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The European Commission's Antitrust Analysis of High-Technology Joint Ventures and Strategic Alliances: A Diverging Analysis?

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The European Commission's Antitrust Analysis of High-Technology Joint Ventures and Strategic Alliances: A Diverging Analysis?

David S. Barrett*

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* J.D., University of the Pacific, McGeorge School of Law, to be conferred May, 2000; B.A., Biology, University of Colorado, Boulder. This Comment is dedicated to my father, James Lee Barrett, 1929-1989. I would like to thank Katherine, Mor, my brother and sisters, Kojo Yelapaala, The Family, and all who made this happen.

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I. INTRODUCTION

To say that technology is changing the world is a bit obvious. Commentators incessantly herald a new age driven by technological advances and entrepreneurial passion.¹ These changes are ever-present as can be seen by technology's encroachment upon traditional methods of commerce.² Auctions by wooden gable are now competing with on-line versions,³ contracts can now be binding with the

1. See Thomas A. Stewart & Jane Furth, *The Information Age in Charts*, FORTUNE, Apr. 4, 1994, at 75 (describing the transformation of industry as evidence of the new "information age"). But see Zachary P. Pascal, *Digital Age Spawns 'Neo-Luddite' Movement*, WALL ST. J., Apr. 12, 1996, at B1 (explaining that not everyone is excited about technological progress). See generally Zachary G. Pascal, *Coming Digital Age May Transform Your Living Room in Many Ways*, WALL ST. J., Feb. 18, 1992, at A4 (quoting William Gates III, Chairman of Microsoft, Inc., as saying that the world is "totally going digital").

2. See, e.g., Judith N. Mottl, *CEOs Feel Internet's Global Impact*, INTERNETWEEK, May 25, 1998, at 25 (noting that 78 percent of those polled in China viewed E-commerce as a threat to many traditional businesses); YVES L. DOZ & GARY HAMMEL, *ALLIANCE ADVANTAGE* 2 (1998).

3. See Suzanne Muchnic, *Going Once, Going Twice in Cyberspace Art: Sotheby's Internet Plans Hail New Age of Auctions and Stir Debate*, Feb. 23, 1999, at F1 (describing Sotheby's planned "virtual auctions" and the criticism attacking their methods for doing so).

click of a computer mouse,⁴ and wireless technology is quickly replacing its terrestrial equivalents.⁵ Society is clearly affected by a changing technological landscape through altered social, personal, and commercial behaviors. Pagers, email, and mobile phones provide individuals greater convenience in communication. The convergence of high-technology products and falling prices results in consumers being able to do more for less. This explosion in high-technology goods and services is increasingly the end result of inter-business cooperation in the form of joint ventures and strategic alliances. Inter-business cooperation has a spillover effect on the legal field, especially in the area of antitrust, and it has not been felt more profoundly than at the present time. The dynamic and global nature of high-technology markets is forcing the European Union (EU) to adjust its antitrust analysis under Article 85 of the Treaty Establishing the European Economic Community⁶ to accommodate and facilitate high-technology innovation, competition, and European competitiveness. Article 85 is an important tool used to advance the economic and social goals set out in the EEC Treaty.⁷ This Comment discusses the European Commission's past and present application of Article 85 on high-technology joint ventures and alliances through an examination of the Commission's case law.

The evolution of the railroad industry provides an illustrative example of how commercial interests seized upon the advent of new technology and propelled society down the path of progress. The first reported self-propelled steam vehicle was created in Beijing around 1681.⁸ This eventually gave way to the invention of the locomotive in 1813 and later the development of a railroad-based economy.⁹ The monumental societal effects that flowed from this technological change included the restructuring of non-railroad industries. Factories that previously needed easy access to rivers and canals for transportation purposes could now relocate near any train tracks.¹⁰ Farmers and coal mines could sell their products to

4. See generally Martin H. Samson, *Click Wrap Agreement Held Enforceable*, N.Y.L.J., June 30, 1998 (visited Feb. 18, 1999) <<http://www.ljx.com/internet/0630click.html>> (describing the case *Hotmail Corporation v. Van Money Pie Inc.*, (N.D. Cal., Apr. 20, 1998), as the first judicial pronouncement in the U.S. regarding the subject of click-wrap agreements).

5. See Richard A. Shaffer, *Data Take to the Skies*, FORBES, Apr. 15, 1991, at 114 (noting that because wireless technology is transforming the communications industry someday the "skies will be filled with wireless invoices, memos, graphical images and perhaps even interoffice video"); see also Scott Thurm & Jeff Cole, *Head in the Clouds?*, WALL ST. J., Sept. 20, 1999, at R25 (describing various companies plans for a wireless satellite-based Internet network).

6. Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II) [hereinafter EEC TREATY]. The EU has recently changed the numbering of the EEC Treaty Articles. Article 85 is now Article 81. For convenience, this Comment refers to the former Article number.

7. See discussion *infra* Part II.A.

8. See THE NEW ENCYCLOPEDIA BRITANNICA, vol. 28, Macropædia (15th ed. 1991) at 765.

9. See *id.* at 765-66.

10. *Id.*; see also BRUCE WILLIAM DEARSTYNE, RAILROADS AND RAILROAD REGULATION IN NEW YORK STATE, 1900-1913 1 (1986) (stating that the railroads drove New York's Erie Canal into obsolescence).

distant markets cheaper and faster.¹¹ This evolution from a steam-propelled vehicle to locomotive took hundreds of years, yet more recently, the invention of the electric telegraph in the 1800s has given way to paging, video-conferencing, and wireless communications all within the last 100 years. The last 50 years has evidenced the computer's huge leap in power and utility while inducing the creation of a cashless society.¹² Businesses have not sat idle amidst recent technological changes.

Technological advances compels a business to adapt its behaviors accordingly in order to survive competition in its particular market. Often times it is crucial to predict the obsolescence of a current technology or ascertain future trends so as to gain the early advantage over competitors. For instance, in the late 1980s, I.B.M. found out that unsuccessfully forecasting the future trend of the personal computer market has serious business consequences.¹³ One corporate behavior used in order to adapt to technological change is the formation of a joint venture. The rate of joint-venture formation has increased in the last several decades, and a relatively new partnering arrangement called a "strategic alliance" is increasingly being used as well.¹⁴ These two partnering strategies are disproportionately being used in the high-technology industries as compared to other industries. This is due to the blistering pace of technological change that necessitates companies to stay on top of the learning curve in order to compete.¹⁵ To stay competitive, companies use the joint-venture and alliance methods of partnering so as to gain access to each other's technology which they do not have time to develop on their own.¹⁶ This sharing of technology results in superior products brought to the market in a quicker time. It also encourages competitors to do the same if they too do not have the technology needed to compete. Another reason for forming these types of arrangements is the global nature of commerce. It is costly to enter new foreign markets. Because time is crucial in the high-technology field, joint ventures and alliances are a quick way

11. See *id.* (adding the example that the bridge-building industry was suddenly stimulated).

12. See Bangemann Report, Recommendations to the European Council, Europe and the Global Information Society, at 8, available at <<http://www.echo.lu/eudocs/en/report.html>>; see also Ky Henderson, *Casting the Net: Electronic Cash Just Waiting to be Caught*, BUS. L. TODAY, Mar.-Apr., 1998, at 8 (describing the rise of electronic cash); DOZ & HAMMEL, *supra* note 2, at 2.

13. See Dennis Kneale, et al., *IBM Unveils Family of New PCs, Fueling Competition in Industry*, WALL ST. J., Apr. 3, 1987, at A1 (describing IBM's lost profits).

14. John R. Harbison & Peter Pekar, Jr., *A Practical Guide to Alliances: Leapfrogging the Learning Curve*, STRATEGY & BUS., at 1 (1998).

15. Ashoka Mody, *Learning Through Alliances*, 20 J. ECON. BEHAV. & ORG. 151, 152 (1991) ("As new technologies emerge, the option of experimenting with various combinations to test their technical commercial potential increases.").

16. See also ROBBIE DOWNING, EC INFORMATION TECHNOLOGY LAW 11 (1995) ("The growing use of networks also highlights one of the main characteristics of the [information technology (IT)] industry today. As hardware and software become more sophisticated, so it becomes more difficult to ensure that they all work together. To be compatible, hardware and software must be designed so that they understand the same set of instructions.").

of attaining distribution chains, manufacturing facilities, local talent, and technology geared for a particular market.

However, a change in commercial behavior may provoke adjustments in the laws that regulate this conduct. Article 85 of the EEC Treaty is one such law used as an antitrust weapon, and its application is undergoing changes. The law regulates agreements between businesses so as to prohibit those agreements that restrict competition and are counter to the prescribed goals of the EU's competition policy.¹⁷ This law was enacted in a time when steel, coal, and oil industries dominated the attention of antitrust authorities. Because Article 85 was created primarily for regulating dominant industries in past decades, they are ill-suited for new high-technology industries—those that are newly created and those that were a fraction of their size and importance thirty years ago. The use of joint ventures and strategic alliances in high-technology businesses pose particular antitrust concerns for the Commission because of the close and cooperative relationship inherent in these arrangements. The Commission stated, “[b]y exchanging information connected with their competitive ability they not only destroy the independence of their market conduct but also remove uncertainty as regards to their future behaviour towards their competitors.”¹⁸ The Commission is concerned that this cooperation that reduces the number of competitors and the level of competition in the market will be economically harmful to consumers. For example, joint ventures that involve research collaboration suppress research competition because what was once two or more companies racing to create a new product is now only one entity. The incentive to research at high speed to outwit competitors disappears and technological innovation may slow down.¹⁹ The Commission must also face the likelihood that rapid change in technology may render yesterday's analysis as completely off-topic today.²⁰ An additional concern is technological convergence and the resulting confusion surrounding product market definition, an essential tool in Article 85's analysis. The other side of the coin is that many types of restrictive vertical and horizontal agreements have long been recognized as having major pro-competitive benefits.

17. Due to what has been phrased as an “identity crisis,” the term “European Community” is often used in literature instead of “European Union” when describing the group of nations that have signed the EEC Treaty.

18. Commission Decision No. 77/543/EEC, 1977 O.J. (L 215) 11, [1977] 2 C.M.L.R. 69; *see also* DOZ & HAMMEL, *supra* note 2, at 8. Please note that European materials quoted in this Comment typically contain European English grammar.

19. Joseph Kattan, *Antitrust Analysis of Technology Joint Ventures*, 795 PLI/Corp 619, 630 (1992).

20. *Id.* at 629; *see also* Thomas M. Jorde & David J. Teece, *Innovation, Cooperation and Antitrust: Striking the Right Balance*, 4 HIGH TECH. L.J. 1, 3 (1989); Speech by Robert Pitofsky to American Bar Association (Feb. 25–26, 1999), available at <<http://www.ftc.gov/speeches/pitofsky/hitch.html>> (last visited Nov. 10, 1999).

The Commission's fear of restricted competition is tempered with the awareness of the beneficial impact that technology has on society.²¹ There is an incessant worry that seemingly beneficial behavior might fall prey to inflexible competition laws originally intended to curb harmful monopolistic behavior.²² Stifling the growth of innovation is a justified fear considering the increasing role technology plays in our lives. Sixty percent of jobs in the EU will be connected to the information technology industries by the year 2000.²³ As of 1996, the information technology sectors constituted US\$600 billion in earnings in the EU alone.²⁴

Part II of this Comment provides a brief history of the EU and relevant antitrust laws. It then describes the traditional goals of the EU and the competition policy that has developed in order to achieve those goals. Finally, Part II identifies the changes the Commission and other governmental organizations are seeking with regards to high-technology industries. Part III outlines the Commission's case law history in recent years to determine if the new competition policy discussed in Part II is being applied, and if so, to what extent it differs from the traditional policy. Part IV of this paper describes the characteristics and recent popularity of strategic alliances.²⁵ It then examines the Commission's analysis with regards to a number of strategic alliance cases, including: *Olivetti-Digital*, *BT-MCI*, *Atlas*, *Phoenix/GlobalOne* and *Unisource*. Finally, Part V offers observations as to the possible differences in joint-venture analysis versus the strategic-alliance analysis and whether we are seeing the first footprints of a new breed of analysis within the strategic alliance cases. Part V then highlights the most recent antitrust developments and the new direction of competition policy.

21. Awareness of the importance of technology seems to manifest itself in Article 85(3) text, which provides that technological progress should be considered when deciding whether an anti-competitive agreement is to be prohibited. Liberalization of technology industries appears to be dominating the Commission's efforts to do so.

22. See discussion *infra* notes 52-6 and accompanying text.

23. Herbert Ungerer, *EC Competition Law in the Telecommunications, Media, and Information Technology Sectors*, 19 FORDHAM INT'L L.J. 1111, 1113 (1996).

24. *Id.* (noting that predictions have this amount rising to US\$3 trillion by the end of the decade).

25. This paper generally mentions cases within the last 15 years. The occasional mention of cases involving companies other than those in high technology is done mainly to illustrate generally applicable points.

II. LEGAL, ECONOMIC, AND SOCIAL BASIS OF EU COMPETITION POLICY

*It is commerce which is rapidly rendering war obsolete, by strengthening and multiplying the personal interests which are in natural opposition to it.*²⁶

The EU was founded on a Constitution that outlined certain goals for the union to accomplish. What follows is a description of these goals and the traditional competition policy the Commission developed in order to achieve these goals. Springing from the traditional framework is a redirection of competition policy with regards to high-technology industries.

To understand the competition concerns that led to Article 85 of the EEC Treaty, it is useful to know Europe's historical concerns regarding the behavior of businesses. The above John Stuart Mill quote may not have been in the minds of the framers who launched the EEC Treaty, but the concept was assuredly a motivating factor. Because the ravages of World War II led to economic disintegration, a number of Western European nations attempted to rebuild and to thwart future armed conflict by signing the European Coal and Steel Community (ECSC) in 1951.²⁷ Buoyed by the economic success of the ECSC Treaty, the six members further tied their economic success to each other in 1957 by creating a common market based on full economic union between member states.²⁸ The six European nations signed the EEC Treaty Establishing the European Economic Community.²⁹ The antitrust law developed since then has been consistently based on a finite set of goals set out in the EEC Treaty.

26. JOHN STUART MILL, *PRINCIPLES OF POLITICAL ECONOMY WITH SOME OF THEIR APPLICATIONS TO SOCIAL PHILOSOPHY* 582 (Sir William Ashley ed., Augustus M. Kelley (1909)) (1987).

27. TREATY ESTABLISHING THE EUROPEAN COAL AND STEEL COMMUNITY, Apr. 18, 1951 [hereinafter ECSC].

28. See BELLAMY & CHILD, *COMMON MARKET LAW OF COMPETITION* §1-002 (Vivien Rose ed., 4th ed. 1993) [hereinafter BELLAMY & CHILD]. The six nations included: France, Germany, Italy, Netherlands, Belgium, and Luxembourg. *Id.* § 1-005. The nations that have since been added to the EEC include: United Kingdom (1973), Denmark (1973), Ireland (1973), Greece (1981), Spain (1986), and Portugal (1986). *Id.* at §1-004. Membership expansion continued into 1995, when Austria, Finland, and Sweden joined the European Union. Additional applications for membership have been received from Malta, Cyprus, and Turkey. *Members of the European Parliament 5th Term: 1999-2004* (visited Nov. 28, 1999) <<http://www.europarl.eu.int/members/en/default.htm>>.

29. The EEC Treaty is often referred to by commentators as The Treaty of Rome. For a thorough explanation of the European Union's legal and political structure, see generally Darryl S. Lew, Note, *The EEC Legislative Process: An Evolving Balance*, 27 COLUM. J. TRANSNAT'L L. 679 (1989); TIMOTHY MILLET, *THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES* (1990); T.C. HARTLEY, *THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW* (2d ed. 1988); RAWLINSON & MALACHY CORNWELL-KELLY, *EUROPEAN COMMUNITY LAW: A PRACTITIONER'S GUIDE* (2d ed. 1994); C.S. KERSE, *E.C. ANTITRUST PROCEDURE* (3d ed., 1994); UNITED STATES, *COMMON MARKET, AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE* (Barry E. Hawk ed., 1982); K.P.E. LASOK, *THE EUROPEAN COURT OF JUSTICE: PRACTICE AND PROCEDURE* (2d ed. 1994).

A. *Traditional Competition Policy*

The Commission's antitrust analysis is based on, and must advance, established policies and goals set out in Article 2 of the EEC Treaty.³⁰ Article 85 sets out the criteria that the Commission and the courts will use to determine whether particular agreements are promoting or discouraging the goals set out in Article 2. One of the questions this Comment ultimately attempts to answer is whether the current Article 85 analysis of high-technology joint ventures and strategic alliances advances the goals of competition policy, or whether it strays from the traditional framework and gives greater weight to goals not outlined in the EEC Treaty.

The operational framework of the EU's competition policy is the maintenance of a free market economy in order to maximize economic efficiency.³¹ It is difficult to identify the precise economic model used to support this framework. The economic model hinges on the degree to which the government interferes with the free market, and this interference depends on the particular industry and market. However, with regards to high technology, the trend is clearly towards a hands-off approach. If not only because of the impossibility of a perfectly competitive market, the EU, and other nation states, use antitrust agencies to pursue other values and policies besides economic efficiency.³² These goals are stated alongside the economic aims in Article 2 and 3 of the EEC Treaty.³³ The framers of the Treaty established as their goal the "promot[ion] throughout the Community a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment, a high degree of convergence of economic performance, a high level of employment and of social protection, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States."³⁴ Article 3 then mandates certain activities the EU must perform in order to advance the goals listed in Article 2. These mandates must be read alongside the general goals of Article 2 in order to fully understand

30. The attitude of European countries, carried on to the EU, was that large, dominate firms in a particular industry were not an overwhelming worry because Europe was trying to achieve economies of scale that could compete with other countries' firms. Telecommunications is an example of an industry the Commission has targeted for abolishment of market fragmentation. Commission XVth Report On Competition Policy 1985, Introduction [hereinafter XVth Report], reprinted in *COMPETITION LAW IN WESTERN EUROPE AND THE UNITED STATES* 829, 830 (D.J. Gijlstra ed., 1985). The many nations within Europe created fractured markets which were relatively small compared to the Soviet Union, United States, and Canada. Furthermore, general European industrial competition policy has taken on a shape influenced by such social factors as concern for class conflict and collective identity. Brian Bercusson *et al.*, *A Manifesto for Social Europe*, 3 *EUR. L. J.* 189 (1997). This social dimension is seen as having faded as a priority in favor of a more free market orientation, which is seen by the authors as a threat to the social and political foundations of the European Union. See *id.* at 190.

31. See EEC TREATY, *supra* note 6, art. 3a(1).

32. See Terry Calvani, *What is the Objective of Antitrust?*, in *ECONOMIC ANALYSIS AND ANTITRUST LAW* 1,7 (Terry Calvani & John Siegfried eds., 1988) (stating that a few of the other values pushed are income redistribution, protection of small business, local control of business, and concentration of political power).

33. EEC TREATY, *supra* note 6.

34. *Id.* art. 2.

the EU's competition policy.³⁵ And even though high technology is treated differently, the goals are still the chief aims of competition policy in those sectors as well.

The Commission was given the power to modify its Article 85 analysis and the power to create regulations. To promote simplicity and predictability in the law, the Commission has outlined in its annual Report on Competition what it considers to be objectives of its competition policy.³⁶ Not only does it discuss the important cases decided in the prior year, but it often times contains clues as to where the competition policy is headed.

The First Report set the tone regarding Article 85 analysis, and it emphasized several competition policy goals: (1) "to prevent governmental barriers from being replaced by similar measures of a private nature,"³⁷ (2) "to maintain or create effective competition,"³⁸ and (3) "to encourage efficiency, innovation, and lower prices."³⁹ The Commission was unequivocal in the First Report that a large dose of free market principles would achieve these ends.⁴⁰ The First Report stated that "decentralized decision making machinery" and the presence of competition is the "sine qua non for a steady improvement in living standards and employment prospects."⁴¹ They remarked that this approach to competition policy is an "essential means for satisfying to a great extent the individual and collective needs of our society."⁴² It should be noted that the Commission's discussion focused on competition "within" the Common Market. As we will see later, "competition"

35. See UNITED STATES, COMMON MARKET AND INT'L ANTITRUST: A COMPARATIVE GUIDE 414 (Barry Hawk ed., 1983).

36. The First Report on Competition Policy was published in 1972. Commission First Report on Competition Policy 1971, Introduction [hereinafter First Report], reprinted in COMPETITION LAW IN WESTERN EUROPE AND THE UNITED STATES 1407 (D.J. Gijlstra ed., 1985). Commission XXVth Report On Competition Policy 1992, Introduction [hereinafter XXVth Report] (recognizing that competition rules have often been complex, the Commission states that it is pursuing a policy to inform the public through press releases, conferences, and the Competition Reports in order to "enhance transparency, legal certainty and predictability"). The Commission is aware of the need for predictability in laws to promote capital investment.

37. See BELLAMY & CHILD, *supra* note 28, § 1-071.

38. See First Report, *supra* note 36, Introduction; BELLAMY & CHILD, *supra* note 28, § 1-071. Also, perhaps this was seen as related to employment creation as it is seen today. Margarida Afonso, *A Catalogue of Merger Defenses Under European and United States Antitrust Law*, 33 HARV. L.J. 1, 8 (1998). The jobs in the Information Society are estimated to be 60% of total jobs by year 2000. *Id.*

39. See BELLAMY & CHILD, *supra* note 28, § 1-071; see also Valentine Korah, *From Legal Form Toward Economic Efficiency—Article 85(1) of the EEC Treaty in Contrast to U.S. Antitrust*, 35 Anti. Bull. 1010, (1990). These ends are seen as a way of "improving the working conditions" of European peoples and "reducing the differences in prosperity between regions."

