

## European Competition Law: Managing the "Chameleon" of Antitrust - Technology Joint Ventures

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## NOTES AND COMMENTS

### EUROPEAN COMPETITION LAW: MANAGING THE "CHAMELEON" OF ANTITRUST—TECHNOLOGY JOINT VENTURES<sup>1</sup>

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1. UTZ TOEPKE, *EEC COMPETITION LAW, BUSINESS ISSUES AND LEGAL PRINCIPLES IN COMMON MARKET ANTITRUST CASES*, ch. 41, at 165 n.230 (1982) (citing Lennart Ritter and Colin Overbury, *An Attempt at a Practical Approach to Joint Ventures under the EEC Rules on Competition*, 14 COMMON MKT. L. REV. 601, 602 (1977) (citing W. Schlieder, the former Director General of the E.U. Commission's Competition Directorate (DG-IV) calling the joint venture "that chameleon of the antitrust world"))).

## I. INTRODUCTION

The "Chameleon" of Antitrust in the modern market is the technology joint venture.<sup>2</sup> Joint ventures<sup>3</sup> and transborder companies are booming in today's highly competitive marketplace.<sup>4</sup> European affiliates in the United States provide 2.9 million Americans with jobs and employ more than 10 percent of the work force in Maryland, New Jersey, West Virginia and South Carolina.<sup>5</sup> As these ventures increase, anti-trust concerns rise.

The vastly different forms that joint ventures take complicate competition regulation. Navigating the maze of competition law applicable to such joint ventures proves to be a perplexing task in today's international market place. Joint venturers must ensure compliance with numerous European Union (E.U.)<sup>6</sup> laws,<sup>7</sup> member state laws, and U.S. antitrust laws.<sup>8</sup> This task is increasingly difficult as the number of regu-

2. *Id.*

3. A joint venture is a business or activity set up by two companies to cooperate in the development, production, output, or marketing of a product. The parent companies' cooperation in the joint venture eliminates competition between them in the joint venture's market. "[I]t is the pooling of complementary skills and product lines as well as the risk distribution and . . . the capital-gathering implications of a joint venture which make this form of business activity attractive to many decision-makers in today's international business environment." UTZ TOEPKE, *EEC COMPETITION LAW, BUSINESS ISSUES AND LEGAL PRINCIPLES IN COMMON MARKET ANTITRUST CASES*, ch. 41, 166 (1982). Unlike joint ventures, traditional mergers permanently combine two companies efforts in all areas. ROBERT W. HAMILTON, *THE LAW OF CORPORATIONS*, 468 (1991).

4. Diane Bentley, *Survey of International Legal Services (3): Marriages of Convenience - A Look at Cross-border Corporate Joint Ventures*, *FIN. TIMES*, Jan. 25, 1994, at 14. European Union and international operations comprised 72 percent of total worldwide joint ventures in 1991-1992. Joint ventures across 12 industry sectors doubled in the five years up to 1990. *Id.*

5. Nancy Dunne, *Europeans Provide 3M US Jobs*, *FIN. TIMES*, June 22, 1993, at 6.

6. Hereinafter "E.U." The E.U., formerly the European Community (E.C.), has generally referred to itself as the European Union (EU) since the November 1, 1993 Maastricht Treaty on European Union entered into force. Alyssa A. Grikscheit, *Are We Compatible?: Current European Community Law on the Compatibility of Joint Ventures with the Common Market and Possibilities for Future Development*, 92 *MICH. L. REV.* 968 (1994).

7. Joint ventures must also comply with the European Economic Area (hereinafter "EEA") competition laws, Agreement on the European Economic Area, signed at Porto, May 2, 1992. See discussion *infra* II.B.

8. Chief among the United States' competition laws enforced by the Department of Justice are the Sherman Anti-Trust Act, 15 U.S.C. §§ 1-7 (1988); the Clayton Act,

lations multiplies.

