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THE EC JOINT VENTURE GUIDELINES: CODIFICATION AND COSMETICS BUT NO BINDING DEADLINES

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I. INTRODUCTION

Any discussion of the European Community's ("EC") recently published Notice concerning the assessment of cooperative joint

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ventures pursuant to Article 85¹ of the EEC Treaty (the "Joint Venture Guidelines" or "JVG")² cannot avoid referring to EC Regulation No. 4064/89 on the control of concentrations between undertakings (the "Merger Control Regulation" or the "MCR").³

The MCR finally established the EC Commission's exclusive authority⁴ to vet mergers having a "Community dimension"⁵ (subject to review by the European Court of First Instance and, ultimately,

1. Treaty Establishing the European Community, March 25, 1957, art. 85, 298 U.N.T.S. 11, 47 (hereinafter EEC Treaty). Article 85 of the EEC Treaty concerns agreements which have the object or effect of restricting competition (*see further* Section III, *infra*), whereas Article 86 of the EEC Treaty concerns abuse of a dominant position by a company. Article 85 always requires at least two participating parties, whereas Article 86 behavior is most frequently unilateral. However, there have been cases of so-called joint and collective dominance: Italian Flat Glass, 1988 O. J. (L33) 44; on appeal Case T-68, 77 & 78/89, judgment of March 10, 1992, not yet reported.

2. 1993 O. J. (C43)2.

3. Council Regulation on Control of Concentrations between Undertakings, 1989 O. J. (L395) (hereinafter MCR), *as amended*. The Regulation was adopted on December 21, 1989, and came into force on September 21, 1990. The MCR is supplemented by implementing rules which set forth the details of the time limits for notification, including the notification Form CO (Commission Regulation 2367/90, 1990 O. J. (L219) 5), and Notices regarding (i) restrictions ancillary to concentrations and (ii) concentrative and cooperative operations (the "Concentrative JV Notice") 1990 O. J. (C203) 5, 10.

4. According to MCR Article 21(2) "No Member State shall apply its national legislation on competition to any concentration that has a Community dimension". The MCR has effectively established a "one-stop-shop" for clearing qualifying mergers, thus avoiding the costly and time consuming exercise of obtaining merger approvals in the individual EC Member States. (It should be noted that certain Member State investment approvals will still have to be sought by qualifying mergers, but these are not competition law type approvals.)

5. Mergers will qualify as having a "Community dimension", and will therefore be subject to *a priori* notification and review, where the combined aggregate worldwide turnover (after turnover-related taxes) of all the participating companies is greater than 5,000 million ECU, and the aggregate EC-wide turnover of each of at least two of the participating companies is more than 250 million ECU. Where the merger relates only to (a) part(s) of (a) company(ies), the threshold will be calculated by reference to the relevant part(s). These thresholds are subject to review and modification by the end of 1993. However, mergers between companies which realize two thirds or more of their aggregate EC-wide turnover in the same Member State will not have a Community Dimension, and will therefore not be subject to the Regulation (though they will remain subject to the relevant Member States' national rules, if any). The thresholds are supposed to be reduced at the end of 1993, when the operation of the MCR will be reviewed. The figure of 2 billion ECU has been mentioned, but this is not definite. If this does happen, many more mergers will qualify for the one-stop-shop clearance at EC level. However, there has been some tension in a number of cases (*e. g.*, Alcatel /AEG Kabel, 1992 O. J. (C6) 23 and Mannesman/Hoesch, Commission Press Release IP/92/920 of November 12, 1992) where Member States felt that a particular case should have been treated nationally, but the EC Commission refused (MCR Article 9 permits referral back of appropriate cases for evaluation under national competition laws). Under the circumstances, the Member States may not want the threshold to be reduced. MCR Article 9 is also to be reviewed by the end of 1993. *See further* note 9, *infra*.

the European Court of Justice ("ECJ"),⁶ and settled the long standing debate about the so called "partial merger" theory.⁷ Article 3(2), para. 2 of the MCR lays down that certain joint ventures may indeed be "concentrative", and hence subject to the MCR.⁸ The successful operation of the MCR, and specifically the ability of the Commission's Merger Task Force (part of Directorate General IV ("DG IV") responsible for competition generally) to respect the tight deadlines⁹ for responding to the obligatory a priori notifications under the MCR, put the rest of DG IV under pressure to streamline procedures for non-merger clearances. Traditionally, the clearance for joint ventures under Article 85¹⁰ of the EEC Treaty can take anywhere from twelve to twenty four months. Yet, by the time the JVG were published, the Merger Task Force had already completed approximately fifty concentrative joint venture cases. The expedited procedures under the MCR caused the business and legal community to demand similar procedures for the notification and clearance of cooperative joint ventures.

The Commission reacted by dusting off its failed attempt in

6. The European Court of First Instance was created in November 1988 in order, *inter alia*, to handle competition disputes on appeal from the EC Commission and thus speed up the processing of cases. Decisions from the Court of First Instance (which became operational in November 1989) may be appealed to the ECJ on matters of law only.

7. Namely, could parties avoid the application of Article 85 of the EEC Treaty by establishing a joint venture which went beyond mere joint cooperation and was in reality a merger of certain elements of the parties' business operations.

8. MCR, Art. 3(2), para. 2, states: "The creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity, which does not give rise to coordination of the competitive behavior of the parties amongst themselves or between them and the joint venture, shall constitute a concentration within the meaning of paragraph 1(b)".

9. Under the MCR, a merger must be notified within one week of the merger agreement or takeover. The merger is automatically suspended until such notification takes place. The Commission has a period of one month from the date of notification to determine whether the merger does in fact fall within the scope of the MCR. However, where a Member State requests the Commission to undertake an analysis relating to a distinct local market problem (under MCR Article 9), then this period of one month is extended to six weeks. If a merger falling within the scope of the MCR creates or strengthens a dominant position within the EC, the Commission must decide within the said one-month (or six-week) deadline whether the merger is compatible with the MCR, or to initiate proceedings (to determine after a more detailed review the compatibility of the merger with the MCR). The Commission's evaluation is based on a hybrid Article 85/Article 86 test. The Commission must reach a final decision on the compatibility of a merger (with or without conditions) with the MCR within a further delay of four months from the date of the initiation of proceedings. In short, the overall period for a final commission decision is either five months or five and a half months, depending upon whether the Member State local consideration procedure is initiated or not.

10. EEC Treaty, *supra* note 1, art. 85, 298 U.N.T.S. 11, 47.

1985 to introduce guidelines for joint ventures¹¹ and redrafting the previously rather vague and general language in light of the Concentrative JV Notice. This article purposefully does not use the term "new" when referring to the JVG, because there is nothing new in its substance. Rather, the JVG is a codification of the Commission's case law and administrative practice to date. The JVG has the merit of providing a quick reference document with general pointers on how to evaluate a joint venture. But it cannot, and must not, be used as a substitute for the rigorous case law analysis which is crucial in determining (a) whether a joint venture is caught by Article 85(1) of the EEC Treaty and (b) whether such a joint venture is likely to be exempted pursuant to Article 85(3) of the EEC Treaty. The Commission is itself at pains to repeatedly underline the need for a case by case approach.¹²

In view of the above described background to the JVG, this paper will first address what the JVG does not do, prior to reviewing the EC competition law framework in which the JVG operates, and the substance of the JVG itself. The EC's notification and enforcement procedures, including its fining policy, are subsequently explained in more detail. Finally, a few comments are made about the decentralized application of EC competition law.

II. WHAT THE JVG DOES NOT DO

Long aware that joint ventures had to be examined on a case by case basis with regard to substantive issues, businessmen and legal practitioners were nonetheless keen to obtain some procedural legal certainty from the Commission in the JVG. They were disappointed.

