Global Business & Development Law Journal

Volume 5 | Issue 1 Article 12

1-1-1992

The Commission's Evaluation of Joint Ventures under Article 85 of the Treaty of Rome: Economic Background and Legal Analysis

Antonio Braggion
University of the Pacific; McGeorge School of Law

Follow this and additional works at: https://scholarlycommons.pacific.edu/globe

Part of the International Law Commons

Recommended Citation

Antonio Braggion, *The Commission's Evaluation of Joint Ventures under Article 85 of the Treaty of Rome: Economic Background and Legal Analysis*, 5 Pac. McGeorge Global Bus. & Dev. L.J. 249 (1992).
Available at: https://scholarlycommons.pacific.edu/globe/vol5/iss1/12

This Article is brought to you for free and open access by the Journals and Law Reviews at Scholarly Commons. It has been accepted for inclusion in Global Business & Development Law Journal by an authorized editor of Scholarly Commons. For more information, please contact mgibney@pacific.edu.

Practitioner's Perspective

The Commission's Evaluation of Joint Ventures Under Article 85 of the Treaty of Rome: Economic Background and Legal Analysis

Antonio Braggion*

Table of Contents

I. INTRODUCTION 251

II. THE COMMISSION'S COMPETITION POLICY 251

III. APPLICABILITY OF ARTICLE 85 TO JOINT VENTURES . . . 253

IV. THE DISTINCTION BETWEEN COOPERATIVE AND CONCENTRATIVE JOINT VENTURES 254

V. THE COMMISSION'S NOTICE ON THE APPLICATION OF REGULATION 4064/89 TO JOINT VENTURES 256

VI. WHEN A JOINT VENTURE SHOULD BE REGARDED AS A CONCENTRATION: THE COMMISSION'S ANALYSIS PRIOR TO THE NOTICE 258

VII. CASES CONSIDERED NOT TO VIOLATE ARTICLE 85 FOR OTHER REASONS 261

*Attorney, *Studio Legale Bergmann, Spinosa & Braggion*, in Milan, Italy. J.D. 1982, Catholic University of Milan; 1988, Institute on Comparative Legal Studies, University of Edinburgh; LL.M. 1991, University of the Pacific, McGeorge School of Law.

The author wishes to thank Professor Kojo Yelpaala, McGeorge School of Law, for the kind help and the indispensable suggestions given in preparing this article.

VIII. THE GRANT OF AN INDIVIDUAL EXEMPTION UNDER ARTICLE 85(3) 264

IX. CASES VIOLATIVE OF ARTICLE 85 TO WHICH AN INDIVIDUAL EXEMPTION WAS DENIED 265

X. JOINT PRODUCTION AND DISTRIBUTION 268

XI. RESEARCH AND DEVELOPMENT 273

XII. REDUCTION OF CAPACITIES AND RATIONALIZATION OF ACTIVITIES 279

XIII. INCREASE IN THE COMPETITIVE STANDARDS OF THE EEC INDUSTRY AND AVOIDANCE OF FINANCIAL RISKS INVOLVED IN INDEPENDENT OPERATIONS 287

XIV. STANDARDIZATION OF PRODUCTS 293

XV. CONCLUSION 302

I. INTRODUCTION

To understand the Commission of the European Community's [hereinafter Commission] approach to joint ventures under article 85 of the Treaty of Rome,[1] it is first necessary to analyze the Commission's competition policy and, then, to determine whether that policy is reflected in the Commission's decisions concerning joint venture agreements.

II. THE COMMISSION'S COMPETITION POLICY

The purposes of the European Economic Community's (EEC) competition rules have been identified as: (1) the prevention of barriers to trade being erected by private agreements between undertakings, abuse of monopoly power, or state subsidies; (2) the maintenance of effective competition as the spur to the creation of a single market; and (3) the encouragement of efficiency, innovation, and lower prices.[2]

In its First Report, the Commission pointed out that:

> Competition is the best stimulant of economic activity since it guarantees the widest possible freedom of action to all. An active competition policy pursued in accordance with the provisions of the Treaties establishing the Communities makes it easier for the supply and demand structures continually to adjust to technological development. Through the interplay of decentralized decision-making machinery, competition enables enterprises continuously to improve their efficiency, which is the sine qua non condition for a steady improvement in living standards and employment prospects within the countries of the Community.[3]

---

1. Treaty Establishing a European Economic Community, 2 U.N.T.S. 294-97; 1-3 Common Mkt. Rep. (CCH) ¶¶ 100-5406.
2. CHRISTOPHER BELLAMY & GRAHAM D. CHILD, COMMON MARKET LAW OF COMPETITION § 1-025, at 14 (3d ed. 1987).
3. *First Report on Competition Policy* Introduction, 2 EEC Competition L. Rep. (MB) 1407 (1971).

According to the Commission, the main advantages of a competition policy are: (1) it endeavors to maintain or create effective conditions of competition by means of rules applying to enterprises; (2) it encourages the best possible use of productive resources for the greatest possible benefit of the economy as a whole, and for the benefit of the consumer; (3) it is a mean of fighting inflation; and (4) it contributes considerably to the better use of labor, since ill adjusted structures which are encouraged by inflation give rise to underutilization of the labor potential within the Community and to underpayment of skilled workers.[4]

The first objective of competition is, according to the Commission, to prevent governmental restrictions and barriers, which have been abolished, from being replaced by similar measures of a private nature. Therefore, a competition policy must ensure fair competition so that enterprises operating within the Common Market can, in general, benefit from the same conditions of competition.[5]

Consequently, the following types of arrangements are considered a serious threat to the achievement of the Commission's objectives.[6] First among these suspect arrangements is market-sharing arrangements and quotas. "The direct object and result of [market-sharing arrangement and quota] implementation is to eliminate the exchange of goods between the Member States concerned."[7] Second among these suspect arrangements is price-fixing. "[A]greements to fix prices and to protect national markets are mutually complimentary and constitute, therefore, an obstacle to trade since they prevent buyers from benefiting from the competitive market conditions which would have prevailed, had there been no such agreements."[8] Third among these suspect arrangements is joint selling agreements.

4. *Id.* at 1408.
5. *Id.* at 1409.
6. *See generally id.* pt. One, ch. I, § 1, ¶¶ 1-24, at 1419-36.
7. *Id.* ¶ 2, at 1420.
8. *First Report on Competition Policy* pt. One, ch. I, § 1, ¶ 6, 2 EEC Competition L. Rep. (MB) at 1423-24.

> The producers allocate among themselves, in predetermined proportions, the total quantity of products to be sold and offer these products on the market through their joint selling agency at uniform prices and conditions of sale . . . . [This prevents] competition among the members of the group who have, therefore, neither the incentive nor the capability to develop individual selling activities for their products at prices freely determined according to quantity and destination. At the same time, buyers are deprived of a choice between several sources of supply and have no way of stimulating price competition among different producers.[9]

Conversely, the Commission's policy encourages cooperation between enterprises. "[T]his can produce favourable economic results and maintain effective competition within the Common Market."[10] Cooperation has been achieved through block exemptions and individual exemptions, which are especially important in the case of joint ventures.

III. APPLICABILITY OF ARTICLE 85 TO JOINT VENTURES

In light of the above considerations concerning the Commission's competition policy, it appears clear that cooperation between enterprises infringe article 85 when it has as its object or effect, the restriction of competition within the Common Market, or may affect trade between member states.

Article 85 of the Treaty of Rome prohibits, subject to the possibility of an exemption under article 85(3), all agreements between undertakings, decisions by association of undertakings, or concerted practices, which are likely to affect trade between member states and which have the object or effect of preventing, restraining, or distorting competition within the Common Market.

In the case of joint ventures, among the conduct prohibited by article 85, the following are particularly relevant: (1) to directly or

9. *Id.* ¶ 11, at 1427.
10. *Id.* ¶ 25, at 1437.

indirectly fix buying or selling prices or other trade terms; (2) to limit or control production, marketing, technical development, or investments; (3) to allocate markets or sources of supply; and (4) to apply to trade partners unequal conditions in respect of equivalent transactions, thereby placing them at a competitive disadvantage.

Specifically, joint ventures infringe upon article 85, if they have as their object, or result in: (1) allocation of geographical or product markets or sources of supply; (2) restrictions on producing or marketing competing products; (3) restrictions on the possibility of making independent investments or carrying out independent technological researches; (4) restrictions on the possibility of independently granting technological licenses; and (5) restrictions concerning the utilization of labels and trademarks on jointly manufactured products.

IV. The Distinction Between Cooperative and Concentrative Joint Ventures

The distinction between concentrative and cooperative joint ventures is relevant to the applicability of article 85 of the Treaty of Rome and Regulation 4064/89 Regarding the Control of Concentrations Between Undertakings.[11] In cooperative joint ventures, the risk of restricting competition is almost inevitable since a coordination of the economic activities of the participants usually takes place, whereby competition is restricted or distorted. In concentrative joint ventures, it is theoretically possible that no coordination of competition between parents or between the parents and subsidiary occurs.

Concentrative and cooperative joint ventures have been deeply analyzed by the Commission in some of its decisions concerning joint ventures and, eventually, in its Notice on the Application of

11. Regulation 4064/89 of Dec. 21, 1989, art. 3, 1989 O.J. (L 395) 1, 4.

Regulation 4064/89 (concerning concentrations in undertakings) to joint ventures.[12]

In the Notice on the Application of Regulation 4064/89 [hereinafter Notice], the Commission pointed out that "the Regulation does not deal with operations . . . [which] are cooperative in character."[13] Such operations are defined as those "whose object or effect is the coordination of the competitive activities of undertakings that remain independent of each other."[14] Where an "operation . . . includes both a lasting structural change and the coordination of competitive behavior," and the two are inseparable, the operation should be regarded as cooperative.[15] On the other hand, "[i]f the structural change can be separated from the coordination of competitive behaviour, the former will be assessed under the Regulation and the latter, to the extent that it does not amount to an ancillary restriction within the meaning of Article 8(2), second subparagraph of the Regulation,

---

12. Commission Notice Regarding the Concentrative and Cooperative Operations Under Council Regulation (EEC) No. 4064/89 of 21 December 1989 on the Control of Concentrations Between Undertakings, 1990 O.J. (C 203) 10 (English ed.) [hereinafter Regulation 4064/89]. *See* Dr. Werner Kleinmann, *Die Anwendbarkeit der EG-Fusionskontrollverordnung auf Gemeinschaftsunternehmen*, RECHT DER INTERNATIONALEN WIRTSCHAFT 605 (1990); Dr. Rainer Bechtold, *Die Grundzüge der neuen EWG-Fusionskontrolle*, RECHT DER INTERNATIONALEN WIRTSCHAFT 256 (1990); Dr. Karsten Schmidt, *Europäische Fusionskontrolle im System des Rechts gegen Wettbewerbsbeschränkungen*, BETRIEBS-BERATER 719 (1990); Dr. Horst Satzky, *New EEC Antitrust Regime for Joint Ventures*, 18 INT'L BUS. LAW. 518 (1990); Trevor Soames, *Merger Control in the United Kingdom: Recent Developments*, 18 INT'L BUS. LAW. 313 (1990); James S. Venit, *The "Merger" Control Regulation: Europe Comes of Age...or Caliban's Dinner*, 27 COMMON MKT. L. REV. 7 (1990); Alexander, *Le Contrôle Des Concentrations Entre Entreprises*, CAHIERS DE DROIT EUROPÉEN 529 (1990); John Cook & Trevor Soames, *EEC Merger Regulation: A Practical View*, 19 INT'L BUS. LAW. 330 (1991); Dr. Hans-Jörg Niemeyer, *Die Anwendbarkeit der Art. 85 und 86 EWG-Vertrag auf Unternehmenszusammenschlüsse nach Inkrafttreten der EG-Fusionskontrollverordnung*, RECHT DER INTERNATIONALEN WIRTSCHAFT 448 (1991) (regarding the application of Regulation 4064/89 to joint ventures).