Disclosure and pervasive regulation are the hallmarks of the E.U.'s approach to competition regulation. Through extensive schemes of notification, exemption, clearances, and comfort letters, the Commission ensures that it scrutinizes and impacts proposed business deals.<sup>9</sup> Except when certain types of joint ventures are involved, the clock runs slowly.<sup>10</sup> This lack of expediency can result in the significant restructuring, elimination or heavy fining of ongoing joint ventures once the Commission finds a violation has occurred, which often occurs in retrospect years later.

Recognizing the economic and technological gains derived from joint ventures, both the United States and the European Union have enacted statutory exemptions relaxing antitrust law, instituted cooperation agreements, and delineated procedures to expedite joint venture approval.<sup>11</sup>

Stringent criteria must be satisfied for most E.U. exemptions to apply;<sup>12</sup> clear cut "safe harbors" remain few. While careful structuring of joint venture agreements can result in considerable time savings and reduced business risks, the seemingly inconsistent decisions emerging from the European Commission's Directorate-General for Competition ("DG-IV")<sup>13</sup> render this task more difficult.<sup>14</sup>

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15 U.S.C. §§ 12-27 (1988); the Robinson-Patman Act, 15 U.S.C. § 13 (1988); National Cooperative Research Act of 1984, 15 U.S.C. §§ 4301-4305; and the Webb-Pomerene Act, 15 U.S.C. §§ 61-66 (1988).

9. The notification scheme is somewhat analogous to U.S. securities regulation which requires extensive approvals and notification prior to businesses taking certain actions. Unlike U.S. regulation, however, the E.U. has been under few time constraints to approve or reject joint venture arrangements. See discussion *infra* I.B.

10. See Council Regulation 4064/89 on the Control of Concentrations Between Undertakings, 1989 O.J. (L 395) 1 [hereinafter "Merger Regulation"] (imposing strict time limits in which the Commission must act on proposed concentrative joint ventures). See also discussion *infra* II.A.i.

11. The National Cooperative Research Act of 1984, 15 U.S.C. §§ 4301-4305 [hereinafter "NCRA"] provides exceptions from existing U.S. antitrust law for joint research and development [hereinafter "R&D"] activities. Under NCRA, U.S. courts are charged with evaluating the competitive effects of joint R&D based on a "rule of reason" analysis balancing pro-competitive effects with anti-competitive concerns in the relevant technology markets. NCRA also reduces monetary damages for later civil actions from treble to actual damages where the challenged conduct is within the scope of the notification provided by the joint venture. The E.U. Block Exemption for R&D joint ventures, Commission Regulation 418/85, 1985 O.J. (L 53) 5, provides safe harbor for joint ventures meeting the Regulation's stringent requirements. *Id.*

12. Commission Regulation 418/85, 1985 O.J. (L 53) 5 (provides safe harbor if stringent criteria is met). See discussion *infra* I.B.

13. RALPH H. FOLSOM, EUROPEAN COMMUNITY LAW IN A NUTSHELL, ch. 2, at

This Note will discuss the basic scheme of E.U. competition law pertaining to technological joint ventures, recent changes in that scheme, decisions regarding joint ventures, and methods for structuring joint ventures to ensure compliance with E.U. laws. The Note will conclude with recommendations for improvements.

## II. THE E.U. APPROACH — A MAZE OF REGULATION

### A. *Obstacles to Joint Venture Formation: The Treaty of Rome Provisions*<sup>15</sup>

The E.U.'s competition laws are set forth in the Treaty of Rome and the regulations and directives which implement it.<sup>16</sup> Designed to further the free movement of goods, services, capital, and people, the Treaty not only proscribes governmental trade barriers but also ensures that businesses will not recreate trade barriers through private actions.<sup>17</sup> Specifically, Articles 85 and 86 of the Treaty contain the key substantive aspects of E.U. competition law.<sup>18</sup>

#### 1. Article 85

Article 85 of the Treaty of Rome ensures that the free flow of goods and services within the E.U. is not hampered by anticompetitive private-party actions.<sup>19</sup> This Treaty provision restricts the formation of monopolies, cartels, and other agreements whose anticompetitive effect is not offset by concomitant benefit to the E.U.<sup>20</sup>

The broad sweep of Article 85 encompasses joint ventures and other agreements between competitors and subjects them to the invasive scrutiny of the Commission.<sup>21</sup> Although joint venture agreements often possess the characteristics of agreements prohibited under Article

53 (West 1992). The Directorate General for Competition is referred to as DG-IV. *Id.*

14. *See* discussion *infra* III.

15. TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [hereinafter EEC TREATY] arts. 85-86 (Also called the "Treaty of Rome," the Treaty was signed in Rome in 1957 and entered into effect on Jan. 1, 1958); RALPH H. FOLSOM, EUROPEAN COMMUNITY LAW IN A NUTSHELL, ch. 1 (West 1992).

16. FOLSOM, *supra* note 15. Article 85 of the Treaty of Rome has been roughly analogized to American Antitrust law in that it prohibits cooperation between competitors which restrains trade or distorts competition. *Id.* at 244.

17. *Id.*

18. *See also* Council Regulation 17, 1990 33 O.J. (L 204) 17-18; Commission Regulation 418/85, 1985 O.J. (L 53) 5.

19. EEC TREATY art. 85.

20. *Id.*

21. *Id.*

85(1),<sup>22</sup> they also provide economic, technological, and consumer-oriented benefits. When these benefits outweigh the anticompetitive effects, the Commission either issues negative clearances, holding Article 85 inapplicable, or issues exemptions under Article 85(3), permitting the agreement to stand.<sup>23</sup>

Article 85(1) prohibits private parties from forming agreements and engaging in concerted practices which may affect trade between member states if they have as their "object or effect" the "prevention, restriction or distortion" of competition within the E.U.<sup>24</sup>

Joint ventures that do not have an appreciable effect on competition fall outside the scope of Article 85(1).<sup>25</sup> The Commission has broadly construed Article 85(1) as covering almost all joint ventures.<sup>26</sup>

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22. Specifically, Article 85(1) states that agreements on price fixing, limiting production, limiting the means of production, unfair practices, and tying are automatically void under 85(1). EEC TREATY art. 85(1) states:

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, and in particular, those which:

- (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.

*Id.*

23. *Id.*

24. *Id.*

25. If the joint venture agreement is outside the scope of Article 85(1), then all additional agreements, even those restrictive of competition, are ancillary to the joint venture agreement and also outside the scope of Article 85(1). Conversely, if a joint venture falls within the scope of Article 85(1), then the ancillary restrictions are caught as well. Notice on the Assessment of Cooperative Joint Ventures Pursuant to Article 85, para. 67, 1993 O.J. (C 43) 2.

26. Agreements must have appreciable effect on competition for Article 85(1) to apply. *Notice Concerning Agreements of Minor Importance*, 1970 O.J. (C 64) 1, updated 1986 O.J. (C 231) 2 (providing guidance as to when an agreement would be deemed to have appreciable effects). The Notice used the size of the undertaking as a measure, stating that Article 85(1) should not generally be applied to agreements or undertakings with a combined market share of not more than 5 percent and an agree-

However, the Commission has held, pursuant to an Official Notice, that agreements or undertakings with a combined market share of not more than 5 percent and an aggregate combined turnover of less than 200 million ECUs are "de minimis" and not covered by Article 85(1).<sup>27</sup>

Article 85(2) states that agreements violative of Article 85(1) are void without prior administrative or judicial action.<sup>28</sup> This nullity affects only the aspects of the joint venture which are violative of Article 85(1).<sup>29</sup> If severable, the remaining aspects of the joint venture agreement remain valid.<sup>30</sup>

Despite the Treaty's ban on anticompetitive agreements, Article 85(3)<sup>31</sup> provides the Commission with the exclusive power to make exceptions through a process known as granting exemptions or negative clearances.<sup>32</sup> This may be done if:

gate combined turnover of less than 200 million ECUs. *Id.* at 3.