A. *No Fixed Response Deadlines*

Without doubt, the motivation behind the JVG was the concern over the so-called two-speed competition law for cooperative and concentrative joint ventures. Initially, the structure of the JVG was more akin to that of an EC Regulation. In mid-1991, the Commission's approach was to advocate the same "pre-meeting"

11. Unpublished internal Commission document entitled "Principles governing the assessment of joint ventures under the EC competition rules," IV/471/85-EN.

12. See, for example, JVG paras. 5 & 14.

procedure for joint ventures as used under the MCR¹³ in order to (i) save time, (ii) focus on the relevant information to be requested (and thereby avoid an incomplete notification which will delay the running of deadlines), and (iii) hold more ongoing informal discussions and meetings. The impact of this approach was to have meant that:

- (a) Within two to three months of the notification, the Commission would provide an initial reaction.
- (b) After four months, the Commission would have been able to publish a Notice in the Official Journal, pursuant to Regulation 17,¹⁴ briefly describing the case and offering interested parties the opportunity to submit written comments within one month.
- (c) Within six months, the Commission would have been in a position to give approval by means of a "comfort letter."

The Commission considered that there was no need for a formal decision if the joint venture did not raise legal problems. If problems arose (e.g., because of a complaint by an interested party), then a formal decision could have been adopted subsequently. However, the draft JVG, made public in early 1992, contained only a general reference to procedural deadlines, and even this disappeared by the time the JVG was adopted.

Despite significant pressure, the Commission once again refused to commit itself to specific deadlines for approving notified joint ventures. The 1991 draft version¹⁵ of the JVG was preceded by a discussion paper which stated that a "self-imposed time limit for the completion of the various procedures" would be applied. This would have been a welcome element of legal certainty. However, the final text of the JVG makes no reference to deadlines. The nearest the Commission came to such an undertaking are the various statements of Sir Leon Brittan, the former Commissioner for Competition, in December 1992 about speeding up competition law procedures.¹⁶ In summary, within two months from the date of the complete notification, the Commission services will inform the parties in writing whether or not the agreement concerned is com-

13. The Merger Task Force encourages parties to hold meetings with them prior to drafting the Form CO notification so as to ensure that any potentially difficult issues are identified and addressed, and to avoid giving irrelevant information.

14. See Section VI, *infra*.

15. IV/647/91-EN.

16. Sir Leon Brittan, *The Future of EC Competition Policy* (Dec. 7, 1992).

patible with EC competition rules. The character of this letter will vary according to the circumstances of the case: it may be a "comfort letter" confirming the compatibility of the agreement with Article 85(1) or (3).¹⁷ In other cases, the commission will formally approve the agreement by announcing a negative clearance or exemption decision. Where the compatibility of the agreement with the competition rules is doubtful, the parties will receive a "warning letter" which will inform them of the Commission's intention to launch an in-depth inquiry with a view to adopting an exemption or prohibition decision. In all cases where a formal decision is envisaged, the Commission services will also inform the undertakings concerned in advance of the envisaged final date and of any modification of it. These constitute purely internal instructions for the handling of the so-called "structural" cases, and are not legally binding.

Realistically, the announced timing will be easy to observe if the joint venture in question does not raise any serious competition issues or problems and a "comfort letter"¹⁸ is deemed appropriate. But a "warning letter"¹⁹ signaling serious competition problems would effectively lead to an open-ended response time. Yet, it is precisely those cases which merit a warning letter that require certainty on deadlines. However, this speech is even less binding on DG IV under the new Commissioner, Mr. Karel van Miert, than the JVG which takes the form of a Commission Notice.²⁰ To be fair, in one recent case,²¹ the Commission did indicate that it would give its decision within two months. However, as at the time of this writing, over two and a half months after the announcement, nothing has been published.²²

17. EEC Treaty, *supra* note 1, art. 85, 298 U.N.T.S. 11, 47.

18. See Section VI, *infra*.

19. See Section VI, *infra*.

20. The Commission's Notices, although good indicators of the Commission's position, are not legally binding (whereas Regulations, Decisions and Directives are), EEC Treaty art. 189.

21. LCD's, a joint venture between Philips Electronics N.V., Thomson Consumer Electronics S.A. and Sagem which was initially notified as a merger: See Reuters, Jan. 19, 1993.

22. DG IV has not yet set up a systematic procedure for the expedited treatment of Article 85(3) notifications, either for ordinary cases or structural cases. Presently, a small working group is in the process of developing a procedure for the structural cases. Such a procedure would, *inter alia*, entail the following steps:

Each structural case will receive a numerical code, preceded by the letters "CS" ("Case Structure"), indicating that the case will benefit from the new procedure.

Immediately after notification, a short notice will be published in the EC Official Journal, analogous to the one published in case of a notified merger. The notice will indicate the

B. No Comments on the Duration of Exemptions

Another of the industry's concerns is the time limits imposed on the duration of cooperative joint ventures approved under the Article 85(1)-(3)²³ process. These range traditionally between five and ten years. Fifteen and even twenty year exemptions are granted in exceptional cases.²⁴ Extensions of the initial exemption period are possible, but they are entirely at the Commission's discretion.²⁵ The JVG is totally silent on this subject. It would have been more satisfactory to have had a minimum time period of no less than ten years while recognizing the need for case by case variations. A period less than this should have required detailed justification by the EC Commission, as most joint ventures are long term projects in which the partners invest a substantial amount of time and money. It is essential that parties making a commercial decision as to whether they should form a joint venture know in advance just how long they will be able to cooperate. Accordingly, the JVG should have contained a set of criteria enabling potential joint venture partners to determine, in advance and with reasonable certainty, how long their proposed cooperative joint venture is likely to be exempted. These criteria could have included a recognition that the exemption duration will depend *inter alia* on:

- (i) the size of the investment, so that the joint venture partners are assured that they can earn a reasonable return on their investment;
- (ii) the tax position of the joint venture, so that it can last long enough to enable the use of loss carry-forwards for early years;
- (iii) the particular joint venture activity, so that, for example, joint production ventures can obtain credit for the time it takes to build a plant and start production; and
- (iv) employee concerns, so that joint venture employees can at least obtain a minimum level of social security benefits.

fact of the notification, the names of the parties, the nature of the operation and the economic sectors involved.

Pursuant to the Communication and the announcement made by Sir Leon Brittan in December, the first stage will end two months after notification.

23. EEC Treaty, *supra* note 1, art. 85, 298 U.N.T.S. 11,47.

24. *E.g.*, Amersham Buchler, 1982 O.J. (L314)34; De Laval/Stork, 1988 O.J. (L59) 32.

25. *E.g.*, De Laval/Stork (No. 2), note 24, *supra*.

III. THE EC COMPETITION LAW FRAMEWORK

Whereas the MCR combines elements of both Articles 85 and 86 of the EEC Treaty,²⁶ the JVG focuses on the application of Article 85 to joint ventures. A few comments about Article 85 are therefore appropriate.

A. *General Scope*

Article 85(1)²⁷ of the Treaty prohibits certain anti-competitive practices, and is applicable if four conditions are fulfilled: there must be an agreement or concerted practice between undertakings²⁸ that restricts competition and affects trade between Member States,²⁹ in an appreciable manner.³⁰

Agreements and concerted practices caught by Article 85(1)³¹ are automatically void under Article 85(2)³² of the Treaty, unless an exemption has been granted by the EC Commission under Article 85(3).³³ An exemption is granted either pursuant to an individ-

26. In other words, the MCR enables the Commission to grant an EEC Treaty Article 85(3)-type approval, provided that the merger does not create or strengthen a dominant position (as per Article 86) which would significantly impede competition in the EC, or a substantial part of the EC. Unlike Article 86, the MCR does not require "abusive" behavior. The mere creation or strengthening of the dominant position is enough.

