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Beyond Per Se, Rule of Reason or Merger Analysis: A New Antitrust Standard for Joint Ventures

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Beyond Per Se, Rule of Reason or Merger Analysis: A New Antitrust Standard for Joint Ventures

Thomas A. Piraino, Jr.*

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INTRODUCTION

The federal courts have not yet been able to develop a unified standard for analyzing cooperative activity among competitors. The courts' failure stems in part from the variety of ways in which competitors can collaborate.¹ Joint ventures can range from mere contractual agreements among competitors to arrangements that are nearly as integrated as mergers. Joint ventures can also have divergent competitive purposes and effects. Some cooperative arrangements promote economic efficiency while others merely facilitate collusion among competitors. Joint ventures thus present the courts with a dilemma with which they have struggled since the passage of the Sherman Act in 1890: how to distinguish "desirable cooperative activity from undesirable cartel agreements."²

In recent years, firms have formed joint ventures more often for pro-competitive purposes than to restrict competition.

1. As one commentator has stated, "A joint venture could involve any business enterprise in which two or more persons collaborate to achieve some commercial goal - a definition that includes all of antitrust, except, perhaps, some single firm attempts to monopolize . . ." Robert Pitofsky, *A Framework For Antitrust Analysis of Joint Ventures*, 74 GEO. L.J. 1605, 1605 (1986); see also J. Paul McGrath, *Antitrust Problems in Negotiating a Joint Venture Agreement*, 54 ANTITRUST L.J. 971, 973 (1985) ("[J]oint ventures come in an infinite variety of structures and durations and forms and scopes.").

2. Thomas L. Greaney & Jody L. Sindelar, *Physician-Sponsored Joint Ventures: An Antitrust Analysis of Preferred Provider Organizations*, 18 RUTGERS L.J. 513, 564 (1987).

Firms frequently use joint ventures today as a means of entry into new markets. The costs of capital, the complexity of technology, and the hurdles of government regulation have increased the risks of investing in new products and facilities. At the same time, returns in new markets have been limited by increased competition and by the shorter duration of the modern product cycle.³ Thus, individual entry to new markets is impossible for many firms. By forming joint ventures with their competitors, firms can obtain access to the capital, technology, and other resources that allow them to enter markets from which they were individually foreclosed.⁴ These “[s]trategic alliances have become fundamental to doing business in the 1990s.”⁵ The number of new joint ventures in the United States has nearly doubled in each of the last ten years, and this trend may even accelerate in the next several years.⁶

3. Thomas M. Jorde, *Remarks on Acceptable Cooperation Among Competitors in the Face of Growing International Competition*, 58 ANTITRUST L.J. 519, 521-22 (1989); Thomas M. Jorde & David J. Teece, *Acceptable Cooperation Among Competitors in the Face of Growing International Competition*, 58 ANTITRUST L.J. 529, 531-33 (1989); Kenneth G. Starling, *Trade Deficit and Legislative Surplus: The New Joint Venture Legislation*, 58 ANTITRUST L.J. 671, 673 (1989).

4. Robert Pitofsky, *Joint Ventures Under the Antitrust Laws: Some Reflections on the Significance of Penn-Olin*, 82 HARV. L. REV. 1007, 1014-15 (1969).

5. Jeremy Main, *Making Global Alliances Work*, FORTUNE, Dec. 17, 1990, at 121, 126. One author has described strategic alliances as “the competitive weapon of the 1990’s.” Jordan D. Lewis, *Competitive Alliances Redefine Companies*, MGMT. REV., Apr. 1991, at 14, 14.

6. Main, *supra* note 5, at 126; Lewis, *supra* note 5, at 18. It is quite likely that many of these strategic alliances will involve the production of new products on a global scale. Joint ventures have been consummated recently between American Telephone and Telegraph Co. (AT&T) and Mitsubishi Electric Corp. for memory chips, among Boeing Co. and various Japanese firms for a new commercial aircraft, between Texas Instruments, Inc. and Hitachi Ltd. for semiconductors, between Fujitsu Ltd. and McDonnell Douglas Corp. for new factory automation equipment, and between the Mitsubishi group and Daimler-Benz AG for an array of new products. Main, *supra* note 5, at 121; Jacob M. Schlesinger, *Fujitsu, McDonnell Douglas to Unveil Alliance in Factory-Automation Field*, WALL ST. J., Jan. 28, 1991, at B3; Bernard Wysocki, Jr., *Cross-Border Alliances Become Favorite Way to Crack New Markets*, WALL ST. J., Mar. 26, 1990, at A1. Joint ventures between U.S. and foreign firms have also become common in America’s basic industries. Joint ventures now exist in the automobile industry between General Motors Corp. and Toyota Motor Corp., Ford Motor Co. and Mazda Motor Corp., and Chrysler Corp. and Mitsubishi Motors Corp., and in the steel industry between National Steel Corp. and Nippon Kokan Corp., Armco, Inc. and Kawasaki Steel, and LTV Corp. and Sumitomo Metal Industries Ltd. William J. Kolasky, Jr., *Recent Developments Affecting Transnational Joint Ventures*, 58 ANTITRUST L.J. 685, 685 (1989).

American firms are coming to a realization that occurred to their Japanese counterparts years ago: that they can often gain more by collaborating with their rivals than by competing with them. In Japan, horizontal alliances (called *keiretsu*) have helped many companies develop new technologies and break into new markets.⁷ In the United States, formerly bitter rivals are now beginning to enter into a variety of cooperative technical alliances. These alliances hold the promise of spurring greater innovation in products and manufacturing processes than the parties could have achieved on their own. In the last three years, General Motors, Ford, and Chrysler have entered into joint research programs to develop new composite materials for cars and trucks, eliminate exhaust pollution, recycle used automobiles, and improve safety.⁸ Putting aside a "fierce rivalry [that] has defined the personal computer industry for the past decade,"⁹ International Business Machines Corp. (IBM) and Apple Computer, Inc. (Apple) recently announced their intention to cooperate in developing a new generation of operating software, new applications of multimedia and a means of making IBM and Apple computers more compatible.¹⁰ One article has described this alliance as the "the equivalent of General Motors and Ford agreeing to offer cars sharing the same engines and designs."¹¹

Despite American firms' increasing reliance on joint ventures, the antitrust status of these arrangements has become more confused in recent years. Much of the confusion has resulted from the courts' abandonment of the traditional ap-

7. Carla Rapoport, *Why Japan Keeps on Winning*, FORTUNE, July 15, 1991, at 76, 76.

8. Bradley A. Stertz, *In a U-Turn From Past Policy, Big Three of Detroit Speed Into Era of Cooperation*, WALL ST. J., June 28, 1991, at B1.

9. Evelyn Richards, *IBM, Apple Plan Cooperation*, WASH. POST, July 4, 1991, at A1.

10. *Id.*; see also Paul B. Carroll, *IBM to Unveil Plan to Build Macintosh Clone*, WALL ST. J., October 2, 1991, at A3.

11. G. Pascal Zachary & Laurence Hooper, *IBM and Apple Open New Front in PC Wars with Strategic Alliance*, WALL ST. J., July 5, 1991, at A1. In laying the groundwork for approval of the alliance by the United States Federal Trade Commission and its European counterparts, the two companies have asserted that the partnership will increase competition. G. Pascal Zachary, *IBM, Apple Outline Plan, But Questions Remain on Products, Rivals' Response*, WALL ST. J., October 3, 1991, at A3, A6. The partners' fears of regulatory impediments to their alliance are not unfounded. Microsoft and Intel, two other dominant companies in the personal computer industry, are currently under investigation for possible antitrust violations. *Id.* Accordingly, IBM and Apple have taken steps to ensure other companies are not excluded from the venture. *Id.*

proach of automatically condemning all horizontal restrictions on competition as per se illegal. Although the Supreme Court no longer routinely applies the per se rule to all horizontal competitive restraints, it has not established a new standard for analyzing these restraints. Thus the federal courts have judged joint ventures under such divergent standards as a summary per se rule, a permissive rule of reason, and a merger-based market analysis.¹² These inconsistent approaches have made it difficult for business executives and practitioners to predict which types of joint ventures courts will uphold. Such uncertainty has deterred American businesses from forming pro-competitive cooperative arrangements. In fact, one commentator has concluded that "some executives view antitrust policy toward joint ventures in much the same fashion as Sir Winston Churchill viewed the Soviet Union—'a mystery shrouded in a riddle wrapped in an enigma.'"¹³

This Article offers a better approach than traditional per se, rule of reason, or merger analyses of joint ventures. In their antitrust assessment of cooperative arrangements among competitors, courts should deem the parties' competitive purpose determinative. A purpose-based analysis would avoid both the harshness of the per se rule and the complexities of a market-based rule of reason or merger analysis. Under this standard, a court would uphold a joint venture whenever it had a legitimate competitive purpose, such as facilitating its partners' entry into a new market. If, however, the parties' intent was only to facilitate collusion in existing markets, the court would prohibit the arrangement. This approach would ensure that courts give fair consideration to the determinative competitive characteristics of joint ventures while avoiding unnecessary inquiries into the parties' market power.

America's earliest antitrust traditions support such a purpose-based approach to joint ventures. In 1898, Judge (later Chief Justice) Taft offered a similar analysis in *United States v. Addyston Pipe & Steel Co.*¹⁴ There, Judge Taft recognized that the purpose of horizontal restrictions among competitors should determine their legality.¹⁵ According to Judge Taft, if the partners intend a horizontal competitive restriction to pro-

12. See *infra* notes 43-89 and accompanying text.

13. J. Paul McGrath, *Text of Remarks Prepared for Delivery Before the 18th Annual New England Antitrust Conference, November 2, 1984*, 5 Trade Reg. Rep. (CCH) ¶ 50,470, at 56,137 (Nov. 12, 1984).

14. 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

15. *Id.* at 282.

mote the objectives of a separate legitimate transaction, a court should uphold the restriction as an "ancillary" restraint.¹⁶ However, any horizontal restraint which is broader than necessary to achieve the venture's legitimate objectives cannot be deemed ancillary to the transaction.¹⁷ Courts should prohibit such "naked" restraints among competitors because they have no legitimate efficiency objectives.¹⁸

Judge Taft's ancillary restraints analysis suggests an effective two-step approach to the analysis of joint ventures. In the first step, a court would determine the legality of the joint venture itself based on the parties' competitive purposes and the likely impact of the joint venture on competition. If the court upholds the joint venture, it should then, at the second stage of the analysis, decide whether any related restraints on competition among the parties were reasonably necessary to promote the legitimate purposes of the joint venture. The court would uphold any legitimate restraints as "ancillary" to the parties' cooperative arrangement. Such a separate analysis would give courts the opportunity to fashion remedies short of outright condemnation of joint ventures that exceed their proper scope. If a restraint was broader than necessary to achieve the parties' proper purposes, the court could prohibit the restraint while leaving the joint venture intact. The court could also limit the restraint to a more reasonable breadth compatible with the venture's legitimate purposes. Such an approach would give clear guidance to businesses and practitioners on the acceptable scope of joint ventures and their related restraints on competition.

Part I of this Article explains the competitive advantages that joint ventures offer and then examines the inconsistent approaches that courts have utilized to determine the legality of these arrangements. Part II details a proposed new antitrust standard for analyzing joint ventures and offers guidance on its application. Finally, Part III addresses restraints ancillary to

16. *Id.*

17. *Id.* at 282-83.

18. In the last decade, such an ancillary restraints analysis has been adopted by many lower federal courts as a means of analyzing agreements among competitors. *See e.g.*, *National Bancard Corp. v. VISA U.S.A., Inc.*, 779 F.2d 592, 601-03 (11th Cir.), *cert. denied*, 479 U.S. 923 (1986); *Rothery Storage & Van Co. v. Atlas Van Lines*, 792 F.2d 210, 215-23 (D.C. Cir. 1986); *Polk Bros. v. Forest City Enters.*, 776 F.2d 185, 188-91 (7th Cir. 1985); *Chicago Professional Sports Ltd. v. National Basketball Ass'n*, 754 F. Supp. 1336, 1357-59 (N.D. Ill. 1991).

joint ventures. A new standard is appropriate for determining the legality of ancillary restraints as well as joint ventures themselves, and this section offers an effective approach and guidance for its practical application.

I. JOINT VENTURES AND CURRENT ANTITRUST ANALYSIS

A. THE COMPETITIVE CHARACTERISTICS OF JOINT VENTURES

A search for a new joint venture standard must begin with an understanding of the unique competitive purposes and effects of cooperative arrangements among competitors. If the various forms of business organizations were classified along a continuum, joint ventures would lie at a mid-point between cartels and mergers.¹⁹ Joint ventures are distinguished from both cartels and mergers by the extent to which they integrate the resources of their partners. A cartel constitutes a naked agreement among competitors unaccompanied by any integration of resources. In a joint venture, partners contribute assets such as capital, technology, or production facilities to a common endeavor.²⁰ This integration of resources creates economic efficiencies that cannot be achieved by naked agreements among competitors. Indeed, the efficiencies created by joint ventures are similar to those resulting from mergers—risk-sharing, economies of scale, access to complementary resources and the elimination of duplication and waste.²¹ Joint ventures, however, differ from mergers in a critical way: because they are less integrated than mergers, they allow their partners to continue to compete with each other in the relevant market. While mergers eliminate all competition between the parties, joint ventures, by virtue of their limited scope, leave the parties free to compete in areas not covered by the joint venture.²² The par-

19. Edmund W. Kitch, *The Antitrust Economics of Joint Ventures*, 54 ANTITRUST L.J. 957, 960 (1985).

20. See generally E. THOMAS SULLIVAN & HERBERT HOVENKAMP, *ANTITRUST LAW, POLICY AND PROCEDURE* 294-95 (2d ed. 1989); see also Joseph F. Brodley, *Joint Ventures and Antitrust Policy*, 95 HARV. L. REV. 1523, 1525 (1982); PHILLIP AREEDA & DONALD F. TURNER, *Antitrust Law* ¶ 947(a) (1978).

21. See generally U.S. Department of Justice, *Department of Justice Merger Guidelines (1984)*, 49 Fed. Reg. 26823, reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,103, at 20,564 (Mar. 28, 1989) [hereinafter *DOJ Merger Guidelines*] (discussing the efficiencies that result from mergers).

22. See Brodley, *supra* note 20, at 1527; Don T. Hibner, Jr., *Antitrust Considerations of Joint Ventures, Teaming Agreements, Co-Production and Leader-Follower Agreements*, 51 ANTITRUST L.J. 705, 713 (1982); Martin B. Louis, *Restraints Ancillary to Joint Ventures and Licensing Agreements: Do*

ties to a research and development joint venture can, for example, compete in the ultimate production and sale of products that use the venture's technology. Joint ventures are thus a distinctive form of business organization characterized by partial integration.

Economists have long recognized that the integration of assets that occurs in a merger may lead to competitive efficiencies.²³ From an antitrust standpoint, it is preferable to achieve efficiencies through joint ventures rather than by mergers. A merger may create efficiencies by removing a competitor from the relevant market. A joint venture, however, often adds a new competitor to the market. Indeed, some courts have emphasized that the distinguishing characteristic of a joint venture is its "capability in terms of new productive capacity, new technology, a new product, or entry into a new market."²⁴ The integration of resources that occurs in a joint venture has the capacity to create something new: a competitive entity that allows its partners to enter markets from which they were individually foreclosed.²⁵

A joint venture facilitates market entry primarily through

Sealy and Topco *Logically Survive* Sylvania and Broadcast Music?, 66 VA. L. REV. 879, 899-900 (1980); McGrath, *supra* note 13, ¶ 50.470, at 56,139; Neil E. Roberts, *Cartels and Joint Ventures*, 57 ANTITRUST L.J. 849, 851 (1989); Adam B. Weissburg, Note, *Reviewing the Law on Joint Ventures with an Eye Toward the Future*, 63 S. CAL. L. REV. 487, 521-22 (1990).

23. See e.g., Pitofsky, *supra* note 1, at 1606; AREEDA & TURNER, *supra* note 20, ¶ 901.

24. *Compact v. Metropolitan Gov't.*, 594 F. Supp. 1567, 1574 (M.D. Tenn. 1984) (quoting Brodley, *supra* note 20, at 1526). The Supreme Court has stated that a joint selling arrangement may make "possible a new product by reaping otherwise unattainable efficiencies." *NCAA v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 113 (1984) (quoting *Arizona v. Maricopa County Medical Soc'y.*, 457 U.S. 332, 365 (1982) (Powell, J., dissenting)).

Professor Brodley has defined a joint venture as:
 an integration between firms that involves a clear addition to productive capacity, as distinct from a mere union of existing operations. Thus, a joint venture is more than a marriage; it is a marriage that at the moment of consummation immediately produces a child. A convenient legal test is whether, as in *Broadcast Music*, the undertaking involves the creation of a new product or entry into a new market—... "a new competitive dimension."

Joseph F. Brodley, *Analyzing Joint Ventures with Foreign Partners*, 53 ANTITRUST L.J. 73, 75 (1984) (quoting JAMES A. ATWOOD & KINGMAN BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD § 12.33 (2d ed. 1981) and citing *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 22-23 (1979)).

25. Brodley, *supra* note 25, at 75.

risk-sharing and the fusion of complementary resources.²⁶ Even relatively large companies have recently formed joint ventures with their competitors to share the costs of developing new products. The immense costs involved in producing a new commercial aircraft prompted Boeing's partnership with various Japanese manufacturers.²⁷ Large computer manufacturers have entered into joint ventures to construct new computer chip factories, which can cost as much as \$500 million.²⁸ IBM and Apple announced their alliance to develop a complex new computer operating system.²⁹ Teaming agreements have become common among defense contractors faced with the high costs of developing new products for the military.³⁰

The fusion of partners' complementary abilities often allows a joint venture to penetrate new markets which its partners could not have entered on their own.³¹ One partner, for

26. Joint ventures allow firms to make complementary assets available to their competitors when a complete transfer of assets through a merger would not be feasible. Often a firm cannot sell an asset to a rival because it requires the asset in its current operations, but it can transfer the asset to a joint venture partner for a limited purpose. For example, E.I. DuPont de Nemours & Co. (DuPont) requires its coatings technology for many of its current products. Phillips can utilize the technology in the production of compact disks. Since DuPont could not sell the technology to Phillips, the parties entered into a venture to jointly utilize the technology for producing compact disks. Kitch, *supra* note 19, at 965. Similarly, although hospitals cannot sell certain expensive diagnostic equipment (such as CAT-scanners or nuclear magnetic resonance imagers) to their competitors, they can share this equipment in a joint venture. See Jonathan M. Joseph, Note, *Hospital Joint Ventures: Charting a Safe Course Through a Sea of Antitrust Regulations*, 13 AM. J.L. & MED. 621, 622 (1988).

27. See Main, *supra* note 5, at 124.

28. Joel B. Eisen, *Antitrust Reform for Joint Production Ventures*, 30 JURIMETRICS 253, 264 (1990).

29. Zachary & Hooper, *supra* note 11, at A1; Zachary, *supra* note 11, at A6.

30. See Hibner, *supra* note 22, at 706.

31. William E. Kovacic, *Antitrust Analysis of Joint Ventures and Teaming Arrangements Involving Government Contractors*, 58 ANTITRUST L.J. 1059, 1098-99 (1990); Kitch, *supra* note 19, at 964-65; see also FREDERIC M. SCHERER, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 137 (2d ed. 1980) (describing "complementarities" resulting from mergers). One commentator has described the advantages of using a partner's complementary resources:

[T]he reason one works with a partner is precisely because that firm has skills one needs and lacks. They should take the lead in areas where they are the experts. It is like the captain of a ship who turns the wheel over to a harbor pilot when the vessel enters shallow waters.

Lewis, *supra* note 5, at 18.

Joint ventures can also be a less costly means than an acquisition to facili-

example, may possess significant manufacturing capabilities, while the other's strength may be in marketing. The recent joint venture between General Motors and Toyota for the production of a new small car in Fremont, California combines Toyota's manufacturing techniques with General Motors' knowledge of the United States marketplace.³² Joint venture partners may also have access to complementary technologies which, when combined, permit entry into new markets. AT&T and Nippon Electric Corp. (NEC) recently entered into a joint venture to produce computer chips using AT&T's computer-aided design technology and NEC's technology for advanced logic chips.³³ Fujitsu and McDonnell Douglas have established a joint venture for factory automation products to which Fujitsu contributed computer hardware and McDonnell Douglas contributed software systems.³⁴

The anti-competitive effects of joint ventures are often minimal because of their narrow scope and limited duration. Frequently, the partners to a joint venture agree that they will continue their association only for a specified period. After the joint venture terminates, the parties will be free to resume full competition. The prospect of such imminent future competition will often deter the parties from colluding for anti-competitive purposes during the term of the joint venture. In addition, most joint ventures are organized for the discrete purpose of researching, producing, or marketing a specific product. Thus, the parties can continue to compete in fields not covered by the joint venture.³⁵ In fact, the joint venture partners may use in-

tate entry into a new product market. As one commentator has pointed out, "General Motors spent \$5 billion in 1985 to acquire Hughes Aircraft in order to use the firm's advanced aerospace technologies. GM could have accomplished the same, through alliances, for zero investment." *Id.* at 14.