13. Regulation 4064/89, *supra* note 12, pt. I, ¶ 1, at 10.

14. *Id.*

15. *Id.* It has been observed that the difficulty of defining joint ventures covered by the Regulation derives from the ambivalent nature of many joint ventures because, "[w]hile the 'horizontal' relationship between the parent companies may contain elements of anti-competitive arrangement, the 'vertical' relationship between the parent companies and the subsidiary may have the features of a merger." Satzky, *supra* note 12, at 519.

[will] be assessed under the other Regulations implementing Articles 85 and 86 of the EEC Treaty."[16]

V. THE COMMISSION'S NOTICE ON THE APPLICATION OF REGULATION 4064/89 TO JOINT VENTURES

According to the Notice, "[t]o define the term 'joint venture'. . . , it is necessary to refer to" article 3(1)(b) of Regulation 4064/89.[17] Under that regulation, the term refers to "undertakings that are jointly controlled by several other undertakings."[18] "Joint control may be provided for in the [joint venture]'s constitution . . . , but [it] may also be established later," as is the case when a holding in an existing undertaking is acquired. It may also be based on agreements or concertations between the parent companies.[19] In addition, it should be noted that pursuant to article 3(2) of Regulation 4064/89, the conditions required for a joint venture to amount to a concentration are: (1) that it permanently exercise all the functions of an autonomous economic firm, and (2) that it does not have—for object or effect—the coordination of competition among the parent companies, or between them and the joint venture.[20]

According to the Commission's Notice, a joint venture must act as an independent supplier and buyer on the market in order to fulfill the first condition.[21] "This is not the case where [a joint venture] supplies its products or services exclusively to its parent companies, or when it meets its own needs wholly from them."[22] The elements supporting the existence of a joint venture on a lasting basis are the agreed duration and, especially, that the human and material resources of the joint venture are such as to "ensure

---

16. Regulation 4064/89, *supra* note 12, pt. I, ¶ 1, at 10. *See* Commission Notice Regarding Restrictions Ancillary to Concentrations, 1990 O.J. (C 203) 5.
17. Regulation 4064/89, *supra* note 12, pt. II.A, ¶ 7, at 10.
18. *Id.*
19. *Id.* pt. II.A.3, ¶ 11, at 11.
20. *Id.* pt. II, ¶ 6, at 10.
21. *Id.* pt. II.B.1, ¶ 16, at 11.
22. *Id.*

the [joint venture]'s existence and independence in the long term."[23] For this purpose, transfer of know-how or of existing undertakings or business, or investment of financial resources may be specifically relevant.[24] Conversely, the autonomous nature of a joint venture is weakened if, for its business, it depends on facilities which remain completely with the parent companies' business.[25]

As to the second condition laid down by article 3(2) of Regulation 4064/89 (*viz*: that the joint venture has, as neither its object or effect, the coordination of competition among the parent companies or between them and the joint venture), the Notice denies the existence of any foreseeable competition, if "all the parent companies withdraw entirely and permanently from the [joint venture]'s market and do not operate" on neighboring, upstream, or downstream markets.[26] Where the parent companies' preexisting activities have been transferred to the joint venture, the risk of coordination should be excluded, if the whole of certain business activities have been transferred to the joint venture, and the parent companies "withdraw permanently from the [joint venture]'s market so that they remain neither actual nor potential competitors . . . ."[27]

Coordination of competition between the joint venture and the parent companies has been inferred by the Commission, even in the absence of any express covenant, from the circumstances of the transaction. Such circumstances include: (1) the obligation for each of the parent companies to grant the joint venture a license for any inventions achieved individually (such an obligation was held to make it impossible for each parent company to acquire an advantage on the other party with respect to the results achieved through its own research);[28] (2) whether all important decisions concerning the joint venture's activity required the agreement of

23. *Id.* pt. II.B.1, ¶ 17, at 12.
24. *Id.*
25. *Id.* pt. II.B.1, ¶ 16, at 11-12.
26. *Id.* pt. II.B.2, ¶ 20, at 12.
27. *Id.* pt. II.B.2, ¶ 25, at 13.
28. Commission Decision of Dec. 23, 1971 (Henkel/Colgate), 1972 O.J. (L 14) 14.

the parent companies (which owned respectively 50% of the joint venture's stock);[29] (3) the existence of exclusive distribution agreements between the parents and the joint venture;[30] (4) the restriction on the ability of the parties to freely license their technology to third parties in the joint venture's market;[31] (5) the joint investments of the parents in such amounts as to restrict the possibility of independent investments;[32] (6) the ban on the parents to utilize the know-how transferred to the joint venture, in the event of their withdrawal;[33] and (7) the existence of an exclusive purchase agreement between the joint venture and one of the parents.[34]

VI. WHEN A JOINT VENTURE SHOULD BE REGARDED AS A CONCENTRATION: THE COMMISSION'S ANALYSIS PRIOR TO THE NOTICE

The Notice is the result of the Commission's evaluation of joint ventures in its previous case law. Therefore, the views expressed in the Notice can be better understood in light of Commission's previous decisions.

In the *SHV/Chevron* case,[35] the conclusion that the planned joint venture would amount to a concentration was based on the following circumstances: (1) a lasting change in the structures of the parents companies (this was found in the permanent transfer of all assets and distribution networks to the joint venture); and (2) the withdrawal of the parents from the joint venture's market, with the likelihood of never returning.

29. Commission Decision of July 25, 1977 (De Laval-Stork), 1977 O.J. (L 215) 11.

30. Commission Decision of July 20, 1988 (Sopelem/Vickers), 1988 O.J. (L 230) 39; *see infra* part XIV (discussing *Sopelem/Vickers*).

31. Commission Decision of July 13, 1983 (Rockwell/Iveco), 1983 O.J. (L 224) 19.

32. *Id.*

33. Commission Decision of Dec. 8, 1983 (Carbon Gas Technology), 1983 O.J. (L 376) 17.

34. Commission Decision of July 20, 1988 (Iveco/Ford), 1988 O.J. (L 230) 39; *see infra* part X (discussing *Iveco/Ford*).

35. Commission Decision of 20 December 1974, 1975 O.J. (L 38) 14; *see infra* part VI (discussing the case).

However, in the *Iveco/Ford* case,[36] the transfer by Ford U.K., to a newly created common subsidiary, of the equipment and related personnel necessary to manufacture certain vehicles, was not considered sufficient to justify the conclusion that Ford U.K. would disappear from the joint venture's market. Ford U.K. would remain part of the market because, even if Ford U.K. had waived the possibility of manufacturing such vehicles in Europe, it would continue manufacturing them in the U.S., and could export to Europe.

Also, in the *Enichem/ICI* case,[37] the dedication by the parents, to a jointly owned subsidiary, of the entire capacity of their plants was not considered sufficient to regard the operation as a concentration, since the parents would retain the ownership of such plants. The Commission also stressed that the parents would be able to reenter the product market transferred to the joint venture, since they would remain active in the upstream market.

In *De Laval/Stork*, the Commission held that a joint venture could not be regarded as a concentration because after the agreement, the parent companies would not become mere holdings, thereby withdrawing completely and definitely from the joint venture's market. According to the Commission, such a withdrawal would have required that the parents had no longer maintained the possibility of independently returning into the joint venture's market.

SHV-Chevron

SHV-Chevron concerned a network of joint ventures for the distribution of petroleum derivatives between Steenkolen-Handelsvereeniging NV (SHV), Utrecht, and Chevron Oil Europe Inc. [hereinafter Chevron], incorporated under the laws of the State of Delaware, with its head office in New York, U.S.

The main points of the agreements included the following: (1) under the cooperation agreement, Chevron and SHV would set up

36. *See infra* part X (discussing the case).
37. *See infra* part XII (discussing the case).

a joint holding company incorporated under the laws of the Netherlands, called "Calpam NV," as well as jointly and equally owned subsidiaries, also called "Calpam," for the purpose of selling the products covered by the agreements in Belgium, the Netherlands, Luxembourg, Germany, and Denmark, where Chevron and SHV had independent distribution networks; (2) they would vest in the Calpam subsidiaries for at least fifty years their distribution networks and all the assets relating thereto (such as, plants and equipment); (3) the object of the general cooperation agreement, and the specific agreements forming a Calpam subsidiary for each country, included (except in Germany) paraffin oil (kerosene), household fuel, industrial fuel, asphalt, marine fuels, and lubricating oils; (4) the Calpam joint subsidiaries would be supplied by the various subsidiaries of Chevron under nonexclusive supply contracts; (5) for the petroleum products listed above, which would be distributed by the joint subsidiaries, the signatory companies each agreed not to compete against the other without the prior consent of the other; and (6) the price of the asphalt sold by the Calpam subsidiaries would be fixed by Chevron.

The Commission observed that: (1) the agreements would bring a lasting change in the structures of the companies involved and above all in that of SHV; (2) SHV would cease to do business as an independent wholesale buyer of petroleum products; (3) SHV and Chevron would cease to retail the relevant products separately; (4) most of the other aspects of the agreement suggested that the distribution side of Chevron and SHV's business would be integrated into the new trading structure of the Calpam subsidiaries; (5) the Calpam subsidiaries were formed for a period lasting until December 31, 2019, thus suggesting that the assets in question would to be transferred permanently to the Calpam subsidiaries; (6) for both Chevron and SHV, this would bring about a real concentration between each of them and their joint subsidiaries, confined to the distribution of the products specified by the agreement; (7) the cooperation agreement contained no clause restricting competition between Chevron and SHV in areas other than those covered by the Calpam joint subsidiaries; (8) considering the distribution of the products covered by the

agreement, Chevron and SHV had agreed not to compete without the prior consent of the other, this would involve no appreciable restriction of competition since Chevron had no industrial or commercial interest which could imaginably lead it to compete with its own 50%-owned subsidiaries; and (9) SHV would disappear as an independent wholesaler on the petroleum product market, with no likelihood of ever returning.
The operation was therefore regarded as a concentration, which did not infringe article 85, so that a negative clearance was granted pursuant to article 2 of Regulation 17.

