to new markets, to acquire new technologies, to diversify investment risk and to expand or rationalize production capacity.<sup>1</sup> Joint ventures are also recognized by governments as a legitimate means to realize more general economic objectives.<sup>2</sup> Increasingly of late, this recognition has raised the question of the proper treatment of joint ventures under competition and antitrust laws.<sup>3</sup>

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1. For a detailed analysis of the varied uses of joint ventures and other forms of industrial cooperation, see TIMOTHY M. COLLINS & THOMAS L. DOORLEY III, *TEAMING UP FOR THE 90S* (1991) [hereinafter COLLINS & DOORLEY]; *THE HANDBOOK OF JOINT VENTURING* (John D. Carter et al. eds., 1988) [hereinafter JOINT VENTURING]; KATHRYN R. HARRIGAN, *MANAGING FOR JOINT VENTURE SUCCESS* (1984) [hereinafter HARRIGAN].

2. For this theme in the European Community, see *infra* part I(B)-(D). For the legal treatment of joint ventures in the United States, see, e.g., The National Cooperative Research Act of 1984, 15 U.S.C. §4301 (1988); *Antitrust Enforcement Guidelines for International Operations*, Antitrust & Trade Reg. Rep. (BNA) No. 1391 at 890 (Nov. 17, 1988) [hereinafter *Guidelines for International Operations*].

3. For a discussion of the antitrust question in the United States, see James Langenfeld and David Scheffman, *Innovation and U.S. Competition Policy*, 34 *THE ANTITRUST BULLETIN* 1 (1989); James F. Rill, *United States Antitrust Policy in International Trade: Legislative Proposals Concerning Antitrust Treatment of Production Joint Ventures, in 1992 AND EEC/U.S. COMPETITION AND TRADE LAW 131* (Barry Hawk ed., 1990). On the antitrust treatment of joint ventures in other countries, see ORGANIZATION FOR ECONOMIC

In the European Community (E.C.),<sup>4</sup> the task of articulating a coherent competition policy has been the responsibility of the European Commission.<sup>5</sup> The content of the policy assumed increased significance in 1985, when the Commission presented a White Paper<sup>6</sup> on the completion of an internal Community market to the

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CO-OPERATION AND DEVELOPMENT, COMPETITION POLICY AND JOINT VENTURES (1988).

4. The European Economic Community was established in 1957 by the Treaty of Rome. "By establishing a common market and progressively approximating the economic policies of Member States," its objective was "to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in trade, an accelerated raising of the standard of living and closer relations between the States belonging to it." TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY AS AMENDED BY SUBSEQUENT TREATIES art. 2 [hereinafter EEC TREATY], reprinted in BASIC COMMUNITY LAWS (Bernard Rudden & Derrick Wyatt eds., 2d ed. 1986). Moreover, the Treaty Contains provisions for the abolition of all barriers to the free movement of goods, persons, services and capital. EEC TREATY art. 3. The European Economic Community will be referred to throughout this Comment simply as the European Community, the E.C. or the common market.

5. The EEC Treaty established four principal institutions: the Commission, the Council, the Parliament and the Court of Justice. EEC TREATY art. 4. For a general survey of E.C. institutions see WILLEM MOLLE, THE ECONOMICS OF EUROPEAN INTEGRATION 55-79 (1990). The Commission is a body of seventeen members each appointed for four years by consent of the governments of the Member States. It acts as a supranational body whose role is "to propose new policies and laws, to act as a watchdog concerning infringements of EEC law, to mediate between Member States in the Council and to represent the EEC in external relations." FRANCIS G. SNYDER, EEC LAW SUBJECT GUIDE 17 (1990). Article 155 of the EEC Treaty provides that:

In order to ensure the proper functioning and development of the common market, the Commission shall:

ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied;

formulate recommendations or deliver opinions on matters dealt with in this Treaty, if it expressly so provides or if the Commission considers it necessary;

have its own power of decision and participate in the shaping of measures taken by the Council and by the Assembly in the manner provided for in this Treaty;

exercise the powers conferred on it by the Council for the implementation of the rules laid down by the latter.

EEC TREATY art. 155.

The Commission has broad authority to ensure that competition is not distorted in the common market. If it finds that there has been a competitive distortion, it shall propose appropriate measures to bring it to an end. EEC TREATY art. 85. The Commission's competence in competition matters is addressed specifically in Council Regulation 17/62 of 6 February 1962, First Regulation Implementing Articles 85 and 86 of the Treaty Amended by Regulation 59, by Regulation 118/63 and by Regulation 2822/71, 1971 O.J. (285) 49 [hereinafter Council Regulation 17/62].

6. Completing the Internal Market: White Paper from the Commission to the European Council, COM(85)310 final, reprinted in AUDREY WINTER, ROBERT D. SLOAN,

European Council.<sup>7</sup> The White Paper contained proposals for the integration of the economies of the Member States<sup>8</sup> into a single market without physical, technical or fiscal barriers.<sup>9</sup>

The deadline set for the elimination of these barriers passed without fanfare on December 31, 1992. It was always understood, however, that the successful completion of the single market would be a gradual process that would require the continuing commitment of the Member States to the economic ideals enshrined in the White Paper, namely, economic integration, efficiency, innovation and long-term competitiveness. The Commission has continually stated that joint ventures have an important role to play in realizing these ideals.

The international dimensions of the single market have been analyzed closely by the U.S. business community,<sup>10</sup> which, despite initial concerns,<sup>11</sup> has for the most part, responded positively to

GEORGE A. LEHNER & VANESSA RUIZ, *EUROPE WITHOUT FRONTIERS: A LAWYER'S GUIDE* app. A (1989) [hereinafter *Completing the Internal Market*]. The White Paper reaffirms the general provisions of the EEC TREATY, for the abolition of all barriers to the free movement of goods, persons, services and capital.

7. The European Council, which formulates most of the important policies of the Community, was created outside of the EEC Treaty. Article 2 of the Single European Act grants the European Council its authority. See BASIC COMMUNITY LAWS, 20 (Bernard Rudden & Derrick Wyatt eds., 2d ed. 1986).

8. The member states are Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Spain, Portugal and United Kingdom.

9. Completing the Internal Market, *supra* note 6, at 4-8. For a detailed analysis of the framework of the integration proposal, see Commission of the European Communities, *The Economics of 1992*, 35 EUR. ECON. 17 (1988) [hereinafter *Commission, The Economics of 1992*]. See also PAOLO CECCHINI et al., *THE EUROPEAN CHALLENGE 1992: THE BENEFITS OF A SINGLE MARKET* (1988) [hereinafter *CECCHINI, et al.*].

The general objectives of the Commission's White Paper on the completion of the internal market were incorporated into the Treaty of Rome by the Single European Act of 1986. The Treaty now provides that:

The Community shall adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992. . . .

The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with provisions of this Treaty.

EEC TREATY, art. 8A (as amended 1987).

10. The interest of the United States in the development of the European Community can be traced to attempts following the Second World War to encourage greater economic and political cooperation among European nations as a means of preventing a resurgence of German nationalism. The Marshall Plan "was not only an economic package but also a stage toward European political and economic unification. American leaders were among the first to recognize that cohesion was a prerequisite condition for any economic recovery." RENE SCHWOK, *U.S.-E.C. RELATIONS IN THE POST-COLD WAR ERA: CONFLICT OR PARTNERSHIP* 9 (1991).

11. In particular, U.S. firms worried about the lack of U.S. participation in the stan-

European Community economic integration.<sup>12</sup> A larger and more efficient market was widely perceived to promise benefits to exporters and to multinationals already established in the E.C.<sup>13</sup> Its evolution has brought broader economic change which presents opportunities for U.S. firms that can be exploited through joint ventures with E.C. partners.

The purpose of this Comment is to analyze the economic potential of U.S.-E.C. cooperative joint ventures within the framework of the single market program and the E.C. competition rules. Section I sets the context by considering briefly the wider economic objectives of the single market program and the role of joint ventures in realizing these objectives. Section II uses the recently adopted Notice on Cooperative Joint Ventures<sup>14</sup> as a guide to present a legal analysis of the competition issues raised by joint ventures in the E.C.<sup>15</sup> Section III examines how U.S. corporations can use joint ventures with E.C. partners to advance their own commercial objectives within the Community by helping to shape the outcome of the ongoing integration process. Finally, the conclusion speculates as to the role this type of cooperation may play in the international economy in the future.

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dard-setting process for E.C. products, the public procurement policies of the governments of the member states and the proposed rules of origin and local content for products sold in the Community. See *Europe 1992: Administration Views: Hearings Before the Subcomm. on Europe and the Middle East, and on International Economic Policy and Trade of the Committee on Foreign Affairs, House of Representatives*, 101st Cong., 2d Sess. 30 (1990) (statement of Roger Wallace, Deputy Undersecretary for International Trade, U.S. Department of Commerce).

12. See SCHWOK, *supra* note 10, at 53 ("Almost all vested professional associations, big enterprises, the administration, and the Congress have published detailed studies of the impact of E.C.-1992 on the U.S. economy and have concluded that there are no reasons to fear the E.C. internal market."). For an analysis of how E.C. policies will affect U.S. interests in various industrial sectors, see *EUROPE 1992: AN AMERICAN PERSPECTIVE* (GARY CLYDE HUFBAUER ed., 1990) [hereinafter *EUROPE 1992*].

13. See SCHWOK, *supra* note 10, at 53-58.

14. Commission Notice Concerning the Assessment of Cooperative Joint Ventures Pursuant to Article 85 of the EEC Treaty, 1993 O.J. (C 43) 2 [hereinafter Notice on Cooperative Joint Ventures]. See also Commission Notice, Guidelines for the appraisal of cooperative joint ventures in the light of Article 85 of the EEC Treaty [hereinafter Draft Notice on Cooperative Joint Ventures] (on file with author). Discussion Paper on the Future Treatment of Cooperative Joint Ventures [hereinafter Discussion Paper] (on file with author).

15. The Commission Notice is not legally binding on the courts of Member States but "constitutes a factor which the national courts can take into account when deciding a dispute before them." Notice on Cooperative Joint Ventures, *supra* note 14, at 3. While it is not controlling authority, as a practical matter it will be given great weight by national courts. The sources of E.C. competition law and their legal effect together with the questions of the relationship between the Commission and the national courts of Member States and the relationship between national competition law and E.C. competition law are discussed *infra* at part II(A)(1)-(3).

## I. ECONOMIC CONTEXT OF JOINT VENTURES IN THE E.C.

A. *Joint Ventures Defined*

The Commission defines joint ventures broadly as "undertakings that are jointly controlled by several other undertakings, the parent companies."<sup>16</sup> More specifically, however, it has distinguished two types of joint ventures. The first "concentrative" type, more commonly termed a "concentration," refers to a collaborative undertaking which functions on a lasting basis as an autonomous economic entity responsible for its own commercial policy and which involves no coordination of competitive behavior either between the parents themselves or between them and the joint venture.<sup>17</sup> The second "cooperative" type is a collaborative venture not deemed concentrative in the aforementioned sense because its purpose or effect is to coordinate the competitive behavior of firms which remain independent.<sup>18</sup> A cooperative joint venture, in other words, involves the coordination of competition between the parent companies or between the parent companies and their joint venture. "Concentrative" and "cooperative" joint ventures are terms of art in E.C. competition law.<sup>19</sup> In this Comment, however, the term "joint venture" is used to refer solely to cooperative joint ventures.

Although parent companies typically structure a joint venture

16. Commission Notice Regarding the Concentrative and Cooperative Operations Under Council Regulation 4064/89 of 21 December 1989 on the Control of Concentrations Between Undertakings, 1990 O.J. (C 203) 10, 10 [hereinafter Commission Notice on Control of Concentrations].

17. *Id.* at 11-12.

18. See Draft Notice on Cooperative Joint Ventures, *supra* note 14, at 1. In comparison, a concentration occurs when the parent companies transfer certain business assets to the joint venture and permanently withdraw from the market in which it is to operate. Commission Notice on Control of Concentrations, *supra* note 16, at 13. Permanent withdrawal reduces the risk of bringing the joint venture into the "cooperative" category. Concentrative joint ventures are termed "mergers" when the parent companies transfer their entire activities to the venture. *Id.*

19. The distinction between concentrations or mergers and cooperative joint ventures has important substantive and procedural consequences. The legality of a concentration is judged by criteria set forth in Council Regulation 4064/89 on the Control of Concentrations Between Undertakings, 1989 O.J. (L 395) 1, [hereinafter Control of Concentrations Regulation]. Cooperative joint ventures are assessed under EEC TREATY art. 85 and other relevant Regulations and Notices. See *infra* part II. The rules governing cooperative joint ventures may also be applied to other forms of association which "produce effects on competition similar to those of joint ventures. . . . Examples include the acquisition of a minority holding, unilateral, multilateral or reciprocal, whether or not it entails representation on the various bodies of the firms concerned." Draft Notice on Cooperative Joint Ventures, *supra* note 14, at 1. The rationale is that the relationship between the parties in such circumstances creates a structure which "may . . . serve as a means of influencing the behaviour of the firms concerned in such a way as to restrict or distort competition on the market in which those firms operate" *Id.* at 21.

on the basis of equal equity ownership, the Commission eschews a formalistic approach to the question of control.<sup>20</sup> It looks beyond the ownership structure of the company to consider the issue in light of the role of the parties in the management of the enterprise. Factors considered relevant include the ownership of the assets, influence over the composition of the supervisory and management boards, voting rights within these boards and contracts involving the management of the business.<sup>21</sup> For example, a contractual provision that both parties consent to important strategic decisions is sufficient to give *de facto* joint control to a party with only a minority voting interest.<sup>22</sup> In addition, a joint venture does not require the existence of a distinct incorporated entity and may as easily be a relationship based on a series of contracts.<sup>23</sup>

Within the category of cooperative joint ventures, a further distinction can be drawn between partial-function and full-function joint ventures.<sup>24</sup> The former, as their name implies, merely carry out certain limited functions of the parent companies such as their sales or purchasing activities.<sup>25</sup> The latter are independent enterprises that "perform all the functions of an autonomous economic entity . . . where they give rise to coordination of competitive behaviour by the parents in relation to each other or the joint venture."<sup>26</sup> Both types of joint venture, moreover, may operate up or downstream of their parents or in markets identical or adjacent to theirs. Thus, they introduce a degree of flexibility into the corporate organization that permits the parent companies to combine their interests in varied ways at different stages in the product chain. For this reason, they have proven to be particularly versatile at enabling them to adapt to the far-reaching effects of the Commission's single market program.

### B. *The Single Market Program*

The outlines of the single market were presented in the Com-

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20. Commission Notice on Control of Concentrations, *supra* note 16, at 11. Control is defined as "the possibility of exercising, directly or indirectly, a decisive influence on the activities of the joint venture." *Id.*

21. *Id.*

22. See Mitchell Cotts/Sofiltra, 1987 O.J. (L 41) 31, 35 (minority shareholder who provided key technology and participated on an equal footing with the majority shareholder in the shareholders' committee held to be a full partner which shared control).

23. See, e.g., GEC-Weir Sodium Circulators, 1977 O.J. (L 327) 26, 27 ("[T]he contractual dispositions made by the parties have all the most essential characteristics of a joint venture; in that they provide for the unified, joint and equal control by the parties of all their activities relating to sodium circulators, including planning, financing, research, development, construction and sale.").

24. See Notice on Cooperative Joint Ventures, *supra* note 14, at 3.

25. *Id.*

26. *Id.*



mission's White Paper on the Completion of the Internal Market.<sup>27</sup> This document was informed by two simple ideas. First, the fragmentation of the E.C. by artificial trade barriers<sup>28</sup> had resulted in the misallocation and inefficient use of resources with detrimental effects upon the Community Members' levels of productivity, innovation and international competitiveness.<sup>29</sup> Second, the elimination of these barriers would provide the impetus for structural economic change that, in turn, would lead to the creation of more efficient and innovative firms better able to compete in international markets.<sup>30</sup>

The stimulus to economic improvement would be the competition unleashed within each Member State when, with the abolition of trade barriers, European companies were deprived of protection in their domestic markets.<sup>31</sup> The new climate would serve as a catalyst of the E.C.'s economic integration. Undistorted by artificial barriers, competition would stimulate better utilization of existing capacity by forcing firms to operate at greater efficiency. As the less efficient firms were driven out of business, increased competition would break down existing market structures to reallocate and rationalize resources across entire industries. Ultimately, it would shift resources between Member States to those which enjoyed a comparative advantage in particular products.<sup>32</sup> Competition would

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27. See *Completing the Internal Market*, *supra* note 6.