27. *Id.* at 3.

28. EEC TREATY art. 85(2). The Article 85(2) nullity provision has been interpreted to strike violative provisions of an agreement while the remaining, acceptable provisions are left intact. The net result can be a substantively different, yet still a binding business agreement between the parties. See V. KORAH, AN INTRODUCTORY GUIDE TO EEC COMPETITION LAW AND PRACTICE (4th ed. 1990).

29. See KORAH, *supra* note 28.

30. EEC TREATY art. 85. The concept of severability can result in numerous substantive changes being directed by DG-IV to the business relationship between the venture partners. The net result is a joint venture with unequal, potentially devastating business effects on the parties as the agreement remains in place with only the objectionable provisions stricken. All this could occur years after the Commission is notified of the joint venture under Article 85(3). In addition, even when a joint venture is granted an Article 85(3) exemption, the exemption is only temporary. Upon its expiration, DG-IV will re-examine the joint venture and could direct changes at that time to the parties' agreement. See also KORAH *supra* note 28.

31. EEC TREATY art. 85(3) states:

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.

*Id.*

32. Council Regulation 17/62, art. 2, 1990 O.J. (L 204) 17-18 (allowing the Commission to grant individual exemptions under Article 85(3) or issue negative clear-

- the agreement improves the production or distribution of goods or promotes technical or economic progress while allowing consumers a fair share of the resulting benefit; and
- the agreement does not impose restrictions which are "not indispensable" to attaining the objectives; and
- the agreement does not provide the opportunity to eliminate competition of a substantial part of the products concerned.<sup>33</sup>

Under Article 85(3), the Commission balances the pros and cons of the joint venture collaboration. Parent companies with large market shares and significant economic power are carefully examined.<sup>34</sup> Demonstrating objective advantages for third parties — especially consumers — carries substantial weight towards exemption.<sup>35</sup> "This will be the case if the joint venture contributes to 'dynamic competition,' 'consolidating the internal market' and 'increased competitiveness of the relevant sector.'"<sup>36</sup> Such research and development (R&D) agreements are generally favored by the Commission, while sales joint ventures are disfavored.<sup>37</sup>

## 2. Article 86

The other key antitrust provision of the Treaty of Rome, Article 86, prohibits the abuse of a dominant position.<sup>38</sup> Joint ventures can fall

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ances). A negative clearance is a finding by the Commission that a particular agreement or practice does not fall within the prohibitions of Articles 85(1) or 86. RALPH H. FOLSOM, *EUROPEAN COMMUNITY LAW IN A NUTSHELL*, ch. 7 (West 1992). Parties usually request both a negative clearance and an individual exemption at the same time. Joseph P. Griffin, *Joint Ventures: Concentrative and Cooperative*, Remarks at the Meeting of the Int'l. Law Section of the ABA (Feb. 16, 1994) (notes on file with author).

33. Council Regulation 17/62, art. 2, 1990 O.J. (L 204) 17-18.

34. See Christopher Jones, *et al.*, *Competition Law Checklist 1992*, EUR. L. REV. cc31 (1993).

35. *Id.*

36. *Id.* at cc31.

37. *Id.*

38. EEC TREATY art. 86 states:

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of



within this provision due to their market share.<sup>39</sup> Analysis of the relevant market is the key criteria which determines whether Article 86 is applicable.<sup>40</sup> The relevant geographic market is the E.U. Dominance is usually established when market share is 40 percent or greater.<sup>41</sup> Market shares between 30 and 40 percent are usually below the level of market dominance absent other evidence.<sup>42</sup>

Once a dominant position within the E.U. is found to be held by one or more of the undertakings, an abuse which affects trade between member states must occur to trigger Article 86.<sup>43</sup> Abuse may take a variety of forms enumerated in Article 86: imposing unfair prices, limiting production, coercing other businesses and partners, and discriminating among different customers.<sup>44</sup>

Although dominance alone does not violate Article 86, behaviors which are usually permitted can be held to violate Article 86 if the activities are those of a dominant firm and have an anticompetitive effect.<sup>45</sup> In addition, there is no exemption procedure in Article 86 as there is in Article 85.

consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making 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.