VII. CASES CONSIDERED NOT TO VIOLATE ARTICLE 85 FOR OTHER REASONS

In two cases, the conclusion that the proposed transaction did not violate article 85 was not based on the question of whether the joint venture would amount to a concentration. The Commission's analysis in the *Mitchell Cotts-Sofiltra* case[38] and in the *Elopak-Metal Box Odin* case[39] was based on the following evaluation: (1) the absence of actual or potential competition between the parties; (2) the parent companies' impossibility of independently manufacturing the joint venture's products (this was inferred from the lack of the necessary know-how and research and development resources); (3) the absence of restrictions on the parent companies' activities outside the joint venture's market; and (4) the absence of restrictions on the joint venture.

Elopak-Metal Box Odin[40]

Elopak-Metal Box Odin, decided in 1990, concerned the creation of a corporate joint venture (Odin) between a Norwegian (Elopak) and a British (Metal Box) undertaking for research and development of a new type of paper container for food. The parties

38. Commission Decision of Dec. 17, 1986, 1987 O.J. (L 41) 31.
39. *See infra* part VII (discussing the case).
40. Commission Decision of July 13, 1990, 1990 O.J. (L 209) 15.

had asked for a block exemption under Regulation 418/85 or, if this was not the case, either a negative clearance or an individual exemption.

The agreements entered into between the parent companies contained the following provisions: (1) the joint venture's stock would be owned 50% by each parent company, and the joint venture's board of directors should be composed of an equal number of members chosen by the parent companies; (2) the parent companies would grant the joint venture an exclusive license for the exploitation, in any country, of all their present and future industrial property rights relating to the agreement; (3) the joint venture would maintain such rights as secret, and utilize them solely for the purposes laid down by the agreements; (4) any improvement achieved by the joint venture would be recognized as its own property; (5) should the joint venture decide not to exploit the technology in a certain country, the parent companies would be entitled to exploit the technology there, if the joint venture offered this opportunity to third parties; (6) the parent companies could be granted a non-exclusive license (not including the right to grant sublicenses) of improvements, unless the exploitation of such improvements could infringe upon the joint venture's rights under the agreements (that is, any utilization not covered by the agreements was practically allowed), or the joint venture decided to exploit the improvements for its own purposes; (7) each parent company would be allowed to carry out research and development activities with third parties in the relevant field, provided that the other parent company's know-how or the joint venture's improvements were not utilized, unless this was permitted under the agreements; (8) in the case of disputes concerning implementation, infringement of the agreement, or the activity of the joint venture, which could not be settled, each parent company would be entitled to purchase the other parent company's shares; (9) should the joint venture be wound up, the parent companies would be granted analogous licenses, but they would be prevented from utilizing the other parent company's know-how, or the improvements achieved by the joint venture, with a competitor of the parent company in question; (10) unless otherwise provided by

the agreement, neither parent company would be allowed to sell its shares without the other parent company's consent; and (11) all information transferred to the joint venture, or to one of the parent companies by the other, should be treated as confidential.

The Commission refused to grant an exemption pursuant to article 7 of Regulation 418/85 because the cooperation not only referred to production, but also to distribution. In addition, it was noted that the grant of such an exemption would have required that the agreements had infringed article 85.

A violation of article 85 was excluded for the following reasons: (1) at the time of the stipulation of the agreement, the parent companies were neither actual nor potential competitors; (2) it was very unlikely that each parent company could independently develop the relevant products, because they lacked the necessary technology; (3) in order to develop the new products, the technical knowledge of both parent companies was necessary (this would reduce technical risks and costs); (4) the exclusive license to exploit the joint venture's know-how in the field of the agreement would ensure each parent company that the other would utilize all its efforts for the achievement of the project; (5) the nonexclusive license granted by the joint venture to the parent companies in respect of the improvements, as well as the limitations concerning the exploitation of the improvements, would ensure that the know-how be exploited solely in the field covered by the agreement; (6) even though the exclusive license granted to the joint venture went beyond the initial starting period, and could last as long as the joint venture existed, it was justified because the parents' know-how was necessary to develop, manufacture, and market the products; (7) the joint venture was not restricted in respect to prices, quantity, or territory, even though the relevant products could, to a certain extent, compete with the present production of Metal Box; (8) the parent companies were not restricted in research and development; (9) the possibility of utilizing the other parent company's know-how, only within the field covered by the agreement, was a necessary consequence of the cooperation concerning a specific field of activity; (10) the obligation for each of the parent companies not to allow, for a term

of five years after the termination of the joint venture, that a competitor of the other parent could utilize its know-how, was a necessary result of the creation of the joint venture; (11) the restriction concerning the joint venture's utilization of the parent companies' know-how and the obligation to maintain such know-how secret, were both necessary not to prejudice the purpose and existence of the joint venture; and (12) the parties' obligations in relation to licensing technology, upon dissolution or breakup of the joint venture, were justified because, in this event, both parties would be free to compete and use all know-how, including that of the other party in the field of the agreements, and to use their own and the joint venture's improvements, in any field. The Commission also pointed out that there would be no implicit restrictions on competition on the parent companies' activity, except in the joint venture's field, because they were neither potential competitors, nor could they have developed the new product independently. In the light of the above considerations, a negative clearance pursuant to article 2 of Regulation 17 was granted.

VIII. THE GRANT OF AN INDIVIDUAL EXEMPTION UNDER ARTICLE 85(3)

Under article 85(3) of the Treaty, the provisions of article 85(1) may be declared inapplicable in the case of any agreement

> which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

The Commission's evaluation for the purpose of granting a joint venture an exemption under article 85(3) usually takes the

following circumstances into consideration:[41] (1) whether the economic benefits could be obtained through a lesser form of cooperation (such as distribution and know-how licensing); (2) whether the agreements impose restrictions on the parties which are not indispensable for the achievement of the operation; (3) whether the joint venture will contribute to the promotion of technical and economic progress; (4) whether the consumers will benefit from the results achieved; (5) whether the costs and financial risks involved in independently carrying out the same activities can justify the creation of the joint venture. With specific reference to joint ventures entered into between European and extra-European undertakings, the Commission has positively considered the possibility that European undertakings could receive advanced technology.[42]

The cases in which an individual exemption was granted have been chosen as some of the most significant decisions concerning joint ventures. They have been divided into different categories according to the purpose of the joint venture or the main reasons on which the grant of an individual exemption was based. Nevertheless, it should be noted that, especially in the case of very elaborate joint ventures, purposes and reasons for exemption often overlap.

IX. CASES VIOLATIVE OF ARTICLE 85 TO WHICH AN INDIVIDUAL EXEMPTION WAS DENIED

The Commission has always exempted joint ventures which were found to be violative of article 85, except in the *Wano Schwarzpulver*[43] and the *Floral*[44] cases. From the Commission's analysis, it appears that the following circumstances may justify the refusal of an individual exemption: (1) the elimination of competition because of the insulation of geographical markets; (2)

41. BELLAMY & CHILD, *supra* note 2, § 5-075, at 229.

42. *See generally* Commission Decision of July 14, 1986 (optical fibers), 1986 O.J. (L 236) 30; *see infra* part XIII (discussing *Olivetti/Canon*).

43. Commission Decision of Oct. 20, 1978, 1978 O.J. (L 322) 26.

44. Commission Decision of Nov. 28, 1979, 1980 O.J. (L 39) 51.

the absence of any improvement in production or technological standards; and (3) the absence of any benefit for the consumer (this is specifically the case where, as a result of the joint venture, uniform prices would be charged, or the parties could achieve monopolistic positions).

Wano Schwarzpulver

Wano Schwarzpulver, decided in 1978, concerned a corporate joint venture (Wano) between Bohlen Industrie AG (Bohlen), including its subsidiary Wasagchemie GmbH (Wasag), and Imperial Chemical Industries Ltd. (ICI), including its subsidiary Nobel's Explosive Company Ltd. (NEC), for the production and distribution of black powder.

The agreements and a letter of intent, notified to the Commission, provided that: (1) ICI would purchase shares and make certain capital contributions, in order to achieve joint and equal control of Wano, previously wholly owned by Wasag; (2) NEC would continue to operate its existing black powder plant only until its customers could be transferred to the joint venture; (3) NEC and Wasag would buy their total requirements of black powder from the joint venture; (4) NEC and Wasag would assign to the joint venture all their business, including know-how, patents, and goodwill, relating to the manufacture of black powder; (5) the joint venture would be jointly controlled by the parties through a management board, to be equally appointed by the parents; and (6) all the joint venture's important decisions would require the consent of both parents.

The agreements entered into between the parties were held to infringe article 85, because: (1) the joint control of the parent companies on the joint venture (each of them would own 50% of the joint venture's capital) would result in coordination of their activities in the relevant market; (2) in the United Kingdom market, the agreement would result in ICI (which fulfilled almost the entire demand of black powder in such a market) purchasing all its future black powder needs only from the joint venture; (3) since the parent companies had relevant holdings in the joint venture, they

would avoid competing between themselves or with the joint venture, either with respect to the prices at which black powder would be sold, or the efforts to be deployed to promote sales; (4) the existence of the joint venture in a certain market would foster cooperation between the parent companies in other markets; and (5) each party would be likely to obtain from the joint venture the same type of black powder at uniform prices.

The parties claimed that, even in the absence of the participation of ICI in the joint venture, ICI would have no alternative than to purchase its requirements for the U.K. demand from Wano and, therefore, there would be no potential competition in the supply of the U.K. market. The Commission rejected these arguments on the ground that other EEC producers were available to supply black powder in the U.K. market, particularly if Wano had been left free to purchase the product from other suppliers. The Commission observed that the agreements, if implemented, would affect trade between member states because ICI would purchase its demands only from the joint venture, thereby erecting additional barriers to the entry of suppliers from other EEC countries. The effects of such restrictions on competition would probably be appreciable because: (1) the parties were groups of significant importance; (2) they had considerable financial resources; (3) they controlled a substantial share of distribution in the Community; and (4) the relevant product was to be considered "an essential homogenous commodity in a highly oligopolistic market."

The grant of an exemption pursuant to article 85(3) was refused because: (1) the implementation of the agreements would afford the parties the possibility of eliminating competition of a substantial part of the products in question in that the implementation of the agreements would result in the insulation of the United Kingdom market by precluding sales made by other suppliers; (2) the agreements would result neither in a new manufacturing process nor in an improvement in the production of black powder; (3) even if the parties had claimed that the implementation of the notified agreements would lead to a greater security of supply for black powder and that ICI's participation in the joint venture was necessary to obtain suitable supplies of black powder and to

guarantee supplies of suitable qualities to its customers in the United Kingdom and elsewhere, security of supply, in circumstances in which there were considerable under-used production capacities, could not be considered a benefit sufficient for the purposes of article 85(3); (4) even on the assumption that the agreements, if implemented, could contribute to an improvement in the production or distribution of goods or to the promotion of technical or economic progress, a fair share of any such benefits would not become available to consumers; and (5) the result of the agreement would be to enable ICI, an existing monopoly distributor of black powder in the United Kingdom, also to become jointly with Wasag a monopoly producer of black powder for the United Kingdom and, in that position, ICI would be subject to negligible competitive pressure to pass on to the consumer any savings achieved through increased efficiency.