32. Main, *supra* note 5, at 126.

33. Wysocki, *supra* note 6, at A1.

34. Schlesinger, *supra* note 6, at B3.

35. In 1985, Alcan Aluminum Ltd. and Atlantic Richfield Co. terminated their original plan to merge their aluminum manufacturing operations and elected instead to form a joint venture for the production of aluminum. *United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 620-22 (W.D. Ky. 1985). The Department of Justice, which had opposed the proposed merger, consented to the joint venture because it allowed the parties to continue to compete in downstream marketing activities. *Id.*; see also *U.S. Department of Justice International Operations Guidelines (1988)*, 4 Trade Reg. Rep. (CCH) ¶ 13,109, at 20,601 (Mar. 1, 1989) [hereinafter *DOJ International Guidelines*] (pointing out that a joint venture may be less anti-competitive than a merger when discretion on downstream marketing activities is reserved to members of venture).

formation acquired from the venture to compete more effectively against each other, even during the term of the venture.³⁶

In particular circumstances, joint ventures can, however, adversely affect competition.³⁷ The adverse effect may be significant when more than one of the joint venture partners was already active in the joint venture market, or could have entered the market independently.³⁸ In such cases, competition that otherwise would have existed between the partners in the joint venture market will be eliminated.³⁹ Such a reduction of competition will occur because the partners will, in the natural course, refrain from competing with a venture in which they have a financial interest. Joint ventures can also restrict competition in other markets in which the partners previously competed. The joint venture may provide a mechanism to cloak conspiracies to fix prices, allocate territories, or engage in other anti-competitive activity in such other markets.⁴⁰

Joint ventures, therefore, can be powerful devices either to enhance or to restrict competition. On one hand, cooperative arrangements among competitors can facilitate entry into new markets and add a competitive force that otherwise would

36. For example, Toyota has already used information acquired from its joint venture with General Motors to establish its own production facility in Georgetown, Kentucky to compete with the American automobile manufacturers. See Paul C. Judge, *Toyota Plant is Expected For Kentucky*, N.Y. TIMES, Nov. 27, 1990, at D4; Jim Mateja, *Toyota Bucks Trend, Doubles Plant Output*, CHICAGO TRIBUNE, Nov. 28, 1990, at C1; *Toyota Announces Plan to Build Second Auto Plant in US*, CHRISTIAN SCIENCE MONITOR, Nov. 29, 1990, at 6. One commentator has explained:

Part of Japan's advantage is that it often does view the ventures as largely another form of competition. You shake hands with your right hand, while making a fist with your left. You learn everything you can from your Western partner while keeping as many of your own secrets to yourself. Then you strike out on your own, sometimes in the very market once controlled by your partner.

Wysocki, *supra* note 6, at A1; see also *id.* at A4.

37. See *United States v. Penn-Olin Co.*, 378 U.S. 158, 169 (1964); see also SULLIVAN & HOVENKAMP, *supra* note 20, at 294-95.

38. *Penn-Olin*, 378 U.S. at 165-67, 173-74.

39. See *id.* at 173-74; *Yamaha Motor Co. v. Federal Trade Comm'n*, 657 F.2d 971, 977-81 (8th Cir. 1981). Some commentators have argued that participation in a joint venture by competitors with significant market power can be anti-competitive simply because the pursuit of "promising independent approaches" by other firms may be discouraged. Kovacic, *supra* note 31, at 1095; see also Eisen, *supra* note 28, at 266-67 ("[O]nce a JPV [joint production venture] with antitrust immunity enters the picture, other entrants will find it difficult to proceed.").

40. Brodley, *supra* note 20, at 1530-34.

never have existed.⁴¹ On the other hand, firms can design joint ventures merely to eliminate competition in existing markets. Any effective standard for analyzing the antitrust status of joint ventures should clearly distinguish between the different purposes for which partners establish these arrangements.

B. THE LACK OF A UNIFIED JOINT VENTURE STANDARD

The federal courts have largely failed to recognize that joint ventures have distinctive competitive characteristics that require a unified antitrust analysis. The courts have subjected joint ventures to the inconsistent standards of merger, cartel, and rule of reason analyses. Indeed, federal policy toward joint ventures has been termed "one of the darkest corners of antitrust law."⁴² The federal courts' confused approach to joint ventures has made businesses uncertain about what types of cooperative arrangements are acceptable under the antitrust laws. As a result, firms have been unnecessarily deterred from entering into pro-competitive cooperative arrangements.

1. Merger-Based Analysis of Joint Ventures

In *United States v. Penn-Olin Co.*,⁴³ the Supreme Court considered the legality of a joint venture under Section 7 of the Clayton Act.⁴⁴ The Court adopted a structural market approach similar to that used in analyzing mergers.⁴⁵ Penn-Olin was a joint venture between Pennsalt and Olin for the manufacture and sale of sodium chlorate in the southeastern United States. Pennsalt had been manufacturing the product in the Pacific Northwest prior to the formation of the joint venture. Although Olin did not manufacture the product, it had the capability to do so. Both companies had considered entering the sodium chlorate market in the southeast.⁴⁶ The Supreme Court

41. See *supra* notes 24-36 and accompanying text.

42. Joseph F. Brodley, *The Legal Status of Joint Ventures Under the Antitrust Laws: A Summary Assessment*, 21 ANTITRUST BULL. 453, 453 (1976); see also Walter T. Winslow, *Joint Ventures—Antitrust Problems and Opportunities*, 54 ANTITRUST L.J. 979, 979 (1985).

43. 378 U.S. 158 (1964).

44. *Id.* at 168. Section 7 of the Clayton Act prohibits any acquisition of assets or stock "where in any line of commerce . . . in any section of the country, the effect of such acquisition may be substantially to lessen competition." 15 U.S.C. § 18 (1988). Section 7 was applicable in *Penn-Olin* because the parties had formed a separate corporation as their joint venture vehicle and each party had acquired an equity interest in the corporation. 378 U.S. at 168.

45. 378 U.S. at 172.

46. *Id.* at 165-67.

remanded the case for a determination of whether the joint venture eliminated potential competition between Pennsalt and Olin in the production and sale of sodium chlorate in the southeast.⁴⁷ Although the Court stated in dictum that joint ventures may not have as significant anti-competitive effects as mergers,⁴⁸ its decision, in effect, required the courts to consider the same structural market factors for joint ventures as for mergers, that is, the relevant product and geographic markets and the partners' actual or potential share of those markets.⁴⁹

Some lower federal courts have also adopted a structural market approach to joint venture analysis. *Yamaha Motor Co. v. Federal Trade Commission*⁵⁰ involved a joint venture to manufacture outboard motors between Brunswick Corp., the second largest United States producer, and Yamaha Motor Co., the leading Japanese manufacturer. The joint venture was to produce the motors in Japan and export them to the United States and other countries.⁵¹ In upholding the FTC's dissolution order, the Eighth Circuit took a market-based approach similar to a merger analysis.⁵² The court found that Yamaha was a potential entrant into the United States market and that, by foreclosing Yamaha's entry, the joint venture would substantially lessen competition in the oligopolistic domestic market.⁵³

Analysis of all joint ventures on such a structural basis would make the legality of cooperative arrangements among competitors highly uncertain. Merger analysis requires a complicated assessment of the relevant product and geographic markets, each of the parties' shares of those markets, their competitors' market shares, and any increase in market concentration that will result from the transaction.⁵⁴ These determinations are fact intensive and time consuming, and their

47. *Id.* at 173. On remand, the trial court found that potential competition was not adversely affected because both parties would not have entered the relevant market independently. *United States v. Penn-Olin Chem. Co.*, 246 F. Supp. 917 (D. Del. 1965), *aff'd per curiam*, 389 U.S. 308 (1967).

48. The *Penn-Olin* Court explained: "This is not to say that a joint venture is controlled by the same criteria as the merger or conglomeration. The merger eliminates one of the participating corporations from the market while a joint venture creates a new competitive force therein." 378 U.S. at 170.

49. *Id.* at 170, 176-77.

50. 657 F.2d 971 (8th Cir. 1981).

51. *Id.* at 973-74.

52. *Id.* at 977-79.

53. *Id.* at 979.

54. See *DOJ Merger Guidelines*, *supra* note 21, ¶ 13,103, at 20,555-60; see also AREEDA & TURNER, *supra* note 20, ¶ 907(a).

outcome is difficult to predict. Many businesses will be deterred from entering into joint ventures simply because of the uncertainties and transaction costs involved in analyzing their structural market effects.⁵⁵ Since joint ventures are often less anti-competitive than mergers and frequently do not have any adverse market effects at all, the courts are not justified in applying to joint ventures a structural merger-based analysis with such a significant deterrent effect.

2. The Inconsistent Analysis of Horizontal Restraints

In order to carry out its purpose, a joint venture may restrict its partners from engaging in certain competitive activities. These restrictions may include agreements by partners not to compete with the joint venture, to limit their dealings with third parties, or to refrain from competing with each other.⁵⁶ In some cases, the federal courts have found these agreements to be per se illegal under Section 1 of the Sherman Act⁵⁷ without any consideration of their potential beneficial effects,⁵⁸ while in other cases the courts have upheld the agreements under a more permissive "rule of reason" standard.⁵⁹ The courts have failed to clarify under what circumstances a per se or rule of reason approach is appropriate. Businesses and practitioners therefore find it difficult to predict whether a

55. Potential joint venturers may have to make a Hart-Scott-Rodino pre-merger filing if they plan to acquire an equity interest in a joint venture with assets of \$10 million or more. See Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 101-73, 103 Stat. 529 (codified at 15 U.S.C. § 18(a) (1988)); 16 C.F.R. § 801.40 (1989). One commentator has noted that "[it] is possible that the mere cost and uncertainty of the Hart-Scott-Rodino process itself can discourage businesses from forming production joint ventures that would require pre-merger notification." Starling, *supra* note 3, at 680. Indeed, the pre-merger review process for the General Motors-Toyota joint venture took ten months to complete. Robert C. Weinbaum, *Production Joint Ventures: The General Motors-Toyota Experience*, 58 ANTITRUST L.J. 709, 711 (1989).

56. See AREEDA & TURNER, *supra* note 20, ¶ 947.

57. Section 1 of the Sherman Act proscribes "every contract, combination . . . or conspiracy, in restraint of trade." 15 U.S.C. § 1 (1988).

58. See *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958). Under the per se rule, practices having a "pernicious effect on competition" and lacking "any redeeming virtue" are conclusively presumed to be illegal under Section 1 without any inquiry into the parties' competitive purpose or the market effect of the restraint. *Id.* For a discussion of the per se rule, see *infra* notes 60-89 and accompanying text.

59. See *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238-41 (1918). Under traditional formulations of the rule of reason, a restraint cannot be found illegal until a court has considered all factors bearing on its potential competitive purpose and effect. *Id.* at 238. For a discussion of the rule of reason, see *infra* notes 90-112 and accompanying text.

court will consider the potential efficiency justifications of competitive restrictions implemented in connection with joint ventures.

Ironically, much of the confusion over the dividing line between per se and rule of reason analysis has resulted from the Supreme Court's increased willingness to consider the efficiency justifications of horizontal restraints. Prior to the late 1970s, the Supreme Court almost automatically applied the per se rule to strike down horizontal restraints among competitors which affected prices or territories, regardless of whether those restraints were implemented in connection with efficiency-enhancing cooperative arrangements. In *Timken Co. v. United States*,⁶⁰ the Supreme Court held that territorial and price-fixing restraints among the partners to a European joint venture were per se illegal.⁶¹ *United States v. Sealy, Inc.*⁶² involved the summary condemnation of territorial and price-fixing restraints that were part of a promotional plan among small bedding manufacturers.⁶³ In *Citizens Publishing Co. v. United States*,⁶⁴ the Court found per se illegal a joint operating agreement between Arizona's two major newspapers that set common subscription and advertising rates.⁶⁵ The Court applied the per se rule in *United States v. Topco Associates*⁶⁶ to territorial restrictions implemented by an organization of small grocers attempting to promote their private label brands in competition with larger chain stores.⁶⁷ Finally, in *National Society of Professional Engineers v. United States*,⁶⁸ the Court summarily prohibited an engineering society from implementing a ban on competitive bidding that ostensibly was intended to promote the safety and quality of engineering on public projects.⁶⁹ In none of these cases did the Court consider whether the restraints at issue could have been justified as incidental to an efficiency-enhancing cooperative arrangement.

Broadcast Music, Inc. v. Columbia Broadcasting System,

60. 341 U.S. 593 (1951).

61. *Id.* at 598.

62. 388 U.S. 350 (1967).

63. *Id.* at 351.

64. 394 U.S. 131 (1969).

65. *Id.* at 135-36.

66. 405 U.S. 596 (1972).

67. *Id.* at 606-12.

68. 435 U.S. 679 (1978).

69. *Id.* at 694-96.

Inc.,⁷⁰ decided by the Supreme Court in 1979, signaled a new approach by the Court to horizontal restraints. Broadcast Music, Inc. was an association of approximately 20,000 music copyright owners which licensed commercial use of the copyrighted works.⁷¹ The Court recognized that because the licenses established an identical price for each of the copyrighted compositions they constituted horizontal price-fixing "in the literal sense."⁷² Instead of finding the licenses per se illegal, however, the Court expressed a willingness to consider the pro-competitive aspects of the cooperative arrangement.⁷³ The Court stated: "Joint ventures and other cooperative arrangements are also not usually unlawful, at least not as price-fixing schemes, where the agreement on price is necessary to market the product at all."⁷⁴ The Court concluded that the licenses should be analyzed under the rule of reason because of the virtual impossibility that members of the association could compete effectively in the market for musical compositions without participating in the licensing agreement.⁷⁵

The Supreme Court's willingness to consider efficiency justifications for horizontal price-fixing in *Broadcast Music* represented a radical departure from its earlier per se approach to competitive restrictions ancillary to cooperative arrangements. The Court's approach can be viewed as requiring an inquiry into the substantive competitive purpose and effect of any agreements necessary for insuring the effectiveness of a joint venture.

In several subsequent cases, however, the Court confused the implications of its holding in *Broadcast Music* by continuing to apply a standard of summary illegality to various restrictions

70. 441 U.S. 1 (1979), *rev'g* Columbia Broadcasting Sys., Inc. v. American Soc'y of Composers, Authors & Publishers, 562 F.2d 130 (2d Cir. 1977).

71. *Id.* at 5. Broadcast Music, Inc. granted a blanket license, which allowed access to all the copyrighted works in its repertory, to purchasers for a percentage of their revenues. Broadcast Music then reimbursed the copyright owners according to usage. *Id.*

72. *Id.* at 8. The Court of Appeals had previously held that the blanket license constituted illegal price-fixing and was a per se violation of the Sherman Act. 562 F.2d at 140.

73. 441 U.S. at 19-23. The Court noted that the association facilitated the marketing and policing of the copyrighted works, and the arrangement saved transaction costs of copyright owners and would-be users. *Id.* at 20.

74. *Id.* at 23.

75. *Id.* at 20-23. The Court emphasized the prohibitive costs of individual sales transactions and the fact that the blanket license functioned as a practical solution to the problem posed by a market containing a high number of owners, users, and compositions. *Id.* at 20.

incidental to competitors' cooperative arrangements. In *Arizona v. Maricopa County Medical Society*,⁷⁶ for example, the Court applied the per se rule when a physicians' organization established maximum fees that its members could charge under an insurance plan.⁷⁷ The physicians had argued that the per se rule should not apply because beneficial effects, such as lower premiums and fuller insurance coverage, were likely to result from the maximum fee arrangement.⁷⁸ The Court concluded that even when potential efficiencies are involved, "the anti-competitive potential inherent in all price-fixing agreements justifies their facial invalidation."⁷⁹ Consideration of efficiencies, however, is precisely what the Court had appeared to mandate in *Broadcast Music*.⁸⁰

The 1984 case of *NCAA v. Board of Regents of the University of Oklahoma*⁸¹ involved restrictions imposed by the NCAA on the frequency that member colleges' sports teams could appear on television and the fees the colleges could receive from the networks.⁸² The Court concluded that a per se approach was not appropriate because the NCAA had to impose certain horizontal restrictions on competition, such as requirements for academic credentials and the number of players on each team, in order to promote collegiate athletics.⁸³ However, the Court then proceeded to characterize the television restrictions as price and output restraints that could be summarily condemned without any consideration of their market effect.⁸⁴ Thus, despite the Court's professed rule of reason analysis, the actual approach followed in *NCAA* was much closer to a per se analysis.⁸⁵

In 1986, in *Federal Trade Commission v. Indiana Federation of Dentists*,⁸⁶ the Court held that the rule of reason should determine the legality of a dentists' association's refusal to sup-

76. 457 U.S. 332 (1982).

77. *Id.* at 342-57.

78. *Id.* at 348-49.

79. *Id.* at 351.

80. See *supra* notes 70-75 and accompanying text.

81. 468 U.S. 85 (1984).

82. *Id.* at 91-94.

83. *Id.* at 101-02.

84. *Id.* at 104-10.

85. Indeed, *NCAA* has been described not as a true rule of reason approach but as "an explanation of why the Court should have applied the per se rule." Wesley J. Liebeler, *1984 Economic Review of Antitrust Developments: Horizontal Restrictions, Efficiency and the Per Se Rule*, 33 U.C.L.A. L. REV. 1019, 1055 (1986).

86. 476 U.S. 447 (1986).

ply X-rays to insurance companies seeking to evaluate benefit claims.⁸⁷ However, as in *NCAA*, the Court's actual analysis was more like a per se approach. The Court concluded that a refusal by a group of competitors to supply a desired customer service (i.e., the forwarding of X-rays to the insurance companies) adversely affected competition no less than price-fixing, and therefore the practice could be summarily condemned without any market analysis.⁸⁸

The Supreme Court's inconsistent approach to horizontal restraints has created serious doctrinal confusion over the proper analysis of cooperative arrangements among competitors. Although it appears that the Court no longer applies the per se rule as a matter of course to restraints ancillary to such arrangements, the actual approach that the Court will follow remains unclear. Business executives contemplating joint ventures are left to wonder whether a court will summarily condemn incidental competitive restrictions, as in *Maricopa*, *NCAA*, and *Indiana Federation of Dentists*, or whether a court will be willing to consider certain efficiency justifications, as in *Broadcast Music*.⁸⁹

3. Deficiencies in Rule of Reason Analysis

The Supreme Court's failure to distinguish per se from rule of reason analysis has not been the only barrier to the adoption of an effective standard for the antitrust analysis of joint ventures. Even if the Supreme Court clearly stated the circumstances in which the rule of reason should apply to joint ventures, the analysis of these arrangements would still be muddled because of the inherent deficiencies in the rule of reason standard.

To begin with, the courts have never adequately explained how the rule of reason should be applied. The classic formulation of the rule of reason, set forth by Justice Brandeis in 1918 in *Chicago Board of Trade v. United States*,⁹⁰ includes such factors as the circumstances peculiar to the defendant's business, the conditions before and after the restraint, the nature and purpose of the restraint, and the competitive effects of the re-

87. *Id.* at 459.

88. *Id.*

89. The confusion for practitioners was compounded by the fact that the Court termed its summary analysis a per se approach in certain situations and a rule of reason approach in others. See *supra* text accompanying notes 76-88.

90. 246 U.S. 231 (1918).

straint.⁹¹ Subsequent Supreme Court cases have failed to refine this open-ended formula. In *Continental T. V., Inc. v. GTE Sylvania, Inc.*,⁹² for example, the Court cited Justice Brandeis's formulation without indicating the relevance or weight to be afforded any particular factor.⁹³ The Court established a rule of reason approach for joint ventures in *United States v. Penn-Olin Co.*⁹⁴ that was no less open-ended. The *Penn-Olin* Court indicated that the market power of the joint venturers and their competitors, the potential market power of the joint venture itself, the reasons for the joint venture's existence, and various other conditions in the relevant market should all be considered.⁹⁵ It gave no guidance on how a court should ultimately weigh and balance those factors.⁹⁶

Without any formulation of the relative weight to be given the various factors in its open-ended formula, the rule of reason has lost most of its utility in antitrust analysis.⁹⁷ The absence of clear standards makes it difficult to predict the outcome of particular cases. If all market conditions must be considered, the courts will presumably inquire into the market power of the parties to the restraints at issue before ruling on their legality. Such an inquiry requires a determination of the relevant product and geographic markets and the shares of the markets held by the parties. Most judges and juries are simply not capable of making the economic decisions required by a full rule of reason market power analysis.⁹⁸

The problems with the rule of reason have prompted many suggestions for reform. The Department of Justice and Federal Trade Commission have each proposed a "structured" rule of

91. *Id.* at 238.