40. See First Report, *supra* note 36, Introduction. This embrace of competition that they avow to was absent in the telecommunications industries until over a decade later, when they made a relatively rapid readjustment of the competition model that was heavy on the hands off way of doing things; see also XVth Report on Competition, *supra* note 30, Introduction (reaffirming the importance of competition by stating that "innovative competition, led by entrepreneurs, is the life-blood of the economy").

41. *Id.*

42. *Id.*

gives way to the outright embrace of European Union "competitiveness" as an important element of Article 85 analysis, and possibly a goal in and of itself.⁴³

The goals of Article 2 have not been the only ends contemplated by the Commission. As the laws have matured and grown more sophisticated, practitioners should be aware of the Commission's periodic injection of new concerns that weigh into their analysis. The Commission has stated in regulations that "fairness" is an important value⁴⁴ as is the existence of small and medium sized firms.⁴⁵ A recent Commission Notice made it clear that small and medium-sized companies are rarely capable of significantly affecting trade and competition.⁴⁶ One of the Commission's "objectives is to enable structural over-capacity to be eliminated to enable the industries concerned to recover profitability."⁴⁷ In what seems to be an increasing concern, as manifested by their focus on the competitive edge of European firms, the EU steadfastly promotes technological development.⁴⁸ With the increasing number of social objectives of competition policy, economic efficiency appears to be playing a smaller role and is perhaps a shrinking concern.⁴⁹ Not expressly stated in the EEC Treaty or the First Report was any mention of a need to maintain a competitive edge over competing economies, notably Japan or North America. However, commentators have noted that this was on the minds of the

43. An example of how disproportionate private business research and development (R&D) budgets were in the recent past, a survey in the late 1980s of the largest R&D budgets showed that U.S. companies comprised nine of the top seventeen companies. Japanese firms represent four of the seventeen, and European firms represented only four. See HIGH TECHNOLOGY EUROPE: STRATEGIC ISSUES FOR GLOBAL COMPETITIVENESS 18 (Phillip de Woot ed., 1990).

44. See, e.g., Commission Regulation 1984/83, 1983 O.J. (L 173); Commission Regulation 123/85, 1985 O.J. (L 15). The elusive definition of "fairness" is illustrated in the First Report when they state that government subsidies in the "Community's interests" are not unfair. First Report, *supra* note 36.

45. Commission XVIth Report on Competition Policy 1986, at points 22-3; see also Commission XXth Twentieth Report on Competition Policy 1991 [hereinafter XXth Report]; DOWNING, *supra* note 16, at 32 (noting that the small firm is protected at the expense of efficiency, or stated another way, "society is paying for choice"). See, e.g., Commission Decision 88/87, 1987 O.J. (L 50), [1989] 4 C.M.L.R. 54 (Enichem/ICI); Commission Decision 88/330, 1989 O.J. (L 150), [1989] 4 C.M.L.R. 24 (Bayer/BP Chemicals).

46. Commission Notice on agreements of minor importance which do not fall within the meaning of Article 85(1) of the Treaty establishing the European Community, 1997 O.J. (C 372) at point 19 ("In cases where such agreements exceptionally meet the conditions for the application of [Article 85(1)], they will not be of sufficient Community interest to justify any intervention. This is why the Commission will not institute any proceedings, either on request or on its own initiative, to apply the provisions of Article 85(1) to such agreements, even if the thresholds set out in points 9 and 10 [of this Notice] are exceeded.").

47. Spencer W. Waller, *Symposium: Perspectives on Efficiencies and Failing Firms in Merger Analysis*, 64 ANTITRUST L.J. 703, 713 (1996) (quoting the XXth Report on Competition Policy).

48. See Commission XXI Report on Competition Policy 1993, at points 47-53.

49. See Korah, *supra* note 39, at 1010 (stating that efficiency is not the most important goal of the EC, however it is an important concern). It has even been suggested that the Commission rarely looks at this factor or it has been assumed for horizontal joint ventures; see also Robert Pitofsky, *A Framework for Antitrust Analysis of Joint Ventures*, 74 GEO. L.J. 1605, 1615 (1986) (stating that in the U.S. any plausible future scenario will lead them to conclude efficiency exists).

framers.⁵⁰ Recent Commission decisions show an increased concern for maintaining competitiveness with other nations' businesses.⁵¹ Global competitiveness concerns are now regularly discussed in the annual Reports on Competition.⁵²

The traditional Article 85 analysis involves all three provisions in that Article, two of which will receive the most attention in this Comment. The first provision is Article 85(1), which exercises authority over "agreements between undertakings" that "may affect trade between Member States" and which will prevent, restrict, or distort competition.⁵³ This three part analysis establishes whether or not the agreement falls within Article 85(1). If the agreement satisfies Article 85(1), meaning it is "caught" by the Article, then Article 85(2)⁵⁴ declares that the agreement is prohibited. Article 85(3) is an escape valve for those agreements caught within Article 85, but which the Commission perceive as having more benefits to competition than drawbacks. The Commission essentially goes from deciding whether an agreement is within Article 85(1) to deciding if it satisfies getting an individual exemption by Article 85(3).⁵⁵ Antitrust law that has developed since then has been fairly methodical and unhurried—this is less so with high technology.

B. High-Technology Competition Policy

Because high technology is increasingly important for society, it follows that strategic coordination in the high-technology sectors is more of a necessity than in low-tech industries. Technological change directly influences the rate of economic growth,⁵⁶ and the coordination and free flow of information is vital to the efficient

50. See David J. Gerber, *The Transformation of European Community Competition Policy*, 35 HARV. INT'L L.J. 97, 102 (1994).

51. See Commission Dec. 86/405, 1986 O.J. (L 236) at point 59 (Optical Fibres) (expressing worries that Europe's high-technology industries may be left behind by other developed nations).

52. See XVth Report, *supra* note 30, at 829 (remarking that one of the Commission's "top priorities" is to strengthen the economy so that it will "improve international competitiveness"); see also XXVth Report, *supra* note 36, Introduction (stating that in order to achieve the optimal allocation of resources, technical progress, and the flexibility to adjust to a changing environment, competition and competitiveness belong together). "Competition policy and competitiveness policy are thus not contradictory but rather serve the same goals of creating the essential conditions for the development and maintenance of an efficient and competitive Community industry, bringing better products and services to European citizens, and providing a stable economic environment." *Id.* "The introduction of competition to [the telecommunications markets] is also vital to facilitate the transition to the information society, and thus our ability to survive in an increasingly competitive and global market." *Id.* at 17.

53. The term "undertakings" means almost any legal or natural person engaged in economic activity. BELLAMY & CHILD *supra* note 28, § 2-003.

54. Article 85(2) of the EEC TREATY states: "Any agreements or decisions prohibited pursuant to this article shall be automatically void."

55. See generally BELLAMY & CHILD, *supra* note 28 (discussing Article 85 procedures).

56. See Jorde & Teece, *supra* note 20, at 9 (citing studies that indicate "90 percent of the long-term increases in output per capita in the U.S. was attributable to technological change, increased educational levels, and other factors . . . [and] that 'advances of knowledge' contributed about 40 percent of the total increase in

development and commercialization of new technology and the establishment of links to developers of complementary technology developers.⁵⁷ Close coordination has become more acceptable from political and legal standpoints.

The last fifteen years have seen a dramatic shift in the EU's focus on competition policy. The high-technology sectors have been the target of a major liberalization process that continues to this day.⁵⁸ These relatively new alterations in policy were sparked by the *British Telecommunications*⁵⁹ case in the early 1980s. This case was the first to hold that Article 85 applied to the telecommunications sector, which included the national monopoly carriers, all still existing at the time. This was followed by the Commission's 1984 Action Programme⁶⁰ which outlined their new liberal policy approach towards the telecommunications sector. This report was followed by a Commission Green Paper recommending the liberalization of the telecommunications industry.⁶¹ The Telecommunications Green Paper set up a "comprehensive policy framework for EC action in the telecommunications industry."⁶² These efforts lead to similar liberalization efforts regarding satellite communications⁶³ and mobile communications.⁶⁴ The Telecommunications Green Paper made clear the Commission's concern with Europe's high-technology competitiveness and it recognized that information exchange is of "vital importance in economic activity and in the balance of power in the world today."⁶⁵ Stated quite

national income per person employed during 1929-57") (citation omitted).

57. See *id.* at 20. The rapid change in "high tech" means that the diffusion of information needed in order for there to be an efficient market interactions are tougher. *Id.*

58. See generally Commission White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty, Commission Programme No. 99/027 (1999), available at <http://europa.eu.int/comm/dg04/entente/other.htm#dgv_pdf_wb_modernisation.html>.

59. Commission Decision 82/861, 1985 O.J. (L 41), [1983] 1 C.M.L.R. 457. This specific issue was presented on appeal in *Italy v. Commission*, Case C-41/83, [1985] E.C.R. 873, [1985] 2 C.M.L.R. 382.

60. COM(84) 277.

61. Commission of the European Communities, Towards a Dynamic European Economy: Green Paper on the Development of a Common Market for Telecommunications Services and Equipment, COM(87)290 Final (1987) [hereinafter Telecommunications Green Paper]. For a complete discussion on the history of telecommunications regulation, see SA'ID MOSTESHAH, EUROPEAN COMMUNITY TELECOMMUNICATIONS REGULATION (1993).

62. See Ungerer, *supra* note 23, at 1119.

63. See TELECOMMUNICATIONS LAWS IN EUROPE 11 (Joachim Scherer ed., 3d ed. 1995), citing Commission of the European Communities, Towards Europe-Wide Systems and Services: Green Paper on a Common Approach in the Field of Satellite Communications in the European Community, COM(90)490 Final (1990). This essentially extended the new liberal policy regarding telecommunications to the satellite area.

64. See generally Council Recommendation on the coordinated introduction of public pan-European cellular digital land-based mobile communications in the Community, 87/371 1987 O.J. (L 196) (establishing the European-wide digital mobile communications (GSM) standard); Council Directive on the frequency bands to be reserved for the coordinated introduction of public pan-European cellular digital land-based mobile communications in the Community, 87/372 1987 O.J. (L 196) (reserving specific frequencies for the GSM); TELECOMMUNICATIONS LAWS IN EUROPE, *supra* note 63, at 9, citing Commission of the European Communities, Towards the Personal Communications Environment: Green Paper on a Common Approach in the Field of Mobile and Personal Communications in the European Community, COM(94)145 Final (1994).

65. Telecommunications Green Paper, *supra* note 63, at "Opening Statement."

bluntly, the "traditional form of organization of the sector does not allow critical development of the potential" of the new information technology services.⁶⁶

In 1993, the call for liberalization of the high-technology sectors, particularly the information technology sector, took on a dire tone in a comprehensive Commission report.⁶⁷ The Delors White Paper exemplifies the redirection of high-technology competition policy. The Preamble states in the first sentence that the paper is designed to aid the E.U. in "lay[ing] the foundations for sustainable development of European economies, thereby enabling them to withstand international competition while creating the millions of jobs that are needed."⁶⁸ The concept behind the Delors White Paper is that maintaining technological competitiveness with the industrialized world is crucial to attain the Article 2 goal of high employment.⁶⁹ The dire tone of the paper includes warnings that to "safeguard the future" Europe must not fall behind the other leading technological nations.⁷⁰ It argues that the future must be built on a healthy, open, decentralized, and more competitive economy. In order to attain this new system, the paper calls, not just for less government interference, but an outright affirmative action to catch up with their competitors—no doubt that the United States and Japan are their main worries.

An equally passionate call for change in high-technology competition policy was made in the Bangemann Report⁷¹ of 1994. This report to the European Council had a desperate tone and was nothing less than a direct call to arms for an immediate change in competition policy as it pertains to high-technology industries. The central theme of this report is that the information technology is revolutionizing the structure of society to such a potentially beneficial extent that European businesses must be a competitive supplier of products. The consequence of a dawdling Europe is nothing less than the downward spiral of Europe's standard of

66. *Id.* at opening statement. Many recommendations in the Telecommunications Green Paper were set into law in 1991 and 1993 in various Directives. *Id.*

67. COM(93)700 Final Growth, Competitiveness and Employment: The Challenges and Ways Forward into the 21st Century: White Paper from the Commission to the European Council [hereinafter Delors White Paper].

68. *Id.* at 1.

69. In fact, the report says unemployment is only one reason for the paper. *Id.* pt. A. Unions have pushed the idea that scientific research and a technology strategy are needed to maintain high employment. David Dickson, *Eureka*, 6 *TECH. REV.* 26, 30 (1988). For an economic analysis of technological change and employment, see PAUL STONEMAN, *THE ECONOMIC ANALYSIS OF TECHNOLOGICAL CHANGE* 12 (1983).

70. The paper goes so far as to state, "[T]hroughout the world production systems, methods of organizing work and consumption patterns are undergoing changes which will have long-term effects comparable with the first industrial revolution." *Id.* at Part A, Development Theme I, (1). The actions plan consists of five points (list) (on p.4 theme II). The guidelines proposed for a policy of global competitiveness includes four points (p.11, B, ch.2 theme II) see annex. start with B, ch 5.

71. Bangemann Report, *supra* note 12.

living.⁷² This increased concern for European competitiveness was apparent, as it was discussed more so than European-wide competition. Becoming a significant player in high technology is a “means to achieve so many of the Union’s objectives.”⁷³ A substantial element in becoming a competitive participant in the Information Society is changing the regulatory environment to allow for full competition.⁷⁴

The new policy framework for the telecommunications, media, and information technology sectors is outlined by the information society⁷⁵ concept in the Commission’s XXVIth Competition Policy Report.⁷⁶ The rapid movement of the high-technology sectors forced the liberalization of many sectors and a new spirit of openness. The Commission has not forsaken antitrust laws in these sectors even though their actions show a willingness to let dominant businesses cooperate to a great extent, especially in the alliance cases.⁷⁷ The interference by the Commission will also depend on the amount of liberalization of the relevant markets.⁷⁸

The Commission Notice on the application of the competition rules to access agreements in the telecommunications sector⁷⁹ addresses how the traditional case-law principals apply to the new problems arising in the telecommunications sector. When analyzing Article 85 cases, the Commission stated there are at least two relevant markets to consider—the service to be provided to end users and access to those facilities needed to provide the service, mobile and fixed.⁸⁰ It continued, saying access agreements involving interconnection are considered essential to

72. See *id.* ch. I, Partnership for Jobs (“We have to act to ensure that [the jobs created by high-technology] are created here, and soon.”) (emphasis added). “The first countries to enter the information society will reap the greatest rewards. They will set the agenda for all who must follow. By contrast, countries which temporise, or favour half-hearted solutions, could, in less than a decade, face disastrous declines in investment and a squeeze on jobs.” *Id.* ch. I.

73. *Id.* ch. I, A Revolutionary Challenge to Decision Makers; see also Michael B. Albert et al., THE NEW INNOVATORS: GLOBAL PATENTING TRENDS IN FIVE SECTORS (1998) (another method of enhancing European competitiveness is state subsidies for research and development (R&D) in high technology. The EU spent an estimated \$18billion over five years to bolster Europe’s science and technology base).

74. See Bangeman Report, *supra* note 12, ch. II.

75. This term is meant to label the future societal state that will be achieved through the diffusion of informational technologies that are changing the basic structure of society. See Towards the Informational Society, The EC Information Society Promotional Office (visited Oct. 19, 1999) <<http://www.ispo.cec.be/infosoc/backg/statement.html>>.

76. See Commission XXVIth Report on Competition Policy 1994, at point 65 [hereinafter XXVIth Report] (announcing that “competition policy play[s] a highly active role in enabling the information society to grow”); see also Ungerer, *supra* note 23, at 1111.

77. See discussion *infra* notes 280-408 and accompanying text discussing strategic alliances. The Commission remarked that the liberal attitude of high-technology’s industrial restructuring does not preclude imposing bans. XXVIth Report, *supra* note 76, at point 66.

78. See XXVIth Report, *supra* note 76, at point 66 (stating that the conditions the Commission attaches to the agreements exemption from an Article 85 violation are dependant on the degree of liberalization, particularly alliance cases).

79. 1988 O.J. (C 265) [hereinafter Commission Notice on Access].

80. XXVIth Report, *supra* note 76, at point 45.

inter-operability of services and infrastructure.⁸¹ The Telecommunications Access Notice identified several types of agreements that concern the Commission. First, an exchange of confidential information concerning a competitor's customer and traffic is easily used for collusive purposes.⁸² Second, exclusivity arrangements require an Article 85(3) analysis.⁸³ Third, access agreements with an anti-competitive object are very unlikely to qualify for an exemption under Article 85(3).⁸⁴ The Commission stated that it will pay particular attention to access agreements pertaining to their likely effects on relevant markets.⁸⁵ Finally, third-party discrimination of access via product pricing, quality, or other "commercially significant aspects" is also disfavored.⁸⁶ With the Commission's concerns in mind, it is necessary to determine how Article 85 is applied in high-technology joint ventures and strategic alliances cases.

III. EUROPEAN COMMISSION'S ANALYSIS OF HIGH-TECHNOLOGY JOINT VENTURES

The amount of positive attention the EU has directed towards high-technology industries indicates its favored status among all industries.⁸⁷ Telecommunication, media, and the pharmaceutical industries have benefitted from the Commission's desire to decentralize, privatize, and increase international competitiveness.⁸⁸ What

81. See *id.* at point 133. The Commission and the ECJ rarely uses the "essential facilities" terminology even though the effect of the doctrine is incorporated in their analyses; see also John Temple Lang, *Defining Legitimate Competition: Companies' Duties to Supply Competitors and Access to Essential Facilities*, 18 FORDHAM INT'L L.J. 437, 439 (1994). The leading case on essential facilities is *ICI v. Commission*, where the court said: "[T]here is a duty to supply at least when: the dominate company is a monopoly; the refusal affects on of the principal users, a former customer; no objective justification is apparent; and the refusal gravely affects the conditions of competitions in the EC."

82. See Commission Notice on Access, *supra* note 79, at point 139.

83. See *id.* at point 140. The Commission stated:

Exclusivity arrangement, for example where traffic would be conveyed exclusively through the telecommunications network of other parties with whom access arrangements have been concluded will similarly require analysis under Article 85(3). If no justification is provided for such routing, such clauses will be prohibited. Such exclusivity clauses are not, however, an inherent part of interconnection agreements.

Id.

84. See *id.* at point 141.

85. See *id.* at point 142. The Commission is worried about hidden price fixing for end-prices for end-users, especially in oligopolistic markets. *Id.* An oligopoly is a market with few competitors. FRANK FISHWICK, MAKING SENSE OF COMPETITION POLICY 47 (1993) (defining an oligopolistic market).

86. Commission Notice on Access, *supra* note 79, at point 143.

87. See Council Resolution concerning trans-European Networks, 1990 O.J. (C 27).

88. Interestingly, the Internet has been the subject of few Commission decisions and Court cases. See Philip Ruttle, *E.C. Competition Law in Cyberspace: An Overview of Recent Developments*, [1998] E.C.L.R. 186 (1998). Cf. Michael H. Ryan, *Competition in the Provision of On-line Services: The U.K. Approach to the Problem of Vertical Integration*, [1997] 7 E.C.L.R. 435 (discussing the dominance of the national telecommunications operators in the provision of on-line services market). The Commission may be waiting for the United States law to develop in this area because of the head start the United States has regarding Internet issues. This would allow

follows is a step-by-step look at how the Commission analyzes high-technology industries when applying Article 85. The procedural steps are outlined, and case examples from different high-technology industries are woven into this material. The Commission's comments are instructive to those businesses that have not yet formed a joint venture because the Commission's main concerns are typically discussed therein. Before that analysis is described, it must be made clear what is meant by a "joint venture."

A. Definition of a Joint Venture

The first significant hurdle is to determine whether a company's agreements equate to the creation of a joint venture, or as the Commission terms it, a "cooperative joint venture." Solving this question means starting with the Commission's definition of a joint venture.

Article 3(1) of Regulation (EEC) No 4064/89⁸⁹ defines joint ventures as an undertaking under the joint control of several other undertakings,⁹⁰ the parents.⁹¹ The core import of the joint-venture definition is the concept of control. The amount of control will dictate whether or not the joint venture is a concentrative joint-venture⁹² versus a cooperative joint-venture. Article 3(3) of Regulation 4064/89 states that control is found when by rights, contracts or any other means which, either separately or jointly and having regard to the considerations of fact or law involved, bestow the possibility of exercising "decisive influence" on an undertaking.⁹³ The Regulation highlights two examples of how decisive influence

sophisticated law to develop and would allow the Commission to see what works and what does not. For more information on the EU's policy, see <<http://fgr.wu-wien.ac.at/nentwich/euroint2.html>>.

89. O.J. (L 395) at point 1.

90. "Undertaking" means a business or legal entity.

91. This definition of a "cooperative joint venture" was a subsequent clarification of Commission Regulation 4064/89 in the Commission Notice concerning the Assessment of cooperative joint ventures pursuant to Article 85 of the EEC TREATY, 1993 O.J. (C 43) at point 2 [hereinafter Commission Notice on Cooperative Joint Ventures]. The Regulation states in part:

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

Id. at point 10.