27. EEC Treaty, *supra* note 1, art. 85, 298 U.N.T.S. 11, 47.

28. The terms "agreement" and "undertaking" have been very widely construed by the ECJ and will, in practice, cover any form of understanding between natural and/or legal persons. However, according to the ECJ's case law, agreements between a parent and its subsidiary will generally fall outside Article 85(1). Case 22/71, *Bequelin Import v. S.A.G.L. Import Export*, 1971 E.C.R. 949. *But see* Section III (C), *infra*.

29. Pursuant to the "effects doctrine", the EC Commission applies Article 85(1) to non-EC entities whose behavior has an impact within the EC (*Woodpulp*, 1985 O.J. (L85) 1, later appealed to the ECJ. *See*, note 42, *infra*). In the Notice relating to imports of Japanese goods into the EC, the Commission had already made it clear that measures to restrict quantities of imports from third countries, or their prices or quality or the like, will be caught by EEC Treaty art. 85(1) even if the headquarters of the companies involved are outside the EC; *see* Section III (B), *infra*.

30. According to its Notice on agreements of minor importance, the so called *de minimis* rule (1986 O.J. (L231) 2), the Commission takes the view that agreements between undertakings engaged in the production or distribution of goods, or in the provision of services generally, do not fall under EEC Treaty art. 85(1) if:

said goods or services do 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 and the aggregate annual turnover of the participating undertakings does not exceed 200 million ECU (approximately U.S. \$245.5 million).

31. EEC Treaty, *supra* note 1, art. 85, 298 U.N.T.S. 11, 47.

32. *See supra* note 31.

33. *See* Sections V & VI, *infra*.

ual notification of an agreement or pursuant to so-called block exemption regulations which have been adopted and set forth general exemption criteria for particular categories of agreement e.g., specialization, research and development, exclusive distribution, and patent or know-how licensing,³⁴ or for agreements in a particular sector e.g., distribution in the motor vehicle sector.³⁵

Article 85 (1)³⁶ is widely interpreted by the EC Commission, with the result that practically all forms of agreements between firms of a substantial size are caught and should, according to the Commission's traditional doctrine, be notified for exemption or structured so as to qualify under an applicable block exemption regulation. While the Commission tries to discourage corporations (or their legal advisors) from adopting the "rule of reason" approach in determining whether Article 85 (1)³⁷ applies to a given agreement, the Commission accepts that it cannot process all the notifications it receives for exemption under Article 85(3).³⁸ Hence, there is a recent tendency to adopt more block exemption regulations and an attempt to institute less formal approval procedures.

B. Extraterritorial Application of EEC Treaty art. 85(1)

In a Notice concerning Japanese imports,³⁹ the Commission emphasized that the fact that "the head offices of several or all the participant undertakings [in an agreement] are outside the Community does not prevent EEC Treaty art. 85(1)⁴⁰ from being applied, as long as the results of the agreements, decisions or concerted practices spread to the territory of the common market". It is generally accepted that "any agreement which prevents undertakings in third states from becoming suppliers or competitors within the Community may fall under Article 85(1)",⁴¹ subject to the proviso that such effect must be appreciable (i.e., not de minimis).

Case law has confirmed that agreements producing the requi-

34. See Section V, *infra*.

35. Regulation No. 123/85, 1985 O.J. (L15) 16.

36. EEC Treaty, *supra* note 1, art. 85, 298 U.N.T.S. 11, 47.

37. See *supra* note 36.

38. See *supra*, note 36.

39. Commission Notice on Imports into the Community of Japanese Goods, 1972 O.J. (C111) 13.

40. EEC Treaty, *supra* note 1, art. 85, 298 U.N.T.S. 11, 47.

41. *Id.*; see, e.g., Reuter/BASF, 1976 O.J. (L254) 40.

site anti-competitive effect on trade within the EC will fall within the scope of Article 85(1),⁴² even where all the parties are situated abroad and absent any presence or activity in the EC via a related or subsidiary corporation situated in a Member State.⁴³ In short, assuming that the other requirements for the application of Article 85(1)⁴⁴ are met, its application is not avoided because the head office and/or the primary activities of one or more of the parties is situated outside the EC.

C. Application of Article 85(1) to Intra-group Agreements

The ECJ has held that Article 85(1)⁴⁵ does not apply to agreements between "undertakings belonging to the same concern and having the status of parent company and subsidiary, if the undertakings form an economic unit within which the subsidiary has no real freedom to determine its course of action on the market, and if the agreements or practices are concerned merely with the internal allocation of tasks as between the undertakings" (emphasis added).⁴⁶ Therefore, the essential point is the determination of whether the individual companies retain the possibility of adopting marketing strategies separate to those laid down by the parent company. If so, Article 85(1)⁴⁷ can apply to relationships between members of the same group.⁴⁸

In the case of partly owned subsidiaries, it has been suggested that the test for the application of Article 85⁴⁹ is whether one undertaking has acquired, actually or potentially, control over another undertaking.⁵⁰ This test would apply irrespective of whether the shareholding was fifty percent or twenty five percent. It is clear from the wording of the Complementary Note to Form A/B⁵¹ that

42. EEC Treaty, *supra* note 1, art. 85, 298 U.N.T.S 11,47.

43. Joined Cases 89, 104, 114, 116 & 177/85, Woodpulp 1988 E.C.R 5193. Previously, the Commission had always demonstrated an EC presence by at least one party to such anti-competitive agreements; e.g., Case 22/71, Bequelin Import v. GL Import Export, 1971 E.C.R 949.

44. EEC Treaty, *supra* note 1, art. 85, 298 U.N.T.S. 11, 47.

45. *See supra* note 44.

46. Case 15/74, Centrafarm v. Sterling Drug, 1974 E.C.R 1147.

47. EEC Treaty, *supra* note 1, art. 85, 298 U.N.T.S. 11, 47.

48. Case 30/87, Corine Bodson v. S.A. Pompes Funèbres des Régions Libérées, 1988 E.C.R 2479.

49. EEC Treaty, *supra* note 1, art. 85, 298 U.N.T.S. 11, 47.

50. *See* Bellamy & Child, Common Market Law of Competition, at 129 (3rd ed.).

51. The form used to make an application for a negative clearance and/or notification for an exemption to the EC Commission. *See further* Section VI, *infra*.

the Commission does not exclude the possibility that a minority holding may nonetheless confer control (the Commission not only asks notifying parties to indicate the companies in which more than fifty percent of the shares is held, but also those companies in which more than twenty five percent is held).⁵²

IV. APPLICATION OF EEC TREATY ART. 85 TO JOINT VENTURE AGREEMENTS

A. General Overview

Joint ventures have long been regarded as the chameleons of EC competition law. Sometimes they are mergers, sometimes not. To date, cooperative joint ventures (i.e., joint ventures which are not mergers) have been subject to review by the EC Commission under Article 85⁵³ of the EEC Treaty as agreements which may restrict or distort competition. The Commission has taken approximately one hundred formal decisions since 1968 concerning joint ventures.⁵⁴ Whether the formation of a joint venture amounts to a restrictive practice and therefore falls within the ambit of Article 85(1)⁵⁵ will depend on the particular circumstances of each case.⁵⁶ However, the general rule is that any agreement between two or more enterprises in any form whatsoever under which a third corporation is owned or operated jointly falls under Article 85(1)⁵⁷ of the Treaty if the agreement has the effect, directly or indirectly, actually or potentially, of restricting or reducing competition between the parent companies, or from third parties or with the joint venture itself.⁵⁸

52. 1985 O.J. (L240) 1. This attitude is in fact reflected in the Commission's block exemption regulations where, to be deemed a "connected" company, the issue of control is not determined by looking at the shareholding in a corporation but rather the ability to directly or indirectly influence the affairs of such company. See, for example, Commission Regulation 1983/83 art. 4(2), 1983 O.J. (L173) 1, *as amended*, and Commission Regulation 2349/84 art. 12(1), 1984 O.J. (L219) 15, *as amended*.