92. 433 U.S. 36 (1977).

93. *Id.* at 49 n.15.

94. 378 U.S. 158 (1964).

95. *Id.* at 176-77.

96. *Id.* at 177. Several commentators have noted the lack of guidance in the *Penn-Olin* formula. See David A. Clanton, *Horizontal Agreements and the General Motors-Toyota Joint Venture*, 30 WAYNE L. REV. 1239, 1251-52 (1984); David L. Foster et al., *National Cooperative Research Act of 1984 as a Shield from the Antitrust Laws*, 5 J.L. & COM. 347, 356-57 (1985); Kovacic, *supra* note 31, at 1083 n.123; Pitofsky, *supra* note 4, at 1062.

97. Brodley, *supra* note 20, at 1523.

98. Economists themselves can argue indefinitely over the single issue of what constitutes a proper product market in a rule of reason antitrust case. One commentator has concluded that "the costs of such an analysis are not worth the effort." Frank H. Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 ANTITRUST L.J. 135, 153-54 (1984) (quoting *United States v. Topco*, 405 U.S. 596, 609-10 (1972)).

reason that relies on the parties' market power as the decisive factor in the balancing test.⁹⁹ Several federal courts have proposed a similar "market filter" which includes a threshold analysis to determine whether a defendant possesses market power.¹⁰⁰ Similarly, commentators have advocated a structured rule of reason for joint ventures based on the partners' market power.¹⁰¹ None of these proposals, however, has addressed the primary deficiency of the current rule of reason approach—the complexity of market power analysis. Since each of the proposals continues to concentrate on the market power of the parties to the restraint, none is likely to be very useful.

Attempts at legislative reform of joint venture antitrust analysis have been no more successful than efforts by enforcement agencies, judges, and academics. The legislation enacted to date represents a piecemeal approach that has done little to clarify the standards of legality. For example, the Export Trading Company Act of 1982¹⁰² grants an exemption from antitrust liability to firms whose joint export activities will not adversely affect competition in the United States.¹⁰³ However, the Export Trading Company Act is very limited in scope and does not even protect the joint manufacture of products for export.¹⁰⁴ The National Cooperative Research Act of 1984¹⁰⁵ directs the

99. See *DOJ International Guidelines*, *supra* note 35, ¶ 13,109, at 20,600; see also *In re Massachusetts Bd. of Registration in Optometry*, 110 F.T.C. 549, 604 (1980) (describing a structured method for analyzing horizontal restraints); Kovacic, *supra* note 31, at 1083 n.124; Timothy J. Muris, *The New Rule of Reason*, 57 ANTITRUST L.J. 859, 861-62 (1988).

100. If the plaintiff fails to prove that the defendant has market power, the restraint is deemed legal and the analysis is at an end. See, e.g., *Ryko Mfg. Co. v. Eden Servs.*, 823 F.2d 1215, 1231 (8th Cir. 1987), *cert denied*, 484 U.S. 1026 (1988); *Assam Drug Co. v. Miller Brewing Co.*, 798 F.2d 311, 316 (8th Cir. 1986); *Morrison v. Murray Biscuit Co.*, 797 F.2d 1430, 1435 (7th Cir. 1986); *Hand v. Central Transp.*, 779 F.2d 8, 11 (6th Cir. 1985); *Jack Walter & Sons v. Morton Bldgs., Inc.*, 737 F.2d 698, 702 (7th Cir.), *cert denied*, 469 U.S. 1018 (1984); *General Leaseways v. National Truck Leasing Ass'n*, 744 F.2d 588, 596 (7th Cir. 1984); *Graphic Prods. Distribs. v. Itek Corp.*, 717 F.2d 1560, 1568 (11th Cir. 1983); *Valley Liquors v. Renfield Importers*, 678 F.2d 742, 745 (7th Cir. 1982); *Muenster Butane v. Stewart Co.*, 651 F.2d 292, 298 (5th Cir. 1981).

101. See e.g., Alden F. Abbott, *Joint Production Ventures: The Case for Antitrust Reform*, 58 ANTITRUST L.J. 715, 732 (1989); Joe Sims, *Developments in Agreements Among Competitors*, 58 ANTITRUST L.J. 433, 439 (1989); Greaney & Sindelar, *supra* note 2, at 571-72.

102. Pub. L. No. 97-290, 96 Stat. 1233 (codified at 15 U.S.C. §§ 4001-4021 (1988)).

103. 15 U.S.C. § 4016(a) (1988).

104. *Id.* §§ 4002, 4013

105. Pub. L. No. 98-462, 98 Stat. 1815 (codified at 15 U.S.C. §§ 4301-4305 (1988)).

courts to analyze research and development joint ventures under the rule of reason.¹⁰⁶ The Act provides that, if a notification filing for a joint venture is made with the Department of Justice and the FTC within ninety days after the parties enter into a written agreement, the joint venture will be exempt from treble damages if it is ever held to be illegal.¹⁰⁷ The Act, however, covers only a narrow range of activities. It does not protect production, marketing, or even certain applied research.¹⁰⁸ Moreover, the National Cooperative Research Act does not define how a court should conduct the rule of reason analysis—it merely states that the analysis should take “into account all relevant factors affecting competition, including, but not limited to, effects on competition in properly defined, relevant research and development markets.”¹⁰⁹ Although Congress believed that such a codification of the rule of reason would clarify the legality of research and development ventures, the Act may in fact have the opposite effect.¹¹⁰ The requirement that the courts consider all relevant factors may preclude use of the new structured rule of reason adopted by the FTC, Department of Justice, and many federal courts in recent years. Furthermore, in the case of new technologies, any definition of the relevant research and development market and the market power of the competitors therein will be particularly difficult.¹¹¹ The failure of Congress to provide a clear standard for the legality of joint ventures is especially disturbing given the blanket exemptions available in Japan and the European Economic Community to competitors engaged in cooperative undertakings.¹¹²

106. 15 U.S.C. § 4302 (1988).

107. *Id.* § 4305.

108. See Sara G. Zwart, *Innovate, Integrate and Cooperate: Antitrust Changes and Challenges in the U.S. and European Economic Community*, 1989 UTAH L. REV. 63, 89.

109. 15 U.S.C. § 4302.

110. See Foster et al., *supra* note 96, at 350.

111. See *id.* at 358.

112. See Jorde & Teece, *supra* note 3, at 547-50; Abbott, *supra* note 101, at 724, 726. Several measures have been proposed in Congress recently to create a greater safe harbor for domestic joint ventures. Measures in the 101st Congress included a bill establishing antitrust immunity for joint production ventures. See S. 1006, 101st Cong., 1st Sess. (1989). Another measure would have provided complete immunity from antitrust damages (but not from injunctive relief) for pro-competitive joint ventures certified by the Government. See H.R. 1024, 101st Cong., 1st Sess. (1989). On January 3, 1991, a bill was introduced in the House of Representatives to extend the provisions of the National Cooperative Research Act of 1984 to joint production ventures. See H.R. 27, 102d Cong., 1st Sess. (1991).

C. THE ADVERSE EFFECTS OF THE CURRENT APPROACH

American firms considering joint ventures today face many unanswerable questions: Will the joint venture be subjected to a merger-based assessment of its structural impact on actual and potential competition in a particular market? If so, what market will the court deem relevant? Will the court take a rule of reason approach to the joint venture and, if so, what factors will be decisive? Will horizontal competitive restrictions related to the joint venture be upheld as integral to its success or will they be struck down as per se illegal? Such fundamental uncertainties put potential joint venture partners at significant legal risk.

The legal consequences of entering into an illegal joint venture can be quite severe. Businesses and individuals can be liable for criminal sanctions under the Sherman Act.¹¹³ The Clayton Act imposes liability for treble damages and attorneys' fees and authorizes divestiture and other injunctive relief.¹¹⁴ Government contractors can lose their right to do business with the federal government.¹¹⁵ These consequences can be invoked by many parties, including the Department of Justice and the FTC, as well as competitors, customers, and suppliers of the partners.¹¹⁶ Even if a defendant is not ultimately found liable, the costs of defending a lawsuit can be prohibitive.¹¹⁷

Under the courts' current approach, joint ventures are subject to greater antitrust risks than mergers. A former assistant attorney general has pointed out that a joint venture is riskier "because you don't find out it's wrong until years later."¹¹⁸ Unlike mergers of significant size, joint ventures are often not structured in a manner that requires pre-transaction clearance

113. 15 U.S.C. §§ 2, 7 (1988).

114. *See id.* §§ 45, 46.

115. *See* 48 C.F.R. §§ 9.406-2(a)(2), 9.407-2(a)(2) (1990).

116. *See* McGrath, *supra* note 1, at 971-72. Fellow partners are also potential litigants. One partner may attempt to enforce another partner's obligation to contribute capital, technology or other assets to a joint venture. As an affirmative defense, the other partner may assert that the joint venture is illegal under the antitrust laws. *See* Kovacic, *supra* note 31, at 1075.

117. The litigation concerning the Northrop-McDonnell Douglas teaming agreement for the production of the F-18 aircraft, for example, lasted six years and consumed at least \$40 million in legal fees and thousands of hours of management time before it was settled. *See* Kovacic, *supra* note 31, at 1075 n.83.

118. *New England Conference Finds More Reality than Rhetoric in Promises for Enforcement*, 59 Antitrust & Trade Reg. Rep. (BNA) No. 1490, at 663,669 (November 8, 1990) [hereinafter *New England Conference*] (comments by Donald Baker).

from the FTC or Justice Department under the Hart-Scott-Rodino Act.¹¹⁹ Thus, joint venture partners are often subject to antitrust challenges at any time during the life of the joint venture. As the joint venture's share of the relevant market changes, the antitrust risks can increase significantly. Competitors, in fact, may be more inclined to challenge joint ventures that succeed over a period of time in increasing their market share.¹²⁰

Legal risks continue to deter American firms from forming pro-competitive joint ventures.¹²¹ Although the courts may be more inclined today to consider efficiency arguments for cooperative arrangements among competitors, the outcome of their analysis remains uncertain. The courts have been unable to define a "safe harbor" in which joint ventures will be deemed legitimate on their face. Many firms will perceive the mere possibility of an antitrust challenge to a joint venture as a risk not worth taking.¹²² As long as the courts continue to send out confusing signals on the standards of legality for joint ventures, businesses will continue to refrain from beneficial cooperative activity because of the perceived antitrust risks.

119. See 15 U.S.C. § 18(a) (1988) (mandating notification and waiting period for mergers). Premerger notification is only required when joint venture partners form a separate corporation and contribute assets of \$10 million or more to the corporation. See *supra* note 55.

120. See Charles F. Rule, *The Administration's View on Joint Ventures*, 54 ANTITRUST L.J. 1121, 1123-24 (1985); *Discussion of Joint Venture Hypothetical A*, 54 ANTITRUST L.J. 1157, 1171 (1985) [hereinafter *Hypothetical A*] (comments by Don T. Hibner, Jr.). But see Eisen, *supra* note 28, at 262 (arguing that the antitrust standards for mergers and joint ventures should be different because of the need to wait to assess the impact of a joint venture on competition).

121. Dick Thornburgh, *U.S. Firms Get Tripped in Race to the Marketplace: Grant Antitrust Exemptions . . .*, WALL ST. J., Dec. 27, 1988, at A10; see also Pitofsky, *supra* note 1, at 1605; Jorde & Teece, *supra* note 3, at 545. Commentators have concluded that Congress was concerned about the deterrent effect joint venture antitrust standards would have on future joint ventures when it enacted the National Cooperative Research Act of 1984. See Foster et al., *supra* note 96, at 353. But see Eisen, *supra* note 28, at 261 (arguing that "the antitrust laws . . . are not a large barrier to consortia formation").

122. This phenomenon was evident in American firms' reaction to the passage of the National Cooperative Research Act of 1984. As one commentator noted, "Despite the fact that existing law clearly permitted most research and development (R&D) joint ventures, it took the passage of this statute, plus the active encouragement of the Commerce Department, to ease the reluctance of many companies to even discuss joint R&D with competitors." Ira M. Millstein, *The Impact of the Antitrust Laws on America's Ability to Restructure Its Industries and Proposals for Change*, 47 U. PITT. L. REV. 713, 719 (1986).

II. A NEW JOINT VENTURE STANDARD

A. THE NEED FOR A PURPOSE-BASED APPROACH

The competitive characteristics of joint ventures are clear enough to allow the courts to adopt a single, easily understood standard for analyzing these arrangements. The standard should define certain safe harbors for pro-competitive ventures while prohibiting and deterring arrangements adversely affecting competition. Such an approach would preserve judicial resources by making the dividing line between permissible and illegal conduct easier for the courts to determine. It would also free American businesses to engage in beneficial cooperative activity without fear of antitrust liability. Neither a merger-based analysis, a traditional *per se* approach, nor a market-based rule of reason is appropriate for the analysis of joint ventures. Merger analysis disregards the fact that joint ventures are not likely to eliminate all commercial rivalry among their partners.¹²³ *Per se* analysis is inappropriate because the partial integration resulting from joint ventures creates substantial efficiencies.¹²⁴ The rule of reason should not apply because it imposes a complex market analysis that is unnecessary for cooperative arrangements that frequently pose no competitive problems.¹²⁵

Instead of the traditional alternatives, the courts should adopt a new intermediate approach based on the purpose of the parties to a joint venture. The market impact of horizontal competitive restrictions can often be inferred from the purposes of the parties to the restraints.¹²⁶ Courts are much more

123. See *supra* notes 43-55 and accompanying text.

124. See *supra* notes 60-89 and accompanying text.

125. See *supra* notes 90-98 and accompanying text.

126. See, e.g., *Broadcast Music, Inc. v. Columbia Broadcast Sys., Inc.*, 441 U.S. 1, 19 (1979) ("[O]ur inquiry must focus on whether the effect and, here because it tends to show effect . . . the purpose of the practice are to threaten the proper operation of our predominantly free-market economy . . ."); *Chicago Professional Sports, Ltd. v. National Basketball Ass'n*, 1991-1 Trade Cas. (CCH) ¶ 69,308, at 65,171 (N.D. Ill. 1991) ("Knowledge of intent may help the court to interpret facts and to predict consequences.") (citing *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 239 (1918)); see also *New England Conference*, *supra* note 118, at 663,669 (comments by Eleanor Fox) ("Purpose is often a good key to determining probable effect."). Many antitrust commentators, however, believe that purpose is not a valid indicator of competitive effects and that a market-based inquiry should be given greater priority. See, e.g., Pitofsky, *supra* note 1, at 1622 ("'[P]urpose' is an unreliable barometer of legality in antitrust."); Edward Brunet & David J. Sweeney, *Integrating Antitrust Procedure and Substance After Northwest Wholesale Stationers: Evolving Antitrust Approaches to Pleadings, Burden of Proof and Boycotts*, 72

capable of determining a defendant's competitive purpose than of divining the market impact of restrictions on competition.¹²⁷ A purpose-based analysis fairly puts the onus on the defendant, who has access to and controls the documents and witnesses most likely to demonstrate the reason why the partners implemented particular competitive restraints.

A purpose-based analysis is particularly appropriate for joint ventures. Often the specific market impact of a joint venture "will not be determinable until some time in the future."¹²⁸ However, the parties' competitive purpose at the time they form a joint venture will usually indicate whether the venture will enhance competition in the relevant market. If the parties' purpose is to integrate their resources to enter a new market from which they were individually foreclosed, the joint venture will have a beneficial competitive effect. A new competitor that otherwise would not have existed will be added to the relevant market. A court can deem this type of joint venture legal on its face without any consideration of its specific competitive effects. Thus a purpose-based analysis would provide a safe harbor that would encourage firms to enter into joint ventures which enhance competition in new markets.

A purpose-based analysis would also recognize those circumstances which warrant further inquiry into the competitive effects of joint ventures. Joint ventures can have an adverse as well as a beneficial impact when the parties' purpose is not to penetrate a new market but simply to integrate their resources in an existing market. Such a venture can enhance the parties' efficiency in the current market, but it can also eliminate competition between the parties. In such cases a court should weigh the potential anti-competitive effects of the arrangement against the efficiencies which the joint venture could create.

VA. L. REV. 1015, 1044 (1986) ("Although 'purpose and effect' have always been the central concerns of antitrust analysis, market impact is clearly the more dominant of the two concepts."); Rand McQuinn, *Boycott Law After Northwest Wholesale Stationers*, 57 ANTITRUST L.J. 839, 839 (1989) ("[T]his [purpose-based] approach has created confusion and the potential for silly results.").

127. See *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 754 (1988) (Stevens, J., dissenting) ("[In] antitrust, as in many other areas of the law, motivation matters and fact-finders are able to distinguish bad from good intent."); *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332, 343 (1982) ("Judges often lack the expert understanding of industrial market structures and behavior to determine with any confidence a practice's effect on competition.").

128. *Hypothetical A*, *supra* note 120, at 1166 (comments by Don T. Hibner, Jr.).

Under a purpose-based approach, such a balancing test could be easily undertaken. In fact, in most cases the competitive impact of a joint venture would be apparent from the parties' objectives for the venture, and no market power analysis would be required.

In addition, a purpose-based analysis would permit the courts to consider whether any ancillary restrictions on competition are necessary to promote the legitimate objectives of a joint venture. By separating consideration of ancillary restraints from deliberations on the joint venture itself, courts can fashion remedies short of outright condemnation of the entire transaction.¹²⁹ If an ancillary restraint is necessary to effectuate the parties' objectives for the joint venture, it should be upheld. If the restraint is broader than necessary to achieve the parties' legitimate purposes, a court can either strike it down or limit it to a more reasonable scope. In either case, the anti-competitive aspects of the ancillary restraint can be remedied without prohibiting the joint venture itself.

There is considerable precedent for applying a purpose-based analysis to joint ventures. The federal courts have moved increasingly in recent years toward adoption of an "ancillary restraints" analysis based on the purpose of horizontal restrictions on competition. Prior to the late 1970s, the ascendancy of the *per se* approach to horizontal restrictions prevented further development of the ancillary restraints analysis,¹³⁰ which was first set forth by Judge Taft in 1898.¹³¹ However, the analysis was revitalized by the Supreme Court's willingness in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*¹³² to consider the potential efficiency justifications of horizontal price-fixing.¹³³ Several lower federal courts subsequently used

129. In certain cases, the courts have inappropriately applied a *per se* analysis to joint ventures because of their mistaken belief that overly broad ancillary restraints taint an entire joint venture. For example, the dissent in *Los Angeles Memorial Coliseum v. National Football League*, 726 F.2d 1381 (9th Cir. 1984), argued that the majority's decision on the legality of territorial restrictions was "tantamount to ruling that the N.F.L. structure is itself *per se* invalid under the Sherman Act." *Id.* at 1408 (Williams, J., dissenting).

130. Greaney & Sindelar, *supra* note 2, at 565-66.

131. See *supra* notes 14-18 and accompanying text.

132. 441 U.S. 1 (1979).

133. Although it did not cite *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898) *aff'd*, 175 U.S. 211 (1899), the *Broadcast Music* Court described the blanket license in terms which evoked Judge Taft's approach. The Court stated: "The blanket license, as we see it, is not a 'naked restrain[t] of trade with no purpose except stifling of competition,' *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963), but rather accompanies the integration

an ancillary restraints analysis to evaluate competitive restrictions among the partners to joint ventures. In *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*,¹³⁴ for example, Judge Bork concluded that the Supreme Court's recent decisions on horizontal restraints had expressly adopted the ancillary restraints doctrine and, in so doing, overruled the blanket per se approach to restrictions incidental to joint ventures.¹³⁵

Unfortunately, the case law in the Supreme Court has not been as clear as Judge Bork indicated in *Rothery*. Considerable confusion remains over the appropriate place for per se, rule of reason, and merger analysis in the joint venture context.¹³⁶ Nevertheless, it is possible to interpret the outcome of several of the Supreme Court's seemingly contradictory opinions as consistent with an intermediate purpose-based standard for the analysis of joint ventures. Certain cases can be viewed as upholding ancillary restraints necessary to achieve the legitimate objectives of cooperative arrangements. In *Broadcast Music*, for example, the Court refused to prohibit a price-fixing arrangement that allowed the association of musical composers to market a new product that otherwise would have been unavailable to the public.¹³⁷ Similarly, in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery*,¹³⁸ the Court upheld membership restrictions necessary for insuring the effectiveness of a pro-competitive purchasing cooperative among small office supply stores.¹³⁹ The Court prohibited ancillary restraints, however, in those cases in which they were broader than necessary to promote the legitimate purposes of a joint venture. In *United States v. Topco Associates*,¹⁴⁰ the territorial restrictions on each grocery store were not required to promote the private label brand of the group-buying association,¹⁴¹ and

of sales, monitoring and enforcement against unauthorized copyright use." 441 U.S. at 20.