X. JOINT PRODUCTION AND DISTRIBUTION

Joint production arrangements are a more sophisticated form of specialization agreements; in both joint production and standard specialization agreements, the parties restrict their possibility of independently manufacturing certain products through the allocation of production or through the transfer of production to common entities.

Regarding specialization agreements, the Commission has taken the view that such agreements are desirable since they can contribute to lower costs by setting up long production runs and to a better utilization of available production capacity through concentration of efforts on a limited number of products. The Commission approves of this result even if such agreements may prevent a member producer from recommending the manufacture of a product given up in favor of another producer or from marketing directly under its own trademark in the territory of another producer of the product in which he specializes (thereby depriving consumers of stimulating competition between the manufacturers). Such agreements are based on the allocation of production between the parties accompanied by mutual obligations

on each party to supply the other exclusively with the products in which he should specialize for sale in the territory of the other party. The essential condition for granting an exemption is that the specialization shall not compromise the effectiveness of competition in such a way that the parties can utilize the saving in costs for their exclusive profit instead of sharing them fairly with their customers. Also, competition at the distribution level must be ensured by allowing intermediates to make parallel imports of the specialized products covered by the agreement.[45]

According to recital 3 of Regulation 417/85, concerning specialization agreements:

> agreements on specialization in production generally contribute to improving the production or distribution of goods, because the undertakings concerned can concentrate on the manufacture of certain products and thus operate more efficiently and supply the products more cheaply [and,] given effective competition, consumers will receive a fair share of the resulting benefit.[46]

This appears to be consistent with the goals of the Commission's policy, previously examined, which tend to foster the best possible use of productive resources for the benefit of the consumer.

Joint production and distribution arrangements involving the creation of a common entity do not fall within the block exemption of Regulation 417/85.

Iveco/Ford[47]

Iveco/Ford, decided in 1988, concerned a series of agreements between a British company related to the Ford group, Ford Motor Company Ltd. (Ford U.K.), and a Dutch holding company associated with the Fiat group, Iveco Industrial Vehicles Corporation BV (Iveco), for the creation of a corporate joint

45. *First Report on Competition Policy* pt. One, ch. 1, § 1, ¶¶ 26-28, 2 EEC Competition L. Rep. (MB) at 1438-40.

46. Regulation 417/85 of 19 December 1984 on the Application of Article 83(3) of the Treaty to Categories of Specialization Agreements, ¶ 3, 1985 O.J. (L 53) 1.

47. Commission Decision of July 20, 1988, 1988 O.J. (L 230) 39.

venture (IC). The purpose of the joint venture was to manufacture and distribute industrial vehicles, previously manufactured and distributed by Ford U.K., and marketed as the Cargo line. It was planned that the joint venture would distribute in the U.K. the Iveco industrial vehicles supplementing the Cargo series and, later on, a new generation of Iveco vehicles which would replace the Cargo line. Pursuant to a shareholders' agreement, Iveco would be entitled to appoint the majority of the members of the joint venture's board of directors. All important decisions would be approved by a qualified majority including the vote of at least one member appointed by each parent.

The agreements included the following provisions: (1) Ford U.K. would transfer to the joint venture the equipment and personnel necessary to manufacture the Cargo vehicles; (2) the joint venture would be entitled to utilize all the necessary industrial property rights owned by the parties; (3) Ford U.K. would supply the joint venture with the whole requirements of certain components pertaining to the Cargo vehicles; (4) the joint venture would grant Ford U.K. the exclusive distribution of spare parts for the Cargo line; (5) joint distribution by the joint venture of Cargo and Iveco's complementary vehicles was scheduled only for the U.K., where the two specialized dealer networks of Ford U.K. and Iveco should be combined, and it should be continued by the joint venture on the basis of exclusive and selective distribution arrangements in accordance with the pattern developed by Ford U.K.; (6) the joint venture would be entitled to distribute Iveco's products under the combined trademark "Iveco-Ford"; (7) sales in the EEC and other countries would be made by the joint venture solely through the Ford subsidiaries; (8) Ford U.K. would neither manufacture nor sell industrial vehicles in Europe or the non-European Mediterranean area; (9) Ford U.S. would neither manufacture nor sell heavy trucks in Europe and would not manufacture or market there the Cargo Ram industrial vehicles currently being manufactured in Brazil and in the Mediterranean area; (11) Iveco would not compete with the joint venture in the U.K., and would market in the U.K. solely through the joint venture, only the complementary Iveco products covered by the

agreement; (12) Iveco would distribute its ancillary products solely in the U.K., and only through the joint venture; (13) Iveco would insure that the joint venture would not sell Cargo vehicles in Australia, Brazil, Canada, or the U.S. unless their appearance had been significantly modified; (14) both the restrictions on competition affecting Iveco and the licensing agreements concerning the trademarks "Ford Cargo" or "Iveco-Ford" were due to expire no later than December 31, 1995; and (15) the parent companies were not allowed to transfer their shares in the joint venture's stock to third parties.

The Commission observed the following regarding the applicability of article 85: (1) the joint venture would be jointly controlled by the parent companies because of their equal holdings and because all major decisions should be approved by a qualified majority; (2) Ford U.K. had waived the possibility of manufacturing industrial vehicles in Europe, but for the moment it was not scheduled that the joint venture should be incorporated into the Iveco Group; (3) Ford U.K. would continue to manufacture such vehicles in the U.S. and would remain an important manufacturer there which could also export to Europe; (4) a joint venture between competitors, as was the case here, could not be regarded as a new independent competitor in the relevant field; (5) with respect to the joint venture, Iveco would remain an actual competitor, since it would continue manufacturing competing products which could be sold in the whole of the Common Market; (6) the joint venture was bound by various agreements entered into by the parent companies, concerning competition; (7) that Iveco's industrial vehicles and spare parts could also be sold under Ford's trademark (whereas the possibility of selling them under the joint trademark "Iveco-Ford" would be allowed only in the U.K.) would result in an allocation of markets and in parallel imports being made more difficult; (8) the joint distribution scheduled through the joint venture would involve restrictions on competition because the members of the joint distribution networks would be allowed to distribute the products only within the range of products fixed by the parties; (9) the exclusive purchase agreement between the joint venture and Ford U.K. would reduce the possibility of Iveco or

other undertakings supplying the joint venture with the same components; and (10) the agreements could appreciably affect trade among member states, since both parent companies were active in the Common Market.

The reasons for granting an individual exemption consist of: (1) the joint venture would make it possible to achieve rationalization, because market conditions forced heavy vehicle manufacturers to produce a variety of types, since vehicles from a single manufacturer were often sought so as to take advantage of uniform maintenance and spare parts systems for different vehicle types and models; (2) after phasing out the Cargo line, advantages should be expected as soon as the joint venture and Iveco had produced and marketed a common range of vehicles with common components; (3) the combination of Iveco's dealer network with the substantially larger Ford U.K. distribution network would increase Iveco's sales and reduce its costs; (4) the joint venture and the restrictions associated with it should be regarded as essential for achieving the object of the cooperation and for improving the production and distribution of the goods because the joint venture needed to be certain, during the period in which the Cargo line had not been replaced by the new lines, that the parent companies would not jeopardize the situation; (5) the agreement would not result in competition being eliminated with respect to a substantial part of the relevant goods because it could be assumed that effective competition existed in the Common Market in the heavy vehicles sector; (6) it was also to be assumed that the cooperation between the parties in the U.K. would not lead to any significant reduction of competition in other areas of the Common Market; (7) for the rest, the joint venture would not wholly exclude competition between Ford U.K. and Iveco since, in member states other than the U.K., the relevant heavy vehicles would continue to be sold under different trademarks and through entirely separate distribution channels; (8) it could be expected that consumers would enjoy a fair share of the resulting benefit since the consumers who had purchased Ford vehicles could now purchase from the same distribution network vehicles complementary to the Cargo line and could be offered a new range of vehicles

manufactured by the joint venture; (11) since competitive pressure from other suppliers was intense, it might be expected that the resulting benefit would be, at least in part, transferred to consumers; (10) there would also be advantages derived from improved customer and after-sales services that could be brought about through joint distribution and the combination of the dealer networks; (11) the advantages to be expected from the agreements, on the whole, would therefore outweigh the disadvantages associated with the restrictions on competition. The exemption was granted for a term of nine years.

XI. RESEARCH AND DEVELOPMENT

The Commission's position regarding joint research and development is that it does

> not generally restrict competition on condition that the enterprises are not restricted as far as their own research activities are concerned, and that the results of the joint research are made available to all participants in proportion to their participation. In principle, third parties must not be excluded from the access to the results of joint research, although the constitution of a joint research organization justifies the obligation not to grant licenses to third parties[,][48]

except with the agreement of the contracting parties.[49]

According to Regulation 418/85, concerning research and development agreements,

> cooperation in research and development and in the exploitation of the results generally promotes technical and economic progress by increasing the dissemination of technical knowledge between the parties and avoiding duplication of research and development work, by stimulating new advances through the exchange of

48. *First Report on Competition Policy* pt. One, ch. 1, § 1, ¶ 32, 2 EEC Competition L. Rep. (MB) 1444 (1971).
49. *Id.*

> complimentary technical knowledge, and by rationalizing the manufacture of the products or application of the processes arising out of the research and development.[50]

Through such agreements, consumers "can generally be expected to benefit from the increased volume and effectiveness of research and development through the introduction of new or improved products or services or the reduction of prices brought about by the new or improved processes."[51]

Continental-Michelin[52]

Continental-Michelin, decided in 1988, related to a cooperation agreement between a German undertaking (Continental) and a French undertaking (Michelin) for the development of a new type of run-flat tire-wheel system for cars called "Reversed Hooking Tire System" (RHT). The Commission noted that Continental was one of the largest tire manufacturers in the world and Michelin the second largest.

The agreement provided for an initial stage in which the RHT system developed by Continental should be assessed. If the assessment was successful, the purpose of the agreement would be, during a second stage, to develop RHT tires on the basis of the RHT system. In cooperation with customers, and in accordance with their needs, a joint system of tire size standardization and physical tolerances of RHT tires was to be established. The cooperation would continue until the completion of the first RHT and for five years after the year in which the RHT was marketed by one of the parties. The cooperation would subsequently be automatically renewed for additional periods unless terminated by one of the parties. Should one of the parties decide to terminate the cooperation, the other party would be allowed to continue to utilize the other party's patents and know-how. Should one of the parties

---

50. Regulation 418/85 of 19 December 1984 on the Application of Article 85(3) of the Treaty to Categories of Research and Development Agreements, recital 4, 1985 O.J. (L 53) 5.
51. *Id.* recital 5, at 5.
52. Commission Decision of Oct. 11, 1988, 1988 O.J. (L 305) 33.

terminate the cooperation because it had developed a new tire with better run-flat characteristics, that party would offer to revise the agreement with the other party so that the new technology might be incorporated by it. With respect to the technology, it was provided that each party would remain the owner of its own work product and all the improvements thereto made in the course of the cooperation. Where the results had been developed from mutually conceived ideas, the respective research and development managers of each party would decide on a case-by-case basis who would be the owner of the rights deriving therefrom.