53. EEC Treaty, *supra* note 1, art. 85, 298 U.N.T.S. 11, 47.

54. There has been no ECJ judgment in this area. Compare, however, the number of decisions adopted since 1968, with the approximately fifty concentrative joint venture decisions adopted since September 21, 1990.

55. EEC Treaty, *supra* note 1, art. 85, 298 U.N.T.S. 11, 47.

56. The factual situation and not the terminology or legal form adopted will determine the result. See Sixth Report on Competition Policy, points 53, 54 (1977); and JVG para. 4.

57. EEC Treaty, *supra* note 1, art. 85, 298 U.N.T.S. 11, 47.

58. SHV/Chevron, 1975 O.J. (L38) 14. The ECJ has stated that even if the particular clauses of an agreement are not expressly restrictive, the overall effect of the agreement itself may still be anti-competitive. See Case 56/65, *Société Technique Minière v.*

In practice, the Commission will take into account all relevant factors in deciding whether actual or potential competition exists.⁵⁹ The relevant issues to consider include the amount of the investment in the joint venture, its production and sales, and the risk factors involved in establishing the joint venture.⁶⁰ These considerations are not exhaustive and must be supplemented with a specific market analysis. Nonetheless, as the Commission's interpretation of Article 85(1)⁶¹ is generally broad, most sizeable joint ventures are likely to be viewed as caught by the prohibition in Article 85(1), thereby requiring a notification for an individual exemption.⁶²

The Commission determined in GEC/Weir,⁶³ that "even in the absence of express provisions, the creation of a joint venture generally has a notable effect on the conduct of parent parties who have a significant holding in the joint venture. Within the field of the joint venture and in related fields such parties are likely to coordinate their conduct and be influenced in what would otherwise have been their independent decisions and activities". Furthermore, the Commission has stated that "parent companies will not in general compete with the activities of joint ventures in which they hold substantial stakes, even if they are contractually free to do so".⁶⁴

The Commission has looked most favorably upon joint ventures involving technical collaboration which enhances technical progress in the EC.⁶⁵ The Commission's principal concern in such instances is that the parties to the joint venture should independently have access to the results of the joint project, as well as to the preexisting technology deemed to be indispensable for the exploitation of the new technology developed by the joint venture.⁶⁶

Maschinenbau Ulm, 1966 E.C.R. 235.

59. Jaz-Peter, 1978 O.J. (L61) 17; *see infra* note 60, point 55.

60. *See further* Thirteenth Report on Competition Policy, point 55 (1983).

61. EEC Treaty, *supra* note 1, art. 85, 298 U.N.T.S. 11, 47.

62. All joint ventures likely to be prohibited by EEC Treaty art. 85(1) need to be notified to the EC Commission with a request for an individual exemption under Article 85(3) or, alternatively, a negative clearance indicating that Article 85(1) is not applicable. *See infra* Sections V & VI.

63. 1977 O.J. (L327) 26.

64. *Id.*

65. *See, e.g.,* National Coal Board (Bull. EC 5 - 1985, point 2.1.31); BP/Kellogg, 1985 O.J. (L369) 9. Note that the Commission has never prohibited a joint venture involving the transfer of technology where the parents were not *actual* competitors. In addition, joint ventures involving specialization and/or research and development may qualify for a block exemption under Regulations 417/85 or 418/85, respectively. *See infra* Section V.

66. De Laval/Stork (No. 1), 1977 O.J. (L215) 11.

B. *The Substantive Structure of the Joint Venture Guidelines*

The definition of a cooperative joint venture under the JVG is accomplished by a negative process. Namely, those joint ventures which are not concentrative joint ventures pursuant to Article 3(2), para. 2, of the MCR are cooperative, though the JVG admits that the delimitation between the two "can be difficult in individual cases".⁶⁷

The JVG excludes the application of Article 85(1)⁶⁸ to joint ventures between parents within the same group, or which are de minimis, or which fall within the 1968 Notice on cooperation between companies.⁶⁹ In all other cooperative joint venture cases, the application of Article 85(1)⁷⁰ has to be appraised by focusing on the relationship between the parties to the joint venture and on the effects of their cooperation on third parties. The JVG makes it clear that the impact of networks of joint ventures can be especially restrictive of competition.⁷¹ An appraisal of whether a particular joint venture restricts competition will address the following primary issues:

(a) Competition between parent companies

Can the tasks of the joint venture be realistically performed by

67. JVG, para. 10. Cooperative joint ventures are those: whose activities are *not* to be performed on a lasting basis, especially those limited in advance by the parents to a short time period, which *do not perform all the functions of an autonomous economic entity*, especially those charged by their parents simply with the operation of *particular functions* of an undertaking (*partial-function JVs*), which perform all the functions of an autonomous economic entity (*full-function JVs*) where they give rise to coordination of competitive behavior by the parents in relation to each other or to the JV.

68. EEC Treaty, *supra* note 1, art. 85, 298 U.N.T.S. 11, 47.

69. JVG, para. 15. The 1968 Notice (1968 O.J. (C75) 3, *as amended*), states that the types of cooperation referred to in said Notice do not restrict competition because: they have as their sole objective the procurement of nonconfidential information and, therefore, serve in the preparation of autonomous decisions of the participating enterprises; they have as their sole objective management cooperation; they have as their sole objective cooperation in fields removed from the market; they are concerned solely with technical and organizational arrangements; they concern solely arrangements between non-competitors; even though they concern arrangements between competitors, they neither limit the parties' competitive behavior nor affect the market position of third parties.

70. EEC Treaty, *supra* note 1, art. 85, 298 U.N.T.S. 11, 47.

71. JVG, paras. 27-31; and Optical Fibres, 1986 O.J. (L236) 30.

the parents individually?⁷²

(b) Competition between the parent companies and the joint venture

Will the joint venture (and in particular a full-function joint venture supplying to, competing with or buying from one or more parent) result in a division of geographic markets, product markets or customers?⁷³

(c) Effects of the joint venture on the position of third parties

Does the creation of a joint venture result in the pooling of market power by the parents (e.g., for purchases or sales) which (i) excludes from the market the parents' traditional suppliers or customers; (ii) creates a barrier to market entry by potential competitors or (iii) impedes the growth of the parents' actual competitors?⁷⁴

(d) Assessment of the appreciable effect of restrictions of competition

The most important questions in this context are:

What are the market shares of the parent companies and the joint venture, the structure of the relevant market and the degree of concentration in the sector concerned?

What are the economic and financial strengths of the parent companies, and any commercial or technical edge which they may have in comparison to their competitors?

72. This was elaborated in the Thirteenth Competition Policy Report, point 55 (1985).

The JVG repeats the criteria:

Contribution to the JV

Does each parent company have sufficient financial resources to carry out the planned investment? Does each parent company have sufficient managerial qualifications to run the JV? Does each parent company have access to the necessary input products?

Production of the JV

Does each parent know the production technique? Does each parent make the upstream or downstream products himself and does it have access to the necessary production facilities?

Sales of the JV

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 channel needed to sell the products manufactured by the JV?

Risk factors

Can each parent company on its own bear the technical and financial risks associated with the production operations of the JV?

Access to the relevant market

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 on its own? Can each parent overcome existing barriers within a reasonable time and without undue effort or cost?

73. JVG, paras. 21 & 22.

74. JVG, paras 23-25.

What is the market proximity of the activities carried out by the joint venture?

Are the fields of activity of the parent companies and the joint venture identical or interdependent?

What is the scale and significance of the joint venture's activities in relation to those of its parents?

To what extent are the arrangements between the firms concerned restrictive?