28. Such barriers include frontier delays, tariffs, quantitative restrictions, market-entry restrictions, discriminatory public procurement practices, divergent product standards and market distorting subsidies. See Commission, *The Economics of 1992*, *supra* note 9, at 21, 33.

29. According to the Commission, international competitiveness and product innovation require an open domestic market and "production units which can without difficulty serve a unified market which is perfectly integrated as regards standards and marketing requirements." *Id.* at 25. Small protected national markets for many products in the Community, on the other hand, minimize incentives for innovation and discourage companies from investing in technology which would run at optimal efficiency. As a direct result, the innovative capacity and productivity of Community firms generally lagged behind that of their major competitors.

30. *Id.* The Commission is particularly concerned about the E.C.'s failure to keep pace with its competitors in high technology industries such as data-processing, electrical goods, precision instruments and electronics.

31. COMMISSION OF THE EUROPEAN COMMUNITIES, XXTH REPORT ON COMPETITION POLICY 11 (1991) [hereinafter XXTH REPORT] ("The full benefits of the internal market in terms of higher output, growth and employment can only be attained if competition intensifies as a result of the dismantling of the barriers to trade that still remain.").

32. The general scheme is presented more fully in CECCHINI, et al., *supra* note 9, at 84. As a result of this process, it is estimated that the Community's Gross Domestic Product (GDP) will increase by 4.3 to 6.4 percent. *Id.* However, these estimates have also been criticized as being overly optimistic. See Merton J. Peck, *Industrial Organization and the Gains from 1992*, BROOKINGS PAPERS ON ECON. ACTIVITY 277 (1989). See also RICHARD BALDWIN, THE GROWTH EFFECTS OF 1992 248 (National Bureau of Economic Research Working Paper No. 3119 1989) (arguing that even greater gains can be expected).

also create the best incentive for firms to innovate: the surest means of commercial success would be the introduction of new and better products.<sup>33</sup> Thus, the ideal of the single market program was a virtuous circle of "competition which stimulates European innovation and innovation [which] in turn stimulates European competitiveness."<sup>34</sup>

Though the primary consideration, increasing competition was not the Commission's sole economic objective.<sup>35</sup> Another strain of reasoning emphasized the need for an environment conducive to interfirm cooperation, one aimed at strengthening "the industrial and commercial fabric of the internal market."<sup>36</sup> This goal would be accomplished, for example, by encouraging cooperative research and development<sup>37</sup> and alliances, particularly between small to medium-sized firms, enabling the partners to exploit the opportunities created by the enlarged market.<sup>38</sup> The Commission also stressed the

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33. As stated by the Commission:

It is . . . widely accepted that competition policy will have to underpin the single market. . . . Continuous exposure to competition should be a feature of the environment in which European companies operate: it will make sure that they actively pursue innovation, stay attuned to the market, keep an eye on costs and avoid waste. This will, of course, benefit not only the consumer in the form of more, better and cheaper products and services, but also industry itself: European companies will not be competitive in world markets without competition at home.

COMMISSION OF THE EUROPEAN COMMUNITIES, XXI<sup>ST</sup> REPORT ON COMPETITION POLICY 1991 40 (1992) [hereinafter XX<sup>IST</sup> REPORT].

34. CECCHINI, et al., *supra* note 9, at 86.

35. See COMMISSION OF THE EUROPEAN COMMUNITIES, XVII<sup>TH</sup> REPORT ON COMPETITION POLICY 13 (1988) [hereinafter XVII<sup>TH</sup> REPORT] ("The overall economic policy of the Community has the threefold aim of promoting a cooperative strategy for the creation of employment, of strengthening economic and social cohesion and of achieving an internal market by . . . 1992.")

36. Completing the Internal Market, *supra* note 6, at 34. See also CECCHINI, et al., *supra* note 9, at xi ("This large market without frontiers, because of its size and because of the possibilities that it offers for scientific, technical and commercial cooperation, gives a unique opportunity to our industry to improve its competitiveness.")

37. See, e.g., Commission, *The Economics of 1992*, *supra* note 9, at 25 (expressing the view that "the critical mass for R&D is considerable and requires the active cooperation if not the integration of European firms if the Community is to match the level and effectiveness of expenditure in this area by American and Japanese companies").

38. See, e.g., Council Regulation 2821/71 on the Application of Article 85(3) of the Treaty to Categories of Agreements, Decisions and Concerted Practices modified by Regulation 2743/72 of 19 December 1972, 1972 O.J. (L 291) 144, 147 ("[T]he creation of a common market requires that undertakings be adapted to the conditions of the enlarged market and . . . cooperation between undertakings can be a suitable means of achieving this."); Commission Notice Concerning Agreements, Decisions and Concerted Practices in the Field of Cooperation Between Enterprises, 1968 O.J. (C 84) 14, 14 [hereinafter 1968 Notice] ("[C]ooperation among large enterprises can be economically beneficial without presenting difficulties from the angle of competition policy."); Commission, *The Economics of 1992*, *supra* note 9, at 137 ("Cooperation between small and medium-sized European

need for the abolition of internal barriers to be accompanied by action to "strengthen research and the technological base of the Community's industry"<sup>39</sup> and expressed the willingness to make Community funds available for future research programs and pilot projects.<sup>40</sup>

Although competition and cooperation are complementary rather than antithetical concepts,<sup>41</sup> the precise nature of their relationship is difficult to define. By way of clarification, a useful analogy is the Commission policy of allowing state aid to industry only where there is an adequate compensatory justification, that is, an objective specified under the Treaty<sup>42</sup> which could not be attained by the recipients under normal market conditions. Aid under these circumstances "promote[s] recognized Community objectives and do[es] not frustrate the move towards the internal market."<sup>43</sup> Although joint ventures and other forms of cooperation between private par-

firms will facilitate market entry and allow them to move on from the Community market to the world market.".)

A survey of business attitudes towards the single market program concluded that "[i]n order to meet the requirements of a completely open market measures to improve productivity rank first but they are almost matched by the share of firms regarding cooperation agreements with companies in other member countries to be necessary." Gernot Nerb, *The Completion of the Internal Market*, in 3 RESEARCH ON THE "COST OF NON-EUROPE": BASIC FINDINGS 38 (1988).

39. Commission, *The Economics of 1992*, *supra* note 9, at 7.

40. *Id.* at 34-35. For an assessment of such programs, see *Europe's Technology Policy: How Not To Catch Up*, THE ECONOMIST, Jan. 9, 1993, at 19-21.

41. According to the Commission:

The task of competition policy must be to give impetus to this integration by facilitating cross-frontier cooperation, for instance in the form of joint ventures which benefit others besides the participants, whilst dismantling those obstacles to a unified market erected artificially by undertakings or governments.

XVII<sup>TH</sup> REPORT, *supra* note 35, at 14.

42. EEC TREATY art. 92 (3).

The following, from Art. 92 (3), may be considered to be compatible with the common market:

- (a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underdevelopment;
- (b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;
- (c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest; . . .

*Id.*

43. XX<sup>TH</sup> REPORT, *supra* note 31, at 125. For a detailed discussion of state aids see Andrew Evans, *Socially Acceptable Distortions of Competition: Community Policy on State Aid*, 16 EUR. LAW REV. 79 (1991) (concluding that "Community policy has been to give preference to the unaided market if possible, as a way of organizing trade...but the Commission will accept distortions of competition to speed the rate at which markets move toward long-run, competitive, equilibrium").

ties raise slightly different issues, they should likewise be considered in the context of their capacity to promote the goals and long-term benefits of the single market, namely, economic integration, efficiency, innovation and competitiveness.<sup>44</sup> As a rule, they are permitted when these benefits provide adequate compensatory justification for any short-term competitive loss.<sup>45</sup>

### C. *Economic Rationale of Joint Ventures*

The Commission's recognition that, although joint ventures are established by the partners for their own private benefit, they often have beneficial spin-off effects in the wider economy is consistent with the foregoing.<sup>46</sup> Broadly, the Commission considers that joint ventures are important vehicles of production and innovation efficiencies.<sup>47</sup> Subject to the constraints discussed in Part II(C)(1)-(4), its policy has been to encourage interfirm cooperation as an essential instrument of economic integration, efficiency and competitiveness. The following subsections consider briefly some of the ways in which

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44. See Commission of the European Communities, XVI<sup>TH</sup> REPORT 43 (1987) [hereinafter XVI<sup>TH</sup> REPORT]:

The Commission's approach to joint ventures...and other forms of industrial cooperation is designed to ensure that the right balance is struck between the need for coordination of industrial effort in order to increase the competitiveness of European industry and to create a single market and the necessity of ensuring that competition in the common market is not distorted and allowed to fulfil its function of bringing about a more efficient allocation of resources.

*Id.*

45. See, e.g., *Re Bayer/Gist Brocades*, 1976 O.J. (L 30) 13 ("The question of a contribution to economic progress . . . can only arise in those exceptional cases where the free play of competition is unable to produce the best result economically speaking."); *Optical Fibres*, 1986 O.J. (L 236) 30, 38 ("The distortion of competition is, however, outweighed by the benefits to which these joint ventures give rise."); *Rockwell/Iveco*, 1983 O.J. (L 224) 19, 28 ("[T]he advantages resulting from this cooperation outweigh considerably the harmful effects it entails.")

46. See Commission of the European Communities, XV REPORT 42 (1986) [hereinafter XV REPORT]. Such effects include:

(i) integration of the internal market, especially by means of cross-border cooperation; (ii) facilitation of risky investments; (iii) promotion of innovation and transfer of technology; (iv) development of new markets; (v) improvement of the competitiveness of Community industry; (vi) strengthening the competitive position of small and medium-sized firms; and (vii) elimination of structural overcapacity.

*Id.*

47. The employment of resources is productively efficient "when goods are produced using the most cost-effective combination of productive resources available under existing technology." Joseph F. Brodley, *The Economic Goals of Antitrust: Efficiency, Consumer Welfare and Technological Progress*, 62 N.Y.U. L. REV. 1020, 1025 (1987). Innovation efficiencies are "achieved through the invention, development, and diffusion of new products and production processes that increase social wealth." *Id.*

joint ventures advance these objectives.

1. *Industrial Restructuring.* Joint ventures have performed an important role in the rationalization of mature E.C. industries. They have allowed the Commission to exercise a degree of control over the restructuring process so that, though largely left to market forces, adjustments have occurred in an orderly fashion.<sup>48</sup> In a series of Decisions and Notices in the mid-1980's, the Commission allowed major corporations to use the joint venture as a vehicle to restructure the Community's petro-chemical sector. Moreover, its treatment of this process gives an indication of how it might approach the restructuring of other industries in the enlarged market.<sup>49</sup>

Against a background of structural overcapacity and increasing international competition, the Commission determined that losses in the petro-chemical sector could not be sustained in the medium to long-term. In an attempt to place the industry on a sounder footing it approved a number of joint ventures and cooperation agreements that were designed to eliminate certain participants from the market. Brushing aside the short-term anticompetitive effect of the arrangements, the Commission reasoned that cooperation would accomplish the necessary steps in the inevitable restructuring process "more quickly and radically"<sup>50</sup> than unrestricted competition and, further, would "accelerate the tendency to re-establish the equilibrium in supply and demand."<sup>51</sup> It concluded that rationalization of capacity through a joint venture, rather than through competition, was more likely to establish a healthy industrial structure that was "able both to run at efficient capacity loadings and to earn sufficient

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48. The statement assumes that this goal is a legitimate objective of the competition authorities. Former Commissioner of Competition, Peter Sutherland has stated that "[i]n the long term it must be possible for industrial restructuring to take place smoothly. That is why within the framework of competition policy, the Commission takes a positive approach towards programmes of industrial restructuring." *EXPLOITING THE INTERNAL MARKET: CO-OPERATION AND COMPETITION TOWARD 1992* 104 (P.J. Slot et al. eds., 1988).

Use of the joint venture in this fashion is analogous to the failing firm defense recognized in federal antitrust law. *See, e.g., Brown Shoe v. United States*, 370 U.S. 294, 346 (1962).

49. The Commission noted that the integration of national markets would have a varying impact on industries such as food-processing, pharmaceuticals, telecommunications equipment and automobiles. *See generally* Commission, *The Economics of 1992*, *supra* note 9. For an example of the anticipated scenario, see CECCHINI et al, *supra* note 9, at 54 ("Dynamic gains in industrial efficiency should be heralded by the removal of intra-EC trade barriers. The European food industry . . . will likely undergo restructuring and consolidation . . . European food companies have by and large remained nationally focused. If they do not react to the pressures from trade deregulation by restructuring, E.C.-based food companies may get left behind.")

50. ENI/Montedison, 1987 O.J. (C 217) 2, 18.

51. BP Chemicals Ltd/ICI, 1984 O.J. (L 212) 1, 8.

profits to finance future investments and research and development.<sup>52</sup>

The petro-chemical cases present a paradigm of the type of structural change through industrial cooperation that the Commission sees as essential to the success of the single market. The companies involved had determined where their relative strengths lay;<sup>53</sup> they closed or disposed of peripheral businesses and focused their efforts in specialized areas;<sup>54</sup> they kept open only the more efficient plants and reallocated production to optimize transport costs.<sup>55</sup> In adopting these measures, the parties were able "to liberate resources to finance long-term investment and research and development rather than to cover operating costs."<sup>56</sup>

2. *Rationalization and Synergy.* Joint ventures are not confined to large multinational companies seeking to eliminate excess capacity and to promote specialization across an entire industry. More frequently, they are undertaken on a smaller scale and motivated merely by the desire to rationalize reduplicated activities by exploiting the potential for synergies between the partners. In *Alcatel Espace/ANT Nachrichtentechnik*,<sup>57</sup> for example, the Commission noted four ways in which two companies seeking to develop satellites and component technology could become more efficient by pooling their resources. First, research and development expenditure could be utilized more efficiently if one company was not constantly reduplicating the efforts of the other. Second, new products could be developed more rapidly through cooperation. Third, the concentration of resources would facilitate a degree of specialization allowing the parties to develop a broader range of products. Finally, higher quality equipment could be supplied at lower cost.<sup>58</sup>

In a similar context, the Commission has pointed to the efficiency gains which can be realized by allowing small and medium-sized companies to cooperate with the aim of increasing productivity and competitiveness.<sup>59</sup> For example, in *Transocean Marine*

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52. *Id.* at 9.

53. *Id.* at 3.

54. ENI/Montedison, 1987 O.J. (L 5) 13, 15.

55. Enichem/ICI, 1987 O.J. (C 217) 2, 4.

56. BP Chemicals Ltd/ICI, 1984 O.J. (L 212) 1, 8.

57. Alcatel Espace/ANT Nachrichtentechnik, 1990 O.J. (L 32) 19.

58. *Id.* at 24. See also UIP, 1989 O.J. (L 226) 25, 31 (the creation of a joint venture by three independent film producers made possible "a more effective and rationalized distribution of the product of the parent companies" through the avoidance of duplicated distribution networks and the reduction of centralized administrative costs).

59. See 1968 Notice, *supra* note 38, at 14. To facilitate such cooperation the Commission has issued a Notice whose effects are presumptively negligible from a competition standpoint. See Commission Notice on Agreements of Minor Importance Which Do Not

*Paint Organization*, the Commission reasoned that "[t]he pooling and coordination of individual distribution networks . . . is a suitable and indeed necessary means of enriching the range of goods on offer, improving sales structures . . . and promoting intensive competition."<sup>60</sup> The Commission also wishes to encourage small and medium-sized companies to use such ventures as a springboard for their activities in the world market.<sup>61</sup>

3. *Technological Innovation*. Joint ventures are not merely vehicles of rationalization and production efficiency. They also serve a more positive function by facilitating the development of new products which substantially contribute to the state of the art in a particular technology. This concern is paramount in several of the Commission's most important Decisions: *Carbon Gas Technologie*,<sup>62</sup> *Rockwell/Iveco*,<sup>63</sup> *Optical Fibres*,<sup>64</sup> *BBC Brown Boveri*<sup>65</sup> and *KSB/Goulds/Lowara/ITT*.<sup>66</sup> The principal issue raised in each case was whether the cooperation between the parent companies would enhance the prospect of successful innovation in E.C. industry. The Commission responded affirmatively in each case, placing great weight in its analysis on the benefits of facilitating access to complementary technical know-how. However, even in these circumstances, it was also relevant that the object of each venture would be attained more rapidly and efficiently through the partners' cooperation.