92. If the joint venture is concentrative, then the analysis is significantly different from the cooperative joint-venture analysis by the fact that it will be analyzed according to Merger Regulation guidelines, which is regarded as a less demanding Commission analysis. A discussion of concentrative joint-ventures is beyond the scope of this Comment. For a thorough description, see JOINT VENTURES IN EUROPE 5 (Julian Ellison & Edward Kling eds., 2d ed. 1997).

93. Commission Notice on Cooperative Joint Ventures, *supra* note 91, at point 4.

can be exercised. First, the parents own the right to make use of all or part of the assets of an undertaking.⁹⁴ Second, rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking, are sufficiently decisive.⁹⁵ This suggests that anything other than a 50/50 stake in a joint venture between two companies is not a cooperative joint-venture. This has not been the practical effect, but, instead decisive influence exercised by a party is determined by the legal and factual circumstances surrounding a case. Once the nature of the joint venture is established, the next step is to determine the applicability of Article 85.

B. Jurisdictional and Exemption Issues

One of the most critical steps before an Article 85 analysis is to determine whether the joint-venture is even subject to the Article's scrutiny. This involves defining the relevant market⁹⁶ and ascertaining the parents' existing market share for the product or services offered, or to be offered, by the joint venture. Certain types of agreements are automatically void prior to an Article 85 analysis. Opposite this concept, certain types of agreements that do not have an appreciable affect on competition are accepted as valid and therefore, do not require an Article 85 analysis.

1. Per Se Violations and Agreements of Minor Importance

Article 85(1) not only prohibits agreements which restrict competition,⁹⁷ it also lists examples of per se violations.⁹⁸ Agreements automatically void include the following: price fixing,⁹⁹ limiting or controlling production, markets, technical

94. *Id.*

95. *Id.*

96. The product market in combination with the geographic scope of business establishes the precise relevant market.

97. Generally, this paper uses the term "restrict" when referring to Article 85(1) to mean restrict, prevent, or distort competition.

98. Article 85 states:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Article 85(1) does not explicitly set up an articulate and effective rule establishing a per se violation via the list, but, instead, lends itself to a case by case analysis on whether competition has been or will be affected by the joint venture agreement.

99. BELLAMY & CHILD, *supra* note 28, § 4-002.

development or investment, sharing markets or sources of supply, dealing exclusively through agreed channels, vertical agreements imposing export bans, or restricting the buyer's freedom to deal with goods.¹⁰⁰

The Commission's antitrust concerns have spurred the creation of a notification procedure which companies may exercise.¹⁰¹ Notification was based on the aggregate amount of the parents' revenue and their market share for the relevant product. The Commission issued guidelines establishing a threshold, and exceeding this threshold meant that the restrictive effect of the joint venture agreement on competition was considered significant—termed “appreciable”—and subject to Article 85 analysis. This is called the *de minimis* test,¹⁰² and it was codified by what is widely referred to as the Commission Notice of Minor Importance.¹⁰³ The test evaluates the dominance of the parties involved by calculating their market shares and gross revenue.¹⁰⁴ The test was revised in 1997 with the issuance of a Commission Notice.¹⁰⁵ The 1997 Notice of Minor Importance eliminated the gross

100. *Id.* § 2–098. On the other side of the coin, the Commission has enumerated specific categories of joint-venture arrangements that will not be considered in violation of Article 85(1) because they do not have as their object or effect the prevention, restriction, or distortion of competition. These include joint ventures of companies belonging to the same parent corporation, agreements that have no appreciable restriction on competition, and a number of agreements listed in the 1968 Notice on cooperation between enterprises, 1993 O.J. (C 43) at point 15. For a thorough comparison of *per se* rules and the rule of reason, see Oliver Black, *Per Se Rules and Rules of Reason: What Are They?*, [1997] 3 E.C.L.R. 145.

101. See BELLAMY & CHILD *supra* note 28, § 11–011 (remarking that any company may elect not to notify the Commission of their creation of a joint venture because there is no duty to notify the Commission). There are, however, severe penalties and no protection from Article 85(1) antitrust violations if the companies do not notify the Commission and are later found to violate Article 85(1)—thereby creating a significant incentive to notify the Commission. See *id.* at § 11–002. The penalties can include: imposition of fines on participating parties; voiding the joint venture agreement; liability to third parties for damages or an injunction or both. “A principal objective of notification . . . is to secure the legal validity of the agreement by obtaining an exemption under Article 85(3).” *Id.* Companies are liable to third parties and subject to fines the moment the joint venture is created. This means that notification after the fact still may subject the companies to penalties. *Id.* at § 11–012.

102. This test was first established in the European Court of Justice: Case 5/69 Völk v. Vervaecke [1969] ECR 295, [1969] C.M.L.R. 273.

103. Commission notice of 3 September 1986 on agreements of minor importance which do not fall under Article 85(1) of the Treaty establishing the European Economic Community, 1986 O.J. (C 231) at point 1 [hereinafter 1986 Notice of Minor Importance] (stating that this agreement was meant to facilitate the cooperation between small and medium-sized businesses). This replaces the Commission Notice of 19 December 1977, O.J. (C 313). *Id.* at n.1.

104. See 1986 Notice of Minor Importance, *supra* note 103, at point 7 (explaining that an agreement is not caught by Article 85(1) if (i) the “goods or services which are subject to the agreement . . . together with the participation undertakings’ other goods or services which are considered by users to be equivalent in view of their characteristics, price and intended use, do not represent more than 5% of the total market for such goods or services . . . in the area of the common market affected by the agreement,” and (ii) “the aggregate annual turnover of the participating undertakings does not exceed 200 million ECU”); see also BELLAMY & CHILD, *supra* note 28, § 2–105. The test is actually a consideration of the whole economic context in which competition would occur. However, the two factors listed in the text are the most important. *Id.* at 2–104. For a detailed analysis and a list of supporting cases, see generally *id.* ch. 2.

105. Notice on agreements of minor importance which do not fall within the meaning of Article 85(1) of the Treaty Establishing the European Community, 1997 O.J. (C 372) at point 7 [hereinafter 1997 Notice of Minor Importance].

revenue component of the *de minimis* test and set the market share thresholds at five and ten percent, respectively, for horizontal and vertical arguments.¹⁰⁶ This change benefits high-technology alliances particularly because by their very definition, alliances typically adopt a broad network of relationships with large companies. The quick pace of technological convergence suggests that the chances of small businesses merging with big businesses are greater.

2. Product Market

Before the Commission can assess any possible Article 85 violation, it must specify the relevant product market in which the joint venture is engaged.¹⁰⁷ This analysis is meant to identify and define the boundaries of competition between firms so that the Commission can identify the parent company's "actual competitors that are capable of constraining those undertakings' behaviour and of preventing them from behaving independently of effective competitive pressure. [Therefore], the market definition makes it possible *inter alia* to calculate market shares [of a company] that would convey meaningful information regarding market power for the purposes of assessing dominance or for the purposes of applying Article 85."¹⁰⁸ Recall that when the Commission determines whether a joint-venture agreement will have an appreciable impact on competition, one important factor is the size of the parent company's market shares. This market share is calculable only after the market is defined.

The exact definition of the market can have a bearing on competition policy and is crucial in a high-technological firm's decision making process.¹⁰⁹ The product market analysis is generally based on the concept of demand substitutability.¹¹⁰ That is, the relevant product market consists of identical products to the ones the joint ventures produce, or products considered as interchangeable with regard to their

106. See *id.* at point 9. For a discussion on the usefulness of the "appreciability" standard and market definition problems, see generally Frances Barr, Editorial, *The New Commission Notice on Minor Importance: Is appreciability a Useful Measure?*, [1997] 4 E.C.L.R. 207.

107. XXVIIth Report On Competition Policy 1997, at point 13 ("The definition of the relevant market is a very important step in the analysis of cases, since it provides the frame of reference against which competition between the firms concerned has to be assessed."). For an industry specific look at market definition issues, see generally DOWNING, *supra* note 16.

108. Commission Notice on the definition of relevant market for the purposes of Community competition law, 1997 O.J. (C 372) at point 2 [hereinafter Commission Notice on the Definition of the Relevant Market].

109. See *id.* at point 4 (stating that the determination of product market and geographic market has a "decisive influence" on their analysis of a competition case); see also Thomas E. Kauper, *The Problem of Market Definition Under EC Competition Law*, 20 FORDHAM INT'L L.J. 1682 (1997) (stating that the definition is relevant to assessing policies which are not always economic).

110. See Kauper, *supra* note 109. The Commission does not rule out the possibility of using supply substitutability. *Id.*

characteristics, price, or use.¹¹¹ The Commission has stated that products can form a separate market based on characteristics, price, or use alone, especially where consumer preferences have developed.¹¹² This poses special problems, especially in the high-technology arena where evolving technology often times means integrating multiple products into a single product.¹¹³ For example, the utility of paging, voice telephony, facsimile and other features are distinct, but they may be interchangeable.¹¹⁴ The Commission has expressed its wariness of technological convergence in its decisions and the impact it can have on product market definition.

An early joint-venture decision in 1991 involved Eirpage, the joint venture entity created by Motorola Ireland Ltd. (Motorola) and Bord Telecom Eireann (Telecom).¹¹⁵ Eirpage was in the business of paging services and did not manufacture components of any kind. Its paging service was categorized by the Commission as falling "within the broader category of mobile communication services in general, which includes mobile telephones and mobile radios."¹¹⁶ However, the product market was defined narrowly as "paging services" because paging is a one-way means of communicating with someone and the relative low cost to other forms of mobile communication were both distinct features.¹¹⁷ It also found important that telephones were "larger" and more "unwieldy" than paging features. This means greater convenience helps distinguish the market.¹¹⁸ Aware that technological progress soon might render the size and cost distinctions immaterial, the Commission said that even if these distinctions fade away, "at present" paging would "continue to exist as a separate option in the mobile

111. BELLAMY & CHILD *supra* note 28, § 2-106; *see also* Commission Notice on the Definition of the Relevant Market, *supra* note 108, at point 7 ("A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices, and their intended use.").

112. *See* 1986 Notice of Minor Importance, *supra* note 103, at point 11. For an early case on product market definition, *see* Case 6/72, [1973] E.C.R. 215, [1973] C.M.L.R. 199. For a more modern approach favored by the Commission, *see* United Brands v. Commission, Case 6/72, [1978] E.C.R. 207, [1978] 1 C.M.L.R. 429 (holding that the relevant market is bananas and not fresh fruit in general).

113. *See* Robert A. Levy, *Microsoft and the Browser Wars: Fit to Be Tied*, Cato Institute, Policy Analysis No. 296 *passim* (1998) (describing the incorporation of Microsoft's World Wide Web browser into the Windows operating system and the legal troubles surrounding the browser).

114. *See* Ungerer, *supra* note 23, at 1113. The Commission noted that where the joint-venture contract components are incorporated into another product produced by the same joint venture, reference should be made to the end product so long as the components represent a significant part of it. *See* 1986 Notice of Minor Importance, *supra* note 103, at point 12. Where the components are sold to third-party undertakings, reference should be made to the component market as well. *See generally* Robert A. Levy, *supra* note 113, at 3-9 (discussing the problems arising from product integration involving Microsoft).

115. Commission Decision 91/562, 1991 O.J. (L 306) (Eirpage). Telecom was the monopoly telecommunications service in Ireland and Motorola was a wholly owned subsidiary of Motorola, Inc. in the United States.

116. *Id.* at point 4.

117. *Id.* at point 10 (noting it can be as much as 50% cheaper).

118. *Id.*

communications sector because it offers one-way communications, a distinct advantage in keeping down the billing costs.”¹¹⁹ This is to say that the one-way characteristic is enough to render this a distinct product market. The Commission did not hint as to how they might view the situation where pagers might evolve from their present characteristics to some form of limited two-way communication, i.e., sending a limited email or voice response signal. Recent developments in integrating pager and cell phone technology will force this issue to be addressed sooner rather than later.¹²⁰

*Astra*¹²¹ is another telecommunications case which involved a joint venture offering television broadcasting services by satellite. British Telecommunications, United Kingdom’s national operator, and SES, a Luxembourg corporation established for the purpose of operating satellites, formed the 50/50 joint-venture company BT Astra SA. There were three distinct product markets identified: satellite space capacity, up-linking services, and down-linking services.¹²² Unpersuaded by BT’s attempt to distinguish the satellite capacity market between low-powered and medium-powered, the Commission stated that both types of capacity “offer customers the same possibilities as far as geographic coverage . . . [and] transmission to cable head-ends; medium-powered satellites simply offer the added feature of enabling DTH reception by relatively small receive dishes.”¹²³ They continued stating that where the cable system in a country is well-developed and in little need for individual dishes, customers would not know if they are receiving the programs via low or medium-powered satellites.¹²⁴ This is an interesting and rarely seen, if ever, twist on the product market analysis. Substitutability of product assumes that consumers are aware of their choices. This reasoning in *Astra* suggests that the lack of knowledge and an inability of the consumer to notice a difference is a different type of interchangeability analysis. With regards to the up-link market, the Commission did not state why this was a distinct market. The obvious facts that it was terrestrial-based, required different equipment, and was a separable service probably did not force the Commission to analyze the up-link market.

119. *Id.*

120. At the time of publication, pagers with two-way messaging capabilities have already been commercialized. One commentator has mentioned that there are several points worth noting: Telecom was required to maintain open access to the same facilities that Eirpage enjoyed; the subscribers contracts were for one year only, so that they could switch services; and that the parent companies were obliged to treat competitors similarly in the future, even when the Commission lacked proof that the parents maintained a dominant position or engaged in past discrimination in favor of the joint venture. See John Temple Lang, *European Community Antitrust Law: Innovation Markets and High Technology Industries*, 20 FORDHAM INT’L L. J. 717, 736 (1997).

121. Commission Decision 93/50, 1993 O.J. (L 20) (*Astra*).

122. *Id.* at point 5.

123. *Id.* at point 15.

124. *Id.* (remarking that the two types of satellites were competing with each other to a certain extent).

The *Optical Fibres*¹²⁵ case involved fiber optic hardware. Corning Glass Works (Corning) was a U.S. corporation with interests in glass and ceramic products and had a turnover in 1984 of US\$1,732,700,00.¹²⁶ In 1970 they developed and patented optical fibers for use in the telecommunications industry and eventually formed several joint ventures in Europe for the manufacturing and marketing of optical fibers. The Commission described the product as a “substitute for microwave and satellite transmission and for traditional coaxial and copper conductors in the field of communications.”¹²⁷ Considering the Commission’s later analysis, it can be inferred that the use of the word “substitute” in this quote was the colloquial, not legal, definition. However, the Commission pointed out that the price for optical fibers was falling rapidly¹²⁸ and fiber optics were used in a variety of applications. The Commission limited their delimitation of the optical fiber market by stating only that “The production of optical fibres and optical cables are different activities.”¹²⁹

The merger decision *EDS/Scicon*¹³⁰ involving software services was an early admission by the Commission on how difficult it is to identify the product market: “Market definition within the services sector is particularly difficult. The boundaries between the various categories and sub-categories of such services are blurred. The ability to provide one service often leads to the ability to provide another. The status necessary to undertake contracts in the various categories are similar.”¹³¹ In *EDS/SD-Scicon* the Commission did not feel it necessary to precisely define the product markets in the decision even though they admitted that they had defined sub-markets for their own use. Either defining the markets broadly or narrowly, they stated that the results would have been the same.¹³²

There are instances when the Commission treats the goods actually produced as having no product market, hence no possible Article 85(1) violation. The Commission’s recent *KGS*¹³³ decision involved several biotech companies¹³⁴ that set up a joint venture to manufacture the acid KGA.¹³⁵ The Commission said that since KGA is “not traded as a separate product on the market [and] . . . there is no supply and demand” for it, vitamin C should be the relevant product market.

125. *Optical Fibres*, *supra* note 51.

126. *See id.* at point 5.

127. *Id.* at point 24.

128. *Id.* at point 36.

129. *Id.* at point 46.

130. 1991 O.J. (C 237), [1993] 4 C.L.M.R. M77 (*EDS/SD-Scicon*).

131. *Id.* at point 8.

132. *Id.* at point 9.

133. Commission Decision 1998 O.J. (C 247) (*KGS*).

134. The companies included Cerestar Deutschland GmbH, Merck KGaA, and BASF AG.

135. *KGS*, *supra* note 133, at point 1. KGA is the intermediate product in the manufacture of vitamin C from sorbitol.

In 1994 the parties argued in the *Fujitsu AMD Semiconductor*¹³⁶ case that the production of semiconductor wafers would not constitute the relevant product market, even though the joint venture was created explicitly to produce that particular good, because the wafers are “products rarely put on the market before being cut into chips and incorporated into . . . devises.”¹³⁷ Therefore, the parties argued that the relevant product market was the market for the devises.¹³⁸ The Commission did not foreclose this argument, but stated that the question would remain open.¹³⁹ The Commission refused to speculate as to future markets that might develop and concluded that there was no product market for the wafers.¹⁴⁰ This is noteworthy because the Commission admitted that there was a market, albeit very small and intermittent. It is arguable that the Commission may be sympathetic to the notion that even though the product market is very small—whether based on monetary amounts or percentage of the market share—the total lack of a market is *not* the necessary prerequisite to concluding no relevant product market exists. However, this may merely be a case where a product is incorporated to a significant degree into an end product. The Commission did not elaborate on this point. This may be analogous to their nurturing of small businesses via the 1997 Notice of Minor Importance. Some markets may be so inconsequential that the Commission might be willing to establish a threshold over which only the Commission will concern itself.

3. Geographic Market

The Commission rarely devotes much ink to the geographic market analysis. Simply, the relevant geographic market is “the area within the Community in which the agreement produces its effects.”¹⁴¹ Defining the geographic market is not necessary for all Article 85 cases because it simply is not relevant for all decisions.¹⁴² In *Fujitsu*, the Commission dismissed the issue in four sentences. It said that the world was the geographic market for the devises in question because they were freely traded around the world, there were no price differences or

136. Commission Decision No. 94/823, 1994 O.J. (L 341) at point 20 (*Fujitsu*).

137. *Id.* at point 20 (emphasis added).

138. *Id.*

139. *Id.*

140. *Id.*

141. 1986 Notice on Minor Importance, *supra* note 103, at point 13 (outlining that wherever the product cannot be bought or sold, or are bought and sold in limited quantities at irregular intervals, that portion of the market should be excluded). The geographic market will be narrower than Community-wide when the nature of the product restricts its mobility and when movement within Community is hindered by barriers—for example, severe taxation. *Id.* at point 14.

142. See Kauper, *supra* note 109, at 1692 (explaining that it is a necessary precondition to Article 86 analysis).

national barriers, and the transport costs were negligible.¹⁴³ In the *Exxon/Shell*¹⁴⁴ decision, the Commission devoted only one sentence to explain that the geographic market was the “whole Community” because the polyethylene products are “safety [sic] and easily transportable.”¹⁴⁵

With regards to the information-technology sectors, the markets will increasingly be international or global. These industries are “beset by intense globalizing pressures,” which drives companies to form a network of relationships in order to be competitive.¹⁴⁶ There is a good chance that any one of the partners conducts commerce on a global scale, and out of this there may rise a worldwide standardization of technical standards.¹⁴⁷ The Bangemann Report declared, “If appropriate, the notion of a global, rather than a Union-wide, market should now be used in assessing European competition issues, such as market, joint ventures and alliances.”¹⁴⁸

4. Article 85(1) Concerns

Article 85(1) provides in part:

1. The following shall be prohibited as incompatible with the common market; all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market[.]

The Commission focuses on three factors when determining whether or not an agreement falls within Article 85(1): (1) whether there is an agreement, decision, or concerted practice made between or observed by undertakings, (2) whether competition within the common market may thereby be prevented, restricted, or distorted, and (3) whether trade between member states may thereby be affected.¹⁴⁹ In fact, a high percentage of joint venture agreements fall within Article 85(1) and are automatically void according to Article 85(2). As will be discussed later, many joint ventures escape prohibition through an Article 85(3) exemption.

As the initial step, the Commission typically devotes scant attention in deciding whether or not there is an “agreement, decision, or concerted practice between

143. See Fujitsu, *supra* note 136, at point 23.

144. See generally *Exxon/Shell*, *infra* notes 155–60 and accompanying text.

145. *Id.* at point 13.