134. 792 F.2d 210 (D.C. Cir. 1986).

135. *Id.* at 229; see also *supra* note 18.

136. See *supra* text accompanying notes 42-98.

137. *Broadcast Music*, 441 U.S. at 20.

138. 472 U.S. 284 (1985).

139. *Id.* at 295.

140. 414 U.S. 801 (1973) (per curiam), *aff'g* 1973-1 Trade Cas. (CCH) ¶ 74,485, at 94,153 (N.D. Ill. 1973).

141. *Id.* In the entry of a final decree against Topco, the district court did not prohibit the joint venture itself but approved limited areas of primary responsibility and profit pass-over clauses as less restrictive alternatives to the exclusive territories. 1973-1 Trade Cas. (CCH) ¶ 74,485, at 94,153. The Supreme Court affirmed. 414 U.S. 801.

in *NCAA v. Board of Regents of the University of Oklahoma*¹⁴² the restrictions on member colleges' television rights were not necessary to promote collegiate athletics.¹⁴³

B. DETERMINING WHEN A JOINT VENTURE STANDARD IS APPROPRIATE

Before undertaking a purpose-based analysis of a cooperative arrangement, a court should confirm that the arrangement does, in fact, possess the distinguishing competitive features of a joint venture. Joint ventures are an intermediate form of business organization that lie between the extremes of cartels and mergers on the continuum of cooperative arrangements.¹⁴⁴ The place of a joint venture on the continuum depends upon the extent to which the arrangement integrates the resources of the parties. The critical feature distinguishing joint ventures from cartels and mergers is partial integration.¹⁴⁵ If a cooperative arrangement does not possess a certain minimum degree of integration, it will be incapable of creating efficiencies. A court should classify this type of arrangement as a cartel and subject it to per se analysis. Other cooperative arrangements are so well integrated that they eliminate all competition between the parties in the relevant market. A court should classify these arrangements as mergers and analyze them under a structural market approach.

When partners contribute assets such as technology, capital, or facilities to a joint venture, there should be no question that sufficient integration exists to avoid the cartel designation. In these cases, the parties will have pooled their resources to establish a new competitive entity. A closer question arises, however, when the parties do not contribute any tangible resources to their cooperative endeavor, but merely undertake to coordinate their efforts in particular ways. One of the leading commentators on joint ventures believes that unless the partners make a contribution of assets there is no justification for treating the new entity as a joint venture.¹⁴⁶ Such an approach, however, is unduly harsh. If the partners have a legitimate efficiency objective, a court should classify their arrangement as a

142. 468 U.S. 85 (1984).

143. *Id.* at 117-18; see also M. Laurence Popofsky, *Integration, Market Power and Necessity: Guideposts for the Practitioner*, 54 ANTITRUST L.J. 1141, 1145-46 (1985).

144. See *supra* notes 19-22 and accompanying text.

145. See *supra* text accompanying note 22.

146. Brodley, *supra* note 20, at 1526.

joint venture even if the objective can be accomplished solely through contractual undertakings. The critical inquiry should be whether the partners merely intend the arrangement to disguise naked restrictions on price or output, or whether their purpose is to promote economic efficiency.¹⁴⁷

Although the distinction between cartels and joint ventures may not be obvious when the only integration between the parties is contractual, the courts should be able to determine when the parties have a legitimate efficiency objective.¹⁴⁸ The types of contractual commitments undertaken by the partners will usually reveal whether they legitimately intend to enhance their efficiency. Group buying organizations, for example, may require their participants to purchase certain minimum amounts through the organization. Such a commitment can give buying organizations composed of small firms the purchasing clout that allows them to compete more effectively against their larger competitors. Similarly, a group selling organization composed of small firms may require its members to market their products exclusively through the or-

147. See Roberts, *supra* note 22, at 853. The Department of Justice defines legitimate joint ventures as those arrangements "that involve some economic integration of the venture members' operations beyond the mere coordination of their pricing and output decisions." *DOJ International Guidelines, supra* note 35, ¶ 13,109.84, at 20,621 (Illustrative Case 5); see also *id.* at 20,628; Popofsky, *supra* note 143, at 1142-43.

148. The courts have been able to distinguish legitimate cooperative arrangements from "sham" joint ventures whose only purpose is to restrict competition. Cartel rules have been applied to cooperative arrangements for which defendants could raise no plausible efficiency arguments other than their desire to suppress competition. In *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951), for example, the aggregate of price-fixing and territorial restraints between the parties made it clear that the parties' attempt "to suppress competition among themselves and others [could not] be justified by labeling the project a 'joint venture.'" *Id.* at 598. In *Federal Trade Commission v. Indiana Federation of Dentists*, 476 U.S. 447 (1986), the sole objective of the dentists' union was illegitimate: to preclude insurers from obtaining patients' X-rays. *Id.* at 451. Naked horizontal agreements not to compete, worldwide divisions of territories effected through patent cross-licensing, joint sales agencies designed to fix competitors' prices, and agreements to forego competitive bidding have all been found *per se* illegal despite the defendants' arguments that they were engaged in a "joint venture." See *United States v. Capitol Serv. Inc.*, 568 F. Supp. 134, 153 (E.D. Wis. 1983) (agreements not to compete among movie theaters), *aff'd*, 756 F.2d 502 (7th Cir. 1985); *United States v. National Lead Co.*, 63 F. Supp. 513, 527 (S.D.N.Y. 1945) (patent cross-licensing); see also *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 692-93 (1978) (foregoing of competitive bidding); *United States v. Dynallectric Co.*, 859 F.2d 1559, 1568-69 (11th Cir. 1988) (same); *Virginia Excelsior Mills, Inc. v. Federal Trade Comm'n*, 256 F.2d 538, 540 (4th Cir. 1958) (joint sales agency agreement).

ganization in order to assure that it can negotiate more effectively with large purchasers. A court should analyze cooperative arrangements with such legitimate purposes as joint ventures rather than as cartels, even though they involve only a relatively small degree of integration.

At the integrated end of the continuum, it should be relatively easy for the courts to distinguish joint ventures from mergers. The distinction is important because a more permissive analysis is only appropriate for cooperative arrangements with a narrow scope. If a joint venture is so broad that it eliminates all commercial rivalry between the partners, it should be subjected to a structural market analysis. When two parties contribute to a joint venture all of their assets used in a particular business, the venture eliminates all competition between them in the relevant market. The substance of such a transaction is no different than a merger. As in a merger, a single entity (the joint venture) takes the place of two former competitors in the relevant market. These transactions have the same competitive effect as an acquisition of one partner's business by the other, and they should be subject to the same antitrust standard as an acquisition: a structural analysis to determine their specific impact on competition in the relevant market.¹⁴⁹

149. Many courts have applied merger analysis to joint ventures which eliminate all commercial rivalry between their partners. In *Citizens Publishing v. United States*, 394 U.S. 131 (1969), the combination of two newspapers' advertising and circulation functions precluded future competition. *Id.* at 134. The Court held that price-fixing and noncompetition agreements between the parties were illegal per se under the Sherman Act. *Id.* at 135-36. In his concurring opinion, Justice Harlan noted that if the operating agreement between the two papers had provided that it would continue indefinitely "we would have had no choice but to treat the transaction in the same way we would treat a total corporate merger." *Id.* at 141 (Harlan, J., concurring). In *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948), competition was eliminated by a joint committee's pooling of the profits of formerly competitive movie theaters. *Id.* at 149. Accordingly, the Court affirmed the decision of the district court which required dissolution of the pooling agreements. *Id.* In *United States v. Ivaco, Inc.*, 704 F. Supp. 1409 (W.D. Mich. 1989), the district court applied a merger analysis to a joint venture to which two manufacturers contributed their entire railroad track equipment business. *Id.* at 1414-30. The court granted the government's motion for a preliminary injunction preventing the proposed joint venture. *Id.* at 1411. The court distinguished its analysis from the more permissive approach that would have been appropriate if the companies had entered into a limited venture for research and development that left them free to compete in other areas of the railroad track equipment business. *Id.* at 1426.

C. DETERMINING THE LEGALITY OF THE JOINT VENTURE ITSELF

1. Distinguishing Per Se Legal Joint Ventures

After a court determines that a cooperative arrangement is sufficiently integrated to be classified as a joint venture rather than as a cartel or as a merger, it should then consider the legality of the joint venture itself. In many cases, a court can determine the legality of the joint venture on its face. If the purpose of the venture is to allow the partners to enter new markets from which they would have been individually foreclosed, the venture will be pro-competitive. This type of joint venture promotes competition by permitting "the introduction of a new competitor that otherwise might never have come into being."¹⁵⁰ At the same time, such joint ventures have no adverse competitive effects. No actual or potential commercial rivalry is eliminated by the formation of joint ventures in markets in which the partners did not compete, or in the absence of the joint venture, could not have competed. There is only one inevitable competitive effect of firms' association in a joint venture that permits their entry into a new market: the addition of new capacity that otherwise never would have existed. Because their only competitive effect is beneficial, such joint ventures should be deemed per se legal.¹⁵¹

Courts should uphold many research and development joint ventures on their face because they allow their partners to enter new product markets that they could not have entered on their own.¹⁵² Given the obvious barriers to entry into markets requiring the development of new technology, one would expect few objections to such an approach. A rule of per se legal-

150. Pitofsky, *supra* note 4, at 1018-19.

151. As one commentator has pointed out: "Joint ventures among firms at the same level of production that have no such competitive links [as actual or potential competitors] raise no competitive concerns . . . from an antitrust standpoint, they are legal." McGrath, *supra* note 13, ¶ 50,470, at 56,137; *see also* Pitofsky, *supra* note 1, at 1608-09 (asserting that joint ventures among non-competitors in unconcentrated markets should be legal per se). Some courts have recognized that no balancing need be undertaken under the rule of reason when a joint venture has no real anti-competitive effect. For example, on remand from the Supreme Court's decision in *Broadcast Music, Inc. v. Columbia Broadcasting System*, 441 U.S. 1 (1979), the Second Circuit concluded that "the balancing of pro and anti-competitive effects need not be undertaken because . . . the blanket license has no anti-competitive effect at all." *Columbia Broadcasting Sys., Inc. v. American Soc'y of Composers, Authors & Publishers*, 620 F.2d 930, 934 (2d Cir. 1980).

152. *See infra* notes 189-91 and accompanying text.

ity should not, however, be confined to research and development joint ventures. The courts should also uphold certain production joint ventures on their face. The costs of manufacturing new products may be just as insurmountable for individual firms as the costs of developing new technology. In such cases production joint ventures should be *per se* legal.¹⁵³

Certain Supreme Court decisions have implicitly recognized the legality of joint ventures that facilitate entry into new markets. In *Associated Press v. United States*,¹⁵⁴ the Court did not question the legality of the venture itself because, according to one commentator, "few, if any, newspapers would have been sufficiently affluent to perform the news gathering services provided by the AP joint venture."¹⁵⁵ In its *per curiam* decision following remand in *United States v. Penn-Olin Co.*,¹⁵⁶ the Court upheld the joint venture after the district court found that neither Pennsalt nor Olin was likely to have entered the sodium chlorate market in the southeast in the absence of the joint venture.¹⁵⁷ Similarly, the Court upheld the musical composers' association in *Broadcast Music, Inc. v. Columbia Broadcasting Systems*,¹⁵⁸ because none of the composers could have marketed their music without the blanket license.¹⁵⁹ Finally, in *NCAA v. Board of Regents of the University of Oklahoma*,¹⁶⁰ the Court did not challenge the legitimacy of the collegiate athletic organization itself because, in its absence, member colleges

153. For example, the joint venture between United Technologies Corp., Rolls Royce Ltd. and others for the manufacture of a new jet engine allowed the parties to produce, at an estimated cost of \$600 million, a product that Rolls Royce did not have the financial capacity to make independently. See *United States Department of Justice Antitrust Guidelines Concerning Research Joint Ventures*, 4 Trade Reg. Rep. (CCH) ¶ 13,120, at 20,667-78 (1980) [hereinafter *DOJ Research JV Guidelines*]. Similarly, in *United States v. Federal Communications Commission*, 652 F.2d 72 (D.C. Cir. 1980), the District of Columbia Circuit upheld a joint venture among International Business Machines (IBM), Comsat General Business Communications, Inc. (Comsat), and Aetna Satellite Communications, Inc. for the production of communications satellites. *Id.* at 107. Although the court questioned IBM's inability to enter the field of satellite communications without Comsat's contribution, *id.* at 100, the court relied on the Federal Communications Commission's conclusion that, because of the risks of new satellite technology and high start-up costs, "Comsat and IBM were unlikely both to enter the field separately." *Id.* at 94.

154. 326 U.S. 1 (1944).

155. Pitofsky, *supra* note 4, at 1057-58.

156. 389 U.S. 308 (1967) (*per curiam*), *aff'g* 246 F. Supp. 917 (D. Del. 1965).

157. 246 F. Supp. at 933.

158. 441 U.S. 1 (1979).

159. *Id.* at 19.

160. 468 U.S. 85 (1984).

could not have effectively participated in amateur athletics.¹⁶¹

2. The Balancing Test for Joint Ventures Among Competitors

(a) *When Balancing is Appropriate*

A rule of per se legality is not appropriate for all joint ventures. Businesses may form joint ventures not only to facilitate entry into new markets, but also to enhance their collective power in markets in which they already compete with each other. This type of joint venture will reduce the number of competitors in the market because the partners will, in the natural course, refrain from competing with their own affiliate.¹⁶² The joint venture will, in effect, take the place of its partners in the relevant market. Whether or not the parties expressly agree not to compete with the joint venture, they will usually avoid competition that could harm their own affiliate. Since this type of joint venture reduces competition and enhances efficiency, the courts must balance the "tradeoff between efficiency gains . . . and the potential anti-competitive losses."¹⁶³

A balancing approach is also appropriate when businesses form a joint venture in a new market which each partner could have entered on its own. Such a joint venture will foreclose the partners' individual entry into the relevant market. By virtue of the partners' participation in the joint venture, other competitors will no longer perceive them as potential entrants into the market. In making their decisions on pricing and output, the incumbent competitors will not feel constrained by the threat of individual entry by the joint venture partners.¹⁶⁴ When the partners to a joint venture could have entered the relevant market individually, a court should balance the adverse effects resulting from the elimination of their potential competition against the efficiencies created by the joint venture.

Thus, the distinction between per se legal joint ventures and those requiring a balancing approach will often depend

161. *Id.* at 101-02.

162. A joint venture "reduces the parents' incentive for competition because whatever a parent might earn by making individual sales in the joint market is now offset by its lowered profit as a partner in the joint venture." Brodley, *supra* note 24, at 76.

163. Greaney & Sindelar, *supra* note 2, at 571.

164. The Supreme Court recognized in *United States v. Penn-Olin Co.*, 378 U.S. 158 (1964), that such adverse consequences could result from a joint venture's elimination of potential competition. *Id.* at 173-74.

upon whether, in the absence of the venture, the parties would have entered the relevant market on their own. The courts should be able to determine rather easily whether the joint venture partners would have been capable of individual entry into the relevant market.¹⁶⁵ The costs and risks of entry often will be evident from the types of products involved. High technology product markets, for example, are usually more difficult to enter than commodity product markets because of the requisite research and development costs. When the pace of technological change in the relevant market is swift, the product cycle will be short, potential returns will be limited and firms will have more difficulty entering the market on their own. Businesses' ability to overcome these barriers to entry will be revealed by their financial resources, technical ability, and experience in producing related products.¹⁶⁶ The courts should have little difficulty deciding on the basis of such evidence whether a joint venture facilitates entry into a new market or simply consolidates the market power of potential competitors in markets they could have entered on their own.

(b) *A Simplified Method of Balancing*

Some commentators have argued that, in analyzing agreements among competitors, courts cannot effectively balance potential efficiencies against possible anti-competitive effects.¹⁶⁷ In fact, because of the perceived difficulty of a balancing test, most courts have refused to recognize an efficiency defense in merger cases.¹⁶⁸ Following a similar approach, federal courts

165. Some commentators have argued, however, that distinctions based on "what a firm might have done" are difficult to prove. See Brodley, *supra* note 20, at 1537; Jeffrey Pfeffer & Phillip Novak, *Patterns of Joint Venture Activity: Implications for Antitrust Policy*, 21 ANTITRUST BULL. 315, 319 (1976).

166. In the Yamaha-Brunswick joint venture, for example, it was clear that Yamaha was a likely entrant into the American market because of its experience in marketing the same products in other countries and its established brand identity, as well as the attractive returns available in the U.S. market. See *Yamaha Motor Co. v. Federal Trade Comm'n*, 657 F.2d 971, 978-79 (8th Cir. 1981), *cert. denied*, 456 U.S. 915 (1982).

167. See Clanton, *supra* note 96, at 1263; Greaney & Sindelar, *supra* note 2, at 578; Pitofsky, *supra* note 4, at 1044.

168. See *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 370-71 (1963); *RSR Corp. v. Federal Trade Comm'n*, 602 F.2d 1317, 1325 (9th Cir. 1979), *cert. denied*, 445 U.S. 927 (1980); *International Tel. & Tel. Corp. v. General Tel. & Elec. Corp.*, 518 F.2d 913, 936 (9th Cir. 1975); see also *Federal Trade Comm'n v. Proctor & Gamble*, 386 U.S. 568, 580 (1967); *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962). The *DOJ Merger Guidelines*, which do not give efficiencies a high status in merger analysis, provide: "[E]fficiencies

have failed to factor potential efficiencies into their analysis of joint ventures among competitors.¹⁶⁹

The federal courts' reluctance to consider the efficiencies of joint ventures is misguided. Since partial integrations among competitors have a unique ability to generate beneficial economic effects, courts should give equal weight to these effects in the balancing analysis. A court should not prohibit a joint venture simply because it could have an anti-competitive impact. The FTC recognized the need for a new balancing approach in its decision approving the General Motors-Toyota joint venture. In that case, the FTC considered both the potential efficiencies and the possible anti-competitive effects of the venture. If anti-competitive effects had been the only consideration, the FTC would certainly have prohibited this joint venture between the first and third largest automobile manufacturers in the world. However, the FTC upheld the joint venture because of its efficiency-enhancing potential (principally by allowing General Motors to learn Japanese management and manufacturing methods) and because its relatively small size and short duration indicated that its adverse competitive impact would be minimal.¹⁷⁰

The FTC's decision on the General Motors-Toyota joint venture demonstrates that the balancing test for cooperative arrangements among competitors need not be complicated. A court can often determine the relative efficiencies and adverse competitive effects of joint ventures without a market analysis. In most cases, the degree of integration achieved by the joint venture and the parties' objectives for the joint venture should dictate whether the balance tips in favor of the legitimacy or the illegality of the arrangement. These factors will be much

do not constitute a defense to an otherwise anticompetitive merger but are one of many factors that will be considered by the Department in determining whether to challenge a merger." *DOJ Merger Guidelines, supra* note 21, ¶ 13,103, at 20,554.

169. In the Yamaha-Brunswick joint venture case, for example, the Eighth Circuit focused only on the potential anti-competitive effects of the joint venture without considering its possible beneficial impact. *See Yamaha Motor*, 657 F.2d at 976-82.

170. *See* J. Fred Weston & Stanley I. Ornstein, *Efficiency Considerations in Joint Ventures*, 53 ANTITRUST L.J. 85, 91 (1984); *Discussion of Joint Venture Hypothetical B*, 54 ANTITRUST L.J. 1197, 1198 (1985) [hereinafter *Hypothetical B*] (comments by David A. Clanton); Lynn E. Eccleston, Note, *Antitrust Implications of a Joint Venture: Is an Efficiencies Justification Justifiable?*, 31 WAYNE L. REV. 1219, 1219-20, 1238 (1985).

simpler for the courts to confirm than the complex economic issues raised in a market power analysis.