To what extent is market access by third parties *restricted*?⁷⁵

The JVG restates that joint ventures between non-competitors are not generally problematic from a competition law perspective, provided that the market access of third parties is not significantly affected. In this latter regard, attention must be paid particularly to the upstream or downstream activities of the joint venture in relation to its parents.⁷⁶ Conversely, joint ventures between competitors will invariably lead to an interplay between the activities of the joint venture and its parents.⁷⁷ While each case must be assessed on the basis of its own facts, the following different situations are identified by the JVG:⁷⁸

Where the joint venture operates on the same market as its parents, the normal consequence is that competition between all participating undertakings will be restricted.

Where the joint venture operates on a market upstream or downstream to that of the parents with which it has supply or delivery links, the effects on competition will be the same as in the case of a production joint venture.

Where the joint venture operates on a market adjacent to that of its parents, competition can only be restricted when there is a high degree of interdependence between the two markets. This is especially the case when the joint venture manufactures products which are complementary to those of its parents.

C. *Ancillary Restrictions*

The JVG adopts the language of the MCR and distinguishes between the restrictions inherent in the creation and operation of a

75. JVG, para. 26.

76. JVG, paras. 32-35.

77. JVG, para. 36. JVG Paras. 37-40 give, respectively, examples of restrictions in joint ventures for R&D, sales, purchasing and manufacturing inputs for the parents.

78. JVG, para. 41.

joint venture, and restrictions in additional agreements. These additional agreements are said to be directly related to and necessary⁷⁹ for the establishment and the operation of the joint venture if their absence would jeopardize its existence. Such agreements are deemed to be ancillary to the joint venture and subordinate to its main objectives.⁸⁰ According to the JVG,⁸¹ if a joint venture does not fall within the scope of Article 85(1),⁸² then neither do any additional agreements which, while restricting competition on their own, are ancillary to the joint venture in the manner described above. Conversely, if a joint venture falls within the scope of Article 85(1),⁸³ then so will any ancillary restrictions. The exemption from prohibition is based for both on the same principles. Ancillary restrictions require no special justification under Article 85(3).⁸⁴ They will generally be exempted for the same period as the joint venture. Additional agreements which are not ancillary to the joint venture normally fall within the scope of Article 85(1),⁸⁵ even though the joint venture itself may not. In order for them to be granted an exemption under Article 85(3),⁸⁶ a specific assessment of their benefits and disadvantages must be made. This assessment must be carried out separately from that of the joint venture.

Examples of ancillary restrictions include obligations on the joint venture to observe a specific product range, to locate production in a particular place, not to manufacture or market products competing with those of the parents (especially in cases of technology transfer), or to purchase from or supply to its parents.⁸⁷ Further examples are restrictions on the parents from competing with the joint venture in its area of activity (at least during the start-up phase).⁸⁸

79. The duration, subject matter and territorial scope of such agreements should not exceed the requirements of the joint venture.

80. JVG, paras. 65 & 66.

81. JVG, paras. 67 & 68.

82. EEC Treaty, *supra* note 1, art. 85, 298 U.N.T.S. 11, 47.

83. *See supra* note 82.

84. *See supra* note 82.

85. *See supra* note 82.

86. *See supra* note 82.

87. JVG, paras. 70-74.

88. JVG, paras. 75-76.

V. EXEMPTIONS UNDER EEC TREATY ART. 85(3) FOR JOINT VENTURES

Only the EC Commission has the authority to grant exemptions under Article 85(3).⁸⁹ Agreements prohibited by Article 85(1)⁹⁰ may be exempted from this prohibition by the Commission if the four cumulative conditions of Article 85(3)⁹¹ are met. An agreement may be exempted if:

it contributes to improving the production or distribution of goods or to promoting technical or economic progress;
it allows consumers a fair share of the resulting benefit;
it imposes on the parties concerned only restrictions which are indispensable to the attainment of these objectives;
and it does not afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question.

The Commission may grant an exemption either by individual decision, regarding a particular agreement, or by regulation, covering an entire category of similar agreements.⁹² There are a number of block exemption regulations which are of special significance to joint ventures, as discussed below in this Section.

The JVG adopts the above criteria, and specifies that the Regulation 17 notification system will continue to apply to cooperative joint ventures.⁹³ In assessing a joint venture under the above criteria, the Commission will determine whether the joint venture brings appreciable objective advantages for third parties (especially consumers) which counterbalance the detriment to competition.⁹⁴ The stronger the position of the parents (as regards financial power and market share, for example), the more rigorous the

89. EEC Treaty, *supra* note 1, art. 85, 298 U.N.T.S. 11, 47.

90. *See supra* note 89.

91. *See supra* note 89.

92. As already mentioned in Section III, *supra*, the Commission has used its regulatory powers to adopt so called "block-exemptions" for exclusive distribution agreements (note 37, *supra*), exclusive purchasing agreements (1983 O. J. (L173) 5, *as amended*), patent licensing agreements (note 52, *supra*), specialization agreements (1985 O. J. (L53) 1), research and development agreements (1985 O. J. (L53) 5), and know-how licensing agreements (1989 O. J. (L61) 1).

93. Except for those in the rail, road and inland waterway, maritime and air transport sectors to which, respectively, Regulations 1017/68 (1968 J. O. (L175) 10), 4056/86 (1986 O. J. (L378) 4), and 3975/87 (1987 O. J. (L374) 1) apply, containing provisions similar to those of Regulation 17.

94. JVG, para. 54.

examination which the joint venture will receive.⁹⁵ The Commission will seek to establish whether the contractual restriction on the parties' economic freedom is (a) directly connected with the creation of the joint venture, and (b) indispensable for its existence.⁹⁶ Hence, the development of new or improved products or processes, or the opening up of new markets, are considered as being pro-competitive. In contrast, joint price fixing, reduction of production and sales will be treated as classic anti-competitive cartels.⁹⁷ The Commission will also look unfavorably on joint venture agreements which consolidate or strengthen a dominant position.⁹⁸ The JVG does confirm that "rationalization" joint ventures adapting supply to shrinking or stagnant demand will still be able to obtain Article 85(3)⁹⁹ exemptions, but only if they "serve to overcome a structural crisis, to accelerate the removal of unprofitable production capacity from the market and thereby to reestablish competition in the medium term (sic)".¹⁰⁰ The Commission sees the foregoing benefits as compensating for the inevitable price increases resulting from such "crisis cartels".¹⁰¹

A large number of the earlier joint venture exemptions, until March 1, 1985, concerned specialization and/or R&D agreements.¹⁰² In order to help ease the exemption process for such agreements, the Commission adopted two block exemption Regulations, 417/85¹⁰³ for specialization and 418/85¹⁰⁴ for R&D arrangements. These Regulations were not, however, much used, due to the various strict qualifying condition contained therein. In fact, only small scale specialization and/or R&D joint ventures could

95. JVG, para. 57.

96. JVG, para. 58.

97. JVG, paras. 55 & 56.

98. JVG, para. 58. This echoes the language of the MCR somewhat. See note 26, *supra*. See also note 162, *infra*.

99. EEC Treaty, *supra* note 1, art. 85, 298 U.N.T.S. 11, 47.

100. JVG, para. 55.

101. There were numerous crisis cartel joint venture exemptions in the early 1980's in particular in the petrochemical sector (*e.g.*, Shell/Akzo (Rovin), 1983 O. J. (295) 7; PRB/Shell, 1984 O. J. (C189) 2, and BPCL/ICI, 1984 O. J. (L212) 1). Subsequently, crisis cartels fell out of favor, though under the current economic climate, and with a new Commissioner for Competition, Mr. Karel van Miert, who has espoused a more "industrial policy" approach to competition law than his two immediate predecessors, it would not be surprising to see more "crisis cartel" joint venture exemptions.

102. *E.g.*, Jaz/Peter No. 1, 1969 J. O. (L 195) 5; Clima Chappee-Buderus, 1969 J. O. (L195) 1; Henkel/Colgate, 1972 J. O. (L14) 14, etc.

103. 1984 O. J. (L53) 1.