146. Bangemann Report, *supra* note 12, ch. 3, The Role of Competition Policy.

147. See Commission Notice 1992 O.J. (C 333) at point 15 (STET, Italtel, AT&T and AT&T-NSI).

148. Bangemann Report, *supra* note 12, ch. 3, The Role of Competition Policy.

149. See, e.g., Commission Notice, *supra* note 113, at points 12–15; see also BELLAMY & CHILD, *supra* note 28, at 38.

undertakings." Many decisions contain little more than a stock discussion. There is typically no analysis, but instead there are conclusory assertions that the parties are undertakings and the transactions between them are agreements.¹⁵⁰ Agreements do not have to be legally binding contracts. They may be the party's expressed intentions, written or oral, inferred from the circumstances, or may be evinced by a continuing business relationship.¹⁵¹

The next step in Article 85(1) analysis is the determination about whether the joint venture has as its "object or effect the prevention, restriction or distortion of competition within the common market."¹⁵² The Commission is very liberal in its analysis of what "may" affect or restrict competition. This was to be expected from the outset of the Article's application because as Justice Brandeis of the U.S. Supreme Court once said, "[e]very agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence."¹⁵³ The language "prevented, restricted, or distorted" of Article 85(1) catches many joint ventures within its scope. The Commission considers these three operative words as having different meanings even if their effects are similar. The traditional strict reading and enforcement of "restriction" has given way to a more liberal interpretation, at times, which apparently coincides with the Commission's new overall flexible attitude.¹⁵⁴

For example, in *Shell/Exxon*¹⁵⁵ the Commission was faced with a joint venture for the manufacturing of primarily linear low-density polyethylene (LLDPE), but with the possibility of producing high-density polyethylene (HDPE).¹⁵⁶ Because LLDPE was interchangeable with another product called high-pressure low-density polyethylene (LDPE), not manufactured at the plant, it was also within the product market. However, when deciding upon whether there was a restriction of

150. This is probably the case because the language in Article 85(1) is very broad and rarely disputed. *See, e.g.,* Commission Decision 93/668, 1993 O.J. (L 306) (Auditel) (illustrating this point, even though it is a non-joint venture case, that the Commission affords a single sentence to the undertakings conclusion, the agreements conclusion; Commission Decision 92/427, 1992 O.J. (L 235) (Quantel International-Continuum/Quantel SA) at points 6-7, 42; Commission Decision 97/123, 1996 O.J. (L 47) (Novalliance/Systemform) at point 52; Commission Decision 91/532, 1991 O.J. (L 287) (Viho/Toshiba) at point 19. This strategic-alliance case is a good example how the Article 85(1) element of whether or not the parties are undertakings and whether there exists an agreement goes entirely without a discussion. This is probably because of the obviousness of the conclusion.

151. *See* BELLAMY & CHILD, *supra* note 28, § 2-016 (explaining that even if there is no formal agreement, an informal restriction of competition could give rise to a "concerted practice"). *See generally id.* § 2-042. *See, e.g.,* Commission Decision 88/172, 1988 O.J. (L 78) (Konica) at points 37-40.

152. *See* EEC TREATY, *supra* note 6, art. 85.

153. *Board of Trade of the City of Chicago v. United States*, 246 U.S. 231, 238 (1912). Seemingly, from its early decisions, it treated any restriction on conduct that was to have important repercussions in the market as a violation of Article 85(1); *see* Korah, *supra* note 39, at 1015. This led to the Commission's establishment of the *de minimis* rule in 1970; VALENTINE KORAH, *EC COMPETITION LAW AND PRACTICE* 60 (5th ed. 1994).

154. Jean-Yves Art & Dirk Van Liedekerke, *Developments in EC Competition Law in 1997: An Overview*, 35 C.M.L.R. 1135-37, 1135 (explaining the current shift towards a "more economic approach in the enforcement of EC competition law," [and] especially with regards to the concept of "restriction on competition"). The Commission "desire[s] to concentrate on cases having a significant effect on competition . . ." *Id.* at 1137.

155. *See* Commission Decision 94/322, 1994 O.J. (L 144) (Exxon/Shell).

156. *Id.* at point 2.

competition, the Commission decided the joint venture did not restrict competition in the HDPE market.¹⁵⁷ Even though Exxon and Shell were recognized as competitors—almost ensuring the conclusion that restriction exists—the Commission determined that the restriction was “not significant” because Exxon and Shell were not big actors in the HDPE market.¹⁵⁸ The wording of Article 85(1) creates a black and white situation in which there is either restriction or there is not. However, *Shell/Exxon* illustrates how the Commission inserts a more subjective analysis by finding that a restriction on competition is not necessarily fatal. This is notable because unlike this case, a full economic analysis, referred to as the rule of reason, is not used in Article 85(1). Rather, it is Article 85(3) that allows for the balancing of interests and the situation as a whole.¹⁵⁹ Here, however, the Commission dismisses the restriction as something trivial and articulates no real analysis as to the benefits.¹⁶⁰ The Commission was dealing with HDPE, that had a considerable percentage in the market, versus a less than 1 percent with Volk.

The third element the Commission analyzes is whether the joint venture has an effect on trade between member states. Business conduct is delimited by those behaviors governed by Community law and those behaviors governed by national law.¹⁶¹ The test for determining whether an agreement affects trade was first established in the ECJ case *Société Technique Minière*.¹⁶² The test has been reiterated in more recent cases including *Remia v. Commission*, which stated:

it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States, such as might prejudice the realization of a single market in all the Member States.¹⁶³

157. *Id.* at point 57 (adding that “in the light of the present characteristics of the oligopolistic HDPE market and of the only partial substitutability of HDPE by polypropylene,” there was only an “insignificant restriction of competition”).

158. *See id.*

159. Mario Siragusa, *The Millenium Approaches: Rethinking Article 85 and the Problems and Challenges in the Design and Enforcement of the EC Competition Rules*, 21 *FORDHAM INT'L L.J.* 650, 651 (1998) (stating that the anti-competitive effects are looked at only in Article 85(3)). The Commission is trying to achieve a fuller economic analysis in Article 85(1), and if they do, fewer companies would fall afoul of this Article. *Id.*

160. *See Exxon/Shell*, *supra* note 155, at points 57–58.

161. *See BELLAMY & CHILD*, *supra* note 28, § 2–126 (“The concept of ‘effect on trade between Member States’ . . . enabl[es] Community law to regulate all restrictive agreements having appreciable repercussions at Community level.”).

162. Case 56/65, *Société Technique Minière v. Maschinenbau Ulm GmbH*, E.C.R. 337 (1966), at points 235, 251.

163. Case 42/84, *Remia BV v. Commission*, E.C.R. 2545 (1985), § 22.

Trade is deemed to be affected not only when products cross national boundaries, but even when they are *likely* to be traded across national boundaries.¹⁶⁴ An example of this is the *Commercial Solvents*¹⁶⁵ case, which held that the elimination of a competitor, who primarily exported its product rather than supply the member states, was an effect on trade.

A few high-technology cases have shown that the Commission is willing to use distortion of competition as a way to condemn agreements even if they are not restricting competition, but are, nevertheless, violating the spirit of how the Commission wants competition to operate.¹⁶⁶ The *X/Open Group*¹⁶⁷ decision involved an agreement, rather than a joint venture, between many large computer software and hardware manufacturers to create an open industry standard by selecting existing interfaces for use with AT&T's Unix operating system.¹⁶⁸ The Commission found that this agreement distorted competition for the following reasons: (1) nonmembers cannot influence the work results of the group, and unlike members, they did not get the technical understanding of these results, (2) nonmembers cannot utilize the standard until it was made publicly available, whereas members had early knowledge of the specifications and can gain a competitive advantage of this lead time—which was crucial in the high-technology sectors, and (3) membership was restricted by the Group.¹⁶⁹

There are two noteworthy cases where the Commission analyzed joint-venture agreements between huge conglomerates. The parties were arguably alliances, even if they were not labeled as such, and they fell outside the scope of 85(1) analysis. The cases were *International Private Satellite Partners (IPSP)*¹⁷⁰ and *Iridium*.¹⁷¹

164. BELLAMY & CHILD, *supra* note 28, § 2-129. "A speculative or contrived possibility is not enough, but a potential effect is sufficient." *Id.* § 2-132. If the joint venture involves agreements that directly relate to international transactions or where the parties are located in different member states, there is a presumption that trade between member states is effected. *Id.* § 2-219. The author goes on to list additional situations and cases that illustrate the presumption that trade is effected, including: where the parties operate in several member states; the agreement applies to more than one Member State; or where the agreement establishes a Community-wide distribution system. *Id.* The presumption is triggered even if the agreement is with a subsidiary or branch of a company that is based in another member state. *Id.* Agreements that alter the structure of competition within member states to an appreciable extent, even when the products do not cross national boundaries, are enough to satisfy this element. *Id.* § 2-131.

165. Cases 6 & 7/73, *Commercial Solvents v. Commission*, E.C.R. 223, at points 30-35.

166. See BELLAMY & CHILD, *supra* note 28, § 2-108; see generally *id.* §§ 4-029 to 4-037 (discussing information agreements); Commission Decision 87/1, 1987 O.J. (L 3), at points 33-42, [1989] 4 C.L.M.R. 445 (*Fatty Acids*).

167. Commission Decision 87/69, 1986 O.J. (L 35), [1986] 4 C.M.L.R. 542 (*X/Open Group*).

168. *Id.* at point 9.

169. *Id.* at point 32-34. The Commission summarized its analysis, saying "an appreciable distortion of competition . . . may result from future decisions of the group on interfaces in combination with decisions on admission of new members to the group." *Id.* at point 35.

170. Commission Decision 94/895, 1994 O.J. (L 354).

171. Commission Decision 97/39, 1997 O.J. (L 16) (*Iridium*).

IPSP was a consortium of international telecommunication firms¹⁷² organized to provide international business telecommunications services and to offer transmission capacity on its satellites. The Commission decided that the venture which operated and maintained the satellite network was of such a nature that no party could be considered actual or potential competitors. This was because no party had all the necessary licenses and authorizations, and none could finance, construct, launch, or operate the satellites alone.¹⁷³ The Commission limited its analysis to licenses the parties presently had. Had the Commission speculated about what licenses the parties could obtain, it may have found them to be potential competitors. The Commission also mentioned that this venture would help provide more options to consumers who were presently limited to the International Satellite Organizations (ISO) and national systems controlled by the incumbent telecommunications operators. The Commission found it important that *IPSP* was essentially the first competitor in a new market that was not created by eliminating existing competitors.

The *Iridium* case also involved a joint venture meant to create a satellite-based system offering global digital wireless communications services using a constellation of low earth orbit satellites.¹⁷⁴ The Commission reiterated the same points contained in the *IPSP* decision. The venture was too financially and technically risky to expect anyone to go it alone. Because this would create a new product market, competition wouldn't be eliminated. This "completely novel" and "revolutionary" idea was seen as competitive with terrestrial systems.¹⁷⁵

172. They included Orion Satellite Corporation from the US; its parent, Orion Network Systems; British Aerospace Communications; Com Dev Satellite Communications Ltd; General Dynamics Commercial Launch Services, Kingston Communications International Ltd.; MCN Sat US; Societa Finanziaria Telefonica per Azioni (STET), an Italian company; Trans-Atlantic Satellite, Inc., and its parent, Nissho Iwai Co.

173. See *IPSP*, *supra* note 170, at point 55.

174. See *Iridium*, *supra* note 171, at point 1. The services included faxing, telephony, and paging. The market targeted was the "high-end" world travelers. See also DOZ & HAMMEL, *supra* note 2, at 4.

175. See *Iridium*, *supra* note 171, at point 40. The risks became reality when Iridium announced on August 13, 1999, that they filed for bankruptcy protection. Bruce Meyerson, *Iridium Files for Protection Dearth of Customers Leads to Bankruptcy*, *Denv. Post*, Aug. 14, 1999, at C2.

5. Article 85(3) Concerns

Because joint venture agreements falling within Article 85(1) are automatically void, a joint venture must fit within either a block exemption or an Article 85(3) individual exemption in order to remain valid. Article 85(3) provides:

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
 - any agreement or category of agreements between undertakings;
 - any decision or category of decisions by associations of undertakings;
 - any concerted practice or category of concerted practices;

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting 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.¹⁷⁶

a. Block Exemptions

The Commission has issued a number of regulations which exempt certain types of agreements from Article 2 prohibition. The regulations are meant to facilitate agreements between common undertakings that enhance competition and are deemed to outweigh any restriction on competition.¹⁷⁷ This type of exemption is termed “block exemption.” The current block exemptions include the following: (1) technology transfer agreements,¹⁷⁸ (2) research and development agreements,¹⁷⁹

176. See EEC Treaty, *supra* note 6, art. 85(3).

177. See BELLAMY & CHILD, *supra* note 28; see also James Ashe-Taylor, *Strategic Alliances: EC Competition Law*, 1063 PRAC. L. INST/CORP. L. & PRAC. 515, 518 (1998), available at WESTLAW, 1063 PLI/Corp 515 (describing the use of block exemptions as a way to streamline the notification process for vertical agreements).

178. Commission Regulation 240/96, 1996 O.J. (L 31).

179. Commission Regulation 418/85, 1985 O.J. (L 53).

(3) franchising agreements,¹⁸⁰ (4) exclusive distribution agreements,¹⁸¹ (5) exclusive purchasing agreements,¹⁸² (6) specialization agreements,¹⁸³ (7) motor vehicle distribution and servicing agreements,¹⁸⁴ and certain insurance related agreements. Because any one joint venture or overall arrangement can include the elements of many types of agreements, it is sometimes hard to predict its classification. High technology benefits to a great degree from the first five block exemptions. An agreement covered by a block exemption are subject to a lenient test to determine its acceptability.

b. Individual Exemption

Article 85(3) of the EEC Treaty states unequivocally four factors the Commission must consider when deciding if an agreement qualifies for an exemption: (1) "whether the agreements contributes to improving the production or distribution of goods or to promoting technical or economic progress," (2) "whether the consumers are allowed a fair share of the resulting benefits," (3) "whether the restrictions in the agreement are indispensable to the attainment of the objective," and (4) "whether the undertakings lack the potential to eliminate competition."¹⁸⁵ Each of these factors are discussed in that order.

i. Technological and Economic Progress

The exemption analysis involving technological and economic progress appears to be the most accommodating to many of the high-technology companies. The Commission views economic progress as flowing naturally from technological progress. That is, where the former is found, the latter almost always seems to follow.¹⁸⁶ Often, the Commission makes little or no reference to the economic benefits, focusing instead on the technological progress. In both the *Olivetti/Canon* and *Eirpage* cases, the Commission devoted only a few sentences to technological progress analysis.

First, in *Eirpage* the Commission states that Eirpage's contribution to the development of telecommunications services in Ireland is brought about by the

180. Commission Regulation 4087/88, 1988 O.J. (L 359).

181. Commission Regulation 1983/83, 1983 O.J. (L 173).

182. Commission Regulation 1984/83, 1983 O.J. (L 173).

183. Commission Regulation 417/85, 1985 O.J. (L 53), amended by Commission Regulation 151/93, 1992 O.J. (L 21).

184. Commission Regulation 123/85, 1985 O.J. (L 15).

185. EEC TREATY, *supra* note 6, art. 85(3).

186. In *Fujitsu*, the Commission's analysis implied that technological progress is synonymous with economic progress. The Commission stated that an "increasingly smaller, faster, more reliable, and more energy efficient electronic system" would lead to technological and economic progress. See *Fujitsu*, *supra* note 136, at point 41; see also Waller, *supra* note 47, at 711.

quicker infusion of technology than would have occurred absent the agreement between two "potential competitors"¹⁸⁷ and the inclusion of rural areas into Eirpage's geographic coverage. The economic benefits were said to come from the stimulation of the paging equipment sector, the increased business efficiency, and especially the ability of small and medium-sized businesses to expand geographically.¹⁸⁸

In *Olivetti/Canon*,¹⁸⁹ the Commission cited the transfer of technology to "a Community undertaking" was "crucial" in these technology-driven markets. Because Canon was known to be research-oriented, the Commission predicted that this would continue to improve Europe's "technological patterns."¹⁹⁰

The very competitive copier, facsimile, and laser printer markets required competitors to offer up-to-date products in order to compete efficiently. This joint venture spread the cost of the investments, avoided duplication of development costs, and stimulated research through the avoidance of duplication costs.¹⁹¹

The *Olivetti/Canon* decision was consistent with the analysis in the *Fujitsu* decision. *Fujitsu* involved computer-hardware in which the Commission combined the technological and economic progress discussion with the benefits to the consumer analysis. The Commission noted in *Fujitsu* that the production of a new generation of semiconductor chip wafers—termed flash memory—will lead to the development of increasingly better products that will have a wide variety of benefits in the long run.¹⁹²

The Commission's leniency towards arrangements which improve Europe's technological status is further illustrated in the *X/Open Group* decision. Even after declaring that non-members would have no say in setting technological standards, the Commission granted an exemption because the restrictions were necessary to achieve the benefits of an open system.

The *Astra* telecommunications case provides a contrasting view to the computer cases mentioned above. The benefits touted were that a privately-owned satellite providing television services were not only the first medium-powered satellite, but it was to compete with Intelsat and Eutelsat satellites for television transmissions.¹⁹³ The Commission's decision focused not on the satellite competition, but on the agreements reached regarding its operation. The

187. See *Eirpage*, *supra* note 115, at point 14.

188. *Id.* at point 15.

189. Commission Decision 88/88, 1987 O.J. (L 52) (*Olivetti/Canon*).

190. *Id.* at point 54. In 1987, Olivetti and Canon requested negative clearance for their recently formed joint venture. Olivetti was an Italian corporation dealing in high-technology products including personal computers, terminals, printers, telecommunications equipment, and copying machines. Canon was a Japanese corporation dealing in copying machines, cameras and optical products, and business machines. The two companies formed Olivetti-Canon Industriale SpA, a joint venture incorporated in Italy.

191. *Id.*

192. See *Fujitsu*, *supra* note 136, at point 41.

193. See *Astra*, *supra* note 121, at point 19.

Commission noted that SES did not need BT as a partner in order to acquire and launch the satellite. The only reason that SES formed a partnership with BT was because BT was the sole statutorily privileged up-link provider. The benefits of this arrangement were said to be negligible.

Turning to the Commission's analysis of economic progress, it is concerned with the rationalization and quick restructuring of an industry and the efficient use of resources.¹⁹⁴ A constant theme is the idea that the agreements in question would not only result in a more sophisticated product, but those products would be commercialized quicker.¹⁹⁵

The Commission's fear that European firms will lose their competitiveness manifests itself in several Commission decisions. The Commission stated flatly in *Olivetti/Canon* that the joint venture enables a transfer of the benefit of advanced technology to Olivetti. Olivetti was a European company in markets where technology is of "crucial importance" and where hopefully the "technological patterns of the EEC industry" will be improved.¹⁹⁶

For example, the Commission was in the midst of planning the deregulation of the telecommunications industry¹⁹⁷ when it decided the *Optical Fibres* case.¹⁹⁸ The joint venture involved the development, production, and sale of optical fibers and optical cables.¹⁹⁹ The technology was viewed as breathing new life into the old network by expanding the utility of telecommunications from simple voice telephony into a multipurpose information systems network.²⁰⁰ The parties in this case were neither actual or potential competitors; instead, they were companies with complementary technologies. The Commission voiced concern over Corning's presence in an oligopolistic market.²⁰¹ The Commission commented that the introduction of the up-to-date technology by Corning was "essential" to enable European companies to withstand competition from the United States and Japan.²⁰²

194. See, e.g., *Exxon/Shell*, *supra* note 155, at point 67 (noting that the joint venture would result in reduced raw materials use, their cost, and the volume of plastic waste).

195. See, e.g., *Optical Fibres*, *supra* note 51, at point 59; Commission Decision 97/780, O.J. (L 318) at point 85 (Unisource); Commission Decision 94/771, 1994 O.J. (L 309) at point 30 (*Olivetti-Digital*); Commission Decision 96/547, 1996 O.J. (L 239) at point 61 (*Phoenix/GlobalOne*); Commission Decision 94/579, 1994 O.J. (L 223) at point 53 (*BT-MCI*); Commission Decision 94/770, 1994 O.J. (L 309) at point 83 (*Pasteur Merieux-Merck*).

196. See *Olivetti/Canon*, *supra* note 189, at point 54.

197. The Commission was working on its Telecommunications Green Paper, which came out in 1987. The telecommunications deregulation in Britain had made this concept more acceptable on the continent. Ungerer, *supra* note 23, at 1119.

198. *Optical Fibres*, *supra* note 51, at point 30.

199. *Id.* at point 38.

200. See Ungerer, *supra* note 23, at 1119-20.

201. *Optical Fibres*, *supra* note 51, at point 38.

202. See *id.* at point 59; see also Margarida Afonso, *A Catalogue of Merger Defenses Under European and United States Antitrust Law*, 33 HARV. INT'L L.J. 1, 26-27 ("Competition from firms located outside the common market is portrayed either as a constraint on the exercise of domestic market power by Community producers, or as warranting reinforcement of their market power to enable them to compete on the world markets.").

The implication is that European companies would have little chance of keeping up with technological developments by going it alone. Commentators have stated that any subsequent parties defending a joint venture with this argument will be taken seriously by the Commission.²⁰³ More recently, the Commission has reiterated this fear in the *BT-MCI*²⁰⁴ and *Phoenix/GlobalOne*²⁰⁵ decisions—cases decided after the aggressive liberalization of the telecommunications industry. They have even said that reduction of overcapacity is tech progress.²⁰⁶

ii. Consumer Benefits

Commentators have stated that it is not difficult to satisfy this condition under Commission analysis.²⁰⁷ The Commission sometimes views consumer benefits as flowing directly from technology or economic gains observed from the first part of Article 85(3) analysis²⁰⁸—recall in *Fujitsu* that the Commission merged the two analyses. Often the analysis seems like a formality,²⁰⁹ and sometimes reiterates the same points brought up in the first part of the analysis.²¹⁰ That is, the reasoning that the Commission applied to affirming technological or economic progress, were also, almost by definition, benefits to consumers. This is not just limited to product price reductions, which is a concern appearing in many of the cases analysis. A wide variety of effects can constitute a benefit. Examples include: the introduction of new products and services on the market,²¹¹ conceivable new products are likely

203. See Alfonso, *supra* note 202, at 27. ("[T]he defense is likely to receive serious consideration under the Regulation.").

204. *BT-MCI*, *supra* note 195, at point 53.

205. *Phoenix/GlobalOne*, *supra* note 195, at point 57.