Both interests are well illustrated by *Carbon Gas Technologie*, a case which concerned the joint development of new coal gasification technology by three firms each of whom, it was acknowledged, might have been able to develop the product alone.<sup>67</sup> The Commission nevertheless reasoned that cooperation was preferable to competition because each party could contribute its own expertise in one area of the given technology. "In view of this existing complementary specialization of the parties, their cooperation within the framework of a joint subsidiary creates, by ruling out competition between them, better conditions for the attainment of the object of the coop-

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Fall Under Article 85(1) of the Treaty Establishing the European Economic Community, 1986 O.J. (C 231) 2 [hereinafter Notice on Agreements of Minor Importance].

60. *Transocean Marine Paint Organization*, 1988 O.J. (L 351) 40. See also *Teko*, 1990 O.J. (L 13) 34.

61. See, e.g., Commission, *The Economics of 1992*, supra note 9, at 137.

62. 1983 O.J. (L 376) 17.

63. 1983 O.J. (L 224) 19.

64. 1986 O.J. (L 236) 30.

65. 1988 O.J. (L 301) 68.

66. 1991 O.J. (L 19) 25.

67. 1984 O.J. (L 376) 17.

eration than if they were to compete with one another."<sup>68</sup> Further, coordination of their respective skills would accelerate the transition from the planning stage to that of large scale industrial production.<sup>69</sup>

4. *Market Integration.* As explained in section B, the Commission believes that market integration is best effected by competition undistorted by trade barriers between Member States.<sup>70</sup> Under appropriate circumstances, however, the goal of market integration is advanced with equal efficiency through cooperation between erstwhile or prospective competitors. A case in point is *Mitchell Cotts/Sofiltra*.<sup>71</sup> Sofiltra Poelman SA, a French company, and M.C. Engineering (UK) established a joint venture to manufacture and market high efficiency air filters. Under their agreement, Sofiltra granted the venture an exclusive know-how license to manufacture the microfine glass fiber which was the key component in the filtration devices. Although the grant of the license excluded competing licensees in the United Kingdom, the Commission reasoned that the creation of the joint venture obviated the need for Sofiltra to establish its own manufacturing base there and thereby saved it "substantial uneconomic expenditure."<sup>72</sup> Thus, Sofiltra gained the benefits of a stronger foothold in the United Kingdom where it had a very small market share without incurring the usual preliminary start-up costs.<sup>73</sup>

#### D. *Joint Ventures and Industrial Policy*

There has been much debate in recent years concerning the desirability of a centrally coordinated, Community-wide, industrial policy. Typical candidates for such a policy include protection for "strategic" industries against "unfair" foreign competition; state subsidies to aid innovation in key technologies; and the promotion of self-styled European champions as competitors in the global economy.<sup>74</sup> A majority of the Commission Members, however, has re-

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68. *Id.* at 20. See also *Rockwell/Iveco*, 1983 O.J. (L 224) 19, 25 ("The joint exploitation of complementary industrial know-how by a specialist axle-manufacturer and an experienced truck manufacturer should contribute to increased technical progress in the goods concerned"); *BBC Brown Boveri*, 1988 O.J. (L 301) 68, 72 ("The cooperation between BBC and NGK is aimed at developing a fundamental technological innovation, which can be done more quickly and cheaply on a collaborative basis").

69. *Carbon Gas Technologie*, 1983 O.J. (L 376) 17, 20.

70. See *supra* text accompanying notes 27-34.

71. *Mitchell Cotts/Sofiltra*, 1987 O.J. (L 41) 31.

72. *Id.* at 34.

73. *Id.*

74. The issue of industrial policy has been the subject of disagreement in the Commission, among Community institutions and among different Member States. See



sisted calls for an interventionist stance towards industrial strategy. It has focused its efforts instead on ensuring "an open trade policy, completion of the internal market and an active competition policy."<sup>75</sup> This *laissez-faire* approach has not gained unanimous acceptance. Many groups have advocated a more active role for the Commission in determining industrial and social priorities through, for example, less aggressive application of the competition rules or the grant of subsidies to strategic sectors.<sup>76</sup>

A joint venture policy, implemented with a view to the wider Treaty objectives, permits the Commission to integrate the concerns of the interventionists with its own market-oriented approach.<sup>77</sup> Within the framework of workable competition, joint ventures can be used as vehicles of structural adjustment and innovation in a manner which encourages specific government policies without the need for protection and public subsidies that would unduly distort the

*Europe's Industrial Tug-of-War*, THE ECONOMIST, Jan. 25, 1992, at 65.

75. XXIST REPORT, *supra* note 33, at 42.

76. See, e.g., *Brussels Attacked Over Merger Policy*, THE FINANCIAL TIMES, Oct. 8, 1991, at 1 (the French and Italian criticism of then Commissioner for competition Sir Leon Brittan and their response to the Commission's decision, to block the Franco-Italian takeover of Canadian aircraft manufacturer de Havilland and the French Transport Minister's suggestion that the Merger Regulation should be modified to give industrial considerations greater priority). The European Parliament has debated the relationship between competition and other economic policies. See XXTH REPORT, *supra* note 31, at 253 (arguing that competition policy should be judged by reference to wider objectives of economic and social cohesion and sustainable development); XXIST REPORT, *supra* note 33, at 218 (emphasizing its concern for the "need to strike a balance between competition policy and the requirements of an industrial policy geared towards strengthening the Community's productive structure and its international competitiveness, particularly in definable strategic sectors").

77. The Commission's response to criticisms of its market-oriented approach is instructive:

The maintenance of effective competition is at the heart of the Commission's industrial strategy. Competition policy is an essential element of industrial policy and the two do not conflict. Effective competition in the E.C. home market is one of the prerequisites for wider international competitiveness . . . [T]he best way to improve competitiveness is through the application of horizontal, efficiency-enhancing measures (e.g. general improvement of training, improved monetary stability to bring about a reduction in real interest rates across the board. The Commission rejects sectoral or company-specific intervention.

The creation of this market is in itself a powerful industrial policy since it gives all industries a real chance to exploit economies of scope and scale to the full and allows them to spread their R&D costs over a larger output, as well as providing the competitive stimulus to companies to innovate and invest in order to exploit new market opportunities.

XXIST REPORT, *supra* note 33, at 223.

In December 1992, Sir Leon Brittan was moved to a new post as foreign minister for economic affairs and was replaced as Commissioner for Competition by Karel van Miert.

competitive process.<sup>78</sup> Private capital bears the investment risk and, with ideas subject to market pressure from a relatively early stage in their development, there is less chance that resources will be squandered unproductively than if projects were financed according to a centrally conceived economic plan.<sup>79</sup> The Commission has been prepared to take the lead by allowing firms to exploit the potential for structural change and the varied possibilities that their alliances will create.

## II. LEGAL ANALYSIS OF COOPERATIVE JOINT VENTURES

The legal parameters for cooperative joint ventures in the E.C. are defined in EEC Treaty Article 85.

1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market....
2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.
3. The provisions of paragraph 1 may, however be declared inapplicable in the case of:
  - any agreement or category of agreements between undertakings;
  - any decision or category of decisions by associations of undertakings;
  - any concerted practice or category of concerted practices;

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits, and which does not:

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- (b) afford such undertakings the possibility of eliminat-

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78. See, e.g., Manfred Caspari, *1992 - EEC Competition Law and Industrial Policy*, in *EEC/US COMPETITION AND TRADE LAW* 163, 179 (Barry Hawk ed., 1990); and Manfred Caspari, *Joint Ventures - The Intersection of Antitrust and Industrial Policy in the EEC*, in *ANTITRUST AND TRADE POLICY IN THE UNITED STATES AND THE EUROPEAN COMMUNITY* 449, 464 (Barry Hawk ed., 1986).

79. See Thomas M. Jorde & David J. Teece, *Acceptable Cooperation Among Competitors in the Face of Growing International Competition*, 58 *ANTITRUST L. J.* 529, 542 (1989) (contrasting national planning which abolishes the market mechanism with "the pure, private enterprise solution [of interfirm cooperation] which preserves market selection but augments selection processes with private, bilateral, interfirm cooperation").

ing competition in respect of a substantial part of the products in question.<sup>80</sup>

As part of its supervisory responsibilities under the Treaty, the Commission is authorized to enact Regulations<sup>81</sup> implementing the broad outlines of this Article.<sup>82</sup> Antitrust lawyers in the United States will be familiar with the categories employed by the Commission in its legal analysis. However, while its basic structure is

80. EEC TREATY, art. 85.

81. Regulations are general provisions of law enacted by the Council or the Commission pursuant to EEC TREATY, art. 189. Regulations are binding in their entirety on Member States and "directly applicable," that is, they do not need to be transposed into national law but take immediate effect upon enactment. The Commission has enacted a variety of Regulations with respect to competition matters, commonly termed block exemption or group exemption Regulations. The most important of these are:

- Commission Regulation 417/85 of 19 December 1984 on the Application of Article 85(3) of the Treaty to Categories of Specialization Agreements, 1985 O.J. (L 53) 1 [hereinafter Commission Regulation on Specialization Agreements];
- Commission Regulation 418/85 on the Application of Article 85 (3) of the Treaty to Categories of Research and Development Agreements, 1985 O.J. (L 53) 5 [hereinafter Commission Regulation on Research and Development Agreements];
- Commission Regulation 2349/84 of 23 July 1984 on the Application of Article 85(3) of the Treaty to Certain Categories of Patent Licensing Agreements, 1984 O.J. (L 219) 15, *corrected by* 1985 O.J. (L 280) 32 [hereinafter Commission Regulation on Patent Licensing Agreements];
- Commission Regulation 556/89 of 30 November 1988 on the Application of Article 85(3) of the Treaty to Certain Categories of Know-how Licensing Agreements, 1989 O.J. (L 61) 1 [hereinafter Commission Regulation on Know-how Licensing Agreements].

The scope of these Regulations has subsequently been extended by Commission Regulation 151/93 of 23 December 1992 amending Regulations 417/85, 418/85, 2349/84 and 556/89 on Application of Article 85(3) of the Treaty to Certain Categories of Specialization Agreements, Patent Licensing Agreements and Know-how Licensing Agreements, 1993 O.J. (L21) 8 [hereinafter Amendment Regulation].

82. The extent of the Commission's competence in competition matters is defined in Council Regulation 17/62, *supra* note 5. This Regulation outlines procedures for the resolution of competition issues and grants the Commission broad investigatory and adjudicatory powers. Actions taken by the Commission pursuant to this authority are subject to review only by the Court of Justice. The Commission has expounded the procedural framework for interpreting various classes of cooperation agreement in Commission Regulation 27/62, First Regulation implementing Council Regulation 17 of 6 February 1962, Amended by Regulation 1133/68 of 26 July 1968, by Regulation 1699/75 of 2 July 1975 and by Regulation 2526/85 of 5 August 1985 (Form, content and other details concerning applications and notifications), 1985 O.J. (L 249) 11 [hereinafter Commission Regulation 27/62]. While ultimate jurisdiction in competition matters under E.C. law resides with the Court of Justice, Commission Decisions must be appealed initially to the Court of First Instance. The Court of First Instance was attached to the Court of Justice in October 1988 in order to alleviate that Court's increasing case load. About half of its work, however, relates to competition cases. See Bo Vesterdorf, *The Court of First Instance of the European Communities After Two Full Years in Operation*, 29 COMMON MKT. L. REV. 897, 898 (1992). Decisions of the Court of First Instance may be appealed to the Court of Justice on points of law only.

similar to that of the United States,<sup>83</sup> its regulatory framework is vastly different. This part presents the legal analysis in a practical structure highlighting the competition issues raised when a U.S. firm contemplates a joint venture with a partner in the E.C.

### A. *The Relationship Between E.C. and National Competition Laws*

The national courts of Member States have a duty to protect the rights conferred upon individuals and companies by E.C. competition law.<sup>84</sup> National competition law, however, is still properly applied within its own sphere. Thus, adjudication of competition issues mirrors the quasi-federal character of E.C. government institutions by raising questions concerning the conflict of laws, the jurisdiction of the courts of Member States and the source of remedies. While these questions are not unique to the application of E.C. competition law, they are obviously central to the legal evaluation of U.S.-E.C. joint ventures.

1. *Conflict of Laws.* It is established that E.C. competition law preempts conflicting provisions of the competition law of individual Member States. In *Walt Wilhelm and Others v. Bundeskartellamt*,<sup>85</sup> the Court of Justice, while allowing in principle that national competition authorities may take action with respect to situations likely to be the subject of a decision by the Commission, held that the parallel application of national competition law is permitted only insofar as "it does not prejudice the uniform application throughout the Common Market of the Community law on cartels."<sup>86</sup> Accordingly, in cases of conflict, Community law takes precedence.<sup>87</sup>

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83. Essentially, anticompetitive agreements are prohibited by Article 85(1) but may be exempted under Article 85(3) either by way of a group exemption Regulation or individual decision. EEC TREATY art. 85(1)(3).

84. This obligation is termed the principle of "direct effect." See, e.g., Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1, 12 ("Independently of the legislation of Member States, Community law . . . not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage."). Accordingly, individuals and corporations may sue for enforcement of E.C. competition law in national courts. See Case 12/73 *BRT v. SABAM*, 1974 E.C.R. 51, 62 ("As the prohibition of Articles 85(1) and 86 tend by their very nature to produce direct effects in relations between individuals, these Articles create direct rights in respect of the individuals concerned which the national courts must safeguard.").

85. Case 14/68, *Walt Wilhelm and Others v. Bundeskartellamt*, 1969 E.C.R. 1.

86. *Id.* at 14.

87. *Id.*

The EEC Treaty has established its own system of law, integrated into the legal systems of the Member States, and which must be applied by their courts . . . Consequently, conflicts between the rules of the Community and national rules in the matter of the law on cartels must be resolved by applying the principle

While easy to state in theory, the application of the preemption principle is disputed in practice and there is debate with respect to what constitutes a conflict between E.C. and national competition law. There is no conflict if, for any of the reasons discussed in Part II(C), Article 85(1) does not apply to a joint venture. Because Community law is inapplicable, national law may be applied without the possibility of conflict. Similarly, if a joint venture violates Article 85(1), it cannot be permitted under a provision of national law because such a decision would conflict with Article 85(2).

Difficulties arise when an agreement that is exempted under Community law pursuant to a Group Exemption Regulation<sup>88</sup> or individual decision<sup>89</sup> would violate a provision of national law. Under the majority view, the prohibition by national law of an agreement exempted under E.C. competition law would conflict with the principle of the supremacy of Community law.<sup>90</sup> This conclusion, it is maintained, follows logically from the authority granted to the Commission "to carry out certain positive, though indirect, action with a view to promoting a harmonious development of economic activities within the whole Community."<sup>91</sup> An important minority has argued, on the other hand, that this interpretation illegitimately extends the holding of *Walt Wilhelm* and is based on an erroneous understanding of the term "positive action." Group exemptions and, according to some, even individual exemptions, do not constitute "positive action" and therefore fall outside the scope of the preemption principle.<sup>92</sup> The minority also points out that the majority position allows minor Community interests to take precedence over important national interests. For both these reasons, it maintains that an agreement must be legal under both E.C. and national law in order to be valid.

As a practical matter, one can assume that national competition law is applicable to joint venture agreements that, for the reasons mentioned in part II(C), are not prohibited by Article 85(1). Even at this stage in the development of the single market, however, it is not possible to predict with certainty whether a national competition authority would seek to prohibit a joint venture that had been exempted under Community law pursuant to an Article 85(3)

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that Community law takes precedence.

*Id.*

88. See *supra* note 81; *infra* text accompanying notes 151-163.

89. See *infra* text accompanying notes 164-186.

90. This view is espoused by the Commission. See *infra* note 106.

91. Case 14/68, *Walt Wilhelm and others v. Bundeskartellamt*, 1969 E.C.R. 1, 14.

92. See Kurt Stockmann, *EEC Competition Law and Member State Competition Laws*, in NORTH AMERICAN AND COMMON MARKET ANTITRUST AND TRADE LAWS 265, 290 nn.72-95 (Barry E. Hawk ed., 1988).

exemption. Potential conflicts are most likely to emerge in those countries that traditionally have been most protective of their own rights as enforcers of competition law, such as the United Kingdom and Germany.<sup>93</sup> Despite the potential availability of a group exemption, the parents of joint ventures with significant effects in these countries would be advised to consult at an early stage in their negotiations with the appropriate national authorities.<sup>94</sup>

2. *Spheres of Competence.* Although national courts are bound to apply E.C. competition law,<sup>95</sup> they do not have authority to apply all the provisions in Article 85. Their competence is limited to the power to void agreements in violation of the prohibition against anticompetitive agreements in Article 85(1) and to grant exemptions from the prohibition pursuant to the narrow conditions defined in the Group Exemption Regulations<sup>96</sup> enacted by the Commission.<sup>97</sup> They are not authorized, however, to grant exemptions by way of individual decision under Article 85(3).<sup>98</sup> The power of exemption by individual decision remains the exclusive province of the Commission.<sup>99</sup>

The rationale for this limitation is the need to ensure the consistent and uniform application of E.C. competition laws throughout the Community. As a political-legislative body, the Commission is better placed than the judiciary of a single Member State to make the type of value judgments that potentially inform individual decisions under Article 85(3).<sup>100</sup> If national courts were authorized to exempt joint ventures on an individual basis, there would be a danger

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93. See, e.g., *UK Agency Chief Advocates Improvements Among E.C. Commission and National Officials*, Antitrust & Trade Reg. Rep. (BNA), No. 1590, at 605 (Nov. 12, 1992) (warning that Commission exemptions "reflect a Community average position, whereas different arrangements may be appropriate for different countries, taking account of national circumstances"). See also Otfried Lieberknecht, *United States Companies in Foreign Joint Ventures*, 54 ANTITRUST L. J. 1051, 1069-71 (1985) (noting that the German federal cartel office claims the right to prohibit the formation of a joint venture which has been the subject of an exemption under Article 85(3)).