Under a balancing approach, a court can rather easily predict the degree of efficiency that a joint venture will generate by the extent to which the parties have integrated their resources in the venture. As one commentator has pointed out, "the assumption that higher levels of integration are likely to be associated with more substantial efficiencies . . . is a premise underlying all of antitrust."¹⁷¹ The amount of capital, technology, or other assets contributed by the partners will demonstrate the extent of their commitment to achieve efficiencies through the joint venture that they could not have achieved on their own. The pro-competitive effects of a joint venture will be maximized when the parties integrate their resources to create a new competitive entity with capabilities beyond those of the individual partners. Research and development joint ventures, for example, can achieve technical break-throughs when partners are willing to assign to the venture all of their rights to relevant technology. Production joint ventures are most successful when the partners contribute a significant amount of capital to construct efficient new facilities. Conversely, when partners contribute little to joint ventures, they are more likely acting for their own competitive benefit rather than to enhance general economic efficiency. An agreement by purchasers to pool their bargaining power, or a joint marketing agreement among competing sellers, unaccompanied by any other efforts at integration, may enhance the profitability of individual partners, but these arrangements will do little to create substantial overall efficiencies in the relevant market.

After determining the efficiencies that will be generated by a joint venture among competitors, the courts must balance those efficiencies against any potential anti-competitive effects. In most cases, the anti-competitive effects should be relatively easy to determine. A joint venture's potential impact on competition may be evident simply from the relationship of the venture's objectives to the production and marketing phases of the product cycle. If the venture cannot affect the partners' decisions on pricing and output, it should have minimal anti-com-

171. Pitofsky, *supra* note 1, at 1623. *But see FTC Enforcement Policy with Respect to Physician Agreements to Control Medical Prepayment Plans*, 46 Fed. Reg. 48,982 (1981) (applying more lenient standard to less integrated plans). As certain commentators have recognized: "This perversely encourages greater concentration without demanding the compensating welfare-enhancing benefits of integration." Greaney & Sindelar, *supra* note 2, at 556.

petitive effects, and no specific analysis of the parties' market power will be necessary.

The Sherman and Clayton Acts preclude concentrations of power that would allow firms to restrict output or raise prices.¹⁷² Recognizing this, the Supreme Court concluded in *Broadcast Music, Inc. v. Columbia Broadcasting Systems*,¹⁷³ that a court's principal inquiry under Section 1 of the Sherman Act should be whether the restraint at issue "facially appears to be one that would always or almost always tend to restrict competition and decrease output."¹⁷⁴ Since "the potential for price-fixing and market domination grows as a company moves closer to the marketplace,"¹⁷⁵ joint ventures removed from the production and marketing phases of the product cycle should raise minimal competitive concerns. Joint ventures limited to research and development, industry standards setting, joint buying, or other "inputs" into the production process usually do not affect the partners' decisions on price and output.¹⁷⁶ If such "upstream joint ventures" are integrated enough to produce substantial efficiencies, the courts should be able to conclude, without any inquiry into the partners' market power, that those efficiencies outweigh the ventures' minimal anti-competitive effects.

Downstream joint ventures involving production or marketing raise greater competitive concerns because they can affect output and pricing in the relevant market.¹⁷⁷ Production joint ventures, for example, give competitors the ability to coordinate their decisions on manufacturing capacity. They also present an opportunity for collusion on pricing by giving each partner access to information on the other partners' manufacturing costs. Nevertheless, the courts should be able to determine, without a market power analysis, whether production joint ventures have a net beneficial effect on competition. A simple review of the duration and size of a production joint venture will usually indicate its competitive effect. If a production joint venture has a short term, the parties will be acutely

172. See ROBERT BORK, *THE ANTITRUST PARADOX*, 17, 20-21 (1978); Alan A. Fisher et al., *Price Effects of Horizontal Mergers*, 77 CALIF. L. REV. 777, 785-86 (1989).

173. 441 U.S. 1 (1979).

174. *Id.* at 19-20.

175. Eisen, *supra* note 28, at 263.

176. See Winslow, *supra* note 42, at 983-84; Pitofsky, *supra* note 4, at 1040.

177. Joseph F. Brodley, *Joint Ventures and the Justice Department's Antitrust Guide for International Operations*, 24 ANTITRUST BULL. 337, 349 (1979).

aware that their self-interest lies in maintaining their individual competitive capacities.¹⁷⁸ They will therefore be less likely to agree on capacity and output limitations during the term of the joint venture. Furthermore, if the venture is small in relation to the rest of the partners' businesses, they will retain their incentive to compete with each other in the marketing phase of the business. The partners will be less likely to collude on pricing or other marketing decisions.¹⁷⁹ A court should thus sustain production joint ventures of limited scope and duration regardless of the partners' market power.¹⁸⁰

The net anti-competitive impact of certain joint ventures may be just as obvious without a consideration of market power. Certain joint ventures so clearly reduce competition without any offsetting efficiency benefit that a court can find the arrangements illegal even if the parties do not possess market power.¹⁸¹ Downstream marketing joint ventures, for example, have the greatest potential for facilitating price collusion, output restrictions, and other anti-competitive effects. In fact, joint marketing arrangements create an even greater danger of collusion than cartels because their direct control over all sales terms "will usually prevent the competitive cheating and half-hearted compliance which may frustrate a cartel agreement."¹⁸²

178. See Brodley, *supra* note 20, at 1547.

179. The General Motors-Toyota joint venture, for example, was limited to the production of 250,000 automobiles a year. James T. Halverson, *Opening Remarks, National Institute on Joint Ventures*, 54 ANTITRUST L.J. 881, 882 (1985). Since this amount was insignificant in relation to the production capacities of General Motors and Toyota, the parties would have been acting against their own self-interests if they had stopped competing against each other in the sale of small cars. *Id.*; see also Kitch, *supra* note 19, at 961-62; Robert C. Weinbaum, *Antitrust Problems in Conducting the Joint Venture's Business Activities*, 54 ANTITRUST L.J. 993, 997 (1985); Robert C. Weinbaum, *The General Motors-Toyota Joint Venture: A Legally Sound Competitive Strategy*, 31 WAYNE L. REV. 1195, 1208 (1985) [hereinafter *General Motors-Toyota Joint Venture*].

180. The Justice Department, however, will undoubtedly continue to be "wary of over inclusive joint ventures involving a large collective market share." Starling, *supra* note 3, at 682.

181. The Supreme Court recognized in *Federal Trade Commission v. Indiana Federation of Dentists*, 476 U.S. 447 (1986), that market power is "but a surrogate for detrimental effects" and that, in cases where the adverse effects on competition are obvious, there is no need for a market power analysis. *Id.* at 461 (quoting PHILLIP E. AREEDA, ANTITRUST LAW ¶ 1511, at 429 (1986)); see also *Chicago Professional Sports, Ltd. v. Nat'l Basketball Ass'n*, 754 F. Supp. 1336, 1363 (N.D. Ill. 1991) (finding no need for market analysis of the NBA's requirement that teams limit their appearance on "superstations" to 20 times per year).

182. Pitofsky, *supra* note 4, at 1039; see also *Appalachian Coals, Inc. v.*

If a marketing joint venture is relatively unintegrated, it will also produce few efficiencies. Without a commitment by the partners to integrate their financial or marketing resources to enhance the efficiency of their distribution network, the only effect of an unintegrated marketing joint venture may be to raise prices and enhance the partners' profitability. Under a balancing test, it would be quite simple for a court to conclude, without any consideration of the partners' market power, that the anti-competitive potential of an unintegrated marketing joint venture outweighs its minimal beneficial effects.

In most cases, therefore, a court can conduct a joint venture balancing test without a specific market power analysis.¹⁸³ The degree of integration in a joint venture, the venture's relationship to the marketing phase of the product cycle, and the scope and duration of the venture will usually reveal whether its efficiencies outweigh its anti-competitive effects. In certain limited situations, however, it will not be clear from these factors whether the venture's beneficial or adverse effects are predominant. The courts will then have to engage in market power analysis to confirm the specific anti-competitive effects of the venture.

Under the joint venture balancing test, market power definition will be required only in those rare cases when the poten-

United States, 288 U.S. 344 (1933); *United States v. Ivaco*, 704 F. Supp. 1409 (W.D. Mich. 1989); Kitch, *supra* note 19, at 962-93 (discussing *Appalachian Coals* and explaining that "most suspect would be joint ventures related to the current market pricing of the members' products"); Kolasky, *supra* note 6, at 692-93 (discussing *Ivaco*).

183. To date, the federal courts have been unable to establish any clear standards for determining when a market power analysis of horizontal restraints is necessary. As the Eleventh Circuit stated, "whether the court . . . must weigh the market power of the antitrust defendant is a curiously confused and uncertain area of the law." *National Bancard Corp. v. VISA U.S.A., Inc.*, 779 F.2d 592, 603 (11th Cir.), *cert. denied*, 479 U.S. 923 (1986). The Supreme Court itself has been willing to dispense with market power analysis in certain horizontal restraint cases, while deeming market power a critical issue in others. Compare *NCAA v. Board of Regents of the Univ. of Oklahoma*, 468 U.S. 85, 109 (1984) ("As a matter of law, the absence of proof of market power does not justify a naked restriction on price or output.") with *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 472 U.S. 284, 294-98 (1985) (requiring proof of market power for illegality of collective refusal to deal). Many federal circuit courts have concluded that market power should be the central factor in their new structured rule of reason. See *supra* note 100. In *Federal Trade Commission v. Superior Court Trial Lawyers Ass'n*, 439 U.S. 411 (1990), however, the Supreme Court criticized the potential for this trend to introduce "the enormous complexities of market definition into every price-fixing case." *Id.* at 430-31 (quoting BORK, *supra* note 172, at 269).

tial competitive benefit and harm of a joint venture are closely matched. This will occur only when the primary factors in the balancing test (the degree of integration achieved by the parties and the objectives of a joint venture) are not decisive and, in fact, point to opposite results. Among all joint ventures, there are only two cases in which market power analysis should be necessary: when the parties have entered into an *unintegrated* purchasing joint venture or an *integrated* marketing joint venture.

As upstream joint ventures, buying groups usually do not have significant anti-competitive effects. However, if the buying groups are not well integrated, they also will not produce significant efficiencies. If the partners pool only their buying power and do not combine other assets that can enhance purchasing efficiency, the joint buying group may have no beneficial effect beyond reducing the partners' costs for raw materials. Without considering the partners' market power, the courts cannot determine whether such an effect outweighs the buying group's adverse impact on competition. Despite their upstream status, buying groups can have certain adverse effects. They eliminate competition among their partners in the purchasing phase and reduce the number of competitive outlets available to sellers. If the partners have significant market power, these adverse effects will outweigh the minimal efficiencies produced by an unintegrated buying group. However, if the partners lack market power, any elimination of competition in the purchasing phase will not be significant. In such cases unintegrated buying groups may be justified by the manner in which they allow small purchasers to compete more effectively against larger competitors.

The efficiencies and adverse competitive effects of integrated marketing joint ventures are also balanced closely enough to require a specific analysis of the parties' market power. Downstream marketing organizations can have significant anti-competitive effects because they directly affect pricing and output in the relevant market. However, if they are well integrated, these joint ventures can also produce substantial benefits, such as more efficient marketing services for customers. In the absence of a market analysis, a court will be unable to determine whether it should prohibit integrated marketing joint ventures. If the partners do not have market power, the benefits of such a joint venture may outweigh the elimination of competition among the partners in the marketing phase.

In cases involving either unintegrated joint buying groups or integrated marketing joint ventures, the courts should establish the share of a particular market that will be deemed to create market power among the joint venture partners. A clear standard would simplify the courts' analysis considerably. The courts should recognize a "safe harbor" of legality for any ventures whose partners have market shares below a particular threshold.¹⁸⁴ Since the courts have, until recently, analyzed horizontal restraints only under a per se approach, they have not had an opportunity to define a safe harbor for these restraints. The courts have, however, had significant experience with a rule of reason analysis of vertical restraints and, in the vertical area, "appear to be converging on a definition of safe harbor for firms with less than 20-25% market share in a relevant market."¹⁸⁵ The Department of Justice has defined a safe harbor for mergers in cases where the post-merger "concentration ratio" is less than 1000 on the Herfindahl-Hirschman Index. This ratio corresponds to approximately a fifty percent market share for the four largest firms in the relevant market.¹⁸⁶ In light of the unique competitive advantages of joint ventures, the market share safe harbor for these arrangements should be higher than for vertical restraints or for mergers. The courts could easily justify a safe harbor for unintegrated buying groups or integrated marketing joint ventures in which partners possess a collective market share of less than thirty-

184. A few federal courts have held that joint ventures among firms that lack market power cannot be deemed illegal. See *Rothery Storage & Van Co., v. Atlas Van Lines, Inc.*, 792 F.2d 210, 229 (D.C.Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987); see also *National Bancard Corp. v. VISA U.S.A.*, 779 F.2d 592, 604 (11th Cir.), *cert. denied*, 479 U.S. 923 (1986). Commentators advocating modification of the United States antitrust laws have noted that both the European Economic Community and Japan allow safe harbor exemptions for joint ventures among firms that lack significant market power. See, e.g., Jorde, *supra* note 3, at 525.

185. Thomas M. Jorde & David J. Teece, *Innovation, Cooperation and Antitrust*, HIGH TECH. L.J. 1, 45 (1989); see Eisen, *supra* note 28, at 260. The vertical restraint cases defining a market share threshold include *Assam Drug Co. v. Miller Brewing Co.*, 798 F.2d 311, 318 n.18 (8th Cir. 1986); *O.S.C. Corp. v. Apple Computer, Inc.*, 601 F. Supp. 1274, 1291 n.8 (C.D. Cal. 1985), *aff'd*, 792 F.2d 1464 (9th Cir. 1986); *Donald B. Rice Tire Co. v. Michelin Tire Corp.*, 483 F. Supp. 750, 761 (D. Md.), *aff'd*, 638 F.2d 15 (4th Cir. 1980), *cert. denied*, 454 U.S. 864 (1981); see also *Ryco Mfg. Co. v. Eden Servs.*, 823 F.2d 1215, 1231-32 & n.14 (8th Cir. 1987), *cert. denied*, 484 U.S. 1026 (1988); *Hand v. Central Transp., Inc.*, 779 F.2d 8, 11 (6th Cir. 1985); *Graphic Prods. Distribs. v. Itek Corp.*, 717 F.2d 1560, 1568 & n.10 (11th Cir. 1983).

186. See *DOJ Merger Guidelines*, *supra* note 21, ¶ 13,103, at 20,552-53.

five percent.¹⁸⁷

Defendants should have the burden of proving the legality of joint ventures under the balancing approach proposed in this Article. The joint venture partners have access to the documents and witnesses that can prove the extent to which they have integrated their resources, the objectives of their venture, its size and scope of operation and, if necessary, their collective market share.¹⁸⁸ Partners should be able to document, in advance, their legitimate objectives for a joint venture. There should be abundant evidence of the parties' competitive purpose in the internal discussions and negotiations preceding the formation of a joint venture and in the legal documents establishing the venture. The partners' failure to come forward with evidence of the venture's efficiency-enhancing objectives may indicate that their real purpose was to eliminate competition among themselves.

D. APPLYING THE PROPOSED STANDARD TO SPECIFIC JOINT VENTURES

A review of the competitive characteristics of specific types of joint ventures reveals how easily a court can apply the anti-trust standard proposed in this Article. In many cases, it will be clear that a joint venture permits its partners to enter new markets and that the venture should therefore be legal on its face. Even when competitors form joint ventures in current markets or in new markets that each could have entered individually, the balancing of efficiencies and adverse competitive effects should not be difficult. In most cases, a court can avoid a complicated market analysis. It should thus be clear to busi-

187. Some commentators have recognized that the safe harbor threshold for joint ventures should be higher than for mergers because such arrangements are significantly less anti-competitive than mergers. See Kitch, *supra* note 19, at 961 n.10. Other commentators have argued, however, that the market share thresholds for joint ventures and mergers should be the same. See BORK, *supra* note 172, at 278; Jorde, *supra* note 3, at 523; see also Jefferson Parish Hosp. Dist. v. Hyde, 466 U.S. 2, 26-27 (1984) (30% market share did not constitute market power in a tying case).

188. One commentator has advocated placing the burden of proving the legitimacy of a joint venture on the defendant because "the defendants are in the best position to demonstrate whether efficiencies are in fact present." Brodley, *supra* note 24, at 79; see also Brunet, *Streamlining Antitrust Litigation by 'Facial Examination' of Restraints: The Burger Court and the Per Se Rule of Reason Distinction*, 60 WASH. L. REV. 1, 12 (1984) (stating that defendant should rebut or raise defenses once plaintiff proves existence of a restraint meriting application of per se rule).

nesses and practitioners what types of joint ventures a court will accept and which it will prohibit. This approach will encourage firms to enter into pro-competitive cooperative arrangements and deter them from forming joint ventures that unduly limit competition.

1. Research and Development Ventures

Under the standard proposed in this Article, courts should almost always uphold joint ventures for the research and development of new products because they create significant efficiencies while causing minimal anti-competitive effects. In fact, in many cases a court should deem these ventures legal on their face. The barriers to entry into high technology markets are now extremely high. By sharing risks in a research and development joint venture, small and medium-sized firms can enter high technology markets from which they would have been individually foreclosed. The integration of complementary technologies in a joint venture will often facilitate technical break-throughs that the parties could not have achieved on their own. Research and development joint ventures that are firms' sole means of entering new technology markets can only have a pro-competitive effect. A court should, therefore, uphold these arrangements without any balancing of their beneficial and adverse market effects.

When the partners to a research and development joint venture possess sufficient resources to enter a new technology market on their own, the venture will eliminate some competition in the research and development phase of the product cycle. Absent the joint venture, the partners could have competed against each other in the development of the relevant technology. A court should balance the harm from this elimination of competition against the efficiencies that will result from the venture. It should be clear in most cases, however, that the efficiencies of research and development joint ventures outweigh their adverse effects on competition.

The efficiencies resulting from most research and development joint ventures are significant. By integrating their technical and capital resources, the partners are able to avoid waste and duplication in the research phase of the product cycle and speed the development of new products. Research and development joint ventures also encourage firms to invest in new technologies. Businesses are often deterred from investing in research and development by the fear that competitors will

copy and use the results without compensating the originating firms for their up-front risks. Joint ventures can eliminate concerns about "free riders" by requiring competitors to invest in the venture before using the fruits of its research. The joint venture can also establish conditions for the licensing or disclosure of its technology to competitors, including the payment of royalties to compensate partners for their original investments. Since joint venture partners can be assured that all who benefit from the technology will share in its costs, they will be more willing to bear the initial risks of research and development.¹⁸⁹

The anti-competitive effects of most research and development joint ventures are minimal. These arrangements are more accurately characterized as a means of "pre-competitive cooperation" than as a device for collusion.¹⁹⁰ Given their position at the initial phase of the product cycle, research and development joint ventures usually do not afford their partners the opportunity to limit downstream competition among themselves. The objective of most research and development joint ventures is to increase rather than restrict the output of new products in the relevant market. Any reduction in research and development competition that these types of joint ventures may cause should usually be offset by increased competition in the eventual production and sale of new products.¹⁹¹ In certain unusual cases, however, the parties may have an anti-competitive purpose for a research and development joint venture that tips the balance in favor of the venture's illegality. The courts should, for example, prohibit research and development joint ventures formed for the purpose of delaying rather than facilitating the introduction of a new product or technology.¹⁹²

189. McGrath, *supra* note 13, ¶ 50,470, at 56,139; Rule, *supra* note 120, at 1131-32; Winslow, *supra* note 42, at 985.

190. Main, *supra* note 5, at 126. The Department of Justice and some commentators have claimed, however, that research and development joint ventures can be illegal when one large research project is substituted for several smaller projects that could have existed in the absence of the joint venture. See *DOJ Research JV Guidelines*, *supra* note 153, ¶ 13,120, at 20,662-63; William J. Murphy, *Interfirm Cooperation in a Competitive Economic System*, 26 *AM. BUS. L.J.* 29, 46 (1988); Brodley, *supra* note 20, at 1571.

191. J. Patrick Ovington, Note, *Mitigating Antitrust Sanctions for Research and Development Joint Ventures*, 4 *PACE L. REV.* 497, 513-14 (1984).

192. In *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980), the Second Circuit disapproved a joint venture under which Kodak agreed with two potential competitors (Sylvania Electric Products, Inc. and General Electric) to delay the development of improved flashcubes until Kodak began to market a matching camera. *Id.* at 304. Similarly, in *United States v. Automobile Manufacturers Ass'n*, 1969 Trade

2. Essential Industry-Wide Organizations

Much confusion exists concerning the legality of industry-wide joint ventures designed to set product standards, collect and disseminate critical data, regulate competition, or provide other essential facilities to competitors in a particular market. The courts have failed to distinguish in such cases between the legitimacy of the joint venture itself and the legality of related restrictions on third parties' access to the venture.¹⁹³ The relevant issue in many cases involving essential facilities is not whether the joint venture itself is legal, but whether the parties have entered into restraints ancillary to the venture that unnecessarily restrict competition. Although related restrictions may be too broad in certain cases, courts should uphold the ventures themselves on their face if they allow the members of an industry to provide a valuable product or service that otherwise could never have existed.¹⁹⁴ Under the approach proposed in this Article, a court would consider the legality of ancillary restraints separately from the legality of the joint venture. A court could then remedy any anti-competitive effects without condemning the legitimate activities of the joint venture itself.