206. See Commission Decision 84/380, O.J. (L 207) at points 8–9, [1985] 1 C.M.L.R. 787 (Synthetic Fibres).

207. John Temple Lang, *Abuse of Dominant Positions in European Community Law, Present and Future*, FORDHAM CORP. LAW INST. 25, 34–5 (Barry Hawk ed., 1979). See generally 2 BARRY E. HAWK, UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE, ch. 9, 298–344 (Supp. 1992).

208. See, e.g., Commission Decision 85/560, 1985 O.J. (L 369) at point 15 (BP/Kellogg); *Fujitsu*, *supra* note 136, at point 41 (merging the technological and economic progress analysis with the benefits to the consumer analysis for a total of two sentences); Commission Decision 90/46, 1990 O.L. (L 32) at point 18 (Alcatel) (merging the two analyses into a single sentence and assuming that the technological and economic progress was the benefit).

209. See, e.g., *Olivetti/Canon*, *supra* note 189, at point 55 (analyzing consumer benefits in a single sentence).

210. *Pasteur Merieux-Merck*, *supra* note 195, at points 83, 90.

211. See, e.g., *Olivetti/Canon*, *supra* note 189, at point 55; *Unisource*, *supra* note 195, at point 90; *BT-MCI*, *supra* note 195, at point 55.

to be more advanced than the old design,²¹² citizens' health,²¹³ cost savings for the parties involved,²¹⁴ and stability in prices charged and quantities supplied.²¹⁵

iii. Indispensability

The restriction on competition must not prove indispensable to the joint venture agreement.²¹⁶ There is speculation that the indispensable analysis is becoming increasingly important.²¹⁷ Generally, an agreement is indispensable when the agreements entered into do not go beyond what is necessary to attain the objectives of the agreement.²¹⁸ The concept is that the joint-venture agreements would never have been entered into without these particular agreements.²¹⁹ The Commission is especially wary of absolute territorial protection, restrictions on the customers to be supplied, and resale price restrictions.²²⁰

The *Astra* decision provided a lengthy discussion on indispensability that ultimately resulted in the Commission's rejecting the joint venture. The further the restrictive agreement is to the main purpose of the agreement, the more likely it will be deemed indispensable.²²¹ The Commission noted that the agreements in question were peripheral to the core of the joint venture.

Eirpage is a good illustration of how much the Commission will speculate as to alternatives to present agreements. The Commission justified the indispensability of the joint venture as the most rapid and effective way to propagate new paging

212. See Bayer/BP Chemical, *supra* note 45, Part II.B ("[M]odern and gives superior performance . . ."); see also Enichem/ICI, *supra* note 45, art II.B (commenting that it was not even sure about quality, but they were satisfied to speculate that it was "probably" better).

213. Pasteur Merieux-Merck, *supra* note 195, at point 89.

214. See, e.g., Commission Decision 87/3, 1987 O.J. (L 5) at point 33 (ENI/Montedison). However, the EC will consider who benefits from the cost savings, the firms or consumers. It helps if consumers are passed the savings. It may lead the Commission to conclude that there is strong competition in the market. See, e.g., Commission Decision 83/669, 1983 O.J. (L 376) (Carbon Gas Technologie). The EC was satisfied that firms would not keep cost savings when consumers had strong purchasing power. Optical Fibres, *supra* note 51, at point 79; see also HAWK, *supra* note 207, at 320-21.

215. Carbon Gas Technologie Oil, *supra* note 214, at point 17.

216. BELLAMY & CHILD, *supra* note 28, § 3-041 (declaring that this is a tough conceptual problem in general).

217. See HAWK, *supra* note 207, at 138.

218. BELLAMY & CHILD, *supra* note 28, at 165-66 (stating that the least restrictive solution consistent with achieving the aims of the agreement); see also Optical Fibres, *supra* note 51, at points 61-72.

219. See, e.g., Commission Decision 88/563, 1988 O.J. (L 309) at point 34 (Delta Chemie/DDD) (suggesting that this reasoning rings hollow because it is hard to see how competition has been restricted); BELLAMY & CHILD, *supra* note 28, at 165.

220. See BELLAMY & CHILD, *supra* note 28, at 166 (adding that a general rule of thumb is that the more restrictive an agreement is, the more likely it will be deemed not indispensable); see also Emmanuel P. Mastromanolis, Insights From U.S. Antitrust Law on Exclusive and Restricted Territorial Distribution: The Creation of a New Legal Standard for European Union Competition Law, 15 U. PA. J. INT'L BUS. L. 559, 579 (noting that absolute territorial protection runs counter to the European goal of market integration).

221. See BELLAMY & CHILD, *supra* note 28, § 3-043.

technology.²²² When addressing the concern that Telecom, the former national carrier, could have provided this service by itself, the Commission reasoned that the paging concept is "new and unknown," especially in the rural areas. This would have resulted in slow acceptance by consumers. From this they concluded that Telecom could have set up a paging system in the "Dublin area *only*."²²³ The Commission then speculated that if Motorola were to enter the market alone, its commercial nature would have led it to provide profitable paging service to the cities, but not to the marginally profitable rural areas. The Commission remarked negatively on a "post-term non-competition obligation" provision of the agreement, which was subsequently deleted prior to the Commission's Decision.²²⁴

In *GEC-ANT-Telettra-SAT*²²⁵ decision, the Commission was faced with a joint venture between four large companies in an already oligopolistic telecommunications hardware market.²²⁶ The parties agreed on two points. First, any member wanting to establish a consortium within the context of a European program (for example, ESPRIT and RACE) must first offer the other members a right to participate. Second, any member wanting to develop a European network of systems, equipment, or critical components must first offer the chance to participate to at least one other member.²²⁷ The Commission quickly noted that these commitments were "necessary to allow the partners to exchange technical data and to create the necessary climate of confidentiality."²²⁸ The Commission's opinion also suggests that because of the time it takes a high-technology product to arrive at the market is crucial, the indispensability of agreements is more likely to be found when time is critical for success. This argument was also used in the computer hardware case *Fujitsu*. After stating that time is critical and research investments are usually large in this sector, the Commission found that the joint venture was the "most efficient" way to bring new high-technology products to the market.²²⁹

In the telecommunications hardware case of *Optical Fibres*, the Commission identified the benefits as the availability of an advanced product, the rapid transfer of this technology to European companies, and a greater number of suppliers for Europe's telecom operators.²³⁰ Without explanation, the Commission said a partial

222. Eirpage, *supra* note 115, at point 18.

223. *Id.* (emphasis added).

224. *Id.* at point 19.

225. 1988 O.J. (C 180) (*GEC-ANT-Telettra-SAT*).

226. The "technical area of cooperation" imagined was transmission systems, equipment and technology for cable transmission, microwave transmission, earth stations, multiplex, broad band video transmission and integrated services digital network. *Id.* at point 5.

227. *Id.* at point 8.

228. *Id.* at point 12(c).

229. *Fujitsu*, *supra* note 136, at point 42 (adding that the scope of cooperation was the minimum amount needed to bring about the benefits).

230. *Optical Fibres*, *supra* note 51, at point 60.

divestiture by Corning would “destroy” the benefits identified, and would increase the risk of European companies becoming “uncompetitive on the EEC and world markets.”²³¹ Here, the Commission is clearly focused on the benefits to companies as opposed to individual consumers. The three alternatives to this joint venture available to Corning were the following: (1) marketing optical fibers in Europe that have been imported from the U.S., (2) establishing a plant in Europe, or (3) granting licenses.²³² Reiterating their concern for businesses and competitiveness, the Commission dismissed the first two alternative options for the sole reason that they would provide no technology transfer to European companies. The third option would not “facilitate the efficient flow of technology” as well as the joint venture. In order to pass the indispensability test, the joint venture agreements were modified to reduce Corning’s voting rights in the German joint venture, remove Corning’s board representation in the German joint venture, and a decrease in Corning’s board representation in the United Kingdom partnership. The Commission also allowed the agreement to require unanimous approval for a limited number of matters because it believed the parties would not have cooperated without such veto rights.²³³ The exclusive sales licences were taken out of the agreement because the optical fiber market was highly oligopolistic, there exists no intermediate fiber optics trade, and the major purchasers of the product favored local suppliers.²³⁴

The Commission treated the limited membership agreement in *X/Open Group* with surprising brevity. The Commission found that regardless of the fact that some members were direct competitors, the ability to decide which outside companies may participate in a massive standard setting venture was practical. If any company could join and participate, there would be “practical and logistical difficulties” which might “possibly prevent appropriate proposals being passed.”²³⁵ This opinion is somewhat confusing because the admitted collusion between many large corporations to set a standard in an increasingly important industry is balanced only against a convenience argument—and the convenience argument prevails. That is, the Commission maintained that the identified benefits—wider choice of application programs and consumer savings—would only be brought about by the Group’s ability to exclude members. The Commission did not adequately explain why the benefits sought would only come about with this level of trade distortion. It also did not state how more members would render the group unmanageable.

231. *Id.* at point 61.

232. *See id.* at point 62.

233. *Id.* at point 66.

234. *Id.* at point 67.

235. *X/Open Group*, *supra* note 167, at point 45 (emphasis added) (“The practical difficulties of bringing together representatives of the members with authority to commit their companies without endless discussions increase considerably with the number of members.”).

iv. Elimination of Competition

The Commission attempts to foster sufficient competition among competing products in the market and to insure that joint ventures will not foreclose entry of new products and businesses.²³⁶ When analyzing whether an agreement eliminates competition, the Commission considers two factors: the relevant product market and the relevant geographic market.²³⁷ For example, in *Eirpage* the Commission noted that competition existed. Nothing was preventing entry into the market, paging was being influenced by developments in the mobile telephone market and Personal Communication Networks technologies, and Eirpage's efforts were to develop the paging market in general and not just for itself.²³⁸

C. Summary

The Commission has not changed the structural analysis of high-technology ventures as compared to the traditional framework. Only recently has the Commission starting to get the ball moving towards a procedural restructuring of Article 85 analysis.²³⁹ Immediate change is mostly directed at the substantive policy justifications and resulting analysis of high-technology joint ventures.

The Commission's high-technology analysis occasionally shows the difficulties the Commission has with these markets. The analysis of whether the arrangements between parties are agreements is just as abrupt and conclusory as the analyses in older high-technology cases.²⁴⁰ The restriction-on-competition element of Article 85(1) is generally the focus of both old and new cases.

Joint ventures involving telecommunications services are treated similarly with joint ventures involving computer or information technology. Most notable is the Commission's preference not to force a narrow product market definition upon high-technology services. The cases involving telecommunications services cases were the biggest beneficiaries of the Commissions unwillingness to narrowly define these markets. Cases involving non-service products—such as hardware—resulted in an even narrower product market being drawn. One important aspect of the high tech market that the Commission is concerned with is the quick dissemination of technology to European markets. This was a consistent theme in the analyses.²⁴¹

236. See BELLAMY & CHILD, *supra* note 28, § 3-044.

237. See *id.* § 3-045.

238. See *Eirpage*, *supra* note 115, at point 20.

239. See generally Delors White Paper, *supra* note 67.

240. See, e.g., Commission Decision 76/172, 1997 O.J. (L 30) (Bayer/Gist-Brocades); Commission Decision 80/1332, 1980 O.J. (L 383) pt. II (Vacuum Interrupters) (presuming the transaction is an agreement).

241. See Lang, *supra* note 120, at 758.

With regard to the acceptability of non-competition agreements, the Commission's past decisions have been mixed. In the 1983 *Carbon Gas Technologie* decision, the Commission validated a post-participation, non-competition agreement lasting five years after any party left the joint venture.²⁴² This case involved a joint venture between several companies involved in the field of coal gasification. The Commission stated that the agreement was indispensable because "the assumption must be that complete concentration of [the parents'] efforts on the attainment of the objective of the cooperation can be ensured only if any attempt to achieve an individual competitive edge is ruled out."²⁴³ They continued, "It affords a limited degree of protection against competition from a former shareholder or from 21 outside companies, without which the object of the cooperation cannot be attained." Compare this treatment with *Eirpage*, a more modern case. Recall that the Commission required the non-competition agreement to be stricken from the original agreements in order for them to receive an exemption.

The Commission defines product markets very narrowly in the biotech, pharmaceutical, and chemical fields. This is not surprising given that medicines are typically disease-specific. As the Commission in *Pasteur Merieux-Merck* pointed out, "each vaccine ensuring immunity against a specific disease forms a different product market. From the viewpoint of the consumer, no substitutability exists between vaccines protecting against different diseases."²⁴⁴

IV. EUROPEAN COMMISSION'S ANALYSIS OF HIGH-TECHNOLOGY STRATEGIC ALLIANCES

A. Definition, Characteristics, and Corporate Justifications for Strategic Alliances

Increasing amounts of literature seem to be devoted to describing or analyzing the relatively new strategic alliance concept of corporate partnering.²⁴⁵ Much of the literature praises strategic alliances²⁴⁶ and others call it an outright necessity.²⁴⁷ Strategic alliances are essentially a type of corporate partnering²⁴⁸ meant to utilize

242. See, e.g., *Carbon Gas Technologie*, *supra* note 214, at point B(3).

243. *Id.*

244. *Pasteur Merieux-Merck*, *supra* note 195, at point 53. The Commission narrowed the market further stating that multivalent vaccines belong to a different product market than the equivalent monovalent vaccines. This was because "the consumer/prescriber adopts relatively quickly a distinct usage whereby the multivalent is preferred for general immunization whereas the monovalents are mainly used for either brush-up immunization or as a booster for non-protected persons." *Id.* at point 54.

245. See discussion *infra* note 264 and accompanying text.

246. See Gaynor N. Kelley, *The Age of Strategic Partnerships*, DIRECTORS & BOARDS, Jan. 1, 1994.

247. See John T. Sakai, *Japan as an Attractive Alliance Partner*, DIRECTORS & BOARDS, Jan. 1, 1994. See generally Harvey Meyer, *My Enemy, My Friend*, J. BUS. STRATEGY, Sept. 19, 1998.

248. See ALAN S. GUTTERMAN, *THE LAW OF DOMESTIC AND INTERNATIONAL STRATEGIC ALLIANCES* 1 (1995).

the complementary assets of another firm.²⁴⁹ This partnering can take several forms²⁵⁰ encompassing any or all of the following: technology licensing arrangements, research and development agreements, manufacturing relationships, sales and distribution agreements, joint ventures, and other various agreements.²⁵¹ There has been a surge of alliances in the last 15 years, with the bulk of them occurring in Western Europe.²⁵² The early 1990s showed a 25% increase in cross-border alliances²⁵³ while a 1992 survey of electronics industry CEOs noted that "eight out of every ten electronics companies now have alliances."²⁵⁴ The mixture of characteristics that define an alliance can sometimes lead to its mistaken characterization as a joint venture.²⁵⁵ The Commission distinguishes them in name, and to some degree in content.²⁵⁶ However this section explores whether the Commission distinguishes them analytically.

Alliances have been defined as "[a] particular mode of inter-organizational relationship in which the partners make substantial investments in developing a long-term collaborative effort and common orientation."²⁵⁷ This definition may seem to define any traditional collaboration between companies, however the

249. *See id.* at 1-2.

250. *See id.* at 2-3 (illustrating a number of commonly structured partnering relationships).

251. *Id.* at 11-18; *see also* William J. Kolasky, Jr., *Antitrust Enforcement Guidelines For Strategic Alliances*, 1063 PLI/Corp 499 (1998), available in WESTLAW, TP-ALL library. One commentator categorized strategic alliances based on the probable outcomes: collisions between competitors, alliances of the weak, disguised sales, bootstrap alliances, evolutions to a sale, and alliances of complementary equals; Joel Bleeke, *Is Your Strategic Alliance Really a Sale?*, HARV. BUS. R., Jan.-Feb. 1995, at 97; Rosabeth Moss Kanter, *Collaborative Advantage*, HARV. BUS. REV., July-Aug. 1994, at 571. For a thorough examination on how to form, organize, and operate a joint venture or alliance, *see* ROBERT P. LYNCH, *THE PRACTICAL GUIDE TO JOINT VENTURES & CORPORATE ALLIANCES* (1989).

252. DAVID FAULKNER, *INTERNATIONAL STRATEGIC ALLIANCES: CO-OPERATING TO COMPETE 1* (1995).

253. *See* Bleeke, *supra* note 251, at 97.

254. *See* Kolasky, *supra* note 251, at 501. IBM is reported to have more than 10,000 alliances. *Id.* Sun Microsystems, Inc. President Scott McNealy claims that Sun has more than 3,500 strategic alliances with software vendors; *see also* Scott McNealy, *A Winning Business Model for the '90s*, DIRECTORS & BOARDS, Sept. 22, 1995. For a survey on strategic alliances within Canadian industries, *see* <<http://www.info.ic.gc.ca/cmb/welcomeic.nsf/Pages.html>>.

255. The similar characteristics have lead some to call the two "virtually synonymous" when defining a joint venture broadly to include any collaborative agreement. Kolasky, *supra* note 251, at 505. Business professionals and some U.S. courts view joint ventures more narrowly to mean an agreement that creates a new legal entity.

256. The Commission delineates between "alliance" and "joint ventures" in documents including their recent annual Competition policy Reports. However they do not provide a clear definition of an alliance. Their use of the term alliance is often mentioned alongside global partnering agreements or large international ventures. A bias favoring alliances that are global in nature may have been implied in their statement that "the acceptability of alliances, which are often pro-competitive outside domestic markets, must be assessed in light of the extent to which those markets have been liberalized." XXVI Report, *supra* note 76, at point 66.

257. *See* DAVID FAULKNER, *supra* note 252; *see also* RANDALL L. CARLSON, *THE INFORMATION SUPERHIGHWAY: STRATEGIC ALLIANCES IN TELECOMMUNICATIONS AND MULTIMEDIA 117* (1996) (defining a strategic relationship as "an inter-corporate relationship that spans vertically or horizontally between two or more firms. Organizationally, it is a joint venture, product swap, licensing arrangement, or strategic alliance. Mergers and acquisitions do not generally count as alliances").

strategic alliance embodies a distinct style of collaboration with a unique set of goals.

A company seeking an immediate massive gain in market share, innovation, or new markets has historically used mergers to do so. The less drastic options were joint ventures or a wide array of collaborative agreements including distribution and technology swapping contracts. The strategic alliance is the new collaborative model for high technology because it offers the partners something that joint ventures and the traditional-style contract agreements do not offer: flexibility and greater potential for gains in innovation, profit, and growth.

Joint ventures can be characterized as a collaborative effort in the form of a legal entity, i.e., a corporation. These entities are narrowly focused with its direction and mission cemented in place. One of the partners usually ends up operating the joint venture, which essentially means running the operation almost in toto. The results are minimal enterprising, collaboration, and learning.²⁵⁸ Strategic alliances are much more flexible because the partnership does not necessarily anchor itself to any one direction, mission, technology, or partner.²⁵⁹ It offers greater independence for the partners,²⁶⁰ but this results in greater ambiguity and uncertainty regarding specific goals. However, the alliance is typically based on an agreement to adapt and change with the consumer market, thus the evolution of the partners relationship is inherently unpredictable.²⁶¹ This collaborative strategy makes it seemingly riskier than joint ventures and contractual agreements.

Regardless of the risk, the alliance is proving to be popular for a variety of reasons. It is thought that an alliance can create greater value in a shorter time than the traditional joint venture or agreement. The value can be in the form of innovation and creativity, profits, growth, or any other benefit to the partners. For example, an alliance may create more opportunities or options for the partners than a joint venture because of the alliance's inherent flexibility and the rigid nature of a joint venture.²⁶² This can be construed as value even if it cannot be measured easily.²⁶³ As will be discussed later, this poses a potential problem to antitrust

258. See generally DOZ & HAMEL, *supra* note 2 (adding that joint ventures are relatively safe because the risks are known).

259. See Kenichi Ohmae, *The Global Logic of Strategic Alliances*, HARV. BUS. R., Mar./Apr., LEXIS, at 11 (1989) (analogizing to marriage he states that there is a large measure of trust that is needed to make the relationship flourish).

260. GUTTERMAN, *supra* note 248, at 6.

261. *Id.*

262. See DOZ & HAMMEL, *supra* note 2, at 15, 19.

263. *Id.* at 11. The author goes on to note that "[v]alue creation in traditional joint ventures, and in customer-supplier partnerships, is usually easy to measure." *Id.* Furthermore, the author adds that value is measurable in mature industries and typical R&D agreements. *Id.* at 11; see also Mody, *supra* note 15, at 165 (asserting that as an alliance network grows, so does the value of an alliance to each individual participant); MITCHELL L. MARKS & PHILLIP H. MIRVIS, JOINING FORCES 5, 14 (1998) (suggesting that maximizing value will not come about through economies of scale and elimination of redundancy); DOZ & HAMMEL, *supra* note 2, at 9-11, 39-56 (describing the concept of value creation and arguing that the present economic analysis needs to take into account

authorities when they measure the costs and benefits of an agreement, and it may require consideration when scrutinizing the acceptability of an alliance.²⁶⁴

The role that strategic alliance formation plays in the high-technology industry is increasingly one of necessity. Statistics show a disparate use by high technology of this strategy as compared to other industries. A recent survey shows that seventy-four percent of the fastest growing high-technology companies utilized strategic alliances in 1996, as compared with forty-nine percent of the fastest growing companies in other industries.²⁶⁵ It is not hard to imagine that the numbers will continue to increase for most industries. The disproportionate use of alliances in high tech occurs for several reasons. First, the high-technology industry grapples with rapid evolution of technology, whereas other industries do not.²⁶⁶ To stay competitive, a company must incorporate into its business plan a flexible operating structure. If a company is tied down to a contract, joint venture, or product line that becomes irrelevant to current consumer preferences, the company will fall behind nimbler competitors. This result can be fatal to a slow reacting company.²⁶⁷ Strategic alliances offer the flexibility that a fast product cycle industry like high technology requires. Second, high-technology industries are also a model of industry and technology convergence—for example, cellular and terrestrial telephony, paging, video-conferencing, facsimile services, Internet commerce, and mass media.²⁶⁸ Many if not all of these high-technology industries, especially information technology, electronics, Internet-related industries, media, and telephony, are integrating more and more already available technology into existing products, or modified versions. It was not too long ago when cell phones did not have paging and Internet interfacing technology incorporated into them. The third reason for high-technology's preference for alliances is that competition in the high technology arena is particularly aggressive and will only increase as nation states' trade barriers collapse. The rate of alliance formation within high-technology industries is an example of the vigorous competition, and sometimes desperate, need to survive. Companies must form a web of alliances with different industries

the more abstract notions of value).