94. This issue has become more important since the extension of the group exemption Regulations. See Amendment Regulation, *supra* note 81.

95. See *supra* note 84.

96. See *supra* note 81.

97. Case 234/89, *Stergios Delimitis v. Henninger Brau AG*, 1991 E.C.R.1 935, 991.

98. *Id.*

99. *Id.*

100. *Id.* See also Helmuth R.B. Schroter, *Antitrust Analysis Under Article 85(1) and (3)*, in NORTH AMERICAN AND COMMON MARKET ANTITRUST AND TRADE LAWS 645, 663 (Barry E. Hawk ed., 1988) ("The underlying idea is that decisions which necessarily imply complex evaluations of economic matters and which, moreover, may have far-reaching consequences in the whole Common Market ought to be taken by the competent political body and not left to the lower courts of the Member States.").

that different courts would evaluate the issues under conflicting principles of economics and social policy thereby undermining the uniformity of competition law and encouraging forum shopping.<sup>101</sup>

3. *Remedies.* The Commission may impose fines for violations of E.C. competition law.<sup>102</sup> It cannot, however, award compensation to a private party for loss incurred due to a violation.<sup>103</sup> Further, although E.C. competition law must be applied in the courts of Member States under the principle of "direct effect,"<sup>104</sup> the rules provide no new private remedies for competition violations. To grant meaningful relief to a private litigant, national courts are directed to

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101. See *E.C. Commissioner Sketches Future Use of Competition Policy and Enforcement*, Antitrust & Trade Reg. Rep. (BNA) No. 1594, at 737 (Dec. 10, 1992) (remarks by then Commissioner of Competition, Sir Leon Brittan who expressed a desire to involve national courts more directly in the implementation of E.C. competition law but reiterated that they would not be allowed to grant individual exemptions from the prohibition against anticompetitive agreements contained in Article 85(1) because of the need to prevent the divergent application of E.C. law in different Member States and the subsequent danger of forum shopping).

The Commission has recently published a draft notice of guidelines to assist national courts in applying E.C. competition law. Draft Notice of the Commission on the Application of the EEC Competition Rules by National Courts, reprinted in BERNARD VAN DE WALLE DE GHELCKE & GERWIN VAN GERVEN, *COMPETITION LAW OF THE EUROPEAN ECONOMIC COMMUNITY*, Appendix 130 (Julian O. von Kalinowski ed., 1992) [hereinafter Draft Notice on the Application of the EEC Competition Rules]. These guidelines articulate several simple principles. First, a national court must determine whether an agreement violates the prohibition of Article 85(1). If it does not violate the prohibition, then the court may determine the legality of the agreement under the applicable national law. Second, if the agreement does violate the prohibition, the court must determine whether it meets the conditions of a group exemption Regulation. If the agreement meets these conditions, it is exempted from the prohibition because, under the principle of "direct effect." See *supra* note 84. The Regulations "create rights for individuals and companies which national courts must enforce." Draft Notice on the Application of the EEC Competition Rules, at 130-3. Third, if the agreement does not fall within a group exemption but the parties have notified the Commission of their agreement, the court should use Commission precedent to evaluate the probability of an individual exemption under Article 85(3). As a result of this evaluation, a national court may (a) determine that an individual exemption is unlikely in which case it should void the agreement; (b) determine that an individual exemption is likely and either treat the agreement as valid or suspend proceedings to avoid potential conflict with a later decision of the Commission; or (c) determine that the outcome is uncertain and either void the agreement or suspend proceedings pending a final decision of the Commission. *Id.* at 130-3-4.

102. See Council Regulation 17/62, *supra* note 5, art. 15(2) (providing for fines "from 1,000 to 1,000,000 units of account, or a sum in excess thereof but not exceeding 10% of the turnover in the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently: (a) they infringe Article 85(1) or Article 86 of the Treaty.").

103. Draft Notice on the Application of the EEC Competition Rules, *supra* note 101, at 130-7.

104. See *supra* note 84 and accompanying text.

provide remedies for a breach of Community competition law on the same conditions as would be available if the breach were a violation of national competition law.<sup>105</sup>

### B. *Preliminary Considerations: The Relevant Market*

At several stages in its analysis, the Commission uses a bright-line market share test to determine the appropriate treatment of a joint venture. Thus, if the partners are to be certain of the substantive and procedural law governing their agreement, it is essential that the relevant market be defined correctly. The question of relevant market definition has two components: the product market and the geographic market.

1. *The Product Market.* The Commission has rejected the notion that the relevant market is comprised merely of the class of identical goods and has adopted a functional analysis that classifies products on the basis of their suitability for the performance of certain tasks. "A relevant product market comprises in particular all those products which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics their prices and their intended use."<sup>106</sup> Application of the test depends on factors which can be inferred only from a consideration of consumer expectations and the other products available to them, in other words, the cross-elasticity of supply and demand in the market.<sup>107</sup> A separate product market will be found when, in terms of price, product characteristics or intended use, there is "lack of sufficient substitutability between the products concerned."<sup>108</sup> Supply and demand-side

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105. Case 158/80 *Rewe v. Hauptzollamt Kiel*, 1981 E.C.R. 1805, *See also* Draft Notice on the Application of the EEC Competition Rules, *supra* note 101, at 130-2. As a practical matter, while permitting individuals and companies to complain directly to the Commission concerning violations of the competition rules, the Commission encourages proceedings in national courts. National courts may permit a plaintiff to combine claims under both national and E.C. law and are in a better position to grant more effective interim relief. In some cases, they may award attorney fees. *Id.* at 130-2. In addition, the Commission has stated that it "will concentrate its activities on those cases which in the light of the Community's overall objectives laid down in the EEC Treaty require priority or otherwise have an important Community interest." *Id.*

106. XXIST REPORT, *supra* note 33 at 357.

107. *Id.* The "reasonable interchangeability" test and associated concepts of cross-elasticity of supply and demand are commonly used in U.S. antitrust analysis. *See, e.g., United States v. E.I. Du Pont De Nemours & Co.*, 351 U.S. 377 (1956); *United States v. Grinnell Corp.*, 384 U.S. 563 (1966).

108. XXIST REPORT, *supra* note 33, at 357. *Compare* *Optical Fibres*, 1986 O.J. (L 236) 30, 40 (holding that effective competition in the E.C. market for optical fibers would be maintained by, among other factors, non-E.C. producers who could readily export to the E.C. and other traditional technologies such as cables and microwave and satellite



substitutability, moreover, must be evaluated on the basis of competition that can be brought about "in the near future and not only be based on a medium or long-term change in demand or supply."<sup>109</sup>

2. *The Geographic Market.* A geographic market is an area in which firms are in competition with one another and the conditions of competition are similar for all firms.<sup>110</sup> Ideally, when the economies of Member States are fully integrated, the relevant market for most industrial products and services will, in most instances, comprise the entire Community.<sup>111</sup> As a practical matter, however, the Commission at the present time must first establish that the conditions of competition are sufficiently homogeneous in different parts of the Community as to justify their inclusion in the same market.<sup>112</sup> A distinct geographic market is most likely to be found whenever conditions of competition are distorted by artificial or high barriers to entry<sup>113</sup> or where transport costs comprise a high proportion of the cost of the finished product.<sup>114</sup> In these cases, the relevant market is

transmission techniques) and BBC Brown Boveri, 1988 O.J. (L 301) 68, 72 (holding that effective competition in the market for electric car high-performance batteries would be maintained by competition with conventional vehicles) *with* Tetra Pak/Alfa Laval, O.J. 1991 (L 290) 35 (separate product markets found for aseptic packaging machines using carton and aseptic or non-aseptic packaging machines using glass or plastic where inquiry revealed low demand elasticity due to difficulty for customers to switch from one product to another).

The substitution test conforms with the intent of E.C. competition law which requires not perfect but workable competition, namely, that degree of competition which is essential to ensure the attainment of objectives set by the Treaty of Rome without eliminating competition in a substantial part of the common market. Case 226/76, Metro SB-Grossmarkte GmbH & Co, KG v. Commission of the European Communities, 1977 E.C.R. 1875, 1904. The goal of the Commission's competition policy is satisfied by a showing that there are available realistic alternative sources of consumer satisfaction. *See infra* notes 178-183 and accompanying text.

109. XXIST REPORT, *supra* note 33, at 357.

110. *Id.* at 254.

111. *Id.* at 43 ("As a result of the abolition of barriers brought about by the completion of the internal market, it is clear that reference markets have a tendency to become wider.")

112. *Id.* at 358. Indicia of an integrated market and homogeneous conditions of competition include absence of price differences, presence of major suppliers in all Member States, substantial cross-border trade and imports, low transport costs and lack of strong national buying preferences.

113. *Id.* at 361. Indicia of discrete national markets include national suppliers with high market shares, import tariffs, national specification requirements, cultural barriers, public purchasers with national buying preferences.

114. *See* Notice on Agreements of Minor Importance, *supra* note 59, at II 14.

The relevant geographical market will be narrower than the whole common market in particular where:

the nature and characteristics of the contract product, e.g. high transport costs in relation to the value of the product, restrict its mobility; or movement of the

the geographic segment of the Community within which the exceptional conditions obtain.<sup>115</sup>

### C. *Analyzing Cooperative Joint Ventures Under Article 85*

After the relevant market has been defined, the analysis proceeds in a series of steps dictated by the market share of the partners and the categorization of their agreement. First, one must establish whether or not the joint venture falls within the terms of the general prohibition against anticompetitive agreements contained in Article 85(1). Second, if the joint venture does fall within the terms of this general prohibition, one must categorize the agreement and ask whether or not it is entitled to an automatic exemption under a relevant group exemption Regulation.<sup>116</sup> Third, if the joint venture is not entitled to an automatic exemption, one must consider whether or not it may be exempted from the prohibition by means of an individual decision. And fourth, all joint ventures must be analyzed to ensure that any anticompetitive restriction between the parents is proportionate to the legitimate objectives of their agreement.

1. *The Applicability of Article 85(1)*. The threshold question is whether a joint venture is prohibited by Article 85(1) because it distorts trade between Member States. Article 85(1) may be held not to apply to a joint venture for one or more of four reasons. First, the actual or foreseeable effects of the joint venture are confined within the territory of one Member State or within territories outside the Community.<sup>117</sup> Second, the joint venture is "neutral to competition

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contract product within the common market is hindered by barriers to entry to national markets resulting from State intervention, such as quantitative restrictions, severe taxation differentials and non-tariff barriers, e.g. type approvals or safety standard certifications. In such cases the national territory may have to be considered as the relevant geographical market. However, this will only be justified if the existing barriers to entry cannot be overcome by reasonable effort and at an acceptable cost.

*Id.*

115. See, e.g., *Alcatel/Telettra*, 1991 O.J. (L 122) 48 (holding Spanish transmission equipment market constituted separate market because vertical links between the State telecommunications operator and its equipment suppliers created barrier to entry to potential foreign competitors) and *Fiat/Ford*, 1991 O.J. (C 34) (holding Italian market for agricultural equipment constituted separate market because of Fiat's market power through exclusive purchasing agreement with a national buying organization). Although the Commission's focus is on markets within the Community, it has found on occasion that the relevant geographic market is, in fact, world-wide. In these circumstances, its evaluation of a product market reflects competitive pressures which exist globally. See, e.g., *Aerospatiale/MBB*, 1991 O.J. (C 59) 13.

116. See *supra* note 81.

117. See Notice on Cooperative Joint Ventures, *supra* note 14, at 4. This factor will apply only to joint ventures between small parent companies with insignificant market

within the meaning of the 1968 Notice on cooperation between enterprises.<sup>118</sup> Third, the parent companies are non-competitors and their joint venture does not significantly affect the market access of third parties<sup>119</sup> or belong to a network of joint ventures created by one of the parents.<sup>120</sup> And fourth, the joint venture meets the *de minimis* exception for "agreements of minor importance."<sup>121</sup> If, for any of these reasons, the joint venture does not fall within the prohibition of Article 85(1), E.C. competition law does not apply to the agreement.<sup>122</sup> In this event, the legality of the joint venture may be determined under the law of the Member State in which it is applied.

a. *The 1968 Notice.*<sup>123</sup> Under the principles of the 1968 Notice, a joint venture is not prohibited by Article 85(1) if its activities are neutral with respect to competition. There are basically four types of joint ventures in this category.<sup>124</sup> First, those "which perform certain internal organizational tasks on behalf of their parent companies" such as joint market research, joint debt-collecting and joint storage facilities for transport equipment;<sup>125</sup> second, those which arrange cooperation in fields away from the market, for example, in research and development;<sup>126</sup> third, those between non-competing firms designed to provide joint-selling, after-sales or repair service;<sup>127</sup> and fourth, those which, without impeding competition, permit the parent companies to pool their resources in fields such as advertising or

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shares and will not, therefore, be discussed in detail in this article. See Draft Notice on Cooperative Joint Ventures, *supra* note 14, at 10 ("Trade between Member States is likely to be appreciably affected only when the thresholds referred to in the Notice on agreements of minor importance are exceeded."). See also *infra* text accompanying notes 140-147.

118. Notice on Cooperative Joint Ventures, *supra* note 14, at 4.

119. *Id.* at 7.

120. *Id.* at 6.

121. Notice on Agreements of Minor Importance, *supra* note 59.

122. The parents of a joint venture that falls outside the prohibition against anti-competitive agreements contained in Article 85(1) are not required to satisfy the notification requirements of Council Regulation 17/62. Indeed, there is not even a need to seek an exemption from the prohibition under Article 85(3). Council Regulation 17/62 *supra* note 5, art. 4 provides that "agreements, decisions and concerted practices of the kind described in Article 85(1) of the Treaty . . . in respect of which the parties seek application of Article 85(3) must be notified to the Commission. Until they have been notified, no decision in application of Article 85[] may be taken."

123. See *supra* note 38. The contents of the 1968 Notice were reaffirmed in the recent Notice on Cooperative Joint Ventures. Notice on Cooperative Joint Ventures, *supra* note 14, at 4.

124. See Draft Notice on Cooperative Joint Ventures, *supra* note 14, at 8-9.

125. 1968 Notice, *supra* note 38, at 1-2.

126. *Id.* at 3.

127. Draft Notice on Cooperative Joint Ventures, *supra* note 14, at 8.

the use of a common quality label.<sup>128</sup> The precise scope of these provisions is unclear but, in any event, they must be construed narrowly. The joint venture will not be deemed neutral with respect to competition if it affects the independent business decisions of the parent companies,<sup>129</sup> restricts competition between them<sup>130</sup> or alters the market position of third parties.<sup>131</sup>

b. *Joint Ventures Between Non-Competitors.* Article 85(1) will not prohibit a joint venture if the parent companies are neither actual nor potential competitors and its creation does not significantly affect the market position of third parties.<sup>132</sup> The question of whether partners in a joint venture are actual competitors is relatively straightforward. One simply determines the relevant market under the analysis used in Part II(B) and asks whether the partners are competing for a share of that market. This analysis would apply to a joint venture involving a U.S. corporation that was already competing through its exports to the Community even though it did not have a direct presence there. The question of whether partners are potential competitors is more complex. In these cases, the Commission requires a realistic appraisal of the likelihood that both partners could participate in the market individually. The application of the criteria used to make this determination will vary accord-

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128. *Id.* at 9.

129. This conclusion may fairly be inferred from the statement that the 1968 Notice applies where "the effect on the business decisions of the parent companies and, hence, on competition, is nil." Draft Notice on Cooperative Joint Ventures, *supra* note 14, at 8.