104. 1984 O. J. (L53) 5.

benefit from Regulations 417/85¹⁰⁵ and 418/85.¹⁰⁶ In tandem with the JVG, the Commission also adopted Regulation 151/93¹⁰⁷ amending the foregoing Regulations, as well as Regulations 2349/84¹⁰⁸ and 556/89¹⁰⁹ on patent and know-how licensing, respectively. These regulations also enhance the development, improvement and transfer of technology. The stated purpose of these various amendments was to render the said block exemptions more usable in the context of joint ventures. While a fuller review of Regulations 417/85¹¹⁰ and 418/85¹¹¹ falls outside the scope of this paper, it is pertinent to note that larger joint ventures are still likely to be excluded by the relatively low market share criteria.¹¹² However, Regulations 2349/84¹¹³ and 556/89¹¹⁴ have been positively modified to allow vertical licensing between a joint venture and its parents;¹¹⁵ this is a welcome development. The Commission will definitely maintain its practice of imposing conditions when exempting a joint venture. Such conditions range from regular reporting requirements to modification of the agreements, to outright divestiture.¹¹⁶

VI. THE EC NOTIFICATION AND ENFORCEMENT PROCEDURES

Given that cooperative joint ventures subject to Article 85(1)¹¹⁷ still require individual exemption pursuant to Article 85(3),¹¹⁸ this Section sets forth the relevant procedural rules, as well as the pros and cons of the notification process. In particular, the impact of Sir Leon Brittan's December 1992 statements on the informal approval mechanisms are also considered.

105. See *supra* note 103.

106. See *supra* note 104.

107. 1993 O. J. (L21) 8.

108. See *supra* note 59.

109. 1989 O.J. (L61) 1.

110. See *supra* note 103.

111. See *supra* note 104.

112. See *respectively*, Article 1 of Regulation 151/93 as regards Regulation 417/85, and Article 2 of Regulation 151/93 as regards Regulation 418/85.

113. See *supra* note 59.

114. See *supra* note 109.

115. Regulation 151/93, Articles 3 and 4, respectively.

116. *E.g.*, Continental/Michelin, 1988 O. J. (L305) 33; UIP, 1989 O. J. (L226) 25; *Procter & Gamble*, see *infra* note 162.

117. EEC Treaty, *supra* note 1, art. 85, 298 U.N.T.S. 11, 47.

118. See *supra* note 117.

A. *Formal Notification Procedures under Regulation 17*

The formal EC approval procedure (commonly called a notification) is governed primarily by Regulation 17.¹¹⁹ A notification to the Commission has two aims. First, one may seek an official ruling that an agreement does not come within the terms of Article 85(1)¹²⁰ of the Treaty at all (this is called a negative clearance). Second, and without prejudice to a concurrent application for a negative clearance, and purely as a precaution only, the same notification may submit that the agreement may fall within the prohibition in Article 85(1),¹²¹ but will provide reasons as to why the provisions of Article 85(1)¹²² should be declared inapplicable to the agreement by virtue of Article 85(3)¹²³ (this is called an exemption). Strictly speaking, one makes an "application" for negative clearance and a "notification" for exemption. In practice, the same term, notification, is used for both the application and notification procedures and normally the request is made in the alternative. It is possible to ask for negative clearance (but not an exemption) in relation to the applicability of Article 86 of the Treaty.

Applications for negative clearance (for both Articles 85 and 86) and notifications for exemption (for Article 85) are made using a so-called "Form A/B" and the accompanying Complementary Note, which provides guidance on how to complete Form A/B. Parties usually lodge Form A/B with the Commission together with additional documentation in the form of exhibits containing a full statement of the facts and reasoning relevant to the notification.¹²⁴ Incorrect or misleading information may attract procedural fines.¹²⁵

If the Commission objects to any matters notified, then it

119. 1962 J. O. (204) 13, *as amended*.

120. EEC Treaty, *supra* note 1, art. 85, 298 U.N.T.S. 11, 47.

121. *See supra* note 120.

122. *See supra* note 120.

123. *See supra* note 120.

124. It is important to make proper use of Form A/B for the notification of all or part of an agreement, as opposed to attaching the Form as a mere "cover letter" to an agreement (Joined Cases 209-215 and 218/78, FEDETAB, 1980 E.C.R. 3125; Case 30/78, Distillers v. Commission, 1980 E.C.R. 2229; and Case 106/79, VBBB v. Eldi Records, 1980 E.C.R. 1137). However, while the notifying parties have a duty to appraise the Commission of all relevant facts, the Commission must also independently evaluate the notified arrangements (Joined Cases 56 and 58/64, Consten and Grundig v. Commission, 1966 E.C.R. 299).

125. Regulation 17, art. 15(1). Such procedural fines are much less than the fines for substantive infringements; *see also* Nat'l Panasonic France S.A., 1982 J. O. (L211) 32.

must serve a notice of objection on the parties and give them the opportunity to respond to the Commission's concerns, questions or objections. Before deciding whether to grant a formal negative clearance or an exemption, the Commission is obliged to publish a summary of the relevant application in the official Journal of the EC and to invite all interested third parties to submit their observations within a specified time limit which must not be less than one month. Such publication must have "regard to the legitimate interest of undertakings in the protection of their business secrets".¹²⁶

There is no deadline by which a request for exemption must be made, but the major advantage of notification-immunity from substantive fines-arises only upon actual notification, as noted below. However, where the Commission decides to grant an exemption, this may be retroactive to the date of notification. The Commission may also impose conditions or obligations upon the granting of an exemption, provided that the parties are given the opportunity to be heard.

(a) Advantages of Notification

One of the most important legal benefits of notification is that the validity of an agreement will not be in jeopardy once a negative clearance or an exemption has been granted. Such an agreement may be enforced in the national courts. This is particularly important where valuable patents, know-how and other technical information is concerned.

Equally important is that, once an agreement has been notified, the Commission cannot impose fines for infringements of Article 85(1)¹²⁷ which take place after notification and before a decision pursuant to Article 85(3)¹²⁸ is taken, provided that such infringements "fall within the limits of the activity as described in the notification".¹²⁹ Thus, from the moment of notification, there is immunity from fines, unless the Commission has informed the parties that "after a preliminary examination it is of the opinion that Article 85(1) of the Treaty applies and that application of Article

126. Regulation 17, art. 19(3).

127. EEC Treaty, *supra* note 1, art. 85, 298 U.N.T.S 11,47.

128. See *supra* note 127. Such a decision may be one granting or refusing exemption; it will be pursuant to Article 85(3) in either case.

129. Regulation 17, art. 15(5)(a).

85(3) is not justified".¹³⁰ An application for negative clearance only does not confer immunity from fines. This is why it has become customary for a joint application and notification to be made for negative clearance and exemption.

Finally, notification may serve to establish a party's bona fides,¹³¹ and offer the Commission a valuable alternative interpretation if the agreement should ever be the subject of a complaint.¹³² This is an approach to bear in mind should a great deal of publicity attach to an agreement.

(b) Disadvantages of Notification

The major disadvantages of a notification are the risk of publicity and the possibility that the Commission may use the opportunity to formulate additional competition policy in the area presented by the notified agreement. Assuming that the agreement is contrary to Article 85(1),¹³³ the Commission could, furthermore, require that certain terms of the agreement be struck out or modified prior to granting an exemption under Article 85(3).¹³⁴

B. Informal Approval Procedure

The Commission issues only about a dozen formal substantive decisions¹³⁵ every year. Therefore, an informal settlement procedure has evolved so that a larger number of cases can be settled by administrative letters, commonly referred to as "comfort letters". Such letters were initially used only in cases which qualified for a negative clearance. They have since been employed in cases technically meriting an individual exemption, and where either the Commission does not consider it necessary to adopt, or the parties indicate that they do not require, a formal exemption decision. According to the Commission, "although this procedure is less well known *and has less legal value* (emphasis added) than a formal

130. *Id.*, Art. 15(6).