264. See discussion *infra* notes 279–93 and accompanying text.

265. Coopers Lybrand–Trendsetter Barometer, July 31, 1997 <<http://www2us.coopers.com/eas/trendset/161.html>>.

266. For example, the semiconductor industry has a cycle time of 5 years or less, whereas the slow-moving technology of shipbuilding has a cycle time of 15 years. The New Innovators: Global Patenting Trends in Five Sectors, U.S. Office of Technology, p. 38 (1998), available at <<http://www.ota.nap.edu.html>>.

267. See Jack Schofield, *A Megabyte out of the Market Despite IBM's Decline, the Computer Industry Enjoyed a Boom Last Year*, *Guardian*, Feb. 18, 1993, available at 1993 WL 9898120 (describing IBM's huge losses in the personal computer market in the early 1990s).

268. See DOZ & HAMEL, *supra* note 2, at 14. Other particular industries also face this convergence. For example: banking, insurance, mutual funds, financial planning, credit cards; see also Tom Brown, *Strategic Alliances Are Hot—And Getting Hotter*, *Leader Lines*, available at <<http://www.mgeneral.com/l-lines/99-lines/021799li.html>> “Where does one industry end and the next one begin.” *Id.*

focusing on different technology in the hope that they can collaboratively produce a product desired by the consuming public before competing alliances do.

Generally, firms form an alliance because of the perceived need to cooperate in order to stay competitive in the technological and increasingly global markets.²⁶⁹ Firms also form alliances because the rising costs of competing globally prevent them from going it alone.²⁷⁰ This increasing need for cooperation is driven by several factors. First, greater globalization in industry requires cooperation with entrenched or native firms to overcome the cost and regulatory obstacles.²⁷¹ Second, technological advances are increasing the optimal-sized firm's economies of scale and scope.²⁷² Third, globalization pressures a large firm to specialize in its core competencies and to form alliances for non-core competencies.²⁷³ Fourth, with the increased complexity of technology, few if any firms can champion them all.²⁷⁴ Firms try to find other companies that specialize in the particular technology needed.²⁷⁵ Fifth, the quick pace of technological change allows companies in alliances enough flexibility to change with it.²⁷⁶ Sixth, the technology market rewards the quickest firm the greatest advantage in establishing the industry standard.²⁷⁷

The need to cooperate is not without its skeptics and attendant risks. This changing environment has thrown together what antitrust authorities suspect as unholy alliances between competitors or potential competitors. Competitors often form alliances not necessarily to merge products or apportion the markets, but to help develop the market for the products collectively.²⁷⁸ Thus, alliances that appear facially anti-competitive are in many instances beneficial to consumers.²⁷⁹ The market forces which drive competing firms to collaborate are arguably on a collision course with the goals of EC competition policy.

269. See Kolasky, *supra* note 251, at 502.

270. Gary Hamel, *Collaborate With Your Competitors*, HARV. BUS. REV. Jan.-Feb. 1989, at 2; see also GUTTERMAN, *supra* note 248, at 553.

271. See Kolasky, *supra* note 251, at 502.

272. *Id.*

273. *Id.*

274. *Id.*

275. See generally GUTTERMAN, *supra* note 248.

276. John W. Slocum, *The New Learning Strategy: Anytime, Anything, Anywhere*, Org. Dynamics, vol. 23 no. 2, 1994, available in 1994 WL 2820028 (stating that vertical integration can harm a company because it insulates the organization for market changes).

277. Cf. Mark A. Lemely, *Antitrust and the Internet Standardization Problem*, 28 CONN. L. REV. 1041 (1996).

278. See ADAM M. BRANDENBURGER & BARRY J. NALEBUFF, CO-OPETITION 32 (1996) (giving an example of how electronic publishing, once seen as a threat by traditional publishers, has actually increased the overall demand for printed versions of books).

279. See Christopher Boam, *Giving the Phoenix Wings: The Deutsche Telekom/France Telecom/Sprint Alliance*, 5 COMM. LAW CONCEPTUS 73, 82 (1997) (noting that global companies desire one firm to service all their telecom needs in order to streamline communication and cut costs, and this has lead to a wave of telecommunication alliances).

B. European Commission Decisions Involving Strategic Alliances

To date the Commission has decided relatively few cases that involved strategic alliances, and most have been decided in the last five years. The relevant cases include: *Phoenix/GlobalOne*,²⁸⁰ *BT-MCI*, *Olivetti-Digital*, *Unisource*, and *Atlas*.²⁸¹ Four of the cases involve international telecommunication services, while *Olivetti-Digital* deals with computer hardware technology. The Commission applied an Article 85 analysis, and these cases provided the Commission with an opportunity to treat alliances differently than joint ventures. What follows is a discussion of the Commission Article 85(1) and 85(3) concerns and a brief summary discussing common themes found in the alliance cases.

1. Computer Case

a. Olivetti-Digital

The alliance between Olivetti, an Italian corporation, and Digital, an American corporation, involved Digital's new generation of reduced instruction set computer (RISC) architecture, called Alpha AXP. Olivetti contracted to incorporate Alpha AXP into its computers.

The Commission construed the "Strategic Alliance Agreement" as seven agreements between parties. It should be noted that the Commission did not label the companies' relationship between themselves as an alliance on its own. Out of the seven provisions, six received negative clearance and only one fell within Article 85(1) scrutiny. Before applying Article 85(1) scrutiny the Commission dealt with the product and geographic market.

The Commission identified two relevant product markets: the market for RISC technology including microprocessors, other hardware, software, and know how and the market for various computer system end products that incorporate RISC technology.²⁸² The Commission dismissed the geographic market concerns in one sentence. Worldwide trade, the small importance of transaction costs, and the relatively insignificant trade barriers led the Commission to conclude that the relevant geographic market was the world.²⁸³ This conclusion may soon be the de facto conclusion considering the global presence and market penetration of many high-technology businesses. This benefits companies because a wide market base will diffuse a company's market share and any perceived anti-competitive behavior.

280. It should be noted that Phoenix later changed its name to GlobalOne. For a detailed description of the background and entire deal, see generally Boam, *supra* note 279.

281. Commission Decision 96/546, 1996 O.J. (L 239) (Atlas).

282. See *Olivetti-Digital*, *supra* note 195, at point 8.

283. *Id.* at point 10.

i. Article 85(1) Analysis

The first provision the Commission examined was the purchase commitment by Olivetti to the Alpha AXP technology. This was not within Article 85(1) purview even after the Commission decided that the agreement restricted Olivetti's freedom to choose its technology.²⁸⁴ The Commission did not equate the purchase commitment to a restriction of competition for two reasons. First, Olivetti would not sink the finances into developing the RISC technology independently, so there would not actually be any stifling of independent development.²⁸⁵ The Commission qualified their analysis by stating that the market was headed towards a preference for this technology, and Olivetti "needs" this technology to maintain its position as a "leading European supplier."²⁸⁶ The incorporation of the "competitive edge" argument seems ill-placed and more suited for rationalizing an Article 85(3) exemption as the Commission occasionally does.²⁸⁷ Second, the Commission stated that considering the resource expenditure to maintain one line of RISC computers and the inertia inherent in quickly changing to another RISC technology, Olivetti would simply not purchase another one.²⁸⁸ The restriction on competition was not absent, it merely was not "beyond what is inherent in any choice of a specific RISC platform."²⁸⁹ The Commission may have felt that the restriction on competition between two large companies was sufficiently minimized by the fact that it was only a five-year commitment.

The second agreement examined involved the purchasing commitment by Olivetti to buy US\$80 million of Digital's Alpha AXP technology based products.²⁹⁰ The purchasing agreement was found to fall within Article 85(1) purview. The violation was due to the restriction on the "freedom to choose its supplier."²⁹¹ A commitment to purchase Alpha AXP technology was considered a non-appreciable restriction on Olivetti's ability to freely choose, but a commitment to purchase a given amount of the products was an appreciable restriction. The Commission saw the apparent unequal treatment between its analysis between the two provisions, and it stated that a distinction must be drawn. They posited that since Digital had licensed the technology to several companies, Olivetti could purchase it from several others besides Digital.²⁹² The distinction is valid to the extent that a commitment to one technology does preclude choice to a certain degree. However, technology's rapid advancement should have forced the

284. *Id.* at point 20.

285. *See id.*

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.* at point 21.

291. *Id.*

292. *Id.*

Commission to speculate as to the necessity of a five year commitment by Olivetti. Their justification for Olivetti's commitment to technology was that "RISC-based central processing units [were] expected to increase substantially in the coming years."²⁹³

The third provision examined was the "residual purchasing commitment."²⁹⁴ Olivetti agreed to purchase US\$70 million worth of Digital equipment within two years time. The Commission concluded that this provision was not within Article 85(1) scrutiny. The agreement was not related to Digital's supply agreement involving AXP products because it was not meant to reinforce Digital's position or weaken Olivetti's position in a particular market segment.²⁹⁵ Therefore, the purchase agreement was a separate supply contract, and as such, it was limited to two years and did not significantly overshadow its other purchase agreements with Digital's competitors. The agreement did not have as its "object or effect an appreciable restriction of competition."²⁹⁶

The fourth provision was a "very general" agreement between the parties to examine the possibility of further cooperation and agreements not covered by the present notification.²⁹⁷ The Commission said the following about this agreement: "this decision should not, therefore, prejudice the view which the Commission may take of such future agreements, if any."²⁹⁸ The decision not to rule on the "future cooperation" agreement suggested that the Commission may analyze future agreements as they arise. This agreement embodies what business practitioners view as a critical element that distinguishes a strategic alliance: the expressed will to maintain flexibility. This has been the only high-technology alliance case that has recognized and spoken on an agreement such as this.

The Commission determined that a services agreement was ancillary to the purchasing commitments.²⁹⁹ Little light was shed on the services agreements. The agreement called for each party to provide their service expertise to the other side regarding the transferred technology. The Commission found Article 85(1) inapplicable because the agreement only involved services for their products that each transferred to the other.

The parties also agreed to form four committees "aimed at facilitating the implementation of the agreement."³⁰⁰ The parties attested that the committees were independent of Olivetti's board of directors, and within them, "all decisions are negotiated and made by consensus."³⁰¹ The complete independence of the

293. *Id.* at point 20.

294. *Id.* at point 22.

295. *Id.*

296. *Id.*

297. *Id.* at point 23.

298. *Id.*

299. *Id.* at point 24.

300. *Id.* at point 12(e).

301. *Id.* at point 25.

committees and the consensus requirement regarding all committee decisions led the Commission to decide that “in these circumstances,” the setting up of committees did not fall within Article 85(1) scrutiny.³⁰² The Commission stated that they viewed the committees as structures not likely to be used for “commercial cooperation” or “coordination of competitive behaviour,” but instead was a vehicle for technical cooperation.³⁰³

The “Share Purchase Agreement” and the “Shareholders’ Agreement” were the last two provisions that the Commission analyzed. Under the Share Purchase Agreement, Digital was to buy eight percent of Olivetti’s share capital. Under the Shareholders’ Agreement, Digital was given proportionate representation on Olivetti’s board of directors as long as it held twenty-five million shares of Olivetti’s common stock. The Commission concluded that Article 85(1) scrutiny was inapplicable because both agreements did not have as their object or effect the prevention, restriction, or distortion of competition. As to the Share Purchase Agreement, the Commission focused on whether there would be the threat of a change in control in Olivetti. The Commission did not think so because the agreement itself elaborated several restrictions on Digital meant to prevent it from increasing its control over Olivetti. Digital was not allowed to purchase any interest in Olivetti that would give them more than a ten percent stake in Olivetti. Digital was prohibited from entering into voting agreements with third parties with respect to Olivetti shares, and Digital was not given veto power that would have given it controlling power over Olivetti.³⁰⁴ The Shareholders’ Agreement was outside of Article 85(1) for the following reasons: (1) the board’s role was only a supervisory one that met four times a year, (2) the board members were outsiders and none had an operational function at Olivetti, (3) the board played no part in the present agreement with Digital and that the board was not even notified until after the deal was concluded, and (4) the board played no part in product development or pricing.³⁰⁵

ii. Article 85(3) Analysis

The Commission preceded its swift Article 85(3) analysis of the purchasing commitment agreement with praise regarding the alliance as a whole. It noted that the result would be an additional competitor in the RISC computer market. The Commission emphasized that this would have been “impossible” without an alliance of this sort.³⁰⁶ Their choice of strong language is interesting and now typical in the high-technology cases. It is certainly possible that with enough

302. *Id.*

303. *Id.*

304. *Id.* at point 26(a).

305. *Id.* at point 26(b).

306. *Id.* at point 28. Recall that they also mentioned this exact point earlier in the analysis at point 20.

resources, any company can diversify and enter new markets. A more accurate conclusion is that it may have been very unlikely that Olivetti would have done just that. But, with a strong conclusion like theirs, the analytical road is a little smoother and a European-based competitor is a little more competitive.

The Commission's Article 85(3) analysis was more conclusory than analytical. The technical and economic benefit examination was a two sentence articulation of what seemed to them as obvious outcomes. That is, Digital will be motivated to commit itself to large-scale production of its technology and to disseminate it more quickly.³⁰⁷ The increased availability of Alpha AXP filled computers will result in increased production of software designed for it. The Commission concluded that this promotes technical progress.

The Commission's concerns with regards to consumer benefits derived from the agreement is similar to its concerns regarding technological and economic progress. Greater production and a resulting decline in costs and prices was anticipated. They stated that consumers will benefit from innovative products of high quality that will fall in price as the RISC technology market matures.³⁰⁸

With regards to indispensability, the Commission only stated that the commitment to purchase the products ensures that the benefits to the consumer will be realized.³⁰⁹ There was no speculation as to less restrictive alternatives, but only the implication that the amounts involved in this agreement was not restrictive enough to invite a discussion about options.

Although the agreement reduces the number of Alpha AXP suppliers Olivetti can use, no substantial elimination of competition was seen to occur because there were "many manufacturers" that might want Alpha AXP products. There were also a number of RISC-based computers on the market, so no real threat to competition in the computer market was identified.³¹⁰

2. Telecommunications Cases

a. BT-MCI

British Telecommunications (BT) and MCI Communications Corporation (MCI) notified the Commission about agreements involving an equity buy-in and the creation of a joint venture. BT is the former U.K monopolist telecommunications operator that supplies telephone exchange lines; local, trunk, and international telephone calls; other telecommunications services to consumers. In 1994, it was the world's fourth largest telecommunications company in terms of

307. *Id.* at point 30.

308. *Id.* at point 31.

309. *Id.* at point 32.

310. *Id.* at point 33.

traffic.³¹¹ MCI is a United States telecommunications company that provides voice and data communications, record communications and electronic mail to and from the United States. As of 1994, it was the fifth largest telecommunications company in the world in terms of traffic.³¹²

The Commission parsed their analysis into three segments: (1) BT's investment in MCI, (2) the creation of the joint venture, called Newco, and (3) a number of contractual agreements. The Commission appeared to label this formation of a partnership a strategic alliance on its own. Before reaching their Article 85(1) analysis, the Commission extensively analyzed the product and geographic markets and the actual and potential competitor aspects of the companies, and the many agreements between companies.

The product market was defined as:

value-added and enhanced services to large multinational corporations, extended enterprises and other intensive users of telecommunications services provided over international intelligent networks. This market will cover a wide range of existing global trans-border services, including virtual network services, high-speed data services and outsourced global telecommunications solutions specifically designed for individual customer requirements.³¹³

The Commission identified six categories of services within this market: data services, value-added application services, traveler services, intelligent network services, integrated VSAT network services, and global outsourcing that allows Newco to integrate the customer's third-party products and services already owned by customers.³¹⁴ The Commission emphasized that two important characteristics of this product market were its global nature³¹⁵ and a specific set of service requirements.³¹⁶ The Commission noted the difficulty of defining the market because it changes rapidly. The geographic market was considered global because the telecommunications services created by alliances will be offered in a market

311. See BT-MCI, *supra* note 195, at point 3.

312. See *id.* at point 4.

313. See *Id.* at point 5.

314. See *id.* at point 6.

315. The Commission's list of characteristics that define the global nature of the product include: (1) the provision of ubiquitous services across multiple borders, (2) the provision of consistent service levels and flexible delivery schedules, (3) the irrelevancy of time-zones, languages, and currencies, (4) overcoming inadequacies of local infrastructures, and (5) making customers *believe* service is local. (emphasis added). *Id.*

316. These requirements include: (1) single point of contact accountable for assuring service levels, (2) seamless, uniform, flexible features/functionality across geography, (3) end-to-end provisioning, installation, fault management, and service support, (4) reliable service, (5) customized billing, management information, reporting with language and currency flexibility, (6) speed and ease of implementation, and (7) products that meet existing and evolving needs. *Id.* at point 7.

that will soon be unable to recognize national boundaries. However, those boundaries were not yet extinct and the services were directed at a set of consumers identified as international in nature.³¹⁷

Trade secrecy protection prevented the Commission from revealing most of the market share information of Newco and its parent, so an analysis is not possible. In the discussion regarding the many competitors of Newco, the Commission noted that "the *precise* set of services being offered [by them] is *never exactly* the same."³¹⁸ The test of whether a company is a competitor is the nature of the product. The Commission's comment about the lack of exactness between competing products may be an afterthought, or it may seem to suggest that the Commission may draw very narrow product market definitions. However, they did not do so in this case.

i. Article 85(1) Analysis

The Commission started with an extensive analysis of the issue regarding whether the two parent companies are actual or potential competitors with Newco in the two markets they identified.³¹⁹ They concluded that the "parent companies must be considered potential competitors of Newco and of each other in respect of the global products to be offered by Newco and actual competitors in the overall telecommunications market."³²⁰ The Commission recognized the ambiguity of Newco's mission by next adding that the business scope is inherently evolving in nature, and as such, its future evolution might affect whether it is a potential or actual competitor of its parent companies.³²¹

The Commission decided that the parties were potential competitors in the international value-added and enhanced services market for a number of reasons. Even though the parent companies were actual competitors before the creation of Newco, the parties agreed to withdraw from this market and to let Newco service it instead. Newco received a license from the parent companies to use the technologies, while the parent companies retained ownership and their respective R&D capabilities.³²² Newco will not engage in independent R&D, but will instead grant contracts to its parent companies to engage in the necessary R&D. The Commission concluded that this arrangement would maintain and enhance the parents technological proficiency and know-how. In effect, the parents were not ceding total ownership and use to Newco, but instead provided an arrangement that

317. See *id.* at point 15. The consumer segments identified were MNCs, extended enterprises, and other intensive users of telecommunications. *Id.* at point 18.

318. See *id.* at point 17 (emphasis added).

319. *Id.* at points 34–42.

320. *Id.* at point 34.

321. *Id.*

322. See *id.* at point 37.

made it possible, a “certainty” as the Commission declared, for the parents to stay abreast of technological developments so that they might one day re-enter the market. The parent companies could re-enter the market because they intended to offer international customer services that were very similar to Newco’s offerings. The parent companies could offer local services and international services under license from Newco—versus Newco’s ability to only offer international services—and the result might be that the business community would be motivated by convenience or cost to buy the bigger package offered by the parents.³²³

In concluding that the parent companies and Newco were actual competitors with regards to telecommunications services, the Commission merely outlined the relevant services that each parent provided in order to illustrate the web of alliances and overlapping areas of business. There was little need for analysis because the actual competition between the two parties was quite obvious. After establishing that the parties were actual competitors, it was necessary for the Commission to examine whether the agreements were within Article 85(1) scrutiny.

The Commission outlined several reasons why the creation of Newco fell within Article 85(1) analysis. The Commission did not bother to discuss whether this was an agreement between undertakings, probably because due to the obviousness of that fact. It makes sense that the Commission did give some attention to whether this would restrict competition, because this hurdle increasingly appears to be the key to Article 85(1) analysis of high-technology joint strategic alliances. Whereas the first two hurdles are often cut and dry issues, the restriction of competition issue is more abstract and often times demands explanation because it is central to competition law.³²⁴ Because the creation of Newco involved exclusive licensing agreements, the Commission concluded that it fell under Article 85(1) prohibition. It was not convinced that the creation of Newco was the “only objective means” for the parent companies to move into and remain in the market for international and enhanced value-added services.³²⁵ After all, both parent companies had “substantial” activities in similar fields and the financial and technological capacities to enter the market on their own.³²⁶ The Commission added that the creation of Newco would result in the parent company’s cessation of developing similar products on its own. As stated earlier, the possible reduction in the aggregate amount of R&D resulting from an agreement is typically a red flag for the Commission.