130. For example, the Commission argues that "joint ventures which deal solely with research and development do not, generally speaking, restrict competition, even where their parents compete with each other." *Id.* at 8. While this assertion might be challenged, it is nevertheless clear that the 1968 Notice will not apply "if the enterprises enter into commitments which restrict their own research and development activity or the utilization of the results of joint work so that they do not have a free hand with regard to their own research and development outside the joint projects." 1968 Notice, *supra* note 38, art. 3.

131. Notice on Cooperative Joint Ventures, *supra* note 14, at 4.

132. On occasion, the Commission indicates that it may be unnecessary to analyze the effects of a joint venture between non-competitors on third parties. *See, e.g.*, Draft Notice on Cooperative Joint Ventures, *supra* note 14, at 4 ("There is no restriction of competition if the joint venture operates outside the actual or potential fields of activity of the parent companies; its establishment therefore has only a positive effect, since it creates a new competitor."). Elsewhere, however, it is clear that this step is an essential part of the inquiry. *See, e.g.*, *Elopak/Metal Box - Odin*, 1990 O.J. (L 209) 15, 21-22 (holding that Article 85(1) did not apply to the joint venture because neither parent "could have realistically developed the new product without the full and active participation of its partner" and the creation of the joint venture was "not likely to lead to foreclosure of similar possibilities to potential competitors"). *See also* Notice on Cooperative Joint Ventures, *supra* note 14, at 7 ("[O]ne must examine whether market access of third parties is significantly affected by the cooperation between the parents.").

ing to circumstances.<sup>133</sup>

The fact that a U.S. firm currently makes no sales in the Community does not establish, without more, that a potential competitive relationship does not exist with a prospective E.C. partner. The firm may have the resources to enter the market alone but, for a variety of reasons, has chosen not to do so. In some circumstances, the realistic threat of its entry may be exerting influence on the policies of those companies actually in the market. The Commission is likely to reach this conclusion, however, only if the threat of entry is "sufficiently intense" as to restrict the ability of firms in the E.C. to act independently of any market pressure exerted by the potential competitor.<sup>134</sup>

A joint venture between parent companies that are neither actual nor potential competitors will not be prohibited under Article 85(1) unless "the market access of third parties is significantly affected by the cooperation between the parents"<sup>135</sup> or unless "it belongs to a network of joint ventures set up by one of the parents for the same product market with different partners."<sup>136</sup> For example, if the parents are companies with strong market positions and operate up or downstream of their joint venture, their cooperation has the potential for serious adverse effects on former customers and suppli-

133. The following questions may be relevant:

Does each parent company have sufficient financial resources, managerial qualifications and access to input products to carry out the planned investment? Does each parent know the production technique? Does each parent make the upstream or downstream product himself and does it have access to the necessary production facilities? Is actual or potential demand such as to enable each parent company to manufacture the product on its own? Does each parent company have access to the distribution channels needed to sell the product manufactured by the JV? Can each parent company on its own bear the technical and financial risk associated with the production operations of the JV? What is the relevant geographic and product market? What are the barriers to entry into that market? Is each parent company capable of entering that market alone? Can each parent overcome existing barriers within a reasonable time and without undue effort or cost?

The parents of a joint venture are potential competitors, in so far as in the light of the above factors, which may be given different weight from case to case, they could reasonably be expected to act autonomously.

Notice on Cooperative Joint Ventures, *supra* note 14, at 5.

134. XXIST REPORT, *supra* note 33, at 365.

135. Notice on Cooperative Joint Ventures, *supra* note 14, at 7. The Notice States that:

The appraisal of a cooperative joint venture in the light of the competition rules will focus on the relationship between the enterprises concerned and on the effects of their cooperation on third parties . . . [I]t is necessary to examine whether the operation in question is likely to affect appreciably the competitive position of third parties, especially with regard to supply and sales possibilities.

*Id.* at 4.

136. *Id.* at 6.

ers.<sup>137</sup> Likewise, a network of joint ventures, even though between parents who are non-competitors, may distort or restrict competition because one of the parent companies has the ability to coordinate the competitive behavior of all the joint ventures.<sup>138</sup> As a rule, joint ventures between non-competitors will not fall within Article 85(1) if there are sufficient alternative sources of supply and demand for the product outside of the joint venture.<sup>139</sup> Where a network of joint ventures is involved, on the other hand, it is less likely that any of them will be found to fall outside the prohibition.

c. *De Minimis Effects*. Although not explicitly stated in Article 85(1), the Commission has adopted the view that "only those agreements are prohibited which have an appreciable impact on market conditions, in that they appreciably alter the market position, in other words the sales or supply possibilities, of third undertakings and of users."<sup>140</sup> Accordingly, even if the parent companies are actual or potential competitors, the foregoing analysis requires a determination of whether the venture falls within a *de minimis* safe harbor.<sup>141</sup>

The Notice on Agreements of Minor Importance provides that a joint venture will be deemed not to have an appreciable effect on competition if two conditions are satisfied. First, the products that are the subject of the agreement must "not represent more than 5% of the total market for such goods or services in the area of the common market affected by the agreement."<sup>142</sup> Second, "the aggregate annual turnover of the participating undertakings [must] not exceed E.C.U. 200 million."<sup>143</sup>

137. *Id.* at 7.

138. *Id.* See also *Optical Fibres*, 1986 O.J. (L 236) 30, 37.

139. *Id.* See also *Elopak/Metal Box*, 1990 O.J. (L 209) 15, 19 ("As the parties could not realistically be regarded as competitors, actual or potential, and the creation of the joint venture entails no foreclosure risk, and the agreement does not involve the creation of a network of competing joint ventures, the agreements to establish Odin do not fall within the terms of Article 85(1)."). See also Notice on Cooperative Joint Ventures, *supra* note 14, at 6 (noting that the risk of foreclosure increases "in step with the degree of oligopolization of the market and the existence of exclusive or preferential links between the joint venture and its parents").

140. Notice on Agreements of Minor Importance, *supra* note 59 at 2.

141. The criteria for determining an "appreciable effect" under the *de minimis* exception of this Notice are different from those criteria used to determine whether, in a joint venture between non-competitors, market access is foreclosed. The test of "significance" in the latter case requires a showing of market power. Because the Notice on Agreements of Minor Importance also applies to competitors, the thresholds of "appreciable effect" are much more stringent.

142. Notice on Agreements of Minor Importance, *supra* note 59 at 7.

143. *Id.* At a conversion rate of \$1.18 per E.C.U., the turnover threshold is approximately \$169 million. For the purposes of determining total sales, the calculation must include sales not only of the parent companies but also the sales of all subsidiary companies

The first criterion can be readily applied to all joint ventures whether involving only E.C. partners or non-E.C. partners using the principles outlined in the preceding section. However, the second condition presents a question of equity as applied to a joint venture involving a parent which is a U.S. corporation. Literally read, the provision suggests that, irrespective of where they are made, all sales of the parent corporation should be included in the calculations of the aggregate annual turnover. While such a standard is a legitimate measure of market power in the E.C. it does not accurately measure the E.C. market power of a joint venture involving a U.S. corporation whose sales are largely made outside of the E.C. Arguably, the domestic sales of a U.S. corporation should not be included in the second prong of the *de minimis* test.

Support for this approach may be found in the Merger Regulation's discussion of the jurisdictional thresholds for the application of the Regulation to mergers or concentrations "with a Community dimension."<sup>144</sup> The Council has specified that the Regulation applies only if, *inter alia*, "the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than E.C.U. 250 million."<sup>145</sup> Thus, without regard to the magnitude of sales elsewhere, sales made in the Community are determinative of the issue of whether a Community dimension exists. Similarly, sales made by a U.S. corporation in the United States do not necessarily indicate that a joint venture involving that corporation will have more than a negligible impact on competition within the Community.

The Commission has stated that its quantitative definition of "appreciable" is "no absolute yardstick."<sup>146</sup> Agreements exceeding the thresholds "may still have only a negligible effect on trade between Member States or on competition, and are therefore not caught by Article 85(1)."<sup>147</sup> Hence, notwithstanding sales in excess of the E.C.U. 250 million threshold, a U.S.-E.C. joint venture could take advantage of the *de minimis* exception if, despite the volume of their combined sales, their joint venture would have only a negligible impact on competition in the E.C.

2. *Automatic Exemption From Article 85(1)*. If a joint venture is prohibited by Article 85(1), Council Regulation 17/62 provides that the parents may notify the Commission of their agreement and seek an exemption from the prohibition under Article 85(3).<sup>148</sup> Moreover,

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within the group of which the parent company is a member. *Id.* at 9(a)-(d).

144. Control of Concentrations Regulation, *supra* note 19, art. 1(2).

145. *Id.* art. 1(1).

146. Notice on Agreements of Minor Importance, *supra* note 59, at 3.

147. *Id.*

148. *See supra* note 147. Whereas applications for negative clearance presuppose

the Commission has created a number of block exemptions<sup>149</sup> which automatically exempt certain categories of agreements deemed to raise minimal problems from a competition standpoint. Parents of joint ventures that meet the criteria set out in these Regulations are not required to notify the Commission of the agreement in order to qualify for an exemption.<sup>150</sup> The most relevant block exemptions concern specialization and joint research and development agreements.

a. *Specialization Joint Ventures*.<sup>151</sup> The Regulation on Specialization Agreements applies to joint ventures in which the parents combine their resources to manufacture certain products.<sup>152</sup> To qualify for an exemption under this Regulation, two tests must be met. First, the products that are the subject of the agreement must "not represent more than 20% of the market for such products in the common market or a substantial part thereof." Second, the parents' combined annual sales must not exceed E.C.U. 1 billion.<sup>153</sup>

The original version of the Specialization Agreement Regulation restricted the application of the exemption to joint ventures involving only production and did not excuse undertakings involving

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that Article 85(1) does not apply to the joint venture, notification is required when Article 85(1) does apply and the partners are seeking an exemption from the prohibition.

149. *Supra* note 81.

150. *See, e.g.*, Commission Regulation on Specialization Agreements, *supra* note 81, Preamble (9) and Commission Regulation on Research and Development Agreements, *supra* note 81, Preamble (18).

151. Commission Regulation on Specialization Agreements, *supra* note 81.

152. *Id.* art. 2.

153. Notice on Cooperative Joint Ventures, *supra* note 14, at 9. The sales threshold contained in the original Regulation was E.C.U. 500 million. The second condition raises the same question as the Notice on Agreements of Minor Importance, namely, whether in the case of foreign firms the sales threshold is calculated exclusively of sales outside the E.C. *See supra* text accompanying notes 143-147. In this case, however, the Commission has stated that the block exemption may be applicable to a joint venture exceeding the sales threshold *provided that* it is "properly notified [to the Commission in accordance with the provisions of Commission Regulation No 27/62] and that the Commission does not object to the agreement within six months." Notice on Cooperative Joint Ventures, *supra* note 14, at 9. By allowing the partners an opportunity to demonstrate that their venture would not threaten competition, this "opposition procedure" preserves the possibility that a joint venture with a U.S. parent may qualify for an automatic exemption notwithstanding sales by the joint venture in excess of the E.C.U. 1 billion threshold. This procedure, however, is not available if the market share threshold is exceeded. *Id.*

The notification procedures of Commission Regulation 27/62 specifically require discussion of the sales of each partner in the relevant market:

The sales or turnover of each party in the goods or services affected by the arrangements in the Community and worldwide. If the turnover in the Community is material (say more than a 5% market share), please also give figures for each Member State, and for previous years (in order to show significant trends), and give each party's sales targets for the future. Provide the same figures for any relevant associated company.

Commission Regulation 27/62, *supra* note 82, Complementary Note IX 3.3.



the products and did not excuse undertakings involving the marketing or distribution of products. In the amended regulation, however, the Commission extends the exemption to cover joint marketing and distribution arrangements subject to the restriction that the venture's combined market share not exceed 10%.<sup>154</sup> In practice, this means that a specialization joint venture will be automatically exempted by the Commission from the prohibition of Article 85(1) if *either*, in the case of a production joint venture only, the parent companies controlled a maximum of 20% of the relevant market and their combined sales did not exceed E.C.U. 1 billion *or*, if the joint venture included distribution, the parents controlled a maximum of 10% of the relevant market and their combined sales did not exceed E.C.U. 1 billion.

b. *Research and Development Joint Ventures.*<sup>155</sup> The Commission Regulation on Research and Development Agreements applies to "joint research and development of products or processes and joint exploitation"<sup>156</sup> of the results of that research and development.<sup>157</sup> The phrase "research and development of products or processes" is narrowly construed as the acquisition of "technical knowledge which is either protected by an intellectual property right or is secret know-how."<sup>158</sup> This definition sets a high standard for the type of agreement that can be exempted under the Regulation.

While the Regulation on Research and Development does not

154. Notice on Cooperative Joint Ventures, *supra* note 14, at 9 and Discussion Paper, *supra* note 14, at 3.

155. Commission Regulation on Research and Development, *supra* note 81. The research and development activities to which this Regulation is addressed must not be confused with the research and development activities mentioned in the 1968 Notice discussed in the text in part II(C)(1)(a), and which are considered to be neutral in their impact on competition so that Article 85(1) does not apply. *Supra* text accompanying notes 123-131. Article 85(1) applies to the joint ventures addressed here because (i) they include the stage of industrial application and (ii) the parents agree to restrict their competitive freedom and "forego the opportunity of gaining competitive advantage over the other parties." *Id.* Preamble (2). *See, e.g.*, Notice on Cooperative Joint Ventures, *supra* note 14, at 10.

By the allocation of contract territories the parents can protect themselves for the duration of the contract from the manufacture and use of the contract products by other partners in the reserved territories; furthermore, they can prevent other partners from pursuing an active marketing policy in those territories for five years after the introduction of the new or improved product into the common market.

156. Joint exploitation is "the manufacture of new or improved products as well as the use of new or improved production processes, the marketing of products derived from R&D activities and the granting of manufacturing, use or distribution licenses to third parties." Notice on Cooperative Joint Ventures, *supra* note 14, at 10.

157. Commission Regulation on Research and Development, *supra* note 81, art. 1(1)(a).

158. *Id.* art. 1(2)(e).

set a sales threshold for exemption, it does impose a definite market share limit.<sup>159</sup> If both partners manufacture products that are capable of being replaced or improved by the product that is the subject of the joint research and development, the exemption will only apply if "the parties' combined production of the products capable of being improved or replaced by the contract products does not exceed 20% of the market for such products in the common market or a substantial part thereof."<sup>160</sup>

If realized, the exemption applies for the duration of the research program and, if the results of the research are jointly exploited,<sup>161</sup> for an additional period of five years from the time when the products are first marketed in the Community. Thereafter, the exemption will be extended for as long as the parents' combined market share for the product of the joint research does not exceed 20%.<sup>162</sup>

The original Regulation did not permit the joint venture to distribute or market the product that was the subject of its research and development activities. The new Notice on Cooperative Joint Ventures, however, extended its scope to include distribution arrangements so long as the market share of the venture and the parent companies does not exceed 10%.<sup>163</sup>

3. *Exemption by Individual Decision.*<sup>164</sup> If a joint venture is not entitled to an automatic exemption, the parents can notify the Commission of their agreement pursuant to Council Regulation 17/62 and seek an exemption by way of individual decision. An exemption will be granted under this provision only if the joint venture satisfies the four conditions of Article 85(3).<sup>165</sup> The degree of scrutiny to which the Commission will subject joint ventures seeking exemptions by individual decision depends on the threat to competition posed by the particular circumstances of each case. There are some joint ventures that may be granted "almost automatic eligibility for exemption."<sup>166</sup> On the other hand, the "major cases (in terms of the economic and financial power and market share of the firms con-

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159. Notice on Cooperative Joint Ventures, *supra* note 14, at 10.

160. Commission Regulation on Research and Development, *supra* note 81, art. 3(2).

161. *Supra* note 159.

162. Commission Regulation on Research and Development, *supra* note 81, art. 3(3).

163. Notice on Cooperative Joint Ventures, *supra* note 14, at 10 and Draft Notice on Cooperative Joint Ventures, *supra* note 14, at 3.

164. The power of exemption by individual decision is within the exclusive competence of the Commission. See *supra* text accompanying notes 95-101.

165. Notice on Cooperative Joint Ventures, *supra* note 14, at 10 and Draft Notice on Cooperative Joint Ventures, *supra* note 14 at 17.

166. Discussion Paper, *supra* note 14, at 3.

cerned) will always require a detailed individual scrutiny which enables their objective advantages to be weighed up against the resulting adverse effects on competition."<sup>167</sup> Indeed, under any circumstances, the parties must establish that the joint venture "entails objective advantages which offset the risks which its establishment and operation pose to competition."<sup>168</sup>

a. *Almost Automatic Eligibility for Exemption.* According to the Draft Notice, there are circumstances under which an agreement will be granted "almost automatic eligibility" for exemption under Article 85(3). The language "almost automatic eligibility for exemption" means, in effect, that certain agreements will be given "sympathetic consideration."<sup>169</sup> This term clearly implies less than the most rigorous degree of scrutiny.