The agreement provided for setting-up a common entity in a country to be agreed upon by the parties. Each party was expected to hold an equal interest in the joint venture and its decisions would be taken by mutual agreement. The research and development managers of each of the parties would be the co-executive directors of the joint venture. The joint venture would deal solely with the exploitation of patents and know-how. It would also be the exclusive representative of each parent company for granting patent or know-how licenses in any country and would ensure the collection and distribution of the royalties paid by third parties for the patents and know-how. Know-how would include all secret information related to the RHT system either developed by the parties or transferred to them prior to the stipulation of the agreement or during its implementation.

It was provided that the joint venture would grant the following licenses: (1) A world-wide nonexclusive license to the parent companies of the patents and know-how resulting from the cooperation should one of them start manufacturing the products during the implementation or after the termination of the agreement; (2) a nonexclusive license to any other tire manufacturer of the above patents and know-how for the purpose of manufacturing the new system, if requested by one of the parent companies, and after having consulted with the other; and (3) upon Continental's request, a similar license should be granted to its current licensees. Each parent company would be entitled to grant to any of the above licensees, under freely agreed conditions, a license for the know-how, the information, or the technical

assistance not covered by the agreement. For five years after the termination of the agreement, the parent companies would maintain all technical information exchanged between them or their subsidiaries as secret and would provide assistance to each other in any action against patent infringements.

The parent companies were not restricted in their decision to commercialize the system or any of its components. However, each parent was required to inform the other party six months in advance should the RHT be put on the market. The parties would be free in their choice of motor vehicle manufacturers and to establish the conditions on which they would present and sell the RHT. However, they should coordinate the technical presentation of the RHT to motor vehicle manufacturers. The cooperation in the commercial development of the RHT should continue for two years following the year in which the RHT had first been marketed by one of the parties.

In examining the applicability of article 85, the Commission did not share the parent companies' view that they would put competing tires on the market under their respective trademarks which would show essential differences. In the Commission's opinion, though cooperation was limited to the RHT system, competition would be restricted because the motor-vehicle industry would be limited in its choice to a single tire-wheel system. Whereas, if the two partners had proceeded separately, the motor-vehicle industry could have selected from among the run-flat tire systems that might then have been available the one which it would have considered most suitable.

In addition, the Commission noted that: (1) since both parents had, in practice, agreed to concentrate on the development of the RHT and to abandon the development of their own systems, their freedom of action would be restricted; (2) because of the exclusive license granted to the joint venture of patents and know-how, the parent companies had waived the possibility of granting licenses to third parties; (3) since licenses to third parties could be granted only upon the agreement of the parties, the joint exploitation of patents and know-how through the joint venture would restrict competition; and (4) the parent companies would not be completely

free to commercialize the RHT system in the initial phase of their cooperation.

The following provisions were considered not to restrict competition: (1) The mutual assistance in proceedings for patent infringements, and (2) the obligation to maintain all information exchanged between the parent companies or their subsidiaries as secret.

It was stressed that through the new system the parent companies would acquire substantial time advantages on the other tire manufacturers. The Commission observed that on the basis of the technical potential of the jointly developed RHT system and its superior running characteristics the parties could achieve a lead which the other tire manufacturers would not be able to catch up with even if, as anticipated, they received licenses for patents and know-how deriving from the cooperation. Other tire manufacturers would probably enter the market with their own fully developed RHT only when the RHT of the Continental and Michelin groups would be already well established on the market and accepted by motor vehicle purchasers. It could therefore be assumed that the pattern of sales of tires would be appreciably altered in favor of these two groups. The agreement could consequently affect trade between member states.

The Commission pointed out that pursuant to article 3(2) of Regulation 418/85 the agreement would not fall within the field of application of this block exemption, since the products manufactured by the parties amounted to more than 20% of car tires manufactured within the EEC.

Regarding the grant of an individual exemption under article 85(3), it was observed that: (1) joint research may be allowed even if the firms concerned have a strong position in the market; (2) only joint research and development would make it possible to produce a tire-wheel system appropriate for industrial manufacture, but further work was still necessary; (3) the parties had justified the need for cooperation on the ground that Continental, on its own, would not be able to solve the numerous technical problems involved nor would it be able to do so without a considerable delay in time; (4) one producer alone could not introduce such a tire

system in the motor vehicle industry, since motor vehicle manufacturers always wish to collaborate with at least two tire producers so as to avoid bottlenecks in supply; (5) the new system could offer advantages not obtainable through the traditional system; and (6) the benefit to consumers would consist of the possibility of a safer run-flat tire being available.

The Commission noted that in assessing the length of cooperation in the technical and commercial area account should be taken of article 3 of Regulation 418/85, which limits the exemption of such cooperation between noncompeting undertakings or between competitors with a combined market share of under 20%, to the duration of the research and development program. Where the results are jointly exploited, an additional period of five years from the time the contract products are first put on the market within the Common Market is added to the time for research and development. Where there is cooperation between competitors having a strong market position, because of the larger impact on competition, cooperation should be restricted to the period essential for the implementation of the program. The Commission considered that the setting of the length of cooperation on the commercial introduction of the RHT at two years was in line with these principles. Also, the length of cooperation provided for research and development was held to be appropriate. The Commission pointed out that both partners should be allowed through minimum coordination requirements during the initial stage of marketing and in the establishment of uniform standards to attempt to lay down starting conditions which would be the same for both so as to ensure that their development work would be rewarded.

The Commission noted, regarding the joint exploitation of patents and know-how by the joint venture, that such a restriction fell within the framework of the block exemption for joint exploitation under Regulation 418/85, on which individual exemption decisions should be based. According to article 2(d), the block exemption applies provided that joint exploitation relates to results which are decisive for the manufacture of the contract products or the application of the contract processes. According to

the Commission, this did not exclude the possibility of joint exploitation of technical knowledge that existed before the cooperation began if, as argued by the parties, such knowledge became a component of joint development to such an extent that it should be considered necessary for the manufacture, use, or sale of the RHT.

As to the coordination for the grant of licenses of the whole of the technical knowledge necessary for the manufacture of the RHT, the Commission held that this would lead to a simplification of administrative procedures for licensees and would also ensure a correct distribution between the two parties of the royalties arising from the agreement. According to the Commission, competition would be eliminated only in the system but not with respect to other construction features of the RHT or to conventional radial tires and would continue to exist with all the other tire manufacturers.

An individual exemption pursuant to article 85(3) was granted with different terms of duration according to the different objects of the cooperation, specifically: (1) ten years for the cooperation in research and development; (2) two years for commercial development; and (3) twenty years for the activity of the common entity. The parties were asked to inform the Commission without delay of any extension of the cooperation to other tire categories and of all instances of licenses granted or refused to third parties and, every two years, on the evolution of the cooperation.

XII. Reduction of Capacities and Rationalization of Activities

As pointed out by the Commission, a competition "policy encourages the best possible use of productive resources," whereas "ill adjusted structures which are encouraged by inflation give rise to under-utilisation of the [EEC] labour potential . . . ."[53] This is the reason why reduction of capacities or rationalization of

53. *First Report on Competition Policy* Introduction, 2 EEC Competition L. Rep. (MB) 1407 (1971).

activities, which inevitably involve restrictions on competition, are preferable to the maintenance of structures which are no longer competitive or have become obsolete. It has already been seen that, in joint production ventures, rationalization has been considered a valid ground to exempt restrictions resulting from the parties' waiving their autonomous possibility of manufacturing certain products (the ratio is the same in the case of specialization agreements). Rationalization of production is incompatible with the maintenance of anti-economic activities which have the effect of distorting competition and raising inflation, in that such units can remain competitive only through state aid. The artificial maintenance of activities, which are no longer competitive, through state aid can restrict technological improvement and prejudice competitors who can rely only on their own capabilities of efficiency and innovation to achieve a competitive balance between costs and prices. On the contrary, as stressed in the *Enichem-ICI* case, rationalization which leads to the elimination of noncompetitive units can make it possible to achieve higher standards in the surviving facilities and to reduce costs.

Enichem-ICI[54]

Enichem-ICI, decided in 1987, concerned the creation of European Vinyls Corporation (EVC), a corporate joint venture in the chemical field between an Italian (Enichem) and a British (ICI) undertaking. The jointly owned company would operate in the vinyl chloride monomer (VCM) and polyvinylchloride (PVC) sectors. The decision also related to certain agreements between Enichem and ICI to shut down, reduce the capacity of, or convert, certain plants or facilities.

The products covered in the agreements were all derivatives of ethylene (obtained from the cracking of naphtha) and either chlorine or hydrogen chloride (HCL). The agreements covered Enichem and ICI's interests in VCM and all forms of PVC, but some of their plants were not included.

54. Commission Decision of Dec. 22, 1987, 1988 O.J. (L 50) 18.

The Commission observed that, with many sectors of the petrochemical industry in western Europe suffering from structural overcapacity, manufacturers had been forced at the beginning of the 1980s to look for ways of reducing their capacity either by individual closures or through bilateral deals with other producers. One consequence of such deals had been the progressive reduction of the number of competitors in each sector and the tendency towards markets characterized by an oligopolistic structure. Both Enichem and ICI were now in the second round of restructuring, having already rationalized their capacity in other sectors through swap deals with Montedison and British Petroleum, respectively. At the time of the agreements, the EDC-VCM-PVC sector still had substantial overcapacity, despite previous rationalization programs. Because of the complex integration of the industry (all major producers were vertically integrated with ethylene and chlorine production), any changes and particularly reductions of capacity, at one level of the vertical chain of production, would have implications for the other levels.

The basic agreement between Enichem and ICI was signed in February 1986. Under its terms, EVC would be set up as a 50-50 jointly owned enterprise to produce and sell VCM and all forms of PVC. EVC would operate for at least five years, starting October 1, 1986. After this period, EVC might be dissolved, but the party withdrawing from it should offer its shares to the other. EVC would be run by a holding company incorporated in the Netherlands. The holding company would wholly own a Coordination Centre in Brussels, which should coordinate the operations of EVC throughout the world, four local operating companies, and two local sales companies. EVC was expected to undertake research, development, production, and marketing of the products covered by the agreement. Enichem and ICI would make available to EVC, free of charge, their most up-to-date technology (including know-how and patents), research and development facilities, and personnel, through research service agreements, in Porto Marghera (owned by Enichem) and Runcorn (owned by ICI). Part of the personnel would be transferred to EVC. EVC should own the results of research, including any patent rights arising from

it. Enichem and ICI would dedicate the entire capacity of their plants, for manufacturing the VCM and PVC products, exclusively to EVC. For legal and business reasons, however, the parent companies would retain the ownership of the plants and only agreed not to compete with the jointly owned company.