3. Joint Purchasing Organizations

Joint buying groups present more difficult antitrust issues than research and development joint ventures or essential industry-wide organizations. Joint purchasing organizations are usually composed of competitors who pool their buying power in order to obtain a more favorable price for a common raw material or a finished product purchased for resale.¹⁹⁵ Although

Cas. (CCH) ¶ 72,907, at 87,456 (C.D. Cal. 1969), the court prohibited four automobile manufacturers and their trade association from conspiring to delay the development of pollution control devices for automobiles. *Id.* at 87,457.

193. *See, e.g.*, *Associated Press v. United States*, 326 U.S. 1, 21 (1944) (newspapers enjoined from participating in AP activities); *Radiant Burners v. Peoples Gas, Light & Coke Co.*, 364 U.S. 656, 659 (1961) (illegality of trade association's tests and seal of approval for gas burners).

194. In *Associated Press*, for example, the Associated Press made possible a worldwide news gathering service that individual newspapers could not have developed on their own. 326 U.S. at 4. Similarly, industry-wide standards, such as a "seal of approval" for gas burners that meet certain operating standards, could not be established without a cooperative effort among many competitors. *Radiant Burners*, 364 U.S. at 658-59.

195. For example, in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 472 U.S. 284 (1985), the Court recognized that a purchasing cooperative among retailers allowed them to obtain reduced prices

these organizations may make the parties more effective competitors in their current markets, they do not facilitate entry into new markets. Joint purchasing organizations may eliminate competition among their partners for essential products or services and reduce the number of competitive outlets available to suppliers. A court should weigh these adverse competitive effects against the efficiencies created by joint buying groups. The balance between beneficial and adverse competitive effects is much closer for these organizations than for research and development joint ventures or essential industry-wide organizations. In certain cases the courts should consider additional factors, such as the degree of integration achieved by a joint buying group and the market power of the participants, before determining the legality of these arrangements.

Cooperative buying arrangements which are not sufficiently integrated should not qualify for joint venture analysis at all. For example, the courts have appropriately applied a *per se* analysis to unintegrated buying groups whose purpose was to establish a uniform price for their partners' products. In *United States v. Socony Vacuum Oil Co.*¹⁹⁶ a group of major oil companies agreed to stabilize market prices for their own brands of gasoline by purchasing surplus gasoline from independent refiners.¹⁹⁷ There was no integration of resources among the parties other than their agreement to buy the surplus gasoline. Despite the defendants' arguments that the agreement was necessary to avoid cut-throat competition, the Court characterized the arrangement as a naked cartel and applied the *per se* rule.¹⁹⁸ Similarly, in *United States v. Capitol Service*,¹⁹⁹ the court found *per se* illegal an agreement among competing movie theaters not to submit competitive bids for motion picture rentals.²⁰⁰ Since the defendants in these cases had not coordinated their efforts to advance any legitimate efficiency objectives, the courts rightfully condemned the buying groups on their face.

If the parties to a joint buying group have integrated their

for stationery and thereby compete more effectively against larger firms. *Id.* at 286-87. Many smaller hospitals, in an effort to remain competitive, have recently begun to form group buying organizations for the purchase of medical supplies at a reduced cost. See Joseph, *supra* note 26, at 633.

196. 310 U.S. 150 (1940).

197. *Id.* at 173.

198. *Id.* at 219-24.

199. 568 F.Supp. 134 (E.D. Wis. 1983), *aff'd*, 756 F.2d 502 (7th Cir. 1985).

200. *Id.* at 148-54.

efforts to enhance their competitiveness, however, their cooperative arrangement should qualify for the joint venture balancing test. In such a case, a court can use the degree of integration achieved by the buying group as a measure of its efficiency. In addition to pooling market power, the members of a joint buying group may integrate their resources in other ways that allow them to provide better services to customers. These measures may include joint warehousing, computerized ordering services, shared transportation, and other means of making inventory more readily available.²⁰¹ Buying groups that are so well integrated should be sustained rather easily under the balancing approach. They provide substantial efficiencies and cause minimal anti-competitive effects because they are removed from the production and marketing phases of the product cycle.

The more typical joint buying group, however, involves no more integration than a pooling of the parties' buying power. Many buying groups simply collect orders and submit group bids on behalf of their members. Better price concessions are the only efficiencies that result from these arrangements. In these cases the courts should consider the market shares of the joint venture partners. If the partners already have significant market power, the adverse effects of the arrangement will outweigh its efficiencies. However, if the partners are small firms that individually lack market power, the arrangement will not have a significant anti-competitive effect. Furthermore, in such a case a buying group may allow small firms to compete more effectively against their larger competitors.²⁰² Group buying organizations among small firms may therefore be valid even if their only integration involves a pooling of the firms' buying power. The courts should not prohibit legitimate joint buying groups whose members have individual market shares of ten percent or less and a collective market share below thirty-five percent.²⁰³ For legitimate joint buying groups that exceed the

201. The *Northwest Wholesale* Court, for example, pointed out that the purchasing cooperative allowed "participating retailers to achieve economies of scale in both the purchase and warehousing of wholesale supplies, and also ensured ready access to a stock of goods that might otherwise be unavailable on short notice." 472 U.S. at 286-87.

202. As the Court stated in *Northwest Wholesale*, these groups "increase economic efficiency and render markets more, rather than less, competitive." 472 U.S. at 295 (quoting *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1, 20 (1979)).

203. See *supra* notes 184-87 and accompanying text. *But see* LAWRENCE A. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 293-94 (1977) (stating that

collective market share threshold, an appropriate remedy may be to limit the number of participants rather than to preclude the joint venture entirely.²⁰⁴

4. Production Joint Ventures

The costs and risks of manufacturing certain new products are so great today that some firms could not hope to produce the products without forming joint ventures with their competitors. A production joint venture may therefore be just as necessary as a research and development venture to bring a new product to market.²⁰⁵ Courts should uphold production joint ventures on their face whenever they allow their partners to produce a new product that they could not have produced on their own. The recently proposed U.S. Memories consortium, for example, would have allowed firms to invest the \$500 million to \$1 billion required to develop and manufacture advanced dynamic random access memories ("DRAMs") for the computer industry.²⁰⁶ The only possible competitive effect of the joint venture would have been an expansion of competition and potential output in the domestic DRAM market. Similarly, recent "teaming agreements" among government contractors have allowed the contractors to manufacture new military products that they could not have produced individually.²⁰⁷

buying agency among firms with collective market share of 10% should be illegal).

204. See Brodley, *supra* note 20, at 1570.

205. Jorde, *supra* note 3, at 520-21. This argument has been made by those seeking to extend the statutory protection of the National Cooperative Research Act of 1984 from research and development to production joint ventures. Kolasky, *supra* note 6, at 694. As support for this argument one commentator has noted that the EEC has granted an antitrust exemption to joint ventures that use the results of research and development in the production phase. Zwart, *supra* note 108, at 68.

206. Jorde & Teece, *supra* note 3, at 553. The production joint venture between Pennsalt and Olin at issue in *United States v. Penn-Olin Co.*, 378 U.S. 158 (1964), should also have been treated permissively because it allowed the two companies to enter a new market in the southeastern United States that they would not have entered individually. See Pitofsky, *supra* note 4, at 1053.

207. Kovacic, *supra* note 31, at 1061-62. Under a teaming agreement, two or more companies form a joint venture to act as a potential prime contractor, or a potential prime contractor agrees to have one or more companies act as subcontractors, under a government contract or acquisition program. *Id.* at 1059 n.2 (quoting 48 C.F.R. § 9.601 (1988)). For an example of a teaming agreement, see *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1037 (9th Cir. 1983) (teaming agreement between Northrop and McDonnell Douglas for production of new military aircraft). Other teaming agreements have been formed to develop a new semiconductor for military use, the Tomahawk cruise missile, a new long distance telephone network for the federal government,

These joint ventures have helped overcome the high barriers to entry caused by the complexity of modern weapons programs and government requirements that contractors assume a greater share of the costs and risks of the programs. Since such joint ventures result in the production of a new product that, but for the integration of the parties' resources, could not have been produced, they should be upheld without any consideration of their impact on competition in the relevant market.²⁰⁸

If, however, the parties form a production joint venture in an existing market or in a new market that the parties could have entered on their own, a court should weigh the efficiencies of the venture against the reduction of competition that will inevitably occur. By joining their production capacities in these markets, the parties eliminate competition that would otherwise exist in the manufacturing phase of the product cycle. The parties will no longer compete in the purchase of raw materials, development of manufacturing technology, or operation of production facilities. Furthermore, the parties' association in the production phase may give them a mutual interest in limiting output or raising prices in the marketing phase. Before upholding a production joint venture among actual or potential competitors, the courts should balance the potential anti-competitive effects against the efficiencies created by the joint venture.

Under a balancing approach, the courts should recognize that production joint ventures may create substantial efficiencies. A significant integration of the partners' resources occurs through a pooling of capital, assets, production technology, and the shared risks of operating a manufacturing facility. This integration creates economies of scale, eliminates duplication of effort, and facilitates the type of risk-sharing that encourages firms to invest in modern capital facilities.

and computers for air traffic control. See Hibner, *supra* note 22, at 711; Kovacic, *supra* note 31, at 1059-61.

208. See Hibner, *supra* note 22, at 714; *Hypothetical A*, *supra* note 120, at 1169 (comments by Don T. Hibner, Jr.). The Department of Justice currently appears to take a benign view toward production joint ventures that allow their partners to enter new markets. See McGrath, *supra* note 13, ¶ 50,470, at 56,140 ("We will also recognize that when a venture adds new, state-of-the-art capacity in the market where the parents operate, it may promote a pro-competitive output expansion."). Indeed, the Department recently terminated its investigation of a joint venture among HBO, CBS and Columbia Pictures to produce programming for cable television. *Id.* at 56,141. The Department's decision was based in part on the fact that CBS and Columbia "did not possess unique capabilities to enter the [pay television] market." *Id.*

When businesses form production joint ventures in order to invest in new manufacturing facilities, the efficiencies of the arrangement should usually outweigh the potential anti-competitive effects. A court can often confirm the legality of such a joint venture simply by reviewing its scope. Capacity-enhancing production joint ventures should raise little antitrust concern if they are confined to the manufacturing phase, are of limited size, and continue for only a specified period of time. Because they do not encompass the marketing phase, joint ventures whose scope is limited to the construction and operation of new manufacturing facilities have less of an anti-competitive effect than mergers.²⁰⁹ Capacity-enhancing joint ventures should not adversely affect prices or output in the joint venture market if the partners retain their individual rights to profit from the marketing phase.²¹⁰ Since the partners' ultimate return will be determined by their individual marketing efforts, the partners will continue to compete on resale prices and will have an incentive to increase the joint venture's output available to each of them for resale.²¹¹ The partners' incentive to continue competing with each other in the marketing phase will be even greater if a production joint venture is relatively small or limited in duration.²¹² Under the balancing test, courts should therefore easily sustain production joint ventures with a limited scope or term when their purpose is to add new manufacturing capacity.

Production joint ventures of broader scope will have more difficulty passing muster under the balancing test. Production joint ventures with no definite termination date are more likely to create a long-term mutuality of interests among their partners that encourages collusion on pricing and output. If the

209. The Department of Justice approved the Alcan-Arco joint venture for the production of aluminum as a less restrictive alternative to the complete merger of the aluminum production businesses of the two companies. *United States v. Alcan Aluminum Ltd.*, 1985-1 Trade Cas. (CCH) ¶ 66,427 (W.D. Ky. 1985).

210. Pitofsky, *supra* note 4, at 1049.

211. The output-enhancing capacity of a production joint venture will be furthered if each partner has the unilateral right to finance facility expansions which it desires. Brodley, *supra* note 20, at 1550; *Hypothetical B*, *supra* note 170, at 1206-07 (comments by James F. Rill).

212. The FTC, for example, concluded that a production joint venture between General Motors and Toyota would not adversely affect competition since the arrangement was limited to a term of twelve years and the production of only 250,000 cars a year. *See In re General Motors Corp.*, 103 F.T.C. 374, 383-84 (1984); *see also* Weinbaum, *General Motors-Toyota Joint Venture*, *supra* note 179, at 1197; Winslow, *supra* note 42, at 983.

joint venture is as large as or larger than the partners' independent operations, the partners may have a greater incentive to collude on pricing and output decisions affecting those operations. The courts may therefore be justified in prohibiting certain large production joint ventures of unlimited duration.²¹³

The balance may also shift in favor of the illegality of a production joint venture when the parties' purpose is to eliminate manufacturing capacity. Since these joint ventures reduce output, their beneficial and adverse competitive effects will be more closely balanced than for joint ventures designed to expand capacity. The anti-competitive effects of these joint ventures can be significant, for in limiting output, they indirectly raise prices in the relevant market.

In certain industries, however, a reduction in capacity by a joint venture can lead to greater efficiency. The costs of closing inefficient and outdated facilities may be prohibitive for individual firms. Joint ventures allow firms to share the costs of employee severance, pension plan terminations, environmental clean-up and other liabilities that arise when old manufacturing facilities are closed. After eliminating outdated plants, these joint ventures may have sufficient remaining capital to modernize the partners' other facilities. Joint ventures can therefore be an efficient means of rationalizing supply and demand in industries suffering from over-capacity. In the tire industry, "15 to 20 percent of the worldwide tire making capacity needs to be shut down before supply and demand come into line."²¹⁴ Joint ventures in basic industries such as steel, aluminum and rubber might allow American companies "to close . . . weak facilities, invest in . . . strong ones, and keep production alive in the United States."²¹⁵ Joint ventures which combine production facilities but leave the partners free to market their products separately would certainly be preferable to the large mergers that have occurred in basic American industries in the 1980s.²¹⁶ Be-

213. In *Yamaha Motor Co. v. Federal Trade Commission*, 657 F.2d 971 (8th Cir. 1981), the indefinite length of the joint venture was one of the factors that helped convince the Eighth Circuit to preclude Yamaha and Brunswick from jointly producing outboard motors. *Id.* at 979-80; see also *Citizens' Publishing v. United States*, 394 U.S. 131, 141 (1969) (Harlan, J., concurring) (stating that if an operating agreement between two newspapers continued indefinitely, it would have to be analyzed like a merger).

214. Jonathan P. Hicks, *Chasing Few Buyers with Too Many Tires*, N.Y. TIMES, February 3, 1991, at F5.

215. See Millstein, *supra* note 122, at 722; see also *Hypothetical B*, *supra* note 170, at 1202, 1206-07 (comments by Rill).

216. Goodyear Tire & Rubber Co., for example, is the only major tire man-

cause joint ventures would be a less anti-competitive way to bring supply and demand into balance in industries plagued by chronic excess capacity, the courts should be more willing to uphold capacity-reducing production joint ventures under these circumstances.²¹⁷

5. Joint Marketing Organizations

Marketing joint ventures raise the greatest anti-competitive risk of all because they limit competition in the critical areas of pricing and output, which have long been the primary concern of the Sherman Act. As the Supreme Court recognized in *Arizona v. Maricopa County Medical Society*²¹⁸ and *Federal Trade Commission v. Indiana Federation of Dentists*,²¹⁹ in the absence of a real integration of resources, courts should deem joint marketing arrangements among competitors per se illegal because they deprive customers of choice in prices, products and services.²²⁰

However, joint marketing organizations that involve a true integration of their partners' resources can contribute to economic efficiency in much the same way as mergers. Joint ventures are a less restrictive means for competitors to enhance their marketing services to customers by combining their complementary marketing and financial strengths, sales forces and product lines. In certain unusual cases the integration of partners' resources in a joint marketing effort can even make available a new product that the partners could not have sold on their own. In *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*,²²¹ for example, the individual composers created a blanket license that could not have existed in the absence of

ufacturer that did not merge with a competitor in the 1980s. See Hicks, *supra* note 214, at F5.

217. *But see* National Institute on Joint Ventures, *Questions and Answers to Applying Joint Venture Antitrust Principles—A Practical Guide*, 54 ANTI-TRUST L. J. 1021, 1024-25 (1985) [hereinafter *Principles: Questions and Answers*] (comments by J. Paul McGrath) (stating that agreement among competitors to cut back on capacity raises serious antitrust questions).

218. 457 U.S. 332 (1982).

219. 476 U.S. 447 (1986).

220. See, e.g., *Maricopa*, 457 U.S. at 356-57; *Indiana Fed'n of Dentists*, 476 U.S. at 459; *Compact v. Nashville*, 594 F. Supp. 1567, 1569 (M.D. Tenn. 1984). An exception to this rule would be marketing joint ventures organized solely for export sales, which are exempted from the antitrust laws under the Webb-Pomerene Trade Act, Pub. L. No. 94-435, 90 Stat. 1397 (codified at 15 U.S.C. §§ 61-66 (1988)), and the Export Trading Company Act of 1982, Pub. L. No. 97-290, 96 Stat. 1233 (codified at 15 U.S.C. §§ 4001-4021 (1988)).

221. 441 U.S. 1 (1979).

the cooperative arrangement.²²² Whenever a marketing joint venture allows the parties to enter a new market they could not have entered on their own, the venture's net competitive effect can only be beneficial and a court should uphold the venture on its face.

In most cases, however, competitors enter into joint marketing arrangements for current products. Because these arrangements directly restrict competition among their partners, courts should balance their anti-competitive effects against their efficiencies. If a marketing joint venture is not well integrated, it will usually be clear, without any consideration of the market power of the participants, that the anti-competitive effects of such a downstream collaboration outweigh its efficiencies. Without a substantial combination of the partners' marketing resources, the only "efficiency" resulting from a pooling of marketing power in a joint venture will be enhanced profits for the partners.²²³

In certain joint ventures the parties may integrate their marketing resources in a way that substantially enhances customer services. For example, by accessing their competitors' products, sales force, distributors, or financial resources, small firms may be able to provide their customers with advertising, product explanations, warranties, delivery methods, and other services that they could not have provided on their own.²²⁴ Because such integrated arrangements create substantial efficiencies, courts should permit them when the partners do not have significant market power. In such cases the anti-competitive ef-

222. The Court stated: "The blanket license is composed of the individual compositions plus the aggregating service. Here, the whole is truly greater than the sum of its parts; it is, to some extent, a different product." *Id.* at 20-21.

223. In *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984), the Court concluded that when major competitors enter into an unintegrated joint selling arrangement in an existing market, "one can hardly imagine a pro-competitive justification actually probable in fact or strong enough in principle to make [the] joint selling arrangement 'reasonable' under the Sherman Act." *Id.* at 109-10 n.39.

224. Although the setting of common prices by joint advertising has been deemed per se illegal by some courts, *see, e.g., United States v. Serta Assoc.*, 296 F. Supp. 1121, 1125-26 (N.D. Ill. 1968), *aff'd mem.*, 393 U.S. 534 (1969); *United States v. Pittsburgh Area Pontiac Dealers, Inc.*, 1978-2 Trade Cas. (CCH) ¶ 62,233, at 75,492 (W.D. Pa. 1978), joint ventures which allow small retailers to conduct advertising that they could not otherwise have afforded should be upheld because they increase competition. *See Richard W. Pogue, Antitrust Considerations in Forming a Joint Venture*, 54 ANTITRUST L.J. 925, 940 (1985).

facts of the joint venture should not be substantial enough to outweigh its efficiencies. In fact, because the partners may still compete in the production and development phase of the product cycle, integrated marketing joint ventures have less of an anti-competitive effect than a complete merger of the partners' operations. Thus, in some cases the courts could justify upholding well integrated marketing joint ventures whose partners had market shares somewhat in excess of those currently deemed acceptable by the Department of Justice for mergers.²²⁵

III. RESTRAINTS ANCILLARY TO JOINT VENTURES

A. A STANDARD FOR ANALYZING ANCILLARY RESTRAINTS

Once a court determines whether a joint venture itself is acceptable under the antitrust laws, it should then consider the legality of any related restrictions on competition among the joint venture partners. Often the anti-competitive effects of a joint venture result not from the parties' agreement to associate in a cooperative undertaking, but from their attempt to restrict competition in ways unrelated to the venture's primary objectives. A research and development joint venture may, for example, exceed its legitimate objectives by requiring its partners to refrain from competing with each other in the ultimate production and sale of products developed by the venture. The courts should analyze such ancillary restraints separately to confirm that they are not broader than necessary for accomplishing the legitimate purposes of the joint venture.²²⁶

225. In unusual cases in which a distressed industry can be made more efficient through an integrated marketing joint venture, the courts should consider establishing a market share safe harbor that is considerably higher than that applicable to a merger. In *Appalachian Coals v. United States*, 288 U.S. 344 (1933), for example, the Supreme Court appropriately upheld a joint sales agency among 132 coal companies in the Appalachian region. *Id.* at 378. The defendants argued that the purpose of the sales agency was to increase the sale of Appalachian coal through better methods of distribution and advertising. *Id.* at 359. The Court emphasized certain unique factors affecting the Appalachian coal industry that justified the arrangement, including the companies' weak competitive position against large buying organizations and the over-capacity and bankruptcies in the industry. *Id.* at 361-64.