To be entitled to "sympathetic consideration," the parties must, at a minimum, present a plausible business justification for their agreement. They must establish that the joint venture entails some objective advantage that could not come about but for the agreement. The Commission has stated that "sympathetic consideration" could be given, for example, to joint ventures that "create substantial capacity or which significantly increase their parents' existing capacity."<sup>170</sup> More generally, an objective advantage may arise for any of the reasons discussed in the economic considerations in Part I(C)(1)-(4).

In practice, however, the application of the standard relies on assumptions about market power. Business justifications receive "sympathetic consideration" only if the joint venture poses no threat to the competitive structure of the markets in question. Thus, the standard is applied subject to strict market share limits which "should not normally exceed 20% where cooperation between the parents does not extend beyond production, and 10% when it includes marketing."<sup>171</sup> Within these limits, there is a presumption that "the effects in terms of the exclusion of third parties, and the risks in terms of barriers to entry are kept within reasonable proportions and that the market structure will continue to ensure effective competition."<sup>172</sup>

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167. Draft Notice on Cooperative Joint Ventures, *supra* note 14, at 17. See also Notice on Cooperative Joint Ventures, *supra* note 14, at 10.

168. Draft Notice on Cooperative Joint Ventures, *supra* note 14, at 18.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* See also Notice on Cooperative Joint Ventures, *supra* note 14, at 13. The 10% limit, however, is not a guaranteed safe-harbor. In the case of purchasing joint ventures, for example, the Commission noted that they may be used as "an instrument for the setting of uniform purchase prices and conditions and often of purchase quotas." *Id.* at

In short, if a joint venture falls within the market share limits, it will be subject to "almost automatic eligibility," meaning, in practice, that the Commission will merely send a "comfort letter."<sup>173</sup>

b. *Individualized Scrutiny*. If a joint venture exceeds the market share thresholds discussed in the preceding subsection, creates a network of joint ventures under common ownership or "helps further to tighten an already narrow oligopoly"<sup>174</sup> it will be subject to rigorous individualized scrutiny under a balancing test that weighs the potential benefits of the proposed agreement against the immediate loss in competition that would result from the joint venture. Central to any such analysis is the need to promote the objectives that competition policy is designed to implement, namely, market integration, efficiency, innovation, and long-term competitiveness.<sup>175</sup> The balancing test, therefore, includes a determination of whether these goals can be accomplished more effectively through unbridled competition or through cooperation in a joint venture.<sup>176</sup> Indeed, the

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12. Accordingly, it was "prepared to grant exemptions only in exceptional cases and then only if the parents retain the possibility of purchasing individually." *Id.*

173. Discussion Paper, *supra* note 14, at 3. In the Notice on Cooperative Joint Ventures, *supra* note 14, the Commission does not use the terms "sympathetic consideration" or "comfort letter." Adoption of the standard for the types of joint venture discussed in the text, however, is clearly implied by the language. *See id.* at 11-13. Comfort letters are issued pursuant to the Notice from the Commission on procedures concerning notification pursuant to Article 4 of Council Regulation No 17/62, 1983 O.J. (C 295) 6. They state that the Directorate-General for Competition "does not consider it necessary to pursue the formal procedure through to the adoption of a Decision under Article 85(3) in accordance with Article 6 of Regulation No 17/62." *Id.* at 7. Because they do not have the status of formal decisions, these letters are not legally binding on the courts of Member States. However, they do have evidentiary value in national proceedings. *Joined Cases 253/78, 1-3/79 Procureur de la Republique & Anor v. Bruno Giry & Ors*, 1980 E.C.R. 2327.

174. Draft Notice on Cooperative Joint Ventures, *supra* note 14, at 18. *See also* Notice on Cooperative Joint Ventures, *supra* note 14, at 11.

175. *See supra* part I(B). Although Article 85(3) requires that consumers be allowed "a fair share of the resulting benefits" of a joint venture, the consumer benefit criterion is not really an independent test. Rather, it is the natural conclusion of a satisfactory analysis of the other requirements of Article 85(3). That is to say, if a joint venture: (i) either reduces costs through rationalization or promotes technical progress; (ii) contains no restrictions not necessary to the realization of the objectives of the agreement; and (iii) does not eliminate competition in a substantial part of the products in question, then it is inevitable that the venture will be to the benefit of consumers. No separate analysis is required. If the market is functioning properly, the benefits of the joint venture will automatically be passed on to the consumer in the form of lower prices, a broader selection of goods and improved products. For the rather minimal consideration given to the consumer benefit criterion, see *Teko*, 1990 O.J. (L 13) 34, 37-38; *Rockwell/IVECO*, 1983 O.J. (L 224) 19, 26; *Alcatel Espace/ANT Nachrichtentechnik*, 1990 O.J. (L 32) 19, 24; *UIP*, 1989 O.J. (L 226) 25, 31.

176. *See, e.g., Re Bayer/Gist Brocades*, 1976 O.J. (L 30) 13 ("The question of a contribution to economic progress within the meaning of Article 85(3) can only arise in those exceptional cases where the free play of competition is unable to produce the best result

preservation of workable competition in the relevant market is fundamental to any decision.<sup>177</sup>

The Commission weighs a number of factors when considering whether workable competition could be said to exist in the relevant market. Particular reference may be made to the following: the number of other firms operating in the market of the joint venture and the degree of concentration;<sup>178</sup> the competitive pressures in the world market and the threat of market entry by firms outside the Community;<sup>179</sup> countervailing purchasing power of the customers of the joint venture;<sup>180</sup> the economic and financial strength of the parent companies and their technical or commercial edge over competitors;<sup>181</sup> the existence of alternative technologies;<sup>182</sup> the threat of market foreclosure to third parties.<sup>183</sup>

Unlike "almost automatic eligibility" scrutiny in which the Commission utilizes explicit and definite market share limits, no definite percentage of the market is controlling. However, a share in excess of 10% for a marketing agreement would certainly merit heightened scrutiny. An upper limit is more difficult to determine. Commission case law, however, supports the view that joint ventures with as much as 20% of the relevant market may be permitted when there are strong countervailing concerns.<sup>184</sup> Subject to main-

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economically speaking").

177. "Workable competition" is that degree of competition which is essential to ensure the attainment of objectives set by the Treaty of Rome without eliminating competition in a substantial part of the common market. Case 26/76 Metro SB-Grossmarkt GmbH & Co, KG v. Commission, 1977 E.C.R. 1875, 1904. For the notion of workable competition. See JOSEPH BOWRING, *COMPETITION IN A DUAL ECONOMY* 83 (1986) ("Definitions of workable competition are an attempt to establish a set of standards for structure, conduct, and/or performance which guarantee 'acceptable' social results. Rigid enforcement of the conditions required for perfect competition would be, it is argued, destructive and counterproductive in a modern industrial setting."). The Commission has never intended to institute a system of pure or perfect competition. Perfect competition in the economic sense occurs "when the number of firms selling a homogeneous commodity is so large, and each individual firm's share of the market is so small, that no individual firm finds itself able to influence appreciably the commodity's price by varying the quantity of output it sells." F.M. SCHERER, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* (2d ed. 1980).

178. See, e.g., Carbon Gas Technologie, 1983 O.J. (L 376) 17, 21; BBC Brown Boveri, 1988 O.J. (L 301) 68, 72; Rockwell/Iveco, 1983 O.J. (L 224) 19, 27; Iveco/Ford, 1988 O.J. (L 230) 39, 43-44; Notice on Cooperative Joint Ventures, *supra* note 14, at 6.

179. See, e.g., Alcatel Espace, 1990 O.J. (L 226) 19, 25; Optical Fibres, 1986 O.J. (L 236) 30, 40.

180. See, e.g., Optical Fibres, at 40; UIP, at 32; P&G/Finaf, 1992 O.J. (C 3) 2, 4.

181. Notice on Cooperative Joint Ventures, *supra* note 14, at 6.

182. See, e.g., Optical Fibres, at 40; BBC Brown Boveri, at 72.

183. See, e.g., Notice on Cooperative Joint Ventures, *supra* note 14, at 6.

184. In UIP, for example, the partners jointly controlled an average of 22% of the Community market. UIP 1989 O.J. (L 226) 25, 32. See also Fiat/Hitachi, 1991 O.J. (C 206)

taining workable competition,<sup>185</sup> the extent to which the Commission permits competitive distortion in the short-term depends on the nature of the compensatory benefits to which the joint venture can reasonably be expected to give rise. Further, the Commission reserves the right to modify its original decision regarding the joint venture in light of changing circumstances.<sup>186</sup>

4. *Ancillary Restrictions.* Even where a joint venture does not fall within Article 85(1) or is exempted from the prohibition, further constraints upon the effect of competitive coordination are set by the terms of Article 85(3)(a) which prohibit competitive "restrictions which are not indispensable to the attainment of [the agreement's] objectives."<sup>187</sup> A restriction is deemed indispensable if the joint venture "could not be implemented or could only be implemented under more uncertain conditions, at substantially higher costs, over an appreciably longer period or with considerably less probability of success."<sup>188</sup> The Commission terms restrictions that are necessary and reasonable in this sense as "ancillary." More precisely, ancillary restrictions are those restrictions which are "directly related and nec-

3, 4 (proposing to exempt joint venture notwithstanding 16% market share).

185. Metro SB, at 1904 ("[T]he nature and intensiveness of competition may vary to an extent dictated by the products or services in question and the economic structure of the relevant market sectors.")

186. *See, e.g.,* Optical Fibres, at 40 (reserving the right to revoke the exemption if the joint venturers "were to bring successful patent infringement actions in the EEC and to refuse, without good reasons, to grant licenses to third parties") and XXTH REPORT, *supra* note 31, at 79 (stating, with reference to a cooperation agreement between KSB, Goulds, Lowara and IIT for the development of new pumps, that the exemption would be revoked, if necessary, "to prevent structural changes which might occur to the disadvantage of competitors"). Additionally, Council Regulation 17/62, *supra* note 5, art. 8 states:

1. A decision in application of Article 85(3) of the Treaty shall be issued for a specified period and conditions and obligations may be attached thereto.

2. A decision may on application be renewed if the requirements of Article 85(3) of the Treaty continue to be satisfied.

3. The Commission may revoke or amend its decision or prohibit specified acts by the parties:

(a) where there has been a change in any of the facts which were basic to the making of the decision.

....

(d) where the parties abuse the exemption from the provisions of Article 85(1) of the Treaty granted to them by the decision.

Council Regulation 17/62, *supra* note 5, art. 8.

187. EEC TREATY art. 85(3).

188. Commission Notice Regarding Restrictions Ancillary to Concentrations, 1990 O.J. (C 203) 6. *See also* Notice on Cooperative Joint Ventures, *supra* note 14, at 13 ("In particular, in determining the necessity of the restriction, it is proper not only to take account of its nature, but equally to ensure that its duration, subject-matter and geographical field of application, do not exceed what the creation and operation of the joint venture reasonably requires.")

essary to the establishment and operation of the joint venture in so far as they cannot be disassociated from it without jeopardizing its existence . . . [but which] remain subordinate in importance to the main object of the joint venture."<sup>189</sup> Accordingly, whether a restriction is necessary requires a determination of the reasonableness of the restriction in relation to the goal sought to be achieved.<sup>190</sup>

A common type of restrictive covenant found in many joint ventures, particularly in research and development agreements, is the allocation of rights in the intellectual property contributed to and developed by the joint venture. The Commission, however, has been sympathetic to both the desire of parents to restrict the use of technologies that they contribute to their joint ventures<sup>191</sup> and the need of the joint ventures for certain territorial protections during the period of a patent or know-how license. Block Exemption Regulations on patent and know-how licensing agreements provide, for example, that where the parent companies are competitors, they

189. Draft Notice on Cooperative Joint Ventures, *supra* note 14, at 18-19. In the specialization, and research and development block exemption regulations, the Commission created what are commonly termed black and white lists of prohibited and permitted provisions that would pass muster under this test. *See, e.g.*, Commission Regulation on Specialization Agreements, *supra* note 81, art. 2; Commission Regulation on Research and Development Agreements, *supra* note 81, arts. 4-6.

190. Parent companies are likely to insist on a number of restrictions to protect their own financial and commercial interests. The following are typical:

agreement between parent companies to make "reasonable efforts" to ensure that their associates did not to compete with the joint venture in the field of the cooperation and that, where possible, they purchased their own requirements from the venture. *Vacuum Interrupters Ltd*, 1977 O.J. (L 48) 32, 38; agreement not to conclude research and development projects with third parties in the field of cooperation for fifteen years. *BBC Brown Boveri*, 1988 O.J. (L 301) 68, 73; agreement between parent companies not to compete with the joint venture in a specific geographical area. *Iveco/Ford*, 1988 O.J. (L 230) 39, 42; agreement barring the parent companies from competing with the joint venture or from competing actively with it on its territory during the starting-up period. Notice on Cooperative Joint Ventures, *supra* note 14, at 14; agreement not to develop certain products entrusted to the other partner under a rationalization program. *Alcatel Espace/ANT Nachrichtentechnik*, 1990 O.J. (L 32) 19, 25; agreement to satisfy total product requirements from the joint venture. *Rockwell/Iveco*, 1983 (O.J. L 224) 19, 27; agreement not to exploit technical know-how acquired through the joint venture in the event of early withdrawal. *Carbon Gas Technology*, 1983 O.J. (L 376) 17, 20.

On the other hand, "restrictions relating to quantities; prices or customers, and export bans obviously go beyond what is required for the setting-up and operation of the joint venture." Notice on Cooperative Joint Ventures, *supra* note 14, at 14.

191. *See* Notice on Cooperative Joint Ventures, *supra* note 14, at 20 ("[T]he joint venture must seek to ensure the success of the new production unit, without depriving the parent companies of the necessary control over exploitation and dissemination of their technology") and *BBC Brown Boveri*, 1988 O.J. (L 301) 68, 71 (joint venture undertakes not to exploit the partners' technology with third parties).

may grant their joint venture exclusive territorial manufacture and distribution licenses subject to market share limits of 20% or 10% where the joint venture respectively manufactures or manufactures and distributes the licensed products.<sup>192</sup> The degree of control over subsequent improvements is the subject of more rigorous scrutiny and is determined by consideration of all the circumstances surrounding the agreement.<sup>193</sup>

### III. U.S.-E.C. JOINT VENTURES

The prospect of a single European market has prompted a substantial increase in the number of international joint ventures in the E.C.<sup>194</sup> Although part of this growth must be attributed to international concern about the creation of a Fortress Europe and the desire to avoid discriminatory treatment by the governments of Member States,<sup>195</sup> many of the ventures do not appear to have been motivated by defensive considerations.<sup>196</sup> In fact, some of the most interesting Commission Decisions have concerned non-E.C. firms using joint ventures positively as a means to participate in the crea-

192. Commission Regulation 151/93, *supra* note 81, arts. 3-4. The original patent and know-how block exemptions did not apply to "agreements between competitors who hold interests in a joint venture or between one of them and the joint venture, if the licensing agreements relate to the activities of the joint venture." Commission Regulation on Patent Licensing Agreements, *supra* note 81, art. 5(2).

193. Compare BBC Brown Boveri, at 69-71 (grant by joint venture to E.C. parent of exclusive territorial license in new technology within the E.C.) and Commission Regulation on Research and Development Agreements, *supra* note 81, art. 5(1)(d) (permissible for parties to undertake obligation "to preserve the confidentiality of any know-how received or jointly developed under the research and development program") with Optical Fibres, 1986 O.J. (L 236) 30, 37 (joint venture must grant back, but only on a non-exclusive basis, improvements relating to the licensed technology).

194. The annual statistics contained in COMMISSION, COMPETITION REPORTS show an increase in the number of industrial joint ventures between E.C. and international partners from 15 in 1982 to 60 in 1990. See *supra* notes 31, 33, 35. The decline in this number to 45 in 1991 probably reflects the depressed states of the European and other international economies rather than signaling a definitive break in the trend. The Commission has suggested that the number of joint ventures with Community partners may increase as the final regulatory and political, barriers to cooperation are eliminated. Commission, *The Economics of 1992*, *supra* note 9, at 136.

195. See, e.g., *Pulling Up the Drawbridge*, THE ECONOMIST, June 8, 1991, at 20.

196. The evidence of motive is sparse but the Commission suggests that joint ventures are undertaken mainly because firms:

- increasingly want to spread the risk of costly new technological development;
- are tending to concentrate more on the fields of activity in which they have a great deal of experience, while seeking, via JVs, to remain abreast of new and promising developments in other fields;
- want to step outside what are often still the national confines of their markets and gain a foothold in other regions of the Community.