131. J. Temple Lang, *EEC Competition Policies: A Status Report*, in *Enterprise Law of the 80's*, at 38 (1980).

132. Such a complaint may be instigated by the Commission itself, by a Member State, by a party to the agreement or by "interested" third parties (Regulation 17, art. 19).

133. EEC Treaty, *supra* note 1, art. 85, 298 U.N.T.S 11, 47.

134. *See supra* note 133.

135. As distinct from procedural decisions requiring information or ordering investigations and so forth.

decision, its importance should not be underestimated, as it enables some cases to be settled with a minimum of administrative intervention".¹³⁶

Comfort letters are not binding upon the Commission,¹³⁷ and Notices under Article 19(3) of Regulation 17 clearly indicate that the issuance of a comfort letter is "without prejudice to subsequent proceedings".¹³⁸ *A fortiori*, a comfort letter is not binding on national courts.¹³⁹ Nor would a comfort letter actually prevent a party to the agreement from claiming that such agreement was prohibited by Article 85(1).¹⁴⁰ Moreover, the informal nature of the comfort letter procedure is no guarantee against publicity. In fact, the Commission's practice is to publish a Notice in order to give interested third parties the opportunity to submit comments prior to the issuing of a comfort letter.¹⁴¹ However, the lack of legal certainty mentioned above may remain even where publication takes place. Thus, the disadvantages of notification are incurred, without benefitting from the legal certainty of a formal decision. Not all comfort letters are actually published, however.¹⁴²

Sir Leon Brittan's statements seek to give added legal certainty to comfort letters, while at the same time repeating that they are not legally binding. Such statements do not have the force of law and cannot modify the legal position of comfort letters as discussed above. The welcome signal being given is that the Commission will attach more weight to comfort letters in the future. But as against third parties, the comfort letter retains its previous legal weakness, as already highlighted. It is "neat" to view the warning letter as the opposite of the comfort letter, but the latter's effect continues in time, whereas the effect of warning letters is of

136. Fifth Report on Competition Policy, p. 9 (1975).

137. Case 71/74, *FRUBO v. Commission*, 1975 E.C.R. 563.

138. *Rovin*, and *BPCL/ICI*, note 101, *supra*.

139. "[A comfort letter is] based only upon the facts in the Commission's possession, and which reflects the Commission's assessment and brings to an end the procedure of examination by the department of the Commission responsible for this; a comfort letter does not have the effect of preventing national courts before which the agreements in question are alleged to be incompatible with Article 85 from reaching a different finding as regards the agreements concerned on the basis of the information available to them. Whilst it does not bind the national courts, the opinion transmitted in such letters nevertheless constitutes a factor which the national courts may take into account in examining whether the agreements or conduct in question are in accordance with the provisions of Article 85" (Joined Cases 253/78, 1-3, 37 and 99/79, *Perfume Cases*, 1980 E.C.R. 2511).

140. Case 59/77, *De Bloos v. Bouver*, 1977 E.C.R. 2359.

141. *Rovin* and *BPCL/ICI*, note 101 *supra*.

142. See Eleventh Report on Competition Policy, point 5 (1981).

limited duration, being only one of a number of procedural step.

C. *Enforcement Procedures and Fines*

In addition to the various powers granted to the Commission regarding the approval or prohibition of restrictive agreements, Regulation 17 provides the Commission with an impressive array of powers relating to the enforcement of Articles 85 and 86. In particular, the Commission may request information by letter,¹⁴³ conduct inquiries into sectors of the economy,¹⁴⁴ request the authorities of the Member States to conduct investigations¹⁴⁵ or investigate a case itself.¹⁴⁶

Agreements or concerted practices contrary to Article 85(1),¹⁴⁷ unless specifically exempted by the Commission, and forms of behavior prohibited by Article 86, will be subject to fines, pursuant to Regulation 17.¹⁴⁸ It is evident that companies infringing the EC's competition rules will be punished increasingly severely in future. The EC Commission has plainly stated that in areas where the law is well-established, it will impose much heavier -not to say draconian- fines than in situations where reasonable doubts exist as to the actual legal position.¹⁴⁹

The Commission does, however, take account of a party's cooperative attitude in fixing fines, and may well reduce otherwise severe fines in view of such cooperation.¹⁵⁰

143. Regulation 17, art. 11, 1959-1962 O. J. Spec. Ed. 87.

144. *Id.*, art. 12.

145. *Id.*, art. 13.

146. *Id.*, art. 14.

147. EEC Treaty, *supra* note 1, art. 85, 298 U.N.T.S 11, 47.

148. Regulation 17, Article 15(2) provides that the Commission may impose fines of 1,000 ECU (approximately U.S. \$1,227) to 1,000,000 ECU (approximately U.S. \$1,227,580) or a greater sum of up to 10 percent of the preceding year's turnover of each company involved. 1959-1962 O. J. Spec. Ed. 87.

149. For example, the zinc producers in *Rio Tinto Zinc*, 1984 O. J. (L220) 27 were fined a total of 3.35 million ECU (approximately U.S. \$4,112,393). Fines of approximately 10 million ECU (approximately U.S. \$12,275,800) are now not uncommon: *see: e.g., Peroxygen Cartel*, 1985 O. J. (L35) 1. More recently, much heavier total fines have been imposed in *Re: Polypropylene Cartel*, 1986 O. J. (L230) 1 totaling 57.85 million ECU (approximately U.S. \$71, 015, 503) ; *Tetra Pak*, 1992 O. J. (L72) 1 imposed a fine of 75 million ECU (approximately US \$92 million) on a *single* non-EC company.

150. *E.g., National Panasonic*, 1982 O. J. (L354) 28; *British Sugar/Napier Brown*, 1988 O. J. (L284) 41; and *Viho/Toshiba*, 1991 O. J. (L287) 39.

VII. THE DECENTRALIZED APPLICATION OF EC COMPETITION LAW

This issue is relevant to a consideration of cooperative joint ventures because, unlike the MCR, the JVG does not purport to establish a one-stop-shop for qualifying arrangements.

A. General

Apart from the competition law formulated and applied at the EC level, certain EC Member States (e.g., France, Germany and the United Kingdom) have enacted detailed and extensive statutes governing restrictive practices affecting their national territories. Pursuant to existing EC case law discussed below, such national competition laws may be applied even if EEC Treaty arts. 85 or 86 were to be applicable to a particular agreement or practice. For example, the *Bundeskartellamt* can lawfully investigate a possible infringement under the relevant German statutes, notwithstanding the existence of an investigation being undertaken by the EC Commission. However, the national authorities have traditionally made sure that parallel investigations are not conducted. In practice, the notification of an agreement to the EC Commission will often have the effect of temporarily suspending the examination of the same file by the national competition authority.

Despite a theoretically clear demarcation between the jurisdictions of the national authorities and the Commission, the issue of the compatibility between national antitrust law and EC competition law remains at times difficult. The issue must be dealt with on a case by case basis, in view of all the relevant facts. But it is definite that the Commission's intent is to ensure that (a) national antitrust authorities/courts take more account of EC competition rules, and (b) cooperate with the Commission to guarantee a uniform application of Articles 85 and 86 at the national level.¹⁵¹ The general approach of the Commission is to enlist the aid of national authorities or courts in applying EC competition law where that law is settled (either in the form of block exemption regulations or individual decisions). However, the Commission does not want national courts to "make" EC competition law and has certainly not abandoned its exclusive right to apply Article 85(3).¹⁵²

151. See, EC Commission Notice on cooperation between national courts and the Commission in applying EEC Treaty arts. 85 and 86, 1993 O. J. (C39) 6.