EVC would be responsible for all aspects of distribution, marketing, selling, and technical services. Both Enichem and ICI undertook to supply exclusively to EVC, the raw material requirements of the plants dedicated to it. Enichem and ICI also entered into a supplementary agreement on the distribution of plasticizers for use in the manufacture of PVC compound. Under this agreement, EVC would act as sales agent for Enichem's primary plasticizers in Italy, where Enichem sold the overwhelming majority of its primary plasticizers for PVC applications. EVC would also act as a sales agent for ICI's primary and secondary plasticizers in other European countries. Both Enichem and ICI would continue to sell plasticizers directly outside such countries.

The Commission noted that, according to the agreements, Enichem and ICI would, through their jointly owned company, close down substantial VCM-PVC production capacity over the years 1986 to 1988. The closures would amount to an important share of the total estimated surplus capacity in the VCM-PVC sector in western Europe in 1986. The plants to be closed were the older and less efficient ones. The global restructuring would also include a more rational allocation of production of the different PVC grades and qualities among the plants dedicated to the jointly owned company, with a view to optimizing transport costs.

The agreements between Enichem and ICI were considered to fall within article 85(1), since they would restrict competition and affect trade between member states. The Commission pointed out that the agreements should be analyzed as a whole, emphasizing their economic consequences. They had the object and effect of restricting competition within the Common Market, because: (1) one of the main purposes was to reduce the capacity of each parent company; (2) in order to allow the jointly owned company to operate and to achieve its objectives, the agreements provided for a continued cooperation between EVC and the parents, which

would remain potential competitors; (3) after the creation of the jointly owned company, both parties would remain potential competitors and, in some cases, actual competitors, between themselves and in relation to EVC, for the products in question; (4) there would be no transfer of assets to the jointly owned company; (5) agreements between competitors designed to close plants and limit capacity, by their very nature, had a direct effect on competition; (6) EVC would be dependent on the continued cooperation of each parent, and this would have a direct impact on competition between them; (7) the supply commitments between the parties and the jointly owned company would restrict competition with third parties; and (8) the jointly owned company would also depend on the cooperation of the parties for the marketing of its products in countries where no local operating or sales company was present.

The Commission stressed that Enichem and ICI would remain actual competitors in the markets of the jointly owned company, because some facilities would remain wholly owned and managed by the parents, although their production should basically be supplied to EVC. On the other hand, ICI had interests in companies outside western Europe, which manufactured VCM-PVC and were capable of selling it into the Common Market in competition with the jointly owned company. Also the parents and the jointly owned company would remain potential competitors because Enichem and ICI, as independent undertakings, would remain actual competitors at the upstream level of production dedicated to the jointly owned company. For two groups as large as Enichem and ICI, with extensive technological expertise and with the active presence they had both retained in the upstream business, it would be comparatively easy and cheap to reenter the downstream businesses, which they would transfer to EVC, and for which they should provide all the feedstock requirements. Potential competition would also be maintained by the decision not to transfer to the jointly owned company the majority of the personnel, the ownership of the production facilities, research centers, patents, and know-how.

The Commission also noted that the parties had not transferred their assets to the jointly owned company. Actually, the production facilities and the research centers dedicated to EVC would remain the property of the parents and would remain absolutely dependent on the parents for services, raw materials, technology, patents, and personnel. The joint venture would, therefore, involve neither the creation of an autonomous entity, nor any total withdrawal from the market of the parents, which after the agreement would remain independent undertakings.

The effect on trade between member states was due to the agreement's concern with products in which there was substantial intra-Community trade. As a result of the agreements, the whole structure of competition would be substantially changed from the point of view of both users and other producers in the Community.

The conditions required for the grant of an individual exemption were considered to exist, because: (1) through the agreements, the parent companies could reorganize their activities in the relevant field more quickly and radically than through individual initiatives; (2) the agreements would create objective benefits—notably through an extensive program of capacity closures in a sector suffering from structural overcapacity—which would outweigh the above mentioned restrictions of competition; (3) the rationalization would improve technical efficiency and make it possible for the parent companies to eliminate productive units which were no longer competitive; (4) the rationalization would also enable each party to absorb more easily, at a financial and commercial level, the closures they had previously carried out separately; (5) because of the elimination of some plants, the relevant activities could be concentrated in more advanced productive units; (6) the transfer of technology from the parent companies to the joint venture would allow the joint venture to dispose of more advanced technology; (7) had the parent companies unilaterally closed their superfluous activities, the clients would have borne the negative consequences; (8) the reduction of the parent companies' surplus capacities was possible only through the joint venture; (9) the agreements for the transfer of the relevant technology to the joint venture were necessary to develop new

products and technology; (10) since the agreements provided for the dedication of patents and know-how from Enichem and ICI to the jointly owned company, which should become responsible for all research and development activities in the sector concerned, EVC would benefit from the most up-to-date technology of the parents and of their respective research centers; (11) the unification of productive activities would allow a certain reallocation of production among the plants and specialization in different grades or subgrades, which could strengthen the rationalization and bring the production centers closer to their natural markets, thus reducing the costs of transport; and (12) similar advantages, at the distribution level, would derive from the agreement on plasticizers, especially since the range offered by EVC would be more complete than the ranges previously sold separately by Enichem and ICI.

As to advantages for the consumer, the Commission noted that the agreements would allow users, who were essentially in the downstream PVC processing industry, a fair share of the resulting benefits. The cooperation agreements would allow rationalization and ensure users a continued supply of products of traditional and probably better quality. Furthermore, users would benefit from the development of the products and the technologies achieved through the unification of the parties' EVC research and development activities. Regarding the agreements on plasticizers, benefits to customers would derive from the possibility of being offered a wider range of products by the same seller.

On the indispensability of the restrictions, the Commission observed that: (1) the agreements between Enichem and ICI were, in the context of structural overcapacity of the market in question, indispensable for the attainment, in the short term, of the above mentioned objectives (this was because the radical restructuring could not be achieved so quickly and be so radical, had it been left entirely to market forces, with each party acting independently); (2) because of the specific integrated nature of petrochemicals, there were clear links between activities in the upstream and downstream markets, with the result that any capacity reduction downstream would have a knock-down effect upstream and vice versa; (3) the restructuring by fully coordinated cooperation could only be

achieved through the creation of a jointly owned company; (4) the agreements whereby the parents would make available to the jointly owned company patents, know-how, and research centers, were closely connected with the creation of EVC, and were essential for obtaining the expected benefits in the development of products and technologies; and (5) the arrangements for supplying raw materials or intermediate or auxiliary products, or for providing utilities or services, were equally indispensable in view of the cost advantages they would offer, as well as in order to avoid the adverse knock-down effect.

According to the Commission, the agreements between Enichem and ICI, and in particular the arrangements to close certain production facilities, would not afford the parties the possibility of eliminating competition for a substantial part of the products in question. This result would occur because there was a substantial trade within the EEC, and because the European market was characterized by insignificant barriers to the entry either of new producers or importers. The continuation of workable competition and, especially, the presence of strong competitors among European manufacturers, would not enable EVC to exercise market power in the short and medium terms. As to the plasticizers market, its structure was, in the Commission's view, more competitive than for VCM-PVC. Notwithstanding the agreement, there would be a high degree of workable competition and users would be able to switch between suppliers in response to price or service criteria. Furthermore, EVC, although combining the sales of Enichem and ICI in this sector, would not become the largest undertaking.

On the issue of duration and conditions for the exemption, the Commission observed that, in view of the nature of the agreements and the short-term outlook for the VCM-PVC industry and its markets, the significant capacity closures and rationalization undertaken through the jointly owned company represented the basic reasons for exempting the agreements. However, the creation of EVC would have an important impact on competition, strengthening the position of the largest undertaking in the market. Therefore, the duration of the exemption should be fixed at five

years. The Commission stressed that neither the jointly owned company nor its parents should, with respect to the products covered by the agreements, maintain, either directly or indirectly, any interests in competing producer or distributor undertakings of a kind likely to serve as an instrument for influencing the commercial conduct of such undertakings within the Common Market. To enable the Commission to check that the conditions of the exemption would be scrupulously complied with, the jointly owned company and each parent were required to submit a report to the Commission every year. The report must give details of the implementation of the rationalization plan and of the progress achieved. In view of the overall trends in the thermoplastics markets, of the dangers which an increase of market power could represent for the maintenance of free competition within the EEC, and of the already strong position achieved by EVC on the market, the jointly owned company and its parents were required to inform the Commission in advance of any initiative, planned by them or their subsidiaries or associated companies, with reference to the products under consideration or to other products on the upstream or downstream markets. The jointly owned company and the parents were also required to inform the Commission, in advance of any renewals of, or extensions in the scope or nature of, or amendments or additions to, the agreements.

XIII. Increase in the Competitive Standards of the EEC Industry and Avoidance of Financial Risks Involved in Independent Operations

As has already been seen, among the main goals of the Commission's policy are the improvement of efficiency in the EEC industry, reduction of costs, and the possibility of consumers being offered more advanced products at cheaper prices. Therefore, the Commission's attitude has always encouraged the transfer of advanced technology from outside the Common Market to EEC industries, particularly in those sectors where competition from Japanese industries is strong. The necessity of achieving high

standards of quality, while at the same time reducing research and development costs, has been positively evaluated in *Olivetti-Canon.* Innovation is an indispensable condition for remaining competitive. As a result, the transfer of advanced technology from the American industry has been considered a sufficient ground to exempt the restrictions on competition resulting from joint development and manufacture.

Olivetti/Canon[55]

Olivetti/Canon, decided in 1987, concerned a joint venture (OCI) between an Italian, Ing. C. Olivetti & C. spa (Olivetti), and an American undertaking, Canon Inc. (Canon), for the development and manufacture of copying machines. The scope of OCI's business was to develop, design, and manufacture copying machine products. The activities of OCI would take place in two phases. During Phase I, it would mainly manufacture copying machine products in the speed-range of ten to twenty copies per minute. In Phase II, the parties might decide to produce, in addition to copying machine products, other office automation products, such as laser beam printer products and facsimile products. The production of higher speed copying machines might also be considered. Phase II was expected to start in early 1989.

Regarding the relevant products market, the Commission observed that from the 1970s, when plain-paper copiers started to be manufactured in the EEC, the number of EEC manufacturers had progressively diminished. The main producers, Rank Xerox (United Kingdom) and Oce (Netherlands) aside, some of the smaller companies--in terms of number of models manufactured--were unable to keep pace with innovation and decreasing prices in office copying, which had mainly come from Japanese companies. Most had converted their business to original equipment manufacturer's (OEM) distribution of Japanese machines (distributed under their own brand name of OEM products). Whereas Olivetti and Develop (Germany) continued to manufacture

55. Commission Decision of Dec. 22, 1987, 1988 O.J. (L 52) 51.

in the low range only. In addition, Olivetti's subsidiary, Triumph Adler (Germany), currently distributed, on an OEM basis, copiers of the Japanese company, Mita. Conversely, Japanese companies had progressively set up manufacturing points in the EEC. Canon had introduced major innovations in the field of copying machines.