226. In some cases, however, restrictions on price and output are so integral to the joint venture that they cannot be analyzed separately. In *Broadcast Music, Inc. v. Columbia Broadcasting System*, 441 U.S. 1 (1979), for example, the price-fixing accomplished by the blanket license was the distinguishing feature of the integration among the copyright owners. *Id.* at 5-6; see also *Liebler*, *supra* note 85, at 1031. In *Arizona v. Maricopa County Medical Ass'n*, 457 U.S. 332 (1982), the maximum fee schedule was the essence of the

Judge Taft's 1898 decision in *United States v. Addyston Pipe & Steel Co.*²²⁷ serves as the theoretical basis for ancillary restraints analysis. After little use for several decades, Judge Taft's approach has, in the last ten years, been rediscovered.²²⁸ *Addyston Pipe* requires the courts to uphold any competitive restraints that are "subordinate and collateral to a separate, legitimate transaction."²²⁹ Thus, if the primary transaction is proper, a court should allow any related restraints essential to the transaction.²³⁰ By the same token, restraints among competitors that are broader than required for the legitimate purposes of a transaction should be void.²³¹ Such "naked" restraints cannot be justified by the legitimacy of the transaction itself. A court should analyze these restraints as if the transaction did not exist. Thus, overly broad horizontal restrictions on price or output should not escape illegality simply because the parties happen to have entered into a legitimate joint venture.²³²

cooperative arrangement among the physicians. *Id.* at 335-36. In *Federal Trade Commission v. Indiana Federation of Dentists*, 476 U.S. 447 (1986), the refusal to supply X-rays to insurance companies characterized the arrangement among the dentists. *Id.* at 448. In such cases, where the restriction on competition is the essence of the joint arrangement at issue, the legality of the venture itself cannot be separated from the legitimacy of the competitive restraint. If the arrangement itself is illegal, the restraint must as a consequence be condemned.

227. 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

228. See *supra* note 18; see also BORK, *supra* note 172, at 27.

229. BORK, *supra* note 172, at 27.

230. Professor Liebler has stated: "Restraints that facilitate a contract's main purpose and that are not broader than reasonably necessary are to be judged on the same basis as the contract itself. If the contract is legal, so is the ancillary restraint, no matter what form either the contract or its ancillary restraint might take." Liebler, *supra* note 85, at 1029. The Department of Justice has adopted a similar definition of restraints ancillary to joint ventures. See *DOJ International Guidelines*, *supra* note 35, ¶ 13,109.10, at 20593, 20599-60.

231. See 85 F. at 282-83.

232. In *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984), for example, the Court properly held the restrictions on the televising of college football games to be illegal because they were not necessary to achieve the NCAA's purpose of promoting collegiate athletics. *Id.* at 120; see also *Chicago Professional Sports Ltd. v. National Basketball Ass'n*, 1991-1 Trade Cas. (CCH) ¶ 69,308, at 65,153 (N.D. Ill. 1991) (NBA's restriction on number of times teams could appear on superstation held to be an unreasonable restraint of trade). Some commentators have argued that the Court's decision in *Arizona v. Maricopa County Medical Society*, 557 U.S. 332 (1982) can be viewed not as condemning the joint venture among the dentists but as finding their maximum fee schedule to be an unjustifiably broad related restriction. See Liebler, *supra* note 85, at 1048; Greaney & Sindelar, *supra* note 2, at 568.

The antitrust analysis of ancillary restraints on competition should be relatively straight-forward. The legality of the restraints should depend upon the parties' competitive purpose and not on complicated issues of market power and structure. Any related competitive restrictions that are necessary for the legitimate purposes of a joint venture should be per se legal. Regardless of the parties' market power, they should be allowed to implement restraints on competition that are necessary to insure the effectiveness of their cooperative arrangement. On the other hand, a court should deem per se illegal any horizontal restrictions on price or output that are broader than necessary to accomplish the purposes of a joint venture. Even if the parties have a small market share, they should not be permitted to restrain competition outside the proper bounds of their joint venture.²³³

In determining whether to uphold particular restraints as ancillary to joint ventures, the courts should be guided by the competitive purpose of the joint venture itself. Judge Taft recognized in *Addyston Pipe* that the purpose of the main transaction "suggests the measure of protection needed, and furnishes a sufficiently uniform standard by which the validity of such restraints may be judicially determined."²³⁴ An effective standard of legality would be whether an ancillary restraint is "reasonably necessary" to accomplish the purposes of the joint venture.²³⁵ Such a test would allow the courts to confirm that the partners had used their reasonable business judgment in adopting legitimate competitive restrictions. It would not permit the courts to second-guess business decisions made in good faith. A restraint would be acceptable under this standard even if it was not the least restrictive means of accomplishing the joint venture's purpose. The fact that a court could conceive of

233. As the Supreme Court stated in *NCAA*, "the absence of proof of market power does not justify a naked restriction on price or output." 468 U.S. at 109.

234. 85 F. at 282. The *DOJ Research JV Guidelines*, which take a similar approach, state: "The legality of collateral restraints is largely a function of the proximity of their relationship to the essential purposes of the joint research venture . . ." *DOJ Research JV Guidelines*, *supra* note 153, ¶ 13,120, at 20,656.

235. See Greaney & Sindelar, *supra* note 2, at 575. The Court implied such a standard for the analysis of ancillary restraints in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979), when it stated, "[W]e would not expect that any market arrangements reasonably necessary to effectuate the rights that are granted would be deemed a per se violation of the Sherman Act." *Id.* at 19.

a less restrictive means of achieving the partners' objectives would not mean that the partners had acted for anti-competitive purposes.²³⁶ However, in cases where the parties intentionally disregarded less restrictive alternatives in favor of more anti-competitive restraints a court might conclude that the parties' real objective was to eliminate competition rather than to enhance efficiency.²³⁷

The courts can most effectively determine the legality of ancillary restraints by considering how central their purposes are to the objectives of a joint venture. Courts should usually uphold restraints which establish internal procedures to insure the efficient functioning of the venture. For example, many joint ventures cannot operate effectively without reasonable membership criteria and provisions for the exchange of information among their partners. Restraints that preclude free-riding on the fruits of the joint venture may be just as necessary to the operation of the venture. Partners may be reluctant to contribute capital, technology, or other assets to a joint venture unless they can be assured that third parties will not be able to use these resources for their own benefit. Restrictions on access to the joint venture, including limitations on the number of partners and on the disclosure or licensing of joint venture

236. In some older cases the courts adopted a "least restrictive alternative" standard for judging the legality of restraints under § 1 of the Sherman Act. *See, e.g.*, *Copper Liquor, Inc. v. Adolph Coors Co.*, 506 F.2d 934, 942-43 (5th Cir. 1975); *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43, 51 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972); *Denver Rockets v. All-Pro Management, Inc.*, 325 F. Supp. 1049, 1064-66 (C.D. Cal. 1971). The more recent trend, however, has been to reject such a strict standard. *See American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1249 (3d Cir. 1975) (stating that business people would "be made guarantors that the imaginations of lawyers could not conjure up some method of achieving the business purpose in question that would result in a somewhat lesser restriction of trade"); *see also Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 303 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980); *National Bancard Corp. v. VISA, U.S.A., Inc.*, 596 F. Supp. 1231, 1256-57 (S.D. Fla. 1984) ("It should be stressed . . . that . . . the relevant question is not whether the challenged practice is the *most* competitive device that can be imagined or the 'least restrictive,' but simply whether it is reasonable."), *aff'd*, 779 F.2d 592 (11th Cir.), *cert. denied*, 479 U.S. 923 (1986). Most commentators have criticized the "least restrictive alternative" approach for placing too great a burden on defendants to justify legitimate business decisions. *See, e.g.*, Salem M. Katsh, *Collateral Restraints in Joint Ventures*, 54 ANTITRUST L.J. 1003, 1005-06 (1985); Greaney & Sindelar, *supra* note 2, at 574-75; Pitofsky, *supra* note 1, at 1620. The Justice Department has stated that it will "not engage in a gratuitous second-guessing of business decisions." *DOJ Research JV Guidelines*, *supra* note 153, ¶ 13,120, at 20,658.

237. *See Muris, supra* note 99, at 863; Kovacic, *supra* note 31, at 1104; *Hypothetical A, supra* note 120, at 1167-68 (comments by Don T. Hibner, Jr.).

technology, may be justified by free-rider concerns. Investors in a joint venture may also be concerned that other partners will try to appropriate the fruits of the venture for themselves.²³⁸ Restrictions on partners' rights to compete with the joint venture may eliminate those concerns and encourage all partners to contribute the resources necessary for the venture's success.

Ancillary restraints which are farther removed from the internal efficiency concerns of the joint venture partners will be more suspect. Restrictions on partners' competition with each other, for example, should be particularly difficult to sustain. Limitations on the prices that partners can charge, the territories or customers to which they can sell, or the amount of product that they can market may not be necessary for a joint venture to operate effectively. At the same time, these restrictions are likely to have a significant adverse effect upon competition in the relevant market. The partners to a joint venture will therefore have a heavy burden in proving that a court should uphold the restraints as ancillary to the legitimate purposes of a joint venture.

B. THE LEGALITY OF PARTICULAR ANCILLARY RESTRAINTS

A review of the various types of competitive restrictions that are usually implemented in connection with joint ventures reveals how simply the courts could determine their legality under an ancillary restraints analysis. Since the courts would already have passed on the legality of the joint venture itself in the first step of their analysis,²³⁹ the only issue at the second stage would be the relationship between the restraint and the objectives of the joint venture. If the partners reasonably tailored the restraint to meet those objectives, a court could uphold it on its face. If the restraint was broader than necessary, a court would have the alternative either of striking it down entirely or limiting it to a more reasonable scope. Under this standard, a court could determine the legality of an ancillary restraint without inquiring into complicated market factors. This approach would ensure that businesses and practitioners receive clear guidance on the appropriate breadth of ancillary restraints as well as on the legality of joint ventures themselves.

238. See Roberts, *supra* note 22, at 853; see also *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 212-13 (D.C. Cir. 1986).

239. See *supra* notes 150-88 and accompanying text.

1. Information Exchanges Among Joint Venture Partners

Exchanges of sensitive technical, production, and marketing information between the partners and a joint venture are often necessary for the effective operation of the venture.²⁴⁰ Research and development joint ventures could not operate without the free flow of technical information between partners. Production joint ventures may require data from their partners on manufacturing methods, raw material costs, capacity, and production schedules. Joint sales organizations necessitate the exchange of pricing and marketing information.

In certain cases, courts have inferred that competitors have conspired to restrain trade merely by exchanging confidential information concerning costs, sales, production, profitability or marketing.²⁴¹ Enforcement agencies, courts and commentators have concluded that certain joint ventures should be prohibited simply because of the potential for collusion from information exchanges among partners. They have been concerned that the partners' initial collaboration and exchange of information on the legitimate goals of a joint venture might eventually "spillover" and cause the partners to collude in other markets where they already compete.²⁴² This view, however, confuses the le-

240. Indeed, disclosure of confidential information may contribute to the competitive efficiency not only of the joint venture, but also its individual partners. One of the rationales for the FTC's approval of the General Motors-Toyota joint venture, for example, was General Motors' ability to learn Toyota's management and manufacturing techniques. See Weinbaum, *supra* note 55, at 713; Janusz A. Ordovery & Carl Shapiro, *The General Motors-Toyota Joint Venture: An Economic Assessment*, 31 WAYNE L. REV. 1167, 1179, 1181 (1985).

241. See, e.g., *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 643 (1980) (credit information); *United States v. United States Gypsum Co.*, 438 U.S. 422, 426 (1978) (price data); *United States v. Container Corp. of Am.*, 393 U.S. 333, 334 (1969) (price data); *Hartford Empire Co. v. United States*, 323 U.S. 386, 392 (1945) (production information); *United States v. Bituminous Concrete Ass'n*, 1960 Trade Cas. (CCH) ¶ 69,878, at 77,488-89 (D. Mass. 1960) (cost information); *United States v. Retail Liquor Dealers Ass'n*, 1957 Trade Cas. (CCH) ¶ 68,751, at 73,071-72 (D. Tenn. 1957) (profit information); see also Katsh, *supra* note 236, at 1007 ("[S]uch data exchanges may eliminate competition or facilitate collusion between the parties and traditionally have been suspect."); William E. Kovacic, *Illegal Agreements with Competitors*, 57 ANTITRUST L.J. 517, 536 (1988) ("[A]ntitrust doctrine historically has viewed freewheeling information exchanges among direct rivals with suspicion.").

242. See *United States v. Minnesota Mining & Manufacturing Co.*, 92 F. Supp. 947 (D. Mass. 1950); DOJ *International Guidelines*, *supra* note 35, ¶ 13,109.10, at 20,601; see also Edward F. Glynn, Jr., *International Joint Ventures: An Enforcement Perspective*, 58 ANTITRUST L.J. 703, 705 (1989); Pitofsky, *supra* note 4, at 1013, 1030. For example, in *Minnesota Mining* the court cited such spillover effects in prohibiting a foreign production joint venture

gality of a joint venture itself with the appropriateness of its related restrictions on competition. Without completely prohibiting the parties' association in a joint venture, the courts should be able to ensure that partners exchange only that information necessary for achieving the venture's legitimate objectives. The sharing of any information required to fulfill a joint venture's competitive objectives should be presumptively legal. Partners' disclosure of technical information to research and development ventures, manufacturing information to production joint ventures, and marketing information to joint sales organizations should raise no antitrust issues.

Courts, however, should prohibit the exchange of confidential competitive information with uses beyond the specific objectives of a joint venture. It would, for example, be inappropriate for the partners in research and development or production joint ventures to disclose to each other pricing or marketing information.²⁴³ In order to avoid improper exchanges of information, sales or marketing personnel of the partners could legitimately be excluded from participating in research and development or production joint ventures.²⁴⁴ Even in a joint marketing organization, exchanges of pricing information should be limited to the specific products covered by

among five domestic manufacturers of coated abrasives. 92 F. Supp. at 962. The court concluded that cooperation among the partners in foreign markets "may inevitably reduce their zeal for competition *inter sese* in the American market." *Id.* at 963.

243. See McGrath, *supra* note 13, ¶ 50,470, at 56,140. Section 2(b)(1) of the National Cooperative Research Act of 1984 specifically excludes from the Act's coverage the exchange of any information "that is not reasonably required to conduct the research and development that is the purpose of such venture." Pub. L. No. 98-462, 98 Stat. 1815 (codified at 15 U.S.C. § 4301 (1988)). In the General Motors-Toyota joint venture, the pricing terms in the supply agreements with the partners were based on market prices for a group of similar automobiles rather than on either party's manufacturing costs. See *In re General Motors Corp.*, 103 F.T.C. 374 (1984). Thus it would appear that the parties did not have access to each other's sensitive competitive information. See Eccleston, *supra* note 170, at 1236. As a condition of approving the joint venture, the FTC required detailed ongoing reporting requirements on the information to be exchanged by the parties. 103 F.T.C. at 377. Similarly, the consent decree in the Alcan-Arco production joint venture prohibited the parties from exchanging information on customers, terms or conditions of sale, or marketing plans. *United States v. Alcan Alum. Ltd.*, 605 F. Supp. 619, 621 (W.D. Ky. 1985).

244. See *Hypothetical B*, *supra* note 170, at 1208 (comments by A. Paul Victor); Brodley, *supra* note 20, at 1549; McGrath, *supra* note 1, at 975. The Arco-Alcan consent decree required that the joint venture manufacturing company not include marketing employees of Alcan, with which the joint venture would be competing. *Alcan Alum. Ltd.*, 605 F. Supp. at 625.

the venture.²⁴⁵

2. Restrictions on Third Parties' Access to Joint Ventures

Joint venture partners may wish to limit access to the venture in order to prevent third parties from free-riding on resources which the partners have contributed. Limitations on the number of partners or on the disclosure or licensing of joint venture technology to third parties may be motivated by free-rider concerns. These concerns will be particularly acute in "risky endeavors such as research and development and innovative manufacturing."²⁴⁶ If the fruits of a joint venture are freely available to third parties, prospective partners will have little incentive to contribute resources to the venture. Access limitations allow the partners to reserve the potential benefits of a joint venture exclusively to themselves for at least a period of time necessary to recoup their original investment plus a reasonable return.

Access limitations also enhance the internal efficiency of joint ventures. Reasonable membership criteria help insure that all partners have the financial wherewithal, technical ability and other qualifications to contribute in a meaningful way to joint venture activities. Limitations on the number of partners may keep a joint venture from becoming too unwieldy. Membership limits may even reduce the potential anti-competitive effects of joint ventures. Competitors foreclosed from participation in a particular joint venture will be forced to form their own cooperative arrangements or to go it alone in the relevant market. In such cases, instead of a single all-inclusive joint venture, the relevant market may include several small ventures and individual competitors. In most cases, therefore, membership limits and restrictions on the disclosure and licensing of joint venture technology should not run afoul of the anti-trust laws.²⁴⁷

245. The presence of counsel and taking of minutes at meetings among the partners to marketing joint ventures may also help ensure that the parties do not disclose or use sensitive competitive information for improper purposes. See *DOJ International Guidelines*, *supra* note 35, ¶ 13,109.10, at 20,601-02.

246. *Id.* at 20,601.

247. The Supreme Court recognized in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 474 U.S. 284 (1985), that, unless a joint venture possesses "exclusive access to an element essential to effective competition," the partners should be permitted to limit access to the joint venture in a reasonable manner. *Id.* at 296. The Court also noted that the mere lack of procedural due process in expelling a partner from a joint venture should not give rise to an antitrust violation. *Id.* at 293.

However, when a joint venture's technology, facilities or other attributes are so essential that firms cannot compete in the relevant market without access to such assets, the joint venture partners should not be allowed to preclude participation by third parties.²⁴⁸ In these cases, competitors' need for access to the "essential facility" outweighs the partners' rights to appropriate the joint venture for their exclusive use. Denial of a competitor's access to the joint venture in these circumstances would have the same effect as excluding it from the relevant market. Joint venture partners should therefore not be able to limit the number of firms that can participate in an essential facility or to refuse to disclose or license the technology of these joint ventures to third parties.

Since access limitations can make joint ventures more efficient as well as limit their anti-competitive potential, the courts should be careful to compel open access only in those situations in which it is clearly necessary. Courts should review only the denial of third parties' access to joint ventures which, at the time they were formed, controlled a unique technology or facility needed to compete in the relevant market. It would be unfair to penalize the initial risk-takers in a joint venture by requiring them to permit access at a later date to all interested parties simply because a joint venture had become successful.²⁴⁹ Open access should be required only in cases where it was clear from a joint venture's inception that it was capable of creating an essential facility.

Such essential facilities would include joint ventures

248. See *id.* at 296.

249. Such unfairness has prompted many commentators to criticize the essential facility doctrine. See, e.g., PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW 656 (Supp. 1988) ("The essential facility is just an epithet describing the monopolist's situation: he possesses something the plaintiff wants. It is not an independent tool of analysis but only a label—a label that beguiles some commentators and courts into pronouncing a duty to deal."); Panel Discussion, *Exclusionary Conduct*, 57 ANTITRUST L.J. 723, 742 (1989) (remarks by William F. Baxter) ("Someone invested in that essential facility. Someone got out in front when it wasn't at all clear that the facility was going to work, and now someone else wants to come along and help themselves. The doctrine is a very dangerous one."). Some commentators have argued that a joint venture should not be deemed an illegal essential facility merely because the parties possess a high collective market share. See Rule, *supra* note 120, at 1134 (even 80% collective market share does not require finding of essential facility). The Microelectronics and Computer Technology Corp. (MCC) joint venture for the development of a new supercomputer almost failed because the parties feared that, if they were successful, "competitors excluded from MCC could argue that an illegal boycott existed." Zwart, *supra* note 108, at 64.

which, at their commencement, control “bottlenecks” or monopolies over essential raw materials, facilities, or technology; industry-wide data gathering organizations; and quasi-regulatory agencies such as stock exchanges and standards-setting organizations.²⁵⁰ Because of the unique characteristics of these joint ventures, prospective partners should be aware that interested parties should be allowed to participate on equal terms.²⁵¹ Furthermore, investments in these joint ventures are less risky because of their natural monopoly characteristics. As a condition of investing in the venture, prospective partners should not require protection against free riders. The potential returns available and the competitive necessity of participating should be sufficient to induce firms to contribute their resources to the joint venture. The courts, however, should allow the partners to adopt objective, non-discriminatory membership requirements to protect their investments in the joint venture and insure its efficient operation.²⁵² A court should also allow the joint venture to charge reasonable membership fees and royalties for the license of technology in order to compensate the partners for their original investment plus an appropriate return.²⁵³

250. See *United States v. Terminal R.R. Assoc.*, 224 U.S. 383 (1912) (bottleneck over terminal required by railroads); *MCI Communications Corp. v. Am. Tel. & Tel.*, 708 F.2d 1081 (7th Cir.) (control of interconnection between long distance and local telephone service), *cert. denied*, 464 U.S. 891 (1983); see also *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351 (5th Cir. 1980) (multiple listing service for real estate); *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963) (stock exchange); *Radiant Burners, Inc. v. Peoples Gas, Light & Coke Co.*, 364 U.S. 656 (1961) (industry standards-setting organization); *Associated Press v. United States*, 326 U.S. 1 (1945) (world-wide news-gathering service).