As to whether BT’s investment in MCI was within Article 85(1) prohibition, the Commission concluded that it was not. In a relatively short analysis, the Commission stated that normally the purchase of one company’s shares does not fall within Article 85(1). However, it might be within Article 85(1) if the buy-in

323. See *id.* at point 38.

324. See DOWNING, *supra* note 16, at 34.

325. See BT-MCI, *supra* note 195, at point 43.

326. *Id.*

was accompanied with other agreements that resulted in the coordination or influence of competitive behavior of the parties.³²⁷ The Commission briefly mentioned additional agreements regarding BT's representation on MCI's board of directors. The Commission noted that there were agreements made that restricted BT's increase in shareholdings for 10 years and prevented BT from seeking control or influence over the company.³²⁸

ii. Article 85(3) Analysis

The Commission outlined four improvements the alliance would contribute to the technological and economic standing of Europe. First, the alliance would offer new, more advanced services at a quicker and inexpensive rate than the parents would have been capable of providing on their own. To punctuate this point the Commission noted that the complexity of getting started is shown by the fact that Newco would not be operational for five years. Moreover, the technology possessed by MCI was said to be the "most credible and user friendly in the world."³²⁹ Second, the alliance would restructure the traditional framework used by the national telephone operators by creating a seamless network of services. The traditional national networks could not typically interconnect because their structure, software, and hardware management systems were incompatible. Third, the Commission remarked that this alliance would strengthen³³⁰ Europe's competitive edge.³³¹ Fourth, the Commission reemphasized the cost savings brought on by international transmission capacity competition and the single network architecture that would result in economies of scale at the technological and operational level.

The consumer benefits test was nothing more than a brief reiteration of the points made in the technology and economic benefits discussion. The benefits flowed from rapid creation of a new, cheaper set of services that would result in a more competitive status for European companies.³³² The exclusive distribution arrangements benefitted consumers through the convenience of dealing with a single person contact in case of service problems. The "loss of rights" agreement advanced stability between the parents' relationship, which the Commission thought was "necessary" for Newco's success and a "very important element" in the customer's decision making process.³³³

327. See *id.* at point 44.

328. *Id.*

329. *Id.* at point 53.

330. *Id.* The Commission remarked earlier in the decision that the U.S. contains 40% of the worlds multinational corporations (MNCs). *Id.* at point 51.

331. See BT-MCI, *supra* note 195, at point 51.

332. See *id.* at point 55.

333. *Id.* The Commission stated that substantial third-party competition existed from a number of alliances and MNCs. *Id.* The competitors listed were AT&T Worldsource, Eunectom, IPSP, IBM, DEC, EDS and various alliances being developed at the time of the decision. *Id.* The Commission also noted that MNCs are sophisticated

The indispensability analysis was more in depth than the previous Article 85(3) hurdles. The creation of Newco was indispensable because the relevant services would be brought to the market in a substantially shortened time period. The reduced time needed to enter the market was a “competitive factor of the utmost importance.”³³⁴ The parent companies’ costs and risks were reduced, and Newco was seen as the most efficient way to bring about a seamless service network. These justifications are merely a rehash of points made in each of the prior analyses and any discussion of lesser restrictive alternatives is absent.

The parties argued that the exclusive distribution agreement protects the intellectual property rights (IPRs) they contributed to Newco and that there is not a more efficient way to set up the distribution system. The Commission balanced these points with the intense competition Newco would face and the substantial bargaining power of customers. Emphasizing the efficient manner of distribution, the Commission concluded that the agreement was indispensable.³³⁵ The parents did not preclude passive sales in the agreements, but instead, they saw it as a real possibility. The Commission required the loss of rights agreement to be modified before it was considered indispensable. Whereas the original agreement stated that if MCI chose to compete with BT in Europe, then BT would cease to be bound by a number of obligations regarding share transfers, voting, and the limit on stock ownership in MCI.³³⁶ The Commission thought this was an unjustified restriction on trade, but finally accepted it when the parties limited the agreement to a five-year term. Five years were acceptable because the parent companies were committed to Newco for that period and Newco would not be fully operational during that time.³³⁷ The joint venture and exclusive distribution agreement were exempted for seven years from the date of notification, and the loss of rights agreement was exempted for five years from the date of the decision.³³⁸

b. Atlas and Phoenix/GlobalOne

These two alliances are discussed concurrently because they were decided two months apart and involve a couple of the same parties and many of the same issues. The discussion that follows discusses the factors of Article 85(1) and 85(3) in the same order as the other cases in this Comment. Atlas was a joint venture company between France Telecom (FT) and Deutsche Telekom AG (DT), the incumbent

enough to build their own networks or attract offers from competitors of Newco.

334. See BT–MCI, *supra* note 195, at point 58.

335. See *id.* at point 59.

336. See *id.* at point 32.

337. See *id.* at point 63.

338. See *id.* at point 65.

public telecommunications corporations in France and Germany, respectively.³³⁹ It was aimed at furnishing telecommunications services at large users in Europe. The *Atlas* decision contained a very thorough description of the alliance's agreements and the conditions under which an exemption would be given. Phoenix was a joint venture between Atlas and Sprint Corporation (Sprint), an American holding company comprised of companies that provided global voice, data and video-conferencing services and related products.³⁴⁰ Phoenix was to supply various worldwide telecommunications services. The *Phoenix/GlobalOne* case often deferred to the reasoning and facts contained in the *Atlas* case.

The Commission categorized the *Atlas* agreements into five categories: the *Atlas* joint venture, the Intellectual and Industrial Property Transfer and Licence Agreements, the Framework Services Agreement, the Distribution Agreements, and the Agency Agreements. The Commission did not approve the Agreements as notified, and the Agency Agreement was eventually stricken by the parents.

The product market definition in both the *Atlas* and *Phoenix/GlobalOne* decision was broader than one would expect from a non high-technology decision. The Commission identified two product markets in the *Atlas* case: customized packages of corporate telecommunication services and packet-switched data communications services.³⁴¹ The Commission's description of the corporate telecommunications services market in *Atlas* included a number of very distinct services.³⁴² The Commission left the question open as to whether these various services were themselves distinct product markets because in its view the analysis would be the same. This justification is a bit insincere considering that the Commission distinguished the corporate data communications services market.³⁴³ The Commission detailed how the data communications services market could be divided into different customer segments. However, they failed to find that the different customer needs would necessitate parsing out separate markets. Recall the *Olivetti/Canon* joint venture analysis that defined two product markets based not on inherent difference between the products, but merely on the difference in product price and target consumers. This product market hair-splitting is expressly rejected in *Atlas* and *Phoenix/GlobalOne*.

The markets in *Phoenix/GlobalOne* were identified as: (1) global and regional non-reserved corporate telecommunications services, (2) traveler services, and (3)

339. See *Atlas*, *supra* note 281, at point 3. DT's worldwide turnover in 1994 was ECU 31.8 billion, and FT's turnover was ECU 21.7 billion. *Id.*

340. See *Phoenix/GlobalOne*, *supra* note 195, at points 3-4. See generally Boam, *supra* note 279, at 81-91 (providing a comprehensive look at the history of the Phoenix and Atlas deals and legal troubles).

341. See *Atlas*, *supra* note 281, at points 5-11.

342. *Id.* at point 5 (listing the services as: data services, value-added application services, voice VPN services, value-added leased lines offerings, very small aperture satellite (VSAT) network services, and outsourcing services).

343. See *id.* at point 8.

carrier services.³⁴⁴ The Commission made a similar analysis in the *Phoenix/GlobalOne* decision. The Commission then listed a diverse array of services that were to be included within the corporate telecommunications market: corporate voice services, data communications services, dedicated transmission for voice and data services, custom network solutions, and platform-based enhanced services.³⁴⁵ The Commission did not narrowly define the market for each of the services despite the fact that the Guidelines on the Application of EEC Competition Rules in the Telecommunications Sector indicated that there was a difference.³⁴⁶

The Commission defined the traveler services market as "telecommunications services [that] comprise offerings that meet the demand of individuals who are away from their normal location, either at home or at work."³⁴⁷ What may seem like a narrowly defined market may in fact be quite large and capable of further narrowing. The court specifically noted the relevant services as: (1) calling card services, (2) specialized voice services such as equal access and code-based authorization services, and (3) selected data and enhanced platform services.³⁴⁸ These services are quite distinct from each other, and like the *Atlas* decision, the Commission defined the market broadly because the outcome would be the same irrespective of how broad or narrow the market. A cautious approach is consistent with the Commission's desire to avoid broad, inflexible rules that might interfere with maturing high-technology markets.³⁴⁹

The Commission defined the market for carrier services as "compris[ing] the lease of transmission capacity and the provision of related services to third-party telecommunications traffic carriers and service providers."³⁵⁰ Appropriately alluding to the competition being forced upon the traditional telecommunications business model, the Commission listed the relevant services within this model as including: (1) switched transit,³⁵¹ (2) dedicated transit,³⁵² (3) traffic hubbing offerings,³⁵³ and (4) reseller services for service providers without international telecommunications

344. See *Phoenix/Global*, *supra* note 195, at point 5.

345. *Id.*

346. 1991 O.J. (C233) at point 27 [hereinafter *Telecommunications Sector Guidelines*] (recognizing distinct service markets for terrestrial network provision, voice communication, data communication, and satellites).

347. *Phoenix/GlobalOne*, *supra* note 195, at point 8.

348. *Id.* at point 8.

349. See *Telecommunications Sector Guidelines*, *supra* note 346, at point 26 ("The Commission can precisely define these markets only within the framework of individual cases.").

350. *Phoenix/GlobalOne*, *supra* note 195, at point 10.

351. See *id.* (defining this as "transport of traffic over bilateral facilities between the originating carrier, neither the originating carrier nor the terminating carrier need bilateral facilities between themselves, but only with the transit carrier").

352. See *id.* (defining this as "leased line offerings for the transport of traffic through the domestic network of the transit carrier; leased line facilities used for this purpose may include discrete voice circuit or a high-bandwidth digital circuit that can be used for both voice and data services").

353. See *id.* (defining this as "where the provider takes care of all or part of international connections; these offerings are typically designed for emerging carriers, who are interconnected with the provider over bilateral facilities and whose international traffic is merged with other traffic on the provider's global network").

facilities of their own.³⁵⁴ The court identified the two consumers of carrier services as established and emerging carriers. It apparently did not need to define the market more narrowly than consumer purchaser types because the Commission noted that both purchasers in this case were "sophisticated."³⁵⁵

The *Atlas* decision analyzed the geographic market with respect to the two product markets. The Commission referred to the detailed discussion in the *BT-MCI* decision regarding the distinction between global, cross-border regional, and national level geographic markets. The cost structure of supplying customized corporate packages of telecommunications services was dependant on the geographic coverage of the service. The price difference was substantial, therefore, the markets were distinct.³⁵⁶ However, the cost difference between different geographic markets was not as great as that for packet-switched data communications services. The demand, supply, and traffic volumes for this service were only on a national scale.³⁵⁷

Phoenix provided corporate telecommunication services on a global scale in order to interconnect providers of telecommunications services via its network. Those corporations that connect to this network are located throughout the world.³⁵⁸ Data communications services were deemed to be offered only in the Europe-wide geographic market. The investment in Sprint by DT and FT was considered to reach a global geographic market because it was an effort to extend its services into global markets.³⁵⁹

With regards to the market for traveler services, the Commission did not define the market. It stated that the market is increasingly global and is a function of consumer demand for integrated services.³⁶⁰ They continued that the question of the geographic scope can be left unanswered in this case because "the finding of narrow geographic markets would not affect the assessment of the party's competitive position."³⁶¹ The geographic market for carrier services was determined to be international "by nature" because it is a substitute for the carrier's own international lines and the transit services offer "cable-or satellite-based routing capacity across third countries."³⁶²

354. *Id.*

355. *Id.* at point 11.

356. *See Atlas, supra* note 281, at points 12–13.

357. This was the conclusion despite the fact a FT German subsidiary provided one fifth of its communications services across the border. *See id.* at point 14. The Commission noted that the global and Europe-wide geographic market may be converging so as to possibly render future distinctions meaningless. *Id.* at point 15.

358. *See Phoenix/GlobalOne, supra* note 195, at point 13.

359. *See id.* at point 17.

360. *Id.* at point 15.

361. *Id.*

362. *Id.* at point 16.

With regards to potential or actual competitors, the Commission briefly listed a number of main competitors of Phoenix in the non-reserved corporate telecommunications services market.³⁶³ It found fewer competitors in the traveler³⁶⁴ and carrier³⁶⁵ services markets.

i. Article 85(1) Analysis

The Phoenix and Atlas joint ventures were not granted negative clearance simply because the joint ventures would restrict competition and affect trade between member states. The parents involved in these decisions were direct competitors for some of the services transferred to the joint ventures, and their size suggested that they could enter the markets alone. According to the agreements, the parents would keep abreast of any technological developments in the markets they abandoned to the joint ventures. This made it possible for them to re-enter the markets at a later time.

The Commission concluded in *Phoenix/GlobalOne* that Article 85(1) did not apply to DT and FT's investment agreements with Sprint. The Commission noted that the policy of the ECJ and the Commission is that Article 85(1) does not apply to investment agreements unless "the agreements affect the competitive behavior of the parties to the transaction."³⁶⁶ There was no threat of DT and FT's representation on Sprint's board leading to all three entities coordinating their competitive behavior via the confidential information to which the parents would be privy because: (1) DT and FT were prohibited by U.S. law from accessing and misusing Sprint's confidential information, (2) the investment agreement does not provide DT and FT the possibility of "exercising a controlling influence over Sprint," and (3) private agreements between the party's enumerated provisions that prohibited misuse of confidential information.³⁶⁷ They concluded that the investment agreement was not within Article 85(1).

In both cases the Commission viewed several provisions as a restriction on competition: (1) an anti-competition obligation binding on the parents with regards

363. These competitors include: AT&T/World Partners; Cable and Wireless Plc; Concert; IBM; Kokusai Denshin Denwa Company Ltd; Nippon Telegraph and Telephone Corporation; Unisource; and the regional Bell operating companies in the United States. *Id.* at point 24.

364. *Id.* at point 25 (stating that AT&T had issues 21% of the calling cards in Europe resulting in 59% of the Europe to U.S. traffic. MCI issued 10.5% of the calling cards in Europe, which resulted in 27% of the Europe to U.S. traffic. Executive Telecard International had similar numbers to that of MCI).

365. *Id.* at point 26 (listing AT&T and BT, both with about a fifth of the market, Cable & Wireless, MCI, and Teleglobe Canada as main competitors).

366. *Id.* at point 51. The agreements between the parties consist of DT and FT each purchasing a 10% equity stake in Sprint, with an accompanying proportional board representation and other agreements. The second main agreement involved the creation of a joint venture called Phoenix which was to provide non-reserved global telecommunications services, amongst other types of similar services, to corporate, carrier, and individual consumers.

367. *Id.*

to the joint ventures' activities, (2) the obligation that the parents obtain all global-service needs from the joint ventures, and (3) the designation of DT and FT as exclusive distributors in their respective countries.³⁶⁸ The first two restrictions were considered ancillary to the creation of the joint ventures, therefore no independent Article 85 analysis was required. The Commission found important that the substantial risk, cost, and robust competition necessitated these particular agreements if the parties were to successfully enter and compete in the global telecommunications market.³⁶⁹ The exclusive distribution agreement was not considered ancillary to the creation of the joint venture because the restriction on competition was appreciable and other non-exclusive forms of distribution were possible.³⁷⁰

ii. Article 85(3) Analysis

The overall Article 85(3) analyses was thorough in both cases and it included many of the same concerns earlier in the joint venture cases. The Commission first outlined the merits of all the agreements with respect to the four elements of Article 85(3), and thereafter discussed these merits within the context of the product markets described earlier.³⁷¹

The *Phoenix/GlobalOne* decision merged the technical and economic progress tests under one heading. The merger highlights the fact that the separate analyses typical in most other high-technology cases are merely a distinction without a difference. As was pointed out in earlier high-technology joint venture and alliance cases, the same arguments are commonly used to justify progress in both areas. The *Phoenix/GlobalOne* decision reiterated the common theme that the joint venture would be adding value to leased lined capacity by applying their own homogenous network elements. This would make available new services, albeit through already existing technology, that would result in a seamless global telecommunications service at a lower cost than if the parents had provided it on their own.³⁷² This case illustrates the notion that the mere bringing together of already existing technology under one roof is considered either technological or economic progress. Combining pre-existing technology is arguably technological and economic progress, but it is also a convenience-to-the-consumer argument. It shows that the Commission is receptive to the notion that increased consumer convenience is a benefit. They imply this by mentioning the new "seamless," or "single network architecture,"

368. *See id.* at point 52; Atlas, *supra* note 281, at point 41.

369. *See* Atlas, *supra* note 281, at point 44.

370. *See id.* at point 54 (noting that the agreement is not appreciable because "Germany and France together account for 40% of all telecommunications revenues in the European Union").

371. *See id.* at points 67–72.

372. *See* *Phoenix/GlobalOne*, *supra* note 195, at point 57. The network elements the court focused on were switches, software platforms, and signaling systems.

being created, however, they do not mention the new technology that will result from it. The only connection the Commission made to economic progress was that the cost savings through economies of scale would probably result in lower prices. A firmer connection could have been made between increased consumer choice and the resulting downward pressure on prices. Another economic-progress factor mentioned was that time was saved by allowing this alliance because Sprint lacked the resources to build the same network this alliance creates in as short of time.³⁷³

The *Atlas* decision separated the economic and technological progress analyses, however, it chose to focus on European competitiveness in the economic progress section. What may have been self-evident to the Commission was not explained in its analysis. The technological test incorporated the competitiveness argument as well.³⁷⁴ Software and hardware incompatibilities within member states' national networks would probably not make possible seamless inter-connectivity through added value services. In what may be analogous to the cart pulling the horse, DT and FT's commitment to invest and maintain a large presence in the European-wide market was called a "requirement" for offering the intended services. The *Phoenix/GlobalOne* case briefly mentioned that the exclusive dealership agreement was important because it made certain that DT and FT would concentrate on making Phoenix successful rather than searching for alternatives to the joint venture. The Commission stated, "[o]nly if DT and FT are seen as fully committed to Phoenix will the joint venture benefit from the reputation and presence of its parents in the marketplace."³⁷⁵

The notion that a seamless network benefits consumers was recycled in the benefit-to-the-consumer test. The new services and their expansive geographic reach were the core concerns of the Commission because these aspects of the deal provided quicker services than could otherwise be provided by parties going it alone.³⁷⁶ In a not-so-subtle nod to the importance of European global competitiveness, the Commission stated in *Phoenix/GlobalOne*: "The creation of a global venture committed to undertaking the investment needed to be present worldwide is therefore crucial for the choice and quality of communications available to MNC's and eventually SME's."³⁷⁷ The mere "going global" may be a benefit in and of itself regardless of the particular product. The *Atlas* decision affirmed this point by stating, "Only global alliances can offer global connectivity of services."³⁷⁸

373. See Boam, *supra* note 279.

374. See *Phoenix/GlobalOne*, *supra* note 195, at points 48–49 ("[Interconnection] is indispensable for the viability of competitive voice service offerings.").

375. *Id.* at point 59; see also Daniel R. Mummery & Robert M. Finkel, *The Emergence of Technology Strategic Alliances*, MERGER & ACQUISITION LAW., April 1998.

376. See *id.* at point 60.

377. *Id.*

378. See *Atlas*, *supra* note 281, at point 54.

Deciding whether or not the agreements were indispensable was a mere formality due to the repeated pronouncements throughout the decisions that the Phoenix and Atlas joint ventures were necessary to reduce cost and risk and service global and regional markets. Similar to the other high-technology cases mentioned in this Comment, the Commission implied that the joint venture was not necessary for a global presence, but instead it was necessary for a global presence in a *shorter time period* than if the parents had gone it alone.³⁷⁹ The Commission concedes that the parties were able to provide these services eventually after amassing a substantial amount of capital themselves.³⁸⁰ In a display of how watered down the indispensability element may become, they stated that Phoenix is a “decisive means to overcome the technical and logistic difficulties of providing the services . . . which cannot be addressed *satisfactorily* under the existing” system.³⁸¹

The exclusivity of the distribution agreement in *Phoenix/GlobalOne*, which guaranteed protection for DT’s and FT’s IPRs, contributed to the joint venture. This creates an incentive for parents to contribute more valuable IPRs than normal.³⁸² It would restrict competition normally, however for three factors ensured that no elimination of competition would occur: (1) there existed competitive alternatives in the market, (2) customers had substantial bargaining power in the market for customized packages of corporate telecommunications services to corporate users, and (3) the opening for DT and FT’s passive sales into each other’s home market.³⁸³ The talk of eliminating competition and the total lack of discussion regarding lesser restrictive alternatives to the exclusive distribution agreements leads one to question whether this was an indispensability analysis, much less a sophisticated one. The *Atlas* justification is applicable to *Phoenix/GlobalOne* as well, and in that case the Commission stated that any other distribution agreement would be less protective of the parents’ IPRs, thus reducing the incentive to collaborate.³⁸⁴

The elimination of competition test, the last hurdle of Article 85(3), repeated exactly the above three reasons in concluding that the Phoenix joint venture did not violate this test.³⁸⁵ The Commission required the modification of exclusive distribution agreements so that DT, FT, and any of their subsidiaries cannot sell Atlas’ services under the same contract covering their reserved services—typically referred to as “bundling.”³⁸⁶

379. See *id.* at point 61.

380. See *id.*

381. *Phoenix/GlobalOne*, *supra* note 195, at point 61 (emphasis added).