Draft Notice on Cooperative Joint Ventures, *supra* note 14, at 2.



tion of the new environment. Indeed, U.S.-E.C. partnerships are recognized as important vehicles towards E.C. economic integration, efficiency and international competitiveness. This Part considers how U.S. corporations can use joint ventures within the framework of European integration to advance their own commercial objectives.

A. *The "Constraints" of E.C. Competition Law*

1. *The Notice on Cooperative Joint Ventures.*<sup>197</sup> Although the competition rules addressed in part II were drafted primarily with E.C. companies in mind, they are applied equally to all joint ventures irrespective of the national origin of their parents. Not surprisingly, because their application depends largely on assumptions concerning the distortion of competition based on E.C. market share, the rules actually work to the advantage of international joint ventures<sup>198</sup> by creating opportunities not available to wholly owned E.C. joint ventures. U.S. corporations, for example, are less likely than their E.C. counterparts to have substantial sales or market share in the Community so that, in theory, U.S.-E.C. joint ventures are more likely to meet the conditions of an automatic exemption. Likewise, in many instances, U.S. corporations will not be considered potential competitors of prospective E.C. partners because, as a practical matter, it is difficult for them to make the kinds of investment in distribution networks that would make them realistic market entrants. As a result, U.S.-E.C. joint ventures are more likely to fall outside the prohibition of Article 85(1).

Many U.S.-E.C. joint ventures, however, will have varying degrees of impact on competition within the Community because of a prior actual or potential competitive relationship between the parent companies and will, therefore, be subject to review. The Notice on Cooperative Joint Ventures and various amendments to the block exemptions provide detailed guidance as to the type of analysis that will be applied to these agreements. At the same time, these changes increase the attractiveness of joint ventures as a means of accomplishing the parents' strategic objectives. The changes should bring four principal benefits to U.S. corporations.

First, the sales threshold required for an exemption under the Regulation on Specialization Agreements has been increased from E.C.U. 500 million to E.C.U. 1 billion.<sup>199</sup> This increase enlarges the pool of prospective E.C. partners for joint ventures that would be eligible for automatic exemption from the prohibition of Article 85(1).

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197. *Supra* note 14.

198. International joint venture refers to a joint venture in the E.C. involving at least one non-E.C. parent company.

199. *See supra* note 153 and accompanying text.

Second, the group exemptions for specialization and research and development joint ventures have been expanded to marketing arrangements. This gives U.S. firms the option, without notification to the Commission, to implement their objectives with E.C. partners through full-function joint ventures rather than through a partial-function joint venture whose production had to be distributed independently by the parent companies.

Third, amendments to the Regulations on Patent and Know-how Licensing Agreements permit parent companies that stand in a competitive relationship to grant exclusive territorial manufacture and distribution licenses to their joint venture.<sup>200</sup> This change should facilitate the transfer of technologies between companies most able to exploit the opportunities of combining complementary know-how.

Finally, the Notice sanctions the application of an "almost automatic eligibility for exemption" standard to certain categories of joint ventures.<sup>201</sup> This standard gives the parents increased flexibility in structuring their joint venture by removing the incentive to plan solely around the prospect of an exemption under the narrowly construed conditions of the group exemptions.<sup>202</sup>

It is important to note that the amendments do not signal a change in substantive policy toward joint ventures. Rather they serve to facilitate the conclusion of transactions that were already deemed beneficial and to streamline the necessary notification procedures.

*2. Strategic Uses of U.S.-E.C. Joint Ventures.* U.S. firms working within the framework of E.C. competition law, both before and after the adoption of the various amendments, have been able to use E.C. joint ventures to enhance their position in the Community. Commission case law demonstrates how U.S. firms through joint ventures have been able to change market structures to their advantage through rationalization, technology transfers and new production methods. Moreover, U.S. firms have also used joint ventures to acquire know-how from their E.C. partners which can be exploited to their competitive advantage in the United States.

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200. See Amendment Regulation 151/93, *supra* note 81, arts. 3-4.

201. See *supra* notes 169-173 and accompanying text.

202. See *Lessons from U.S. Law, Interview: Professor Eleanor M. Fox*, ANTITRUST 8, 11 (Fall/Winter 1991) ("The problem is that block exemptions steer deals into a very narrow framework. Business people find themselves doing deals in terms they would not otherwise choose."). See also Margot Horspol & Valentine Korah, *Competition*, 38 THE ANTITRUST BULL. 337, 357 (1992) ("The drawback of proceeding by regulating agreements through providing group exemptions is that some agreements are distorted by the parties to come within them.").

a. *Optical Fibres*.<sup>203</sup> Corning Glass, a manufacturer of optical fibers, entered into several joint ventures with cable makers in the United Kingdom, Germany and France. The objective of the ventures was the development, production and sale of optical fibers and cables, "a high technology product with significant advantages" over comparable and competing technologies.<sup>204</sup> Corning and its E.C. partners were neither actual nor potential competitors and their technologies were complementary rather than in direct competition.<sup>205</sup> Nevertheless, the Commission expressed concern over the potential anti-competitive effects of a network of ventures under Corning's control since it was a common technology provider in an oligopolistic market. "In this oligopoly, trade between Member States is bound to develop along different lines than would otherwise be the case and therefore to be affected appreciably when inter-related joint ventures, licensees and subsidiaries are subject to influence and coordination by a common partner."<sup>206</sup>

After establishing a legitimate argument against the joint ventures, the Commission then considered the benefits to European global competitiveness that were likely to result from a contribution of Corning's technology. In its view, Corning's optical fiber know-how was essential "to enable the European companies to withstand competition from non-Community producers, especially in the USA and Japan."<sup>207</sup> Reluctant to forego such an advantage, the Commission, after hedging the agreements by adding clauses to prevent Corning from exploiting its control over the network,<sup>208</sup> exempted the joint ventures from the prohibition of Article 85(1).

The result of the Commission's action was that Corning had been able not only to conclude agreements with three leaders in the E.C. cable industry but also to secure the uniform development of its technology in the Community through a non-exclusive grant-back clause for improvements. As a result, Corning acquired a strong position in the E.C. market for optical fibers and limited the ability

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203. *Optical Fibres*, 1986 O.J. (L 236) 30.

204. *Id.* at 38.

205. *Id.* at 36.

206. *Id.* at 38.

207. *Id.* The Commission rejected other possibly less restrictive options available to the partners such as marketing fibers imported from the United States, the establishment of fully owned plants in the E.C. or the grant of licenses. Under any of these options, "there would be no transfer of technology to the European companies and therefore no dissemination of Corning's technology." *Id.* at 39.

208. *Id.* at 40. For example, Corning was required to reduce its management, voting and veto rights in the joint ventures and the joint ventures undertook to sell their products "to all users on non-discriminatory terms [to ensure] . . . that competitors of the parents [were] able to obtain optical fibres from the joint ventures in order to compete on equal terms." *Id.*

of its competition to establish a similar bridgehead. Corning was also positioned to be the principal beneficiary of a shift in the demand curve in the communications technology market in the E.C.

b. *Rockwell/Iveco*.<sup>209</sup> A similar outcome resulted from a joint venture between Rockwell and its E.C. partner, Iveco, to develop a new axle for heavy trucks. Rockwell, a specialized axle manufacturer, granted an exclusive license to the joint venture to manufacture its proprietary axles while Iveco, a truck manufacturer, transferred its entire axle manufacturing capacity and agreed to satisfy its total axle requirements from the venture.<sup>210</sup> After the agreement the axle market in the Community was split approximately 80%-20% between manufacturers of trucks that produced axles on their own account and companies that produced for the free market.

Finding that the joint venture would not jeopardize competition in the free market and would contribute to technological innovation in the Community, the Commission exempted the agreement from the prohibition of Article 85(1).<sup>211</sup> It further remarked that the joint venture was likely to "induc[e] truck manufacturers to change their policy regarding production on their own account and to purchase axles from third parties and start a trend which creates a more competitive situation on this market, from which the other free axle manufacturers could also benefit."<sup>212</sup> The Commission, therefore, explicitly recognized that through joint ventures that exploit synergies and introduce new production methods and technologies non-E.C. firms can help to create the market structures of an integrated Europe.

Corning and Rockwell are U.S. firms which have sought to use joint ventures as a way to improve their competitive positions in the E.C. Corning used its superior technology as leverage to secure market power in a rapidly growing area of technology,<sup>213</sup> while Rockwell acquired a guaranteed outlet for its production and attempted to create new market structures by altering the way in which potential customers conducted their business. The effects of U.S.-E.C. joint ventures, however, need not be confined to markets

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209. *Rockwell/Iveco*, 1983 O.J. (L 224) 19.

210. *Id.* at 24-25.

211. *Id.* at 27.

212. *Id.*

213. *Optical Fibres* illustrates the type of joint venture that is subject to rigorous examination under the individualized scrutiny standard discussed in Part II(C)(3)(b). The threat to workable competition in this case arose from the possibility of changes in market structure that would exclude competitors from access to the state of the art technology developed by the joint ventures. *Optical Fibres*, 1986 O.J. (L 236) 30. Where the danger of market foreclosure is apparent, the parent companies will obviously be required to carry a much greater burden to establish potential benefits that would offset the anti-competitive risks.

in the E.C. They could be used as a springboard for activities in export markets and even as a means to gain a competitive advantage over domestic competition in the United States. This theme is more pronounced in the following case.

c. *Fiat/Deere III*.<sup>214</sup> Deere entered an agreement with a subsidiary of Fiat SpA of Italy to share the development of a range of medium-sized crawler tractor loaders and crawler tractor dozers. The E.C. markets for these products were highly concentrated with Caterpillar, Fiat and Komatsu controlling more than 80% of both markets.<sup>215</sup> Deere, on the other hand, sold neither product in the E.C. Although it would be logical to assume that Deere was a potential competitor whose independent entry into the markets might lead to some degree of deconcentration, the Commission did not discuss this issue but merely stated that, without prejudice to later proceedings, the agreement "may be exempted under Article 85(3)."<sup>216</sup>

Deere's use of the joint development agreement is instructive. Disavowing any purpose to enter the E.C. markets for the contract products,<sup>217</sup> its primary intent in pooling resources was to acquire access to complementary technology with a view to the exclusive exploitation of any developments in the United States and other American markets. Both aspects of the agreement undoubtedly gave Deere the opportunity to enhance its competitive position in the United States. It is important to recognize, however, that the structure of the agreement would have been determined in large part by changes then occurring in E.C. markets. The Commission would have evaluated the arrangement in light of the type of factors discussed in part I(B) and (C)(1)-(4). From its perspective, the joint venture was an appropriate response to the broader economic change shaping the Community.<sup>218</sup> In effect, Deere traded the advantages that Fiat and the Commission anticipated within the E.C. for similar benefits for itself in the United States.<sup>219</sup>

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214. *Fiat/Deere*, 1992 O.J. (L 87) 3.

215. *Id.* at 3.

216. *Id.* at 4.

217. Under the agreement, both parties were to transfer their existing technology to the venture, undertake certain stages of production and would become co-owners of jointly developed know-how. The agreement also provided that Fiat would have exclusive territorial rights to market the new products in Europe, Africa and the Middle East while Deere would have similar rights in North, Central and South America. Further, the parties undertook to discourage parallel trade by third parties into their respective exclusive territories with the exception of the Community. *Id.* at 3-4.

218. *Id.*

219. See, e.g., *De Laval-Stork*, 1977 O.J. (L 215) 11 (holding a joint venture between parent companies who together held between 10% - 15% of the Community market for steam turbines exempted because, by making it easier for an international company to

d. *International Joint Ventures in the E.C.* There is a slight irony, however, in the fact that U.S. and other international corporations can play such an active role in the evolution of the single European market. After all, one of the principal purposes was to enhance the competitiveness of E.C. companies in world markets. This sentiment is reflected in the "vestigial thought"<sup>220</sup> that the nationality of a corporation should be a relevant factor in a government's policy toward that corporation. Although the single market initiative should have debunked this myth at the national level, the mentality seems to have reappeared on a European scale in the advocacy of interventionist policies designed to ensure that large European companies acquire leadership in the technologies of the future. International joint ventures are reminders that economic welfare is perhaps more soundly based on an openness to private investment and the pursuit of alliances with more advanced companies elsewhere. One may also expect that such a policy would lead to greater international economic integration and a relaxation in tensions between the major trading partners.

B. *Extraterritorial Application of Federal Antitrust Law to U.S.-E.C. Joint Ventures*

The potential use of U.S.-E.C. joint ventures to effect strategic objectives in the United States and other markets, notwithstanding exemption under E.C. competition law, a joint venture might be prohibited under applicable provisions of the federal antitrust laws.<sup>221</sup> United States courts have frequently asserted extraterritorial jurisdiction over conduct initiated abroad. Reflecting a degree of uncertainty as to the exact basis of their jurisdiction, however, they have used various tests to determine when federal antitrust law is properly applied in the international context.<sup>222</sup>

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penetrate the E.C., it increased competition with larger companies while allowing its Community partner to reorganize and expand its business); *Iveco/Ford*, 1993 O.J. (L 20) 14 (holding a joint venture to develop and produce multi-purpose vehicles in Portugal exempt since it would increase competition in the concentrated multi-purpose vehicle market and would have positive effects on infrastructure and employment in an underdeveloped region of the Community); *P&G/Finaf*, 1992 O.J. (C 3) 2, 4 (holding a joint venture to manufacture sanitary protection products exempt because it would strengthen competition in Italy, Spain and Portugal); *KSB/Goulds/Lowara/ITT*, 1991 O.J. (L 19) 25 (holding a joint venture exempt notwithstanding the high market share held by the dominant partner since participation of all parent companies was required to create viable economies of scale in research and production and to enhance probability of successful innovation.)

220. ROBERT B. REICH, *THE WORK OF NATIONS* 137-68 (1992).

221. Sherman Act, 15 U.S.C. §§ 1-7 (1890); Clayton Act, 15 U.S.C. §§ 12-27 (1914); Federal Trade Commission Act 15 U.S.C. §§ 41-51 (1914).

222. *See, e.g., Matsushita Electric & Industrial Co. v. Zenith Radio*, 475 U.S. 574

Many of the factors considered by the courts have been incorporated by the Department of Justice in its antitrust analysis of international operations.<sup>223</sup> The Department's position is that federal law is properly applicable to the conduct of domestic or foreign firms having a "direct, substantial and reasonably foreseeable effect" on the interstate, import or export commerce of the United States.<sup>224</sup> Its policy, however, has been to act only when the "adverse effects on competition harm U.S. consumers by reducing output or raising prices."<sup>225</sup> Subject to considerations of comity,<sup>226</sup> the Department will evaluate a U.S.-E.C. joint venture under the rule of reason.<sup>227</sup>

The Department asks whether the elimination of competition through the joint venture "would likely create, enhance, or facilitate

(1986) (the double effects doctrine); *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) (the intent and effect test); *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976) (a balancing of interests test); *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984) (the reasonableness test).

223. See *Guidelines for International Operations*, which lists factors such as:

- (1) the relative significance, to the violation alleged, of conduct within the United States as compared to conduct abroad;
- (2) the nationality of the persons involved in or affected by the conduct;
- (3) the presence or absence of a purpose to affect United States consumers or competitors;
- (4) the relative significance and foreseeability of the effects of the conduct on the United States as compared to the effects abroad;
- (5) the existence of reasonable expectations that would be furthered or defeated by the action; and
- (6) the degree of conflict with foreign law or articulated foreign economic policies.

*Guidelines for International Operations*, *supra* note 2, at 22.

224. *Id.* at 20 (citing Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 7 et seq. (1988)).

225. *Id.* at 21 n.159. Based on the text of the Foreign Trade Antitrust Improvements Act, however, it is unclear why the Department's policy should be restricted in this manner. Former Chairman Representative Rodino of the House Judiciary Committee stated that "[t]he bill will establish that restraints on export trade only violate the Sherman Act if they have a direct and substantial effect on commerce within the United States or on a domestic firm competing for foreign trade." H.R. REP. NO. 686, 97th Cong., 2d Sess. 7-8 (1982) (emphasis added).