251. The proposed IBM-Apple joint venture will, for example, offer competitors the opportunity to join the venture or to use the new computer operating system that will be developed by the venture. See Zachary & Hooper, *supra* note 11, at A1; Zachary, *supra* note 11, at A6.

252. For example, membership criteria such as reasonable financial standing, professional accreditation, technical skill, quality levels and other conditions related to members' ability to participate effectively in the joint venture should be acceptable. In *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985), the Court stated that membership rules can give a joint venture “a needed means for monitoring the creditworthiness of its members.” *Id.* at 296. Membership standards are often critical to the success of a joint venture. It is, for example, important for joint ventures among hospitals to establish quality standards (such as nurse/bed ratios and the number of particular types of physicians) in order to maintain their effectiveness. See Joseph, *supra* note 26, at 632.

253. National Institute on Joint Ventures, *Questions and Answers to Overview: A Basic Foundation For Joint Venture Analysis*, 54 ANTITRUST L.J. 947,

3. Agreements by Partners Not to Compete with Joint Ventures

Agreements by partners not to compete with a joint venture are necessary to prevent the partners from diverting the resources of the joint venture to their own use.²⁵⁴ Parties will be unwilling to invest in a joint venture if their partners can continue to compete freely in the joint venture market.²⁵⁵ Participating firms have a right to expect that all partners will delegate to the venture the exclusive right to operate within its scope free of interference from the partners.²⁵⁶ Without this commitment, some partners may fear that others will not be fully dedicated to supporting the joint venture.

A partner's agreement not to compete with its own joint venture has no additional adverse effect on competition and should be upheld as an ancillary restraint. In cases where joint ventures facilitate entry into new markets, courts have recognized that non-competition agreements have no detrimental effect on competition because, in the absence of the venture, the parties could not have competed in the new market anyway.²⁵⁷ Courts should also acknowledge that non-competition agreements between a joint venture and its partners do not, in and of themselves, restrain trade among competitors in existing markets. Any such restraint of trade will result not from the non-competition agreements, but from the joint venture itself. Competition between a joint venture and its parents is always

948 (1985) [hereinafter *Overview: Questions and Answers*] (comments by Richard W. Pogue).

254. Judge Taft recognized in *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (1898), that non-competition agreements should be upheld as ancillary restraints because they are made "with a view of securing [each partner's] entire effort in the common enterprise." *Id.* at 280.

255. Liebeler, *supra* note 85, at 1028; Kovacic, *supra* note 31, at 1103 n.237; *DOJ International Guidelines*, *supra* note 35, ¶ 13,109.85, at 20,627.

256. Indeed, a joint venture often cannot operate effectively without an exclusive delegation from the partners of their rights to the portion of a business covered by the joint venture. For example, in order to amass sufficient bargaining power to operate effectively, a joint buying organization may have to require its members to deal exclusively through it and not to engage in independent purchases of the relevant products. See *Louis*, *supra* note 22, at 904.

257. In *United States v. Pan American World Airways, Inc.*, 193 F. Supp. 18 (S.D.N.Y. 1961), *rev'd on other grounds*, 371 U.S. 296 (1963), the court upheld an agreement by Pan Am not to compete with a joint venture for commercial air service on the West Coast of South America. *Id.* at 22. The court relied on the fact that the joint venture allowed the extension of air service to a new territory not previously served by Pan Am. *Id.* at 31; see also *Rule*, *supra* note 120, at 1135; *Principles: Questions and Answers*, *supra* note 217, at 1021 (comments by Salem M. Katsh).

eliminated as a result of the venture's formation. Regardless of whether they have entered into an express non-competition agreement, the partners to a joint venture will have a natural inclination to avoid competing with the joint venture. Direct competition is contrary to the partners' interests because it reduces the profits of their own affiliate.²⁵⁸ When a court rules on the legality of the joint venture itself, it must consider the adverse effects of the natural elimination of competition between the partners and the joint venture. Once a court has determined that the adverse effects are offset by the efficiencies generated by the joint venture, it should not revisit the issue in the second stage of its analysis. If the court has deemed the joint venture itself proper, the court should also allow the partners to secure by agreement what they can expect to occur in the natural course: that each partner will refrain from diverting business from the joint venture.²⁵⁹

4. Agreements By Partners Not To Compete With Each Other

Direct agreements between partners not to compete with each other can have a much greater anti-competitive effect than can agreements by partners not to compete with their joint ventures. Non-competition agreements between partners and their own joint venture are vertical and by their nature are limited to the joint venture's scope of activities. However, non-competition agreements between joint venture partners are

258. The Supreme Court recognized in *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158 (1964), that "realistically the parents would not compete with their progeny." *Id.* at 168.

259. See Brodley, *supra* note 20, at 1554. The Department of Justice and some courts, however, continue to believe that agreements by parties not to compete with their joint ventures are illegal in and of themselves. See, e.g., *DOJ Research JV Guidelines*, *supra* note 153, ¶ 13,120, at 20,656 ("An agreement by the participants to forego independent research in competition with the joint venture may constitute an unreasonable competitive restraint."); *Pennsylvania Water & Power Co. v. Consolidated Gas Elec. Light & Power Co.*, 97 F. Supp. 952, 955-56 (D. Md. 1951) (invalidating agreement precluding competition between parents and joint venture in electrical generation market), *aff'd*, 194 F.2d 89 (4th Cir.), *cert. denied*, 343 U.S. 963 (1952). Some commentators have argued that agreements not to compete between a joint venture and its parents may be valid if limited to a reasonable period, such as the amount of time it would have taken the partners to recoup their initial investment or to develop the joint venture product independently. See Katsh, *supra* note 236, at 1011; Louis, *supra* note 22, at 906; *Principles: Questions and Answers*, *supra* note 217, at 1021-22 (comments by Salem M. Katsh).

horizontal and have the potential to extend beyond a joint venture's limited scope.

If the partners limit a non-competition agreement to the activities conducted by the joint venture, the agreement can be upheld because it has the same effect as a covenant by the partners not to compete with the joint venture. For example, the partners' agreements not to compete with each other in developing products covered by a research and development joint venture constitute no more than a commitment to refrain from operating within the joint venture's scope of activities. Non-competition agreements between partners, however, often extend beyond the scope of the joint venture to limit other areas of commercial rivalry between the parties. These agreements can obviate one of the most important competitive benefits of a joint venture: the ability to integrate resources to create efficiency in one portion of a market while allowing competition to continue in another portion. The pro-competitive potential of a research and development joint venture, for example, would be negated if the partners agreed not to compete with each other in manufacturing or marketing products which use the joint venture's technology.

Non-competition agreements between joint venture partners can take several different forms. The partners may agree on a common price for selling the products developed or produced by a joint venture; they may consent to limit their sales of such products; or they may establish exclusive territories in which each partner can sell the products free of competition from other partners. Each of these horizontal restraints has a significant adverse effect on competition. Horizontal price and output restrictions have traditionally been the primary concern of the Sherman Act.²⁶⁰ Horizontal allocations of customers or territories are just as appropriate for per se treatment.²⁶¹ In

260. See *supra* notes 172-74 and accompanying text. As the Supreme Court recognized in *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984), "restrictions on price and output are the paradigmatic examples of restrictions of trade that the Sherman Act was intended to prohibit." *Id.* at 107-08; see also *General Leaseways, Inc. v. Nat'l Truck Leasing Ass'n*, 744 F.2d 588, 594 (7th Cir. 1984) ("An agreement on output also equates to a price-fixing agreement . . . [If] firms restrict output directly, price will . . . rise in order to limit demand to the reduced supply.").

261. A horizontal agreement to allocate customers or territories "create[s] a series of regional or local . . . monopolies," *General Leaseways*, 744 F.2d at 594, and has therefore been deemed just as appropriate for per se treatment as a horizontal restriction on price or output. See, e.g., *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 597-98 (1951) (allocation of territories among

fact, the establishment of exclusive marketing territories among joint venture partners may have an even greater anti-competitive effect than an agreement by the partners to sell products at a common price. A price-fixing agreement only eliminates price competition among the partners. Even if they have agreed to sell a product at a common price, the partners can still compete with each other in non-price areas such as customer service. The establishment of exclusive territories, however, eliminates all competition, price and non-price, among joint venture partners.²⁶²

Joint venture partners may attempt to justify horizontal market division by free-rider concerns. The partners to a research and development joint venture, for example, may assert that in order to recoup their investment in the venture each partner should be given the exclusive right to sell products in a particular territory using the joint venture technology. Partners to marketing joint ventures may argue that to encourage partners to increase their services to customers they should each have the exclusive right to sell the joint venture products to certain accounts or in certain areas. However, these restrictions have severe anti-competitive effects and, furthermore, they are often broader than necessary to promote the legitimate objectives of the venture.²⁶³ The partners should not

affiliated companies in Europe); *Eiberger v. Sony Corp. of Am.*, 622 F.2d 1068, 1072 (2d Cir. 1980) (agreement to allocate territories for dictation machines); *United States v. Cadillac Overall Supply Co.*, 568 F.2d 1078, 1087-90 (5th Cir.) (competitors' agreement not to solicit others' accounts), *cert. denied*, 437 U.S. 903 (1978); *United States v. Pennsylvania Refuse Removal Ass'n*, 357 F.2d 806, 807 (3d Cir.) (allocation among refuse pick-up customers), *cert. denied*, 384 U.S. 961 (1966). Several commentators have concluded that horizontal market division is just as anti-competitive as horizontal price-fixing. See Richard A. Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 COLUM. L. REV. 282, 292 (1975); Peter J. Monte, Comment, *Restricted Distribution After 'Schwinn'*, 9 B.C. INDUS. & COM. L. REV. 1032, 1040-41 (1968); Comment, *Vertical Agreements to Terminate Competing Distributors: Oreck Corp. v. Whirlpool Corp.*, 92 HARV. L. REV. 1160, 1163 (1979).

262. See Donald L. Beschle, "What Never? Well, Hardly Ever": *Strict Antitrust Scrutiny as an Alternative to Per Se Antitrust Illegality*, 38 HASTINGS L.J. 471, 479-80 (1987).

263. In its only decisions dealing with horizontal market division among joint venture partners, the Supreme Court found the restrictions on competition to be per se illegal. In *United States v. Sealy*, 388 U.S. 350 (1967), and *United States v. Topco Ass'n*, 405 U.S. 596 (1972), the Court failed to find any legitimate rationale for the establishment of exclusive sales territories for joint venture partners. *Sealy*, 388 U.S. at 356-57; *Topco Ass'n*, 405 U.S. at 611. Some lower federal courts and commentators believe that the Supreme Court has implicitly overruled *Sealy* and *Topco* by its recent application of the rule

have to eliminate all competition between themselves in order to avoid free-rider problems.²⁶⁴ For example, instead of absolutely prohibiting its partners from selling in other partners' territories, a joint venture may require the partners to concentrate their sales efforts in their own areas of primary responsibility.²⁶⁵ The partners could also be required to pay a fee for sales made outside their areas of primary responsibility. The fee could be calculated to compensate the other partners for the costs of investing in the joint venture or providing desired services to customers in their own areas.

There is one circumstance in which non-competition agreements among the partners to a joint venture are justified. A non-competition agreement can have no incremental adverse effect when the joint venture partners could not have entered the relevant market independently.²⁶⁶ In *Broadcast Music, Inc.*

of reason to horizontal restraints incidental to joint ventures. See *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 226 (1986) (Bork, J.); *Chicago Professional Sports Ltd. v. National Basketball Ass'n*, 754 F. Supp. 1336, 1357 (N.D. Ill. 1991); Rule, *supra* note 120, at 1123; Clanton, *supra* note 96, at 1245 n.30. However, the Supreme Court and the enforcement agencies continue to cite *Topco* with favor. See *Palmer v. BRG of Georgia, Inc.*, 111 S. Ct. 401 (1990); *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 734 (1988); see also McGrath, *supra* note 13, ¶ 50,470, at 56,138. In fact, in *Palmer* the Court expressly reaffirmed the per se illegality of a horizontal market division among competitors. 111 S. Ct. at 403. In addition, some recent lower federal court cases have also cited *Topco* for the per se illegality of horizontal market allocation. See, e.g., *United States v. Capitol Service, Inc.*, 568 F. Supp. 134, 154 (E.D. Wis. 1983), *aff'd*, 756 F.2d 502 (7th Cir. 1985). In light of such recent precedent, it will be difficult for joint venture partners to convince a court that exclusive sales territories should be upheld as ancillary to a joint venture. Indeed, one commentator has stated that the reciprocal exclusive territories established for the marketing of the partners' competing products in *Yamaha Motor Co., Ltd. v. Federal Trade Commission*, 657 F.2d 971, 974 (8th Cir. 1981), *cert. denied*, 456 U.S. 915 (1982), "created an aura that the whole deal was set up to keep Yamaha out of the United States market." *Overview: Questions and Answers*, *supra* note 253, at 951 (comments by Robert Pitofsky).

264. Such restraints make "the mind suspicious . . . of anti-competitive intent," *Hypothetical A*, *supra* note 120, at 1166 (comments by Don T. Hibner, Jr.), because there are less restrictive means of furthering a venture's objectives.

265. See *Overview: Questions and Answers*, *supra* note 253, at 951 (comments by Robert Pitofsky). The Supreme Court in *United States v. Topco Assocs.*, 414 U.S. 801 (1973) (*per curiam*), *aff'g* 1973-1 Trade Cas. (CCH) ¶ 74,485, at 94,153 (N.D. Ill. 1973), affirmed the district court's decision which had allowed areas of primary responsibility and profit pass-over clauses as less restrictive alternatives to the exclusive territories which the Court had originally prohibited. 1973-1 Trade Cas. ¶ 74,485 at 94,154-55.

266. See *Louis*, *supra* note 22, at 892, 911-12; see also *Overview: Questions and Answers*, *supra* note 253, at 950 (comments by Robert Pitofsky). If a non-competition agreement is among partners in a vertical relationship, such an

v. Columbia Broadcasting System, Inc.,²⁶⁷ for example, the musical composers' agreement to establish a common price for their compositions did not adversely affect competition because, in the absence of the agreement, the composers would not have been able to license their songs at all.²⁶⁸ Thus, if a joint venture produces a new technology or product in a market which the parties could not have entered but for the joint venture, individual partners should be able to limit competition between themselves.²⁶⁹ Joint ventures designed to enter new markets are inherently risky, and non-competition agreements among

agreement should also not violate the antitrust laws. As the Supreme Court recognized in *Continental Television, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), a manufacturer may limit competition among its distributors in order to protect them against free-riders and encourage them to promote its products more effectively. *Id.* at 54-57. Territorial and customer restrictions imposed by a manufacturer on its distributors are usually valid because they promote competition between brands and have only a minimal anti-competitive effect on intrabrand competition. Indeed, the relationship between the manufacturer and its distributors is a type of joint venture, and territorial and customer restrictions should generally be upheld as ancillary to the venture. See Thomas A. Piraino, Jr., *Reconciling the Per Se and Rule of Reason Approaches to Antitrust Analysis*, 64 S. CAL. L. REV. 685, 723-27 (1991); Louis, *supra* note 22, at 895. If, however, the impetus for the territorial restrictions comes not from the manufacturer but from the distributors, the territorial restraints are horizontal in substance and should be deemed per se illegal as naked attempts by the distributors to restrict competition among themselves. See *United States v. General Motors Corp.*, 384 U.S. 127, 133-36 (1966) (distributors' inducement of General Motors to forbid sales by dealers to discounters); Thomas A. Piraino, Jr., *Sharp Dealing: The Horizontal/Vertical Dichotomy in Distributor Termination Cases*, 38 EMORY L.J. 311, 344-51 (1989). *But see* Kolasky, *supra* note 6, at 690 (characterizing attempts to distinguish horizontal from vertical agreements in the joint venture context as "semantic games").

267. 441 U.S. 1 (1979).

268. *Id.* at 18-23. Similarly, in *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030 (1983), the partners to the teaming agreement for the production of the F-18 agreed that McDonnell Douglas would be the primary contractor for the Navy version of the jet and that Northrop would be the primary contractor for the land-based version. *Id.* at 1037. In upholding these non-competition agreements, the Ninth Circuit emphasized that, but for the teaming agreement, neither party would have been able to produce the F-18. *Id.* at 1052-53. Thus, the court concluded that the non-competition agreements "actually foster competition by allowing both parties to compete in a market from which they were otherwise foreclosed." *Id.*

269. Of course, such non-competition agreements should not extend to other products in which the parties competed prior to the formation of the joint venture. In *Yamaha Motor Co., Ltd. v. Federal Trade Commission*, 657 F.2d 971 (8th Cir. 1981), the Eighth Circuit appropriately distinguished exclusive territorial rights for joint venture products, which might arguably have been ancillary to the joint venture, from divisions of territories covering non-joint venture products, which the court believed were not reasonably necessary to achieve the objectives of the joint venture. *Id.* at 981.

individual partners can be justified by the need to encourage prospective partners to invest in the venture. Less restrictive alternatives such as areas of primary responsibility and fee arrangements among partners may not be sufficient to induce investments in markets with such high barriers to entry.²⁷⁰

CONCLUSION

A joint venture is a unique form of business organization that is particularly suited to the current needs of American business. By giving firms access to the resources of their competitors, joint ventures reduce barriers to entry in new markets and encourage firms to invest in new products and technology. Joint ventures have significant advantages over mergers as a means of achieving economic efficiency. By virtue of their limited scope, joint ventures enhance efficiency without eliminating all competition among their partners.

In order to encourage pro-competitive alliances among competitors, the courts need to establish clear standards for their legality. Unfortunately, the antitrust status of joint ventures has become more confused in recent years. A market-based merger analysis, the *per se* rule and the uncertain standards of the rule of reason have all been deemed applicable to joint ventures and their related restrictions on competition. The courts' inconsistent and confusing analysis of joint ven-

270. For example, firms may not be willing to participate in a research and development joint venture in high barrier markets without being guaranteed an exclusive license of joint venture technology in a particular territory. See *id.*; *Overview: Questions and Answers*, *supra* note 253, at 950 (comments by Robert Pitofsky); *Hypothetical A*, *supra* note 120, at 1192-93. Partners in marketing joint ventures for new products may require a guarantee of an exclusive right to sell the products in a particular territory or to certain customers. Exclusive territorial grants should, however, extend only for the period necessary to assure the partners that they can recoup their original investment and receive a reasonable return to compensate them for their up-front risks. See *Louis*, *supra* note 22, at 906. The Department of Justice and some commentators have argued that the duration of such restrictions should be limited to the period of time it would take a partner to independently develop and produce the new joint venture product (the so-called "reverse engineering period"). See *DOJ International Guidelines*, *supra* note 35, ¶ 13,110, at 20,649; *Katsh*, *supra* note 236, at 1011. Determination of such a reverse engineering period could, however, be quite difficult "in view of the high technical complexity and uncertainty of the concept." *Brodley*, *supra* note 177, at 346-47. The period required by the parties to recoup their original investment plus a reasonable return is easier to ascertain and is more suited to encourage investment in pro-competitive ventures.

tures has deterred American firms from entering into these beneficial arrangements.

It is now appropriate for the courts to adopt a new standard that recognizes the distinctive competitive features of joint ventures. The purpose-based analysis proposed in this Article would simplify the courts' approach and provide clear guidance on the acceptable scope of joint ventures and their ancillary restraints. This new antitrust standard would free businesses to engage in creative joint solutions to the problems of outdated technology, over-capacity and foreign competition.