As to facsimile machines, Canon had a full line of products, from desktop models to sophisticated broadcasting facsimile and G4 machines, which made it one of the EEC leaders in this field. With regard to laser printers, the Commission noted that, despite the number of competitors (mostly Japanese companies), the two most significant laser printer manufacturers in the world were Canon, for the low-end range, and Xerox, for the medium and high range. Canon had the basic technology to produce color laser printers, which had been introduced in 1986.

The agreements entered into between the parties consisted, among others things, of a master business agreement, a license agreement, a technical assistance agreement, a secrecy agreement, and a shareholders agreement. The planned joint venture (OCI) would be a manufacturing operation owned by Olivetti at 50% plus one share and by Canon at 50% minus one share. The products manufactured by the joint venture would be sold independently by the two partners, mainly through their own distribution networks. Olivetti would transfer both its copier research and production activities to the joint venture. A large majority of components for the products manufactured by the joint venture would be supplied by Olivetti; the rest, by Canon and by third companies.

Among the provisions of the master business agreement, the following were the most significant: (1) the parent companies would transfer their own experiences in the development of the relevant products to the joint venture; (2) the parent companies would insure that the joint venture would strictly cooperate with them in order to reduce the costs for purchasing the necessary components; (3) the components would be purchased preferably from the parent companies, provided that the conditions were favorable; (4) the products manufactured by the joint venture, developed by Canon or based on Canon's technology, and developed by Olivetti or the joint venture, could be sold

respectively by Olivetti and Canon, under trademarks designated by them, to certain companies outside their groups, only by mutual agreement; (5) except for the previous case, on the products distributed through Olivetti or Canon, the parent companies' respective trademarks should be affixed; (6) the products manufactured by the joint venture, and marketed in the EEC or elsewhere, should be differentiated in their appearance and other features, in a manner that the parties might agree to; and (7) unless terminated upon the agreement of the parent companies, the agreement would remain in force until both parent companies maintained a holding in the joint venture.

The license agreement provided for the grant to the joint venture of a nontransferable license covering patents and know-how. The parties would communicate to each other any improvement concerning the products under license, whereas the joint venture would not disclose any confidential information during the implementation of the agreement, or after its termination.

According to the shareholders' agreement, the board of directors of the joint venture would be composed of six members. Olivetti and Canon agreed that each would designate three members of the board of directors. The shareholder's meetings would act by absolute majority of shares on all matters. An exception was provided for the sale of all, or almost all, of the assets, the acquisition of its own shares by the joint venture, merger or consolidation, dissolution of the joint venture, and allocation of profits. In these cases, the approval of more than 70% of the shares was required.

The Commission pointed out that the agreements should be evaluated together and not separately, and that both the creation of the joint venture and certain clauses of the agreements would restrict competition. It further observed that the joint venture would be controlled jointly by the parent companies, because neither could make any relevant decision without the participation of the other. The parent companies were actual competitors in the field of fax appliances and certain types of copying machines. It was held, regarding laser printers, that Olivetti was neither an actual nor a

potential competitor because, in order to reconvert its plants, some time and considerable investments would be necessary. It was therefore unreasonable to think that Olivetti could, alone, face the high financial risks involved in producing laser printers.

As a result of the creation of the joint venture, competition would be restricted at the levels of production and sales, because: (1) the manufacturing costs would be equally sustained by both parties and, therefore, in determining its sale prices, each parent company would be less autonomous than it would be if its manufacturing costs were different; and (2) the products sold would be substantially the same, except as to trademark and appearance.

Also, at the level of investment and development of the products, competition would be significantly reduced because: (1) it was unlikely that the parent companies, after having invested considerable amounts in the joint venture, would make substantial competing investments; and (2) since development and projects would be jointly carried out within the joint venture, there would be no reason why the parent companies should independently invest in the same field.

The obligation on the parties to promote the sale of the joint venture's products was held to reduce their business independence and the possibility of competing through the distribution of other products, as well as to restrict competition by other manufacturers in the supply of the parent companies. The necessity of an authorization of the other parent company for any supply of products manufactured by the joint venture on the basis of the other parent company's technology, and made by any parent company to firms outside its own group, would restrict competition. Such restriction would affect the parent companies and third party undertakings, which might be interested in purchasing the joint venture's products from the parent companies for the purpose of resale. The obligation on each parent company to sell the joint venture's products under its own trademark and through its own distribution network, would limit the independence of its sales and trademark policy, and would make it impossible for third party undertakings to obtain from the parent companies a license

to distribute the joint venture's products, or to utilize the parent companies' trademarks.

The obligation of the parent companies to individualize their products could restrict competition, in that each of them would be prevented from offering products similar to those of the other party. Nevertheless, in so far as competition could also consist in individualizing a product for the purpose of increasing sales, it was not proved that such an obligation could appreciably restrict competition. The same conclusion was reached with regard to the obligation of the joint venture to purchase components preferably from the parent companies, because such an obligation would, for all practical purposes, depend on whether the conditions of the parent companies were actually competitive in comparison with those offered by third parties.

The following clauses of the licensing agreement were considered to restrict competition: (1) the exclusive territorial license granted to the joint venture (because it would prevent the parent companies from manufacturing in the territory, and third parties from being granted a license in the territory); (2) the obligation to mutually exchange improvements concerning the licensed technology; and (3) the obligations concerning the products and the territory under license (because they would restrict the manufacturing possibilities of the joint venture). The obligations not to grant sublicenses or to transfer the license, and to maintain the know-how as secret, even after the termination of the agreement, were held not to restrict competition significantly. Nevertheless, such restrictions were found to prejudice trade among member states because the products manufactured by the joint venture would also be distributed within the EEC.

Grant of an individual exemption under article 85(3) was justified because the joint venture would contribute to the improvement of technical and economic progress, since the increase of production capacity resulting from the joint venture would allow the parties to share the necessary investments and to avoid high costs, which would make products prices noncompetitive. Through the joint venture, a European undertaking (Olivetti) could receive advanced technology from outside the Common Market. On the

other hand, consumers would have the benefit of competitive prices and new products manufactured on the basis of an advanced technology. The advantages resulting from an increase in the European technology standard would not have been possible through a mere licensing agreement since only the participation of the parties in the joint venture could allow a continuous flow of new technology. The following restrictions were regarded as necessary: (1) the obligation to promote and sell the products; (2) the necessity of obtaining the other parent company's consent for the sales previously discussed (the purpose of this obligation was to avoid the technology developed by one party from being utilized to manufacture products which, through the other party, might be sold to competitors of the first party); (3) the obligation of each parent company to sell under its own trademark and through its distribution network; (4) the exclusive character of the license granted to the joint venture; and (5) the restrictions concerning the products and the territory under license.

In discussing the duration of the exemption, the Commission stressed that, in the case of production joint ventures requiring substantial long term investments and concerning a new product, a term of twelve years would be indispensable so that the parties could rely on the enforceability of the agreements and obtain satisfactory remuneration for their investments. The following obligations were imposed: (1) to provide the Commission with a report on the overall activities of the joint venture, and the overall application of the exempted agreements, every two years; and (2) to inform the Commission of any new agreement in relation to the exempted agreements and of any modification or extension of the same.

XIV. Standardization of Products

Concerning joint advertising, joint use of quality labels, and standardization of products, the Commission has observed that joint advertising does not restrict competition if participants are not prevented from carrying out their own publicity. Also, agreements on the use of common quality labels do not restrict competition if

competitors whose products satisfy the required quality conditions may use the labels on the same terms as the members themselves. Agreements on uniform application of standards and types may come under the general ban of cartels if they are linked with the obligation to manufacture or sell only those products which have been the object of jointly fixed standards. However, the Commission has recognized that they help in rationalizing production through a better utilization of production capacity and improvement of supply conditions due to the increased interchangeability of the products concerned to the benefit of the consumer.[56] The advantages of utilizing interchangeable products are considered (in Part X) in the *Iveco/Ford* case where, as a result of the utilization of common components, consumers could be offered products complementary to those already in their possession, as well as uniform maintenance and interchangeable spare parts.

On the other hand, standardization of products can restrict competition. Certain competitors may be able to achieve significant time advantages against their competitors, and consumers are restricted in their possibility of choosing among competing products. Nevertheless, in the *Continental-Michelin* case, the development of a new, common tire-wheel system was exempted, even though it would give the parties a significant advantage over other manufacturers.

In the *Sopelem/Vickers* case, standardization of components between two manufacturers of microscopes was considered to foster reduction of costs and the possibility of having interchangeable products.

Sopelem/Vickers[57]

Sopelem/Vickers, issued in 1977, concerned three contracts [collectively referred to as the agreement] concluded on April 17,

56. *First Report on Competition Policy* pt. One, ch. I, § 1, ¶¶ 36-39, 2 EEC Competition L. Rep. (MB) at 1447-50.

57. Commission Decision of Dec. 21, 1977, 1978 O.J. (L 70) 47.

1975 between a French company (Sopelem), Vickers Ltd., London [hereinafter Vickers], and Microscopes Nachet SA, Paris [hereinafter Nachet]. The products covered by the agreement were microscopes, stereo-microscopes, and microdensitometers manufactured by Sopelem and Vickers, as well as all spare parts and accessories for these instruments. According to the agreement, Vickers would acquire 49% of the shares of Nachet, which, until then, had been a wholly controlled subsidiary of Sopelem, in charge of marketing and distribution of Sopelem's products. Thus, Nachet would turn into a joint venture company of Sopelem and Vickers. The system, set up by Sopelem and Vickers, aimed at establishing the basis for a progressive technical cooperation between the two companies in the field of microscopy, and a future common structure for distribution (Nachet).

The agreement provided that cooperation between the parties be carried out in the following way: (1) the parties would cooperate and coordinate their activities through regular contacts between their research and development teams and by means of a comprehensive exchange of expertise and know-how in the field of microscopy; (2) each of the parties would, concurrently, continue its own research and development activities, and manufacturing in this field; (3) common production to be undertaken by the joint venture company (Nachet) was not scheduled at the time; (4) however, technical cooperation was established with a view to reaching a standardization of components, so that Sopelem parts might be fitted into Vickers instruments and vice versa; and (5) the parties envisaged a specialized division of their production between their respective factories in order to avoid irrational double production (such specialization should take into account the particular knowledge and expertise of each of the parties in relation to the production of particular features or components).

As regards distribution, it was agreed that: (1) Nachet would be the exclusive distributor in the Common Market (with the exception of Ireland and the U.K.) of all microscopes manufactured by Sopelem and of certain types manufactured by Vickers; (2) Vickers would be the exclusive distributor in Ireland and the U.K. of certain types of microscopes manufactured by Sopelem and of

its own microscopes; (3) Nachet would be the exclusive distributor in other European and African countries of both Sopelem and Vickers' microscopes and accessories; (4) Vickers would be the exclusive distributor of Sopelem microscopes in all countries of the world, except those attributed to Nachet under item 3; (5) each distributor would purchase from the principal all of its requirements for sale in its territory, but could independently fix its sale prices and would offer adequate maintenance for the products sold in the license territory; (6) each distributor would not sell any competing products; (7) even though Sopelem or Vickers would be free to accept unsolicited orders from any part of the Common Market, they could neither maintain stocks, nor advertise the products in other member states; and (8) they would not, directly or through any intermediary, endeavor to obtain orders for the products outside their respective distribution territories.