382. See *id.* at point 62.

383. *Id.* at point 65.

384. See *Atlas*, *supra* note 281, at point 58.

385. The *Atlas* decision provided a somewhat clear definition of these points. *Id.*

386. See *id.* at point 60; *Phoenix/GlobalOne*, *supra* note 195, at point 66. *Atlas* articulates that the conditions are necessary because: there is an asymmetry between the parents monopoly networks and the “small presence and reliance on interconnection of new market entrants on the other; there is insufficient regulatory transparency. These conditions would impair market entry by competitors. See *Atlas*, *supra* note 281, at point 61.

The initial notifications of both alliances encountered major Commission concern regarding the elimination of competition. The Commission imposed a number of conditions to which the parents agreed. First, the Commission required that the parents award two alternative infrastructure licenses so as to create competition and consumer choice. Second, Atlas and its competitors must be able to interconnect to DT'S and FT's networks on non-discriminatory terms.³⁸⁷ Third, Atlas is not to have a competitive advantage over competitors as the result of the parents sharing confidential information. Fourth, FT must sell its Germany subsidiary Info AG. Finally, the Commission identified two customer segments: customers that demand casual, low-speed, low-volume applications and customers that generate more traffic on a regular basis.³⁸⁸ The profit margin on providing services to the low volume users was low, hence a disincentive for investors to invest.³⁸⁹

The *Phoenix/GlobalOne* decision dismissed the notion that competition was eliminated in the global market for corporate telecommunication services because entry into this "immature market" required an "established United States provider."³⁹⁰

c. *Unisource*

There were no surprises in the latest high-technology decision involving Unisource. It started in 1992 as a 50/50 joint venture between PTT Telecom BV (PTT Telecom) and Swedish Telecom International. One year later, Schweizerische PTT-Betriebe (Swiss PTT) joined Unisource.³⁹¹ After a lengthy examination of the structure of Unisource, the Commission listed as the relevant product markets those which were found in *BT-MCI* and *Phoenix/GlobalOne*, namely non-reserved

387. See *Atlas*, *supra* note 281, at point 64.

388. *Id.* at point 69.

389. Atlas was seen as creating competition on the national level because there existed mainly the incumbent national monopoly. *Id.* at point 72.

390. See *Phoenix/GlobalOne*, *supra* note 195, at point 67. ("The elimination of Sprint as an independent supplier does not lead to an elimination of competition in light of significant third-party competition stemming from existing alliances, such as AT&T World Partners, Concert and IPSP, and from future alliances between TOs that are not yet positioned, such as the RBOCs, NTT and European TOs such as Mercury.").

391. PTT Telecom is the Dutch incumbent telecommunications operator. It is wholly owned by the public company Royal PTT Netherlands NV (KPN), which is in turn 44 percent owned by the Dutch State. Swiss PTT is run by the Swiss State, and Telia AB is owned by the Swedish State. See *Unisource*, *supra* note 195, at points 1-6.

corporate telecommunications services,³⁹² traveler services,³⁹³ and carrier services.³⁹⁴

The geographic market was considered primarily cross-border regional, with the exception of non-reserved corporate telecommunications. Varying consumer needs meant that this latter product market had a global, regional, and national geographic scope.³⁹⁵ The market for traveler services “appears to be increasingly global,” yet the Commission left this question open because “the finding of narrow geographic markets would not affect the assessment of the party’s competitive position.”³⁹⁶ Sounding uncertain, the Commission stated that the market for carrier services is “at least cross-border regional.”³⁹⁷ This has been stated in every telecommunications alliance case the Commission has decided.

i. Article 85(1) Analysis

The conclusion that Unisource was a cooperative joint venture stems from the improbability that any one party could exercise decisive influence on either of the two governing boards—the Managing Board and the Supervisory Board.³⁹⁸ The Commission concluded after a brief analysis that the joint venture and various agreements restricted trade.³⁹⁹ This even after the Commission stated the shareholders of Unisource were *actual competitors* in several of the markets.

With regards to the contractual provisions, the “one telecom country” and non-competition provisions were considered ancillary and subject to Article 85(1) analysis together with the joint venture. It was recognized that the “one telecom country” structure could step-up the level of the parent company’s coordination of competitive behavior. This was not seen as a problem. Furthermore, the structure agreement was inseparable from the joint venture because decisions adopted by the

392. The services included within this market were: (1) corporate voice services, (2) data communications services using in particular the X.25, Frame Relay, and Internet protocols (IP), (3) dedicated transmission for voice and data services, (4) custom network solutions, and (5) platform-based enhanced services. *Id.* at point 25.

393. The Commission noted that the “most relevant” of these services were calling card services and GSM mobile services. The Commission noted that GSM services were geared towards travelers, but also used by customers with fixed networks. This latter use may eventually be included under the corporate telecommunications market instead of the traveler services market. *Id.* at points 26–27.

394. This market includes lease of transmission capacity and related services to other carriers and service providers. These services included: switched transit, dedicated transit, traffic hubbing offerings, and reseller services. *Id.* at point 28.

395. *See id.* at point 30.

396. *See id.* at point 31.

397. *See id.* at point 32.

398. *See id.* at point 76. Point 8 of the decision outlines the duties of each Board. The Management Board is a three-person arrangement elected by unanimous shareholder approval. The Board supervises the day-to-day operations of Unisource. The Supervisory Board monitors the Management Board’s conduct of affairs and the general course of business. *Id.* at point 8.

399. *See id.* at points 75–80. The agreements were an exclusive distribution agreement and two contractual agreements.

parents regarding their networks would have a major impact on the services transferred to Unisource. Therefore, it would not make sense to hinder the seamless nature of the telecommunications operations.⁴⁰⁰ The exclusive distribution agreements were not ancillary and were caught by Article 85(1) because “they have the object or effect of isolating each national market involved from imports of those services from other EU Member States.”⁴⁰¹ Because of the pan-European nature of the agreement, these agreements affected trade between member states.

ii. *Article 85(3) Analysis*

The technological and economic progress hurdle was satisfied by a mere list of all the typical benefits that have appeared in most of the Commission’s high-technology decisions. Unisource expected the arrival of converging technology and somewhat seamless telecommunications services, all at a substantial savings of cost.⁴⁰² The joint venture was going to facilitate the building of a trans-European network which would provide better services to consumers. The Commission also included an argument not seen in other strategic alliance cases—notably this high-technology alliance is the most recent analyzed case. The joint venture would enhance the competitive edge of Unisource’s competitors through improved services because they would be able to either: (1) interconnect with Unisource’s public packet-switched data networks, (2) access public packet-switched data networks from other networks, or (3) interconnect with the parent company’s other networks.⁴⁰³

Quicker presence of the product in the market, lower prices, increased choice, and enhanced European competitiveness were all going to be realized consumer benefits. The Commission listed as the exclusive distribution agreement’s sole benefit a “single person to contact in respect of any contract.”⁴⁰⁴ Addressing the indispensability factor of Article 85(3), the Commission cited integrated management schemes as necessary to establishing credibility with customers.⁴⁰⁵ The Commission essentially encouraged alliance formation when discussing medium-sized business’ desire to enter into alliances in order to compete with larger companies. The Commission said, “it is only by joining forces that the parties will be able to field an array of pan-European services on a reduced cost and time basis as Unisource is doing.”⁴⁰⁶ The exemption was granted for five years on the

400. *Id.* at point 82.

401. *Id.* at point 83.

402. *See id.* at points 85–9.

403. *See id.* at point 88.

404. *Id.* at point 91 (“This will *substantially* benefit customers . . . who up to now had to deal with several counterparts in the different countries or regions.”) (emphasis added).

405. *See id.* at point 92.

406. *Id.*

condition that the parents grant two licenses in each product market for alternative infrastructures.⁴⁰⁷ The Commission also compelled Unisource and the parents to submit to a number of periodic accounting and records inspections.⁴⁰⁸

C. Summary

A starting point in discerning a difference in analyses of joint ventures and alliances would be to glean a definition of an alliance out of the language of these decisions—to see if they are merely borrowing the “strategic alliance” term, or imposing it themselves. This is difficult to accomplish because although the Commission uses the alliance terminology, it does not expressly distinguish joint ventures from them. For example, in *Olivetti/Digital* the Commission borrowed the term from the title of the parties’ agreement.

The common thread throughout the alliance cases was the creation of a cooperative joint venture. The Commission’s concern for control of the joint venture may be increasing. Of course, the alliance cases involve huge corporations and in several cases a nation’s telecommunications monopoly was involved. The allowance of telecommunication giants to cooperate extensively in horizontal arrangements is nearly proof positive that a less stringent analysis is being applied. The high-technology cases appear to have explicit agreements with regards to the distribution of power. This was the circumstance in some older cases, but even then, there appeared to be few cases where control was not an issue. The strategic alliance analysis is procedurally the same as the traditional model, with only a slight variation. The only difference being that the Commission occasionally collapsed the different Article 85(3) factors into fewer categories for discussion. This is not surprising because in every alliance case the Commission concluded the four factors were satisfied using many of the same facts: reduced prices, reduced time products brought to market, enhanced European competitiveness, and new technology. The Commission is positively receptive to the notion that a rearrangement of existing technology adequately satisfies the technological progress test. In older cases, this alone would not have saved the joint venture. The Commission oddly uses a fairly speculative and somewhat abstract notion as supporting the economic benefits element.

407. See *id.* at point 103. The Commission listed a comprehensive set of additional conditions to exempt. *Id.* at points 44–64.

408. See *id.* at point 105.

V. THE PRESENT AND FUTURE ANALYSIS

Although there exists a non-telecommunications alliance decision, the following comparison between joint venture and alliance cases of the same or similar products focuses more so on telecommunications than other areas. This comment finishes with a quick word on recent developments and the future direction of competition policy.

The treatment afforded to alliances is virtually the same as that given to joint ventures.⁴⁰⁹ However, this is not saying much considering there have been few high-technology alliance decisions. The alliances involved numerous agreements and in most instances the creation of a joint venture. However, the telecommunications cases show subtle differences that may be the beginning of a distinct analysis. No credible comparison between the *Olivetti-Digital* alliance and the joint-venture cases (involving non-service product markets) discussed in Part III can be made only based on one case. However, the case warrants a few remarks.

The *Olivetti-Digital* alliance involved computer hardware, and it was similar to the non-telecommunications service, joint-venture cases in procedural and substantive review. However, in *Olivetti-Digital* the Commission may have defined the market a bit broader than they have done in the joint venture cases. Instead of a market for each individual RISC-based component, the Commission appeared to group all the components into one market. Olivetti's computer system end-products that incorporated Digital's RISC technology were also aggregated into one product market. This was so despite the fact that the RISC technology would be incorporated into a "full range of computer systems, from palmtops to mainframes."⁴¹⁰ Palmtops and mainframes are clearly not interchangeable or targeted at the same consumer segment. Contrast this to the *Olivetti/Canon* joint venture in which the product market for different printers were distinguished almost entirely upon price difference and the consumer segment targeted.⁴¹¹ In the *Pasteur Merieux-Merck* joint venture decision, multivalent vaccines were defined into very narrow product markets determined by the precise combination of different vaccines. It is clear that individual vaccines are not interchangeable, but there is a somewhat stronger argument that multivalent vaccines comprised of many individual vaccines are interchangeable with another if the difference is only slight. The Commission, however, seemed to levy a *per se* rule regarding the two types of

409. See John Temple Lang, *European Community Antitrust Law: Innovation Markets and High Technology Industries*, 20 FORDHAM INT'L L.J. 717, 731 (1997) ("If it were thought desirable that Community antitrust law should adopt substantially altered approaches for these industries, they are not yet visible."). It should be noted that there is presently a dearth of alliance decisions involving software, pharmaceutical, biotech, or any other high-technology manufacturer producing non-service products, for example, computer chips.

410. See *Olivetti-Digital*, *supra* note 195, at point 6.

411. Cf. *Optical Fibres*, *supra* note 51, at point 59 (distinguishing optical fibers lines and the traditional cables). But see *Vacuum Interrupters*, *supra* note 240, Part I.B. Market for all interrupters, not just the more expensive one.

vaccines. The *Olivetti-Digital* decision explained neither how palmtops and similar products are interchangeable with mainframe computers, nor how the consumer segments compared. Whether or not this was result oriented reasoning, it still leaves little guidance for practitioners to follow.

With regards to telecommunications services cases, the Commission tended to define the alliance and joint-venture markets more broadly than the non-telecommunication services cases. Even though the specific sub-services outlined by the Commission—those that fell under the broader market definition actually used in the analyses—were probable distinct markets, the Commission found no need to narrowly define them for the purposes of the analysis.⁴¹² Most of these services cannot reasonably be considered as interchangeable at this time—even though several different products can be used for the same purposes under certain circumstances, for example, fax machines and telephones. In most instances, the different services were aimed at different consumer types.⁴¹³

Narrowly defined markets may give businesses in that market a giant *de facto* market share, well over the five percent or ten percent threshold that triggers notification. Where technology markets are constantly being created, the first party involved commands 100% of the market share. This is where the commission may play with the definition of a particular product market so as to broaden favored or important markets enough to dilute the market share. However, recall the Commission's analysis in *Iridium* and *IPSP*.⁴¹⁴ The Commission weighed the cost and risk involved in entering a new satellite telecommunications market in which the parties would command 100% of the market share and found that the agreements were not caught within Article 85(1). The Commission reasoned that as the creators of this new market, the parties were creating competition where none preexisted. This may either signal the declining concern of market share in high technology generally, or perhaps merely its lack of importance in newly created markets.

It appears that the distinction between a concentrative or cooperative joint venture will become increasingly important in high technology. Alliances often times involve multiple parties with varying degrees of ownership and control.⁴¹⁵ Properly distinguishing between the two types of joint ventures involves determining whether or not the parents can re-enter the markets they abandoned themselves and transferred to the joint venture. However, the speed of market

412. See, e.g., *Phoenix/GlobalOne*, *supra* note 195, at point 15; *Atlas*, *supra* note 281, at point 6.

413. See, e.g., *Phoenix/GlobalOne*, *supra* note 195, at points 5–10; *Atlas*, *supra* note 281, at points 5–11.

414. See discussion *supra* notes 170–175 and accompanying text.

415. See Ungerer, *supra* note 23, at 1175 (“[D]ue to the high dynamics of markets . . . the distinction between cooperation and concentration [is] a moving target.”).

change, the global nature of alliances, the expanding web of business relationships all muddle attempts at properly defining the type of joint venture.⁴¹⁶

The Commission is sensitive to costs imposed by the legal environment because it is a factor determining competitiveness, especially when a business is medium-sized.⁴¹⁷ Presumably medium-sized businesses do not have the same cash reserves as bigger businesses to handle legal costs. The present administrative and legal systems do not furnish Commission decisions in a reasonable time. The White Paper on Modernisation puts forward potential solutions to these problems.⁴¹⁸ The present framework is considered inappropriate for present day realities because the EU has grown from six to fifteen members, which now includes over 350 million people speaking eleven languages.⁴¹⁹ The White Paper on Modernisation argues that in order for the Commission to accomplish its mission of enforcing Article 85 within the guidelines of Article 87(2), the procedural framework must change.⁴²⁰

The Commission seeks to accomplish three goals. First, to refocus on the most serious cases involving restriction of competition. Their target would be "cartels, particularly in concentrated markets and in markets which are being liberalised."⁴²¹ The clear implication of this goal is an increased attention on the information technology sectors. Second, it seeks to decentralize the enforcement of competition laws. The present system is perceived as increasingly ineffective as EU membership grows.⁴²² The proposed system looks more like the U.S. federal court system in that the Circuit Court of Appeals is analogous to the member states' national courts, with the Commission having the final word on the issues if it so chooses. This brings up the possibility that the national courts of the member states may decide the same issues differently, thus necessitating the Commission's role to resolve jurisdictional splits to effectuate uniform competition policy. Third, the Commission proposes to ease the procedural constraints on undertakings.⁴²³ This appears to be the most dramatic change from the present framework because it appears to be taking a step back from the Regulation 17 notification procedures. The Commission states, "[a] system of prohibition of restrictive practices does not

416. See *id.* at 1169 (citing BT-MCI as an example of confusion, the case was first notified as a concentration, but later determined to be a cooperative joint venture). This may be increasingly hard to determine in high-technology industries due to an "environment of rapid regulatory evolution, changing alliances, and the convergence of markets." *Id.* at 1170.

417. Commission White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty, Commission Programme No. 99/027, at point 50 [hereinafter White Paper on Modernisation], available at <<http://europa.eu.int/comm/dg04/entente/>>.

418. See *id.* at point 55.

419. *Id.* at point 5 (noting that membership is likely to grow).

420. *Id.* at point 42.

421. *Id.* at point 45. Illustrating their inefficient use of resources, the White Paper notes that Commission decisions only account for six percent of cases closed. *Id.* at point 44.

422. See *id.* at points 46, 82–107.

423. See *id.* at points 48, 76–81.

need to have an authorisation system in order to work properly.”⁴²⁴ They conclude that a system does not need to validate all restrictive practices as the current system employs. The Commission continued, “the current division between paragraph 1 and paragraph 3 in implementing Article is artificial and runs counter to the integral nature of Article 85, which requires economic analysis of the overall impact of restrictive practices.”⁴²⁵

In both joint-venture and alliance cases, it appears that the Commission is less concerned about close cooperation than about public access to essential facilities.⁴²⁶ The Commission is worried that with converging markets, companies may take control of crucial segments that others require in order to benefit from the full value chain.⁴²⁷ This may mean that any one segment of a network that could bottle-neck a system and which may take competitors more than a reasonable time to replicate will be deemed an essential facility.⁴²⁸ Because seamless interconnection between an increasing number of information-technology networks is Europe’s goal, new “facilities” and products that become integrated into a network may potentially be another essential facility.

Other areas the Commission is particularly concerned about include: (1) interconnection agreements, (2) schemes established for financing universal service, (3) access to rights of way, (4) cross-ownership of different networks and joint provision of network and services, and (5) the emergence of global and regional partnerships and alliances.⁴²⁹

VI. CONCLUSION

The Commission clearly distinguishes between an alliance and a joint venture. In recent Competition Policy Reports, the Commission distinguished the two without directly defining an alliance. It can be gleaned from the context of its case decisions and discussions in Competition Policy Reports that the Commission

424. *Id.* at point 48.

425. *Id.* at point 49 (citation omitted). It is suggested that inserting a “rule of reason” test in Article 85(1) is more appropriate than in Article 85(3). *Id.* at point 56. The Commission defined “rule of reason” as an “approach in which the authorities or courts responsible for competition law balance the pro-competitive aspects of an agreement against its anti-competitive aspects in deciding whether to prohibit it.” *Id.* at n.46.

426. See European Commission, *Status Report on European Union Telecommunications Policy*, Part II.C. (visited Dec. 1, 1999) <<http://www.ispo.cec.be/infosoc/telecompolicy/en/tcstatus.htm>>; see also *Satellites: Commission Blocks Nordic Satellite Deal in Rare Decision*, Tech Europe, Sept. 7, 1995 (stating that Commissioner Van Miert is worried about access). See generally C.G. Veljanovski, *Competition in Mobile Phones: The MMC Rejects Oftel’s Competitive Analysis*, (1999) 4 E.C.L.R. 205 (examining a “bottleneck monopoly” in the United Kingdom’s mobile phone market). See, e.g., Atlas, *supra* note 281, at points 28–29; Phoenix/GlobalOne, *supra* note 195, art. 2(b).

427. See Ungerer, *supra* note 23, at 1165; see also DE WOOT, *supra* note 43, at 18 (pointing out that the value chain emphasizes that each function, or participant, is an “enterprise subsystem”).

428. See *id.* at 1166.

429. See *Status Report on European Union Telecommunication Policy*, *supra* note 426, pt. II.C.

views alliances as having more of an international or global element than joint ventures.⁴³⁰ A global perspective will, in all likelihood, increase the favorability of the two partnering strategies. However, similar treatment of both joint ventures and alliances indicates that for analytical purposes, it is a distinction without a difference. This may be in part because The White Paper on Modernisation, the Commission's hesitation to define markets and interfere with high technology, and the absence of a sophisticated analysis all signify the Commission's desire to expound policy in broad strokes rather than micro-manage high-technology industries with blunt, inflexible laws.

The Commission must eventually grapple with the issue regarding the market share's degree of importance at any one time in quickly evolving markets. However, the almost inherent global nature of alliances puts them in a better position than joint ventures to create the Information Society.⁴³¹

The liberal application to high-technology sectors will assuredly continue, although, the spirit of liberalization may potentially create a race-to-the-bottom scenario. Because innovation is fueled primarily by the income derived from the *commercialization* of innovative products,⁴³² it stands to reason that any nation that fears being left behind competitively will make its antitrust laws a bit more favorable to businesses than other countries. Businesses willing to relocate and innovate domestically or perhaps merely partner with local businesses will pressure competitors to relocate or pressure nations to match the advantage. This gradual stripping away antitrust constraints will be viewed by some as harmful to consumer welfare.

Whether or not this occurs, the general liberalization of high-technology laws is appropriate if the goal is to remain competitive in global commerce. Strict application will surely stifle innovation or force Community businesses to relocate elsewhere. Because high-technology will continue to evolve rapidly in the future, the Commission must evolve along with it even if this means further liberalizing Article 85 application.

430. See Ungerer, *supra* note 23, at 1175 ("[T]he telecommunications, media, and information technology markets are inherently global.").

431. See Boam, *supra* note 279, at 94.

432. See Jorde & Teece, *supra* note 20, at 20.