226. See *Guidelines for International Operations*, *supra* note 2, at 29.

227. Under the rule of reason, the Department asks whether the joint venture poses any significant anticompetitive risks. If the venture presents no serious risk of anticompetitive harm, it is permitted. Where, however, there is significant danger of anticompetitive harm the Department must consider "whether any procompetitive efficiencies that the parties claim would be achieved by the joint venture would outweigh the risk of anticompetitive harm." *Id.* at 12-13. Agreements that are "naked" restraints of trade, on the other hand, such as price-fixing, will be condemned *per se* without extensive consideration of their effects. *Id.* at 6. For the basic contrast between the *per se* and rule of reason analyses, see *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49-50 nn.15-16 (1977).

the exercise of market power in the relevant market.<sup>228</sup> While assuming that the joint ventures are merging their interests,<sup>229</sup> the Department bases its response on the degree of market concentration as calculated under the Herfindahl-Hirschman Index.<sup>230</sup> The Department defines certain concentration "safe harbors" within which it presumes that "the structure of the market itself indicates that the successful exercise of market power" is unlikely.<sup>231</sup> Beyond these "safe harbors" it is a working principle that the threat of anti-competitive harm increases in proportion to the degree of market concentration after the hypothetical merger. As the degree of market concentration rises, the Department requires the parties to prove "offsetting procompetitive efficiencies on the basis of clear and convincing evidence"<sup>232</sup> when market concentration does in fact increase.

In addition to the foregoing analysis of the Department of Justice, U.S. courts have considered the status of joint ventures under federal antitrust law.<sup>233</sup> In particular, courts have acted where the

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228. *Guidelines for International Operations*, *supra* note 2, at 12.

229. *Id.* at 12.

230. The Herfindahl-Hirschman Index (HHI) is the sum of the squares of the market shares of the individual firms in the market. *Id.* at 9 n.70. The Department classifies a market as unconcentrated if the HHI is below 1000, moderately concentrated if the HHI is between 1000 and 1800, or highly concentrated if the HHI exceeds 1800. *Id.*

231. *Id.* The Department will not challenge a merger if the merger would result in an HHI of less than 1000; moderate concentration and the level of concentration will increase by 100 HHI points or less; or high concentration and the level of concentration will increase by 50 HHI points or less. These "safe harbors" may be applied in the joint venture context. *Id.* at 12.

232. *Id.* at 13. Offsetting benefits include realization of economies of scale, the pooling of complementary technologies and risk-sharing. For working case examples of the Department's involving research and development joint ventures, and the distribution of a foreign competitors product see *id.* at 31-35, 35-36. See also *United States v. Ivaco, Inc.* 704 F. Supp. 1409 (W.D. Mich. 1989) (enjoining proposed joint venture between two of the three firms in the market for automatic tampers for railroads since it would result in control of 70% of the market and was likely to inhibit competition); *United States v. Westinghouse Electric Corp.*, 1989-1 Trade Cases (CCH) ¶68,607 (S.D.N.Y. 1989) (allowing a joint venture between two producers and suppliers of electrical power, equipment and services, one a U.S. firm and one a European firm, upon the condition that the European firm divest of another U.S. firm to a third party so that it may act as a competitor in the U.S. market); *United States v. Hercules Inc.*, 1973 Trade Cases (CCH) ¶74,530 (D. Del. 1973) (dissolving, pursuant to a consent decree, a joint venture undertaken by Japanese and American companies into the manufacture of high density polyethylene); *United States v. Monsanto Co.*, 1967 Trade Cases (CCH) ¶72,001 (W.D. Pa. 1967) (requiring Monsanto, under the terms of a consent decree, to sell its shares of the newly created firm to its co-venturer). See also 2 WILBUR L. FUGATE, FOREIGN COMMERCE AND THE ANTTTRUST LAWS §11.3 (4th ed. 1991).

233. U.S. courts use a similar, though not identical, rule of reason methodology. See, e.g., *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 302 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1979) (listing relevant variables in rule of reason analysis including:



parent companies in a U.S.-E.C. joint venture were actual competitors in the United States market. For example, relying on dicta of the Supreme Court in *United States v. Penn-Olin Chemical Co.*,<sup>234</sup> the Court of Appeals for the Eighth Circuit applied a two factor test to determine when an international joint venture between potential competitors would violate the antitrust laws. The court stated that "[f]irst, it must be shown that the alleged potential entrant had 'available feasible means' for entering the relevant market, and second, that those means offer[ed] a substantial likelihood of ultimately producing deconcentration of that market or other significant pro-competitive effects."<sup>235</sup> After considering these factors, the Court of Appeals held that a joint venture eliminating the likely prospect of independent entry into a concentrated and non-competitive market by a leading foreign corporation constituted a violation of §7 of the Clayton Act and §5 of the Federal Trade Commission Act.<sup>236</sup> On the other hand, "there would be no need for concern about the prospects of long-term deconcentration of a market which is in fact genuinely competitive."<sup>237</sup>

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the size of the joint venturers; their share of their respective markets; the contributions of each party to the venture and the benefits derived; the likelihood that, in the absence of the joint effort, one or both parties would undertake a similar project, either alone or with a smaller firm in the other market; the nature of the ancillary restraints imposed and the reasonableness of their relationship to the purposes of the venture).

For differences in ideology and approach between the Department of Justice and the federal courts, see Maria Sendra, *Strategic Alliances for Innovation in the Global Market of the 1990s: A Comparative Study of the Relationship Between Innovation and the Patent/Antitrust Mechanisms of the United States and the European Economic Community*, 9 INT'L TAX & BUS. LAW. 382, 393-99 (1991/1992).

234. 378 U.S. 158 (1964). Under the Supreme Court's holding in that case, the factors to be considered in analyzing the likelihood of a substantial lessening of competition as a result of entry by a potential competitor include:

the number and power of the competitors in the relevant market; the background of their growth; the power of the joint venturers; the relationship of their lines of commerce; . . . the reasons and necessities for its existence . . . ; the potential power of the joint venture in the relevant market; an appraisal of what the competition in the relevant market would have been if one of the joint venturers had entered it alone; . . . and such other factors as might indicate potential risk to competition in the relevant market.

378 U.S. at 177. The Court noted that, under §7 of the Clayton Act, *supra* note 221, these factors should be weighed "in terms of the probability of a lessening of substantial competition, not in terms of tangible present restraint." *Id.*

235. *Yamaha Motor Co. v. Fed. Trade Comm'n*, 657 F.2d 971, 977 (8th Cir. 1981) (citing *United States v. Marine Bancorporation Inc.*, 418 U.S. 602, 633 (1974)), *cert. denied sub nom. Brunswick Corp. v. Fed. Trade Comm'n*, 456 U.S. 915 (1982).

236. *Id.*

237. *United States v. Marine Bancorporation*, 418 U.S. 602, 630-31 (1974) *cited in* *In the Matter of Brunswick Corp., et al.*, 94 F.T.C. 1174, 1271 (1979). *See also* *In the Matter of General Motors Corp.*, 103 F.T.C. 374, 386 (1984) (holding that the procompetitive benefits of a GM-Toyota joint venture which introduced a new line of small cars and en-

As the degree of market concentration in the United States increases, U.S.-E.C. joint ventures that raise serious antitrust issues under federal law will be the exceptions rather than the rule.<sup>238</sup> Indeed, a U.S.-E.C. joint venture that poses a threat to U.S. competition would also threaten the maintenance of workable competition in the E.C. and thus fail to meet the conditions of individual exemption under Article 85(3). Nevertheless, the possibility that joint venture agreements will be given different interpretations in the future should not be discounted. It is certainly possible that the respective antitrust authorities will evaluate the potential benefits of the more problematic types of joint ventures from the perspective of conflicting policy goals.<sup>239</sup> In *Fiat/Deere III*,<sup>240</sup> for example, the Commission made certain assumptions about industry consolidation within the E.C. which could be completely irrelevant to an evaluation by the Department of Justice. Further, whereas the Commission may consider that exclusive dealing and exclusive licensing arrangements are ancillary and indispensable to the success of particular joint ventures and would be of benefit to consumers in the E.C., federal authorities may take the view that they are a ruse for international market division which impedes the sale and purchase opportunities of U.S. competitors. Conflicts of this type would need to be resolved within the framework of the recent U.S.-E.C. agreement on competition laws.<sup>241</sup>

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abled GM to learn about Japanese production techniques outweighed the anticompetitive effects of the agreement); *United States v. Fed. Communications Comm'n*, 652 F.2d 72 (D.C. Cir. 1980) (holding that the technological advances in special communications venture between IBM, Aetna and Comsat General Business Communications outweighed the anticompetitive effects).

238. For a recent example of the market concentration approach in the international context, see *Nippon Sheet Glass Company Ltd., et al.; Proposed Consent Agreement With Analysis To Aid Public Comment*, 55 Fed. Reg. 11256 (1990); the commentary on this case by Deborah K. Owen and John J. Parisi, *International Mergers and Joint Ventures: A Federal Trade Commission Perspective*, in *FORDHAM CORPORATE LAW INSTITUTE 1990: INTERNATIONAL MERGERS AND JOINT VENTURES 1*, 16-19 (Barry Hawk ed., 1991).

239. Cf. Diane P. Wood, *International Competition Policy in a Diverse World: Can One Size Fit All*, in *FORDHAM CORPORATE LAW INSTITUTE: E.C. AND US COMPETITION LAW AND POLICY 671* (Barry Hawk ed., 1992).

240. 1992 O.J. (C 87) 3.

241. Agreement between the Government of the United States and the Commission of the European Communities Regarding the Application of their Competition Laws, Sept. 23, 1991, Hein's No. KAV 3050, Temp. State Dep't No. 91-216. See, e.g., Article II:

#### NOTIFICATION

1. Each Party shall notify the other whenever its competition authorities become aware that their enforcement activities may affect important interests of the other Party.
2. Enforcement activities as to which notification ordinarily will be appropriate include those that:

CONCLUSION: FUTURE DEVELOPMENTS IN  
U.S.-E.C. INTERFIRM COOPERATION

Industrial restructuring across Europe offers an unprecedented opportunity for direct participation in the development of a vast and affluent market. In addition to its current population of approximately 325 million people, the Community is likely to accept new members in the near future from the European Free Trade Association<sup>242</sup> and, in the medium to longer terms, from the former Soviet bloc.<sup>243</sup> In addition, the Community is well situated for exploitation of the new markets opening in Eastern Europe.<sup>244</sup>

Joint ventures with E.C. companies are also set to assume an increasingly important role in the competitive strategies of U.S. corporations. As reduced information and transportation costs make formerly distant foreign markets more attractive investment prospects,<sup>245</sup> joint ventures, which have long been recognized as an expeditious way of securing access to new markets through partners with regional expertise,<sup>246</sup> should continue to be a popular form of business association in the Community.<sup>247</sup>

More generally, for several reasons joint ventures offer an effective means of adjusting to and promoting the technological

- a) Are relevant to enforcement activities of the other Party;
- b) Involve anticompetitive activities . . . carried out in significant part in the other Party's territory; . . .

. . . .

- d) Involve conduct believed to have been required, encouraged or approved by the other Party; or
- e) Involve remedies that would, in significant respects, require or prohibit conduct in the other Party's territory.

242. The members of the EFTA are Austria, Finland, Iceland, Lichtenstein, Norway, Sweden and Switzerland. *Hungary, Bulgaria Latest Nations to Sign Trade Agreements with EFTA*, INT'L TRADE REP., March 31, 1993. Austria and Sweden will probably join the E.C. in January 1995. See Dennis Swann, *The single European market in context*, XXXVII THE ANTI-TRUST BULLETIN 283, 302-303 (1992).

243. See *id.*

244. See, e.g., *An American Business Perspective of the Single Market*, EUROPE, Feb. 1993, at 27, 28 ("As you see the central and eastern European opportunities moving into the forefront in the years ahead, the single market is the most logical entry point to scale your operations to treat Eastern Europe as well.")

245. COLLINS & DOORLEY, *supra* note 1, at 5.

246. See, e.g., John R. Wille, *Joint-Venturing Strategies*, in HANDBOOK OF JOINT VENTURING, *supra* note 1, at 3, 11 [hereinafter Wille, *Joint Venturing Strategies*]; Ellen R. Auster, *International Corporate Linkages: Dynamic Forms in Changing Environments*, XXII COLUM. J. WORLD BUS. Summer 1987, at 3, 4.

247. See, e.g., Janet Guyon, *Business Plan: Foreign competition will change the face of Europe's corporate landscape*, WALL ST. J. Feb. 3, 1993, at R7 ("For all companies, the trick to prospering in the coming decade will be to expand globally while adapting to local tastes, a gambit being called 'globalization.' Europe may be becoming a single market, but it isn't homogeneous in products, style or prices.")

change that is essential to commercial success in an increasingly international trading environment.<sup>248</sup> First, joint ventures permit the parent companies to diversify the risk of large capital investments required to develop new generations of products.<sup>249</sup> They can be used by small and medium-sized companies to remain competitive with larger companies as well as by market leaders about to embark on an unusually risky project.<sup>250</sup> Second, as the complexity and expense of new product development more frequently requires firms to develop more specialized areas of expertise, joint ventures will allow the parent companies to exploit their proprietary knowledge with the complementary technologies of their partners to develop new applications.<sup>251</sup> Third, joint ventures enable the partners to acquire essential know-how and production techniques quickly. Of course, ready access to new technologies grows in importance as product lives become shorter due to the pace of technological change and the ability of firms rapidly to emulate the innovations of their competitors.<sup>252</sup> Finally, joint ventures enable firms to pool their human resources to solve problems beyond the reach of the individual firms.<sup>253</sup> Access to the knowledge and experience of "symbolic analysts"<sup>254</sup> is the competitive advantage on which, more than any other, commercial success in the new skills economy depends.<sup>255</sup>

The foregoing suggests that joint ventures are a necessary means of acquiring competitive strength in changing markets. Indeed, they can be used by parent companies to "forc[e] their industries' structures to evolve in a favorable manner."<sup>256</sup> As technological

248. See COLLINS & DOORLEY, *supra* note 1, at 7-8; HARRIGAN, *supra* note 1, at 10-13.

249. Wille, *Joint Venturing Strategies*, *supra* note 246, at 14-15.

250. See, e.g., *Now for the really big one*, THE ECONOMIST, Jan. 9, 1993 at 57 (on Boeing's invitation to members of the Airbus consortium to discuss a feasibility study on a super-jumbo jet).

251. See, e.g., ROBERT P. LYNCH, THE PRACTICAL GUIDE TO JOINT VENTURES AND CORPORATE ALLIANCES 9 (1989) [hereinafter LYNCH] (referring to the "hybridization" of technologies as the process by which firms develop new products through the acquisition of know-how which they lack the breadth of knowledge to develop themselves); HARRIGAN, *supra* note 1, at 17-18.

252. See, e.g., COLLINS & DOORLEY, *supra* note 1, at 6 ("[M]ultinationals must be prepared to use strategic partnerships to acquire the best technology from . . . outside); LYNCH, *supra* note 264, at 9 (asserting that it is essential to introduce a good product on time or suffer a loss of potential market share).

253. See LYNCH, *supra* note 251, at 10.

254. REICH, *supra* note 220 (symbolic analysts conceptualize problems, devise solutions and plan their execution). For the role of "symbolic analysts" in the global economy, see *id.* at 171-240.

255. Cf. *id.* at 87-97 (asserting that the most profitable firms are those which consist of symbolic analysts guiding ideas through the enterprise).

256. HARRIGAN, *supra* note 1, at 19 (citing Kathryn R. Harrigan, *Joint Ventures and Global Strategies*, XIX COLUM. J. WORLD BUS., Summer 1984, at 7.

advance in many sectors blur the boundaries between formerly distinct activities,<sup>257</sup> partnerships between firms with complementary technologies will serve as an effective vehicle with which to exploit the new business environments created.<sup>258</sup>

Joint ventures' unlimited potential has not gone unnoticed by the Community. Rather, the Commission's single market initiative is an unprecedented step towards the internationalization of product markets. Accordingly, cooperative joint ventures have been a popular form of adaptation for E.C. firms. Now, in partnerships with non-E.C. companies, they may act as a stimulus for further global economic integration. Certainly, the statistics suggest that E.C. firms are actively seeking new sources of competitive strength in domestic and international markets and are more willing than in the past to conclude alliances that promise an infusion of international capital and new ideas.<sup>259</sup> Given this willingness and the importance of broader economic changes currently shaping Europe the Community will continue to attract U.S. joint venturers seeking their own advantages in international markets.

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257. Kathryn R. Harrigan, *Strategic Alliances: Their New Role in Global Competition*, XXII COLUM. J. WORLD BUS. Summer 1987, at 67, 69.

258. For an example of this type of global strategic thinking, see *BT and EDS: Digital Dating*, THE ECONOMIST, Feb. 6, 1993, at 68 (commenting on the response of Britain's BT and America's Electronic Data Systems to the growing convergence between computers and telecommunications).

259. See *supra* note 194.