As to products and technical cooperation, the Commission noted that: (1) the microscopes covered by the agreement ranged from a more elementary level, through an intermediary level, to highly sophisticated instruments; (2) Sopelem and Vickers produced a wide range of microscopes, although at that time only Sopelem manufactured stereo-microscopes; (3) the more elementary level microscopes were numerically the biggest range for both Sopelem and Vickers; (4) there was only little similarity and overlapping between Sopelem and Vickers in more advanced and sophisticated instruments; (5) due to their individual research results and expertise, their instruments at these levels were more complementary than competing because altogether they made up a complete range of instruments and not two ranges of identical and competing microscopes; (6) as a consequence, there was no actual interchangeability between the final products of each party, but only between a number of parts of the parties' microscopes, whereas one of the aims of the agreement was to increase this interchangeability; (7) it was the intention of the parties, through their cooperation in research and development, to move out of the routine area of microscopes towards more specialized and sophisticated levels of instruments; and (8) in this sense, the first result of the parties' cooperation under the agreement had already

been achieved, because they were able to introduce a new type of microscope, developed on the basis of experience and designs exchanged between them.

The Commission noted, with regard to the situation of the relevant market, that: (1) in the wide range of products manufactured by Sopelem and Vickers, the microscopes falling under the agreement were of minor importance to both companies; (2) both Sopelem and Vickers were engaged in a wide range of other activities in the technical field; (3) because competition in the Common Market was strong for the products concerned, neither Sopelem nor Vickers had been able to obtain appreciable market shares outside France (Sopelem), Ireland, and the United Kingdom (Vickers); (4) the most important competitors for the products in question were Zeiss, Leitz, and Will, which currently held a market share of approximately 50% of all sales of microscopes in the Common Market; (5) Japanese manufacturers were believed to hold an overall market share of 30% to 35% of all sales in the Common Market of the microscopes concerned; (6) prior to the agreement, the parties had sold their microscopes in EEC countries outside their traditional markets (France, Ireland, and the United Kingdom), mainly via agents; (7) the costs related to marketing and distribution of specialized precision instruments, such as microscopes, were high because of the importance of having specialized distributors; and (8) furthermore, it was important to maintain a sufficient stock of the instruments, as well as having adequate facilities.

According to the Commission, the reason article 85 should apply, entailed: (1) even though, before the creation of the joint venture, Sopelem and Vickers had been actual competitors solely of certain types of microscopes, they were potential competitors with reference to other products because, in light of their expertise and skill in producing the products concerned, they would have been able to extend their ranges of products, thus becoming direct competitors in the production of microscopes for similar purposes; (2) the technical cooperation and exchange of research and development could eliminate competition between the parties in this field; (3) the standardization of various parts of the

microscopes and the specialization in their production, taking into account each party's special knowledge and expertise, would affect the ability of both parties to remain active on the market as independent developers and manufacturers of microscopes or parts; (4) the distribution arrangement, whereby Vickers would be appointed the sole distributor of both parents' products in Ireland and the United Kingdom, and the establishment of a single sales joint venture (Nachet) as sole distributor of Sopelem and Vickers microscopes in the rest of the Common Market, would imply common price policy and consultation between the parties; and (5) these provisions would also deprive each party of the possibility of exercising an independent activity in some member states (specifically, Sopelem and Vickers should refrain from soliciting orders in the countries where Nachet or Vickers were exclusive distributors, which would affect competition in those countries).

The Commission observed that, in view of existing competition on the relevant market, the effects of the restrictions would be limited, but still appreciable. Actually, neither Sopelem nor Vickers were among the largest manufacturers of microscopes, but they were both economically and technically important companies, which had now established a cooperation in research and development. Joint distribution of these microscopes would also involve standardization of parts and specialized division of these instruments for which they both had sizeable market shares in their home countries.

The agreement would affect trade between member states because: (1) the agreement concerned competing undertakings from two different member states, which had previously operated independently on the various Community markets; (2) it covered research and development, as well as distribution, of products manufactured in two member states, which were dealt with in trade between all member states; (3) Nachet, as well as Sopelem itself, was prevented from actively marketing Sopelem products in Ireland and the United Kingdom, whereas Vickers was prevented from marketing its products in the continental member states of the Common Market; and (4) as a result, marketing would proceed in

a different manner than it would have been if the joint distribution arrangement had not been created.

Despite its anticompetitive effect, an individual exemption was granted because: (1) the technical cooperation and the exchange of research expertise and know-how would enable both Sopelem and Vickers to secure the development and maintenance of a more comprehensive and technically advanced range of microscopes; (2) the specialization would enable each party to focus its activity on those products which would be more adapted to its own experience and skill; (3) the standardization of components would increase the possibility of having interchangeable components, and would reduce costs because it would avoid having identical production facilities, tools, and machines for the manufacture of the same components; (4) without the agreement, Sopelem would have stopped the production of microscopes because of the exorbitant costs for research and development; (5) by virtue of offering the possibility of an extended and more comprehensive range of microscopes, as well as the specialization, the agreement would allow each party to improve its technical competence and, therefore, would improve their individual competitive situations after the termination of the agreement; (6) the distribution system would enable the parties to increase their own sales and avoid the high costs necessary to maintain independent distribution networks in the same country; (7) the efficiency of the distribution system would be increased because the distributors appointed for the various countries would be those who previously had the better sales network and the most well-established business relations; (8) the after-sales service, which according to the agreement was to be carried out by the distributor, would be more rational because the parties could avoid expensive concurrent service organizations in the same countries; and (9) the technical cooperation would enable both Sopelem and Vickers to offer a more satisfactory range of microscopes and services.

The Commission noted that the benefits which would be available to the consumer would include: (1) the reduction of costs arising from the unification of their distribution networks and the specialization and concentration in research and development would

enable both parties to supply such instruments and after-sales service at lower costs; (2) the existence in the Common Market of several technically advanced, larger, and economically stronger competitors would ensure that the consumers would have a large part of the advantages of the reduced costs transferred to them; (3) the technical cooperation, the standardization of the parties' instruments, and the subsequent greater interchangeability of certain parts and accessories for the instruments concerned would offer consumers an increased use of these instruments without increased purchasing costs because they could add a greater number of accessories and special devices manufactured by both Sopelem and Vickers to the standardized instruments in their possession; and (4) because of the competitiveness, the economic strength, and the production capacity of their major competitors, Sopelem and Vickers would be bound to transfer the economic advantages to the consumer.

It was held that the agreement contained no restrictions on competition which were unnecessary for the achievement of the aims pursued by the parties through the joint venture because: (1) in light of their small market shares and not very competitive products, both parties found it difficult to achieve sufficient sales to make a technically sufficient independent distribution system economical outside their traditional markets; (2) as a consequence, in order to fully obtain the advantages of the technical cooperation, it was necessary for the parties to cooperate in sales and distribution activities and, at the same time, to make sure that a jointly appointed distributor would be technically competent to manage the distribution and after-sales service of even the most complicated instruments; (3) only through joint distribution could the parties maintain their present positions in the market and to enter some territories within the Common Market, where their individual and even combined positions were insignificant; (4) the restrictive effects of the distribution system on intrabrand competition and interbrand competition between Sopelem and Vickers would be minimal, and would be counterbalanced by the advantages flowing from it because the two parties' microscopes were far more complementary than competitive; (5) the technical

cooperation, coordination, and exchange of expertise in research and development were necessary for Sopelem and Vickers to maintain a sufficiently comprehensive and continuously competitive range of microscopes at reasonable costs which would be competitive with those of Japanese manufacturers in particular, and also to enable them to maintain and expand their market positions; and (6) both parent companies would not be prevented from independently carrying out research and development activities but would be free to exploit the results of research and development (both their own and those of the other party) without restriction after the termination of the agreement.

The Commission observed that neither Sopelem nor Vickers were among the major manufacturers of microscopes operating in the Common Market and that the position of German and Japanese manufacturers would prevent Sopelem and Vickers from eliminating competition in a substantial portion of the relevant market.

The Commission noted that, in view of the time necessary to develop new instruments in this field, the term of the exemption should be long enough to enable the agreement to produce the benefits reasonably to be expected therefrom and, therefore, a period of five years was deemed reasonable.

In view of the general market strength of the undertaking involved, as well as the nature of the restrictions on competition flowing from the agreement, the parties are required to send annual reports to the Commission. These reports should contain all the information necessary to appraise the operation of the agreement, its practical results, and its effects on the relevant market, with particular reference to the maintenance of effective competition within the EEC. The exemption granted by the decision was subsequently renewed for a further ten-year period.[58]

58. Commission Decision of Nov. 26, 1981, 1981 O.J. (L 391) 1.

XV. CONCLUSION

The Commission's approach to joint ventures under article 85 reflects the goals of its competition policy. Among such goals is improvement in production and distribution, so that the European industry can achieve higher standards of efficiency, offering the consumer more advanced products, at lower prices.

Joint research and development, as well as joint production and distribution, have been exempted under article 85(3) if, for instance, a joint venture can make it possible to receive advanced technology from outside the EEC or if high costs and risks otherwise involved in independent operations can be avoided.

Standardization of products or components has been considered to justify an individual exemption if this would offer consumers interchangeable products. Allocation of production among competitors has been positively considered if the enterprises concerned would be able to specialize their respective productions and reduce costs.

On the other hand, the Commission has considered that restrictions on competition due to reorganization of activities are preferable to the maintenance of obsolete, noncompetitive structures: these structures can only survive through state aid, and result in an obstacle to the natural development of the market, in that they prejudice competitors who can rely solely on their own capacities to remain competitive.

In the above situations, the interest of consumers has always been a decisive element of the Commission's evaluation, in the sense that they should benefit, at least in part, from the economic benefits deriving from the joint venture. Also, the requirement that the joint venture involve no restrictions on competition which cannot be considered indispensable for the achievement of the project, has been carefully evaluated.

Apart from the case in which article 85 does not apply, because a joint venture is considered to amount to a concentration and because the parents definitely withdraw from the joint venture's market with the likelihood of never returning, cooperation between undertakings almost inevitably infringes upon article 85. This may

especially be the case if the creation of a joint venture results in allocation of markets, restrictions on independent investments or independent research, restrictions on the possibility of granting licenses to third parties, coordination of policy, and the like.

After the entry into force of Regulation 4064/89 concerning concentrations between undertakings, article 85 will continue to apply if a joint venture has a cooperative character or even if it should be regarded as a concentration. It involves restrictions of competition which cannot be considered ancillary to the proposed operation. To evaluate whether a restriction should be considered ancillary or, more generally, whether a joint venture should be regarded as concentrative or cooperative, the analysis of the Commission's decisions on the application of article 85 to joint ventures can offer a reliable guide.