152. EEC Treaty, *supra* note 1, art. 85, 298 U.N.T.S 11, 47.

B. *The Case Law*

In the leading case of *Walt Wilhelm v. Bundeskartellamt*¹⁵³ the ECJ clearly confirmed the coexistence of Community law and national laws on competition. At that time, the ECJ rejected the argument that Community competition law might in some respects be exclusive (subject always to the Commission's exclusive authority to grant Article 85(3) exemptions, presently to the exclusive jurisdiction of the Commission in mergers falling with the MCR). However, the ECJ went on to clarify that the parallel application of national law would only be permissible to the extent that it does not prejudice the full and uniform application of Community law or the effects of measures taken or to be taken to implement it. This principle was repeated in the *Perfume cases*,¹⁵⁴ discussed further below. In practice, the interrelationship of national and EC competition laws must be considered in three distinct factual contexts.

(a) Agreements Prohibited Under EC Law

The *Walt Wilhelm*¹⁵⁵ case held that an agreement may be the subject of prohibitions under both Community and national laws. The application of the prohibition in Article 85(1)¹⁵⁶ of the EEC Treaty does not mean that the agreement escapes a national prohibition (or a fine or other penalty).

(b) Agreements Outside the Scope of EEC Treaty arts. 85 and 86

Where EC competition law does not apply to agreements, there can be no conflict with national law, the full force of which will apply. For example, an agreement too minor to be caught by Article 85(1),¹⁵⁷ because of the *de minimis* rule,¹⁵⁸ would not escape the application of a particular national law which does not have the equivalent of the *de minimis* rule.

153. Case 14/68, 1969 E.C.R. 1.

154. Joined Cases 253/78 and 1-3/79, *Procureur de la Republique v. Giry and Guerlain S.A.*, 1980 E.C.R. 2327.

155. See *supra* note 153.

156. EEC Treaty, *supra* note 1, art. 85, 298 U.N.T.S. 11, 47.

157. See *supra* note 156.

158. See *supra* note 30.

(c) Agreements Exempted Under EC Competition Law

The problematic and critical case is where an agreement caught by EC Treaty Article 85(1)¹⁵⁹ has been granted an exemption, either individually by a decision, or through a block exemption regulation, by the EC Commission pursuant to Article 85(3).¹⁶⁰ The matter is still somewhat uncertain, with two opposing schools of thought. One school argues that the "double barrier" of both EC and national competition law must be overcome. The other view holds that an EC exemption prevents the application of national competition law.¹⁶¹

The EC Commission itself was initially hesitant on this question, commenting as follows on the *Walt Wilhelm*¹⁶² case at paragraph 45 of its Fourth Report on Competition Policy (1974):

"The Court's judgment. . . leaves open the question whether the primacy of Community exemptions constitutes a strict rule, or whether it should be regarded rather as a flexible principle in the application of which it is permissible to take account of the respective interests of the Community and of Member States."¹⁶³

The Commission's current position has, however, become more aggressive in defense of the effect of EC Commission exemptions. Only shortly before the political compromises alluded to above were discussed, the Commission re-evaluated its position, stating that individual and block exemptions constitute "the only Commission measures which prevent the application of domestic com-

159. See *supra* note 156.

160. See *supra* note 156.

161. But not normal matters of contract law governing such things as capacity to contract, legality and the like.

162. See *supra* note 153.

163. Advocates of the double barrier theory also point to more permissive aspects of certain block exemption regulations which have legitimate and more restrictive national counterparts. For example:

- (a) Regulation 123/85, (note 35, *supra*) on motor vehicle distribution and servicing expressly states that it is without prejudice to more rigorous national prohibitions. (Note, however, that the motor vehicle distribution market has unique political and industrial aspects.)
- (b) Regulation 1984/83 (note 59, *supra*) on exclusive purchasing agreements has a longer tie-in clause (ten years) for brewery contracts, whereas a shorter (five years) duration is more common in some countries. The same is true for petrol and service stations. Again, this Regulation was subject to highly political debate at the time of adoption, and there was a degree of political compromise.

petition law where this would have the effect of prohibiting or annulling an agreement exempted under Article 85(3).¹⁶⁴

The Commission's more robust attitude is based on the judgment in the Perfume¹⁶⁵ cases, where the ECJ stated:

"However, in the above mentioned judgment (Walt Wilhelm) the Court stressed that parallel application of national competition law can only be permitted in so far as it does not prejudice the uniform application, throughout the common market, of the Community rules on cartels or the full effects of the measures adopted in implementation of those rules. In that regard, it has been claimed [by the Commission] that the application of national competition law may not be permitted where it would result in an exemption granted by a decision or a block exemption being called in question. It follows, however, from the observations set forth above that the agreements which form the subject-matter of the present cases do not benefit from any decision in application of Article 85(3). Moreover, it is not in dispute that the agreements concerned do not come within the scope of any regulation granting a block exemption."

The ECJ unfortunately avoided tackling the effect of exemptions because the agreements concerned in the case were not the subject of an individual or block exemption. However, the most recent example of the Commission's position is made clear in the MCR where, subject to the limited exception in Article 9 of the MCR, EC jurisdiction is exclusive.

VIII. CONCLUSION

Will the JVG actually modify one's approach in the legal analysis of a cooperative joint venture? This author doubts it: the truly major shift in this area of the law (i.e., having to make the concentrative v. cooperative joint venture evaluation) came earlier with the adoption of the MCR. Practically speaking, it is a lot less (procedurally) burdensome to qualify as a concentrative joint venture than a cooperative one. Many companies bear this in mind when drafting their contracts, though the Commission may not always agree.¹⁶⁶

164. Commissioner Andriessen's reply of February 22, 1982, to Written Question No. 1508/81, 1982 O. J. (C85) 6.

165. See *supra* note 154.

166. See, e.g., Press Release, *Procter & Gamble/Finaf*, Oct. 18, 1991, (IP (91) 929).

From a business perspective, the "raison d'être" of the JVG has always been procedural. In this regard, the Commission has kept its options open. The "comfort letter" has seen the birth of its apparent opposite, the "warning letter". This "innovation" is only a catchy term for what the Commission was already doing in practice. It also lacks the long-term effect of a comfort letter. The single most important issue, therefore, was and remains the Commission's ability to speed up the exemption procedures. The Commission's informal statement in December 1992 undertaking to give an indication of where a case stands within a two month time frame should certainly be applauded. If observed, this will be helpful; but it is not a dramatic move, since it is an inevitable consequence of the successful implementation of the MCR. Moreover, it was already the practice of parties in joint venture cases perceived from the outset as being difficult to engage in pre-notification meetings with the Commission to discuss the joint venture, prior to filing Form A/B. This practice has gained additional favor since the adoption of the MCR, where tight deadlines have made it essential that any questions are ironed out before the notification is filed (so that an "incomplete" filing does not prevent the deadlines from starting to run). Hence, even in the traditional cooperative joint venture context, the parties had a fairly good idea of where they stood early in the process.

Nonetheless, all of this has not been a waste of time. The Commission has at least gone on record with its intentions for streamlining and improving the procedures, and administrative changes are being considered. Such internal housekeeping was long overdue. As for the JVG, its very existence will save money for corporations. The JVG sets forth a general overview of the Commission's practice in a public document. Companies will no longer have to pay outside lawyers handsome fees for a memorandum describing the same thing. Moreover, if (as one suspects) the JVG will have the additional role of an in-house guide for the Commission's competition services, parties to a notified joint venture will have the advantage of starting their evaluation from more or less the same base as DG IV. At last, and as the JVG does not hesitate to repeat, the joint venture parties and their legal counsel can concentrate on the specific facts of the joint venture at hand. This

Originally notified as a merger of certain businesses in Italy, Portugal and Spain, the Commission determined that the case in fact was a cooperative joint venture. Considerable divestiture to reduce the joint ventures market share was required.

should result in a more meticulous analysis of the application of the existing case law to the particular facts, rather than getting bogged down in generalities.