*Id.*

39. John H. Riggs, Jr. & Anthony Giustini, *Joint Ventures Under EEC Competition Law*, 46 BUS. LAW 851, 864 (1991).

40. *Id.*

41. *Id.*

42. *Id.*

43. EEC TREATY art. 86.

44. GEORGE A. BERMAN, ET AL., *CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW* ch. 23 at 812 (1993).

45. Riggs & Giustini, *supra* note 39, at 865.

The [European Court of Justice] adopted an objective test for the determination of abuse under Article 86 in *Hoffmann-La Roche*. The ECJ said:

The concept of abuse is an objective concept relating to the behavior of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.

*Id.*

*B. The Traditional Escape Routes From the Treaty Provisions*

The fact that the Treaty does not delineate an objective calculus for deciding whether an agreement is valid under Article 85 or 86 fosters uncertainty among companies desiring to enter into joint venture agreements. Also, the Commission's process of deciding which agreements merit approval and which should be nullified is largely subjective and somewhat enigmatic.<sup>46</sup> Recognizing the breadth of Articles 85 and 86, the Commission issued regulations and notices providing guidance and supplying procedures for compliance with the Treaty.<sup>47</sup> The first of these procedures, Regulation 17, as implemented by Regulation 27 and Regulation 2526/85,<sup>48</sup> established the process of notification. Regulation 17 also provided the Commission with broad investigatory power.<sup>49</sup>

If businesses notify the Commission of their agreements, they will not be subject to fines for the period between notification and any subsequent Commission action disapproving the venture.<sup>50</sup> If businesses in this situation are granted an exemption, it will only be deemed valid for the time period specified by the Commission.<sup>51</sup> In addition, the Agreement must comply with member state competition law despite the Commission's exemption.<sup>52</sup>

Once a business has notified the Commission of its agreement, there are two possible results which will enable businesses to avoid Article 85 violations. The Commission can either grant individual exemptions or issue negative clearances pursuant to Article 2 of Regulation 17.<sup>53</sup> Parties usually request both a negative clearance and an individual exemption at the same time. A negative clearance is a finding by the Commission that a particular agreement or practice does not fall within the prohibitions of Articles 85(1) or 86.<sup>54</sup> Businesses requesting such a clearance or exemption must wait an average of eighteen

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46. See generally BERMANN, *supra* note 44.

47. *Id.*

48. Council Regulation 17/62, 1962 O.J. (13) 204 (the "Regulation 17"); Commission Regulation 27 1962 O.J. (1118) 5; Regulation 2526/85, 1985 O.J. (L 240) 1. Regulations under Article 189 of the Treaty of Rome have direct application in the legal systems of member states. Article 87 of the Treaty of Rome empowers the Council of Ministers of the EEC to make regulations in order to give effect to the principles found in Articles 85 and 86. EEC TREATY arts. 189, 87.

49. EEC TREATY arts. 189, 87.

50. *Id.*

51. *Id.*

52. *Id.*

53. 1990 O.J. (L 204) 17-18 (reprinted in English Regulation 17).

54. See BERMANN, *supra* note 44.

months before the Commission makes a determination.<sup>55</sup>

Failing to notify the Commission of a joint venture under the assumption that the agreement is exempt from Article 85(1) could result in substantial penalties if the Commission later finds that the joint venture falls within the scope of Article 85(1).<sup>56</sup> This hard reality induces most businesses to notify the Commission of their joint ventures or look for the safe harbor provisions of the block exemption.<sup>57</sup>

Once the Commission decides to grant an exemption, it must publish a summary of the proposed cooperation in the Official Journal of the European Community prior to taking formal action.<sup>58</sup> During this period, third party competitors can submit comments to the Commission on the proposed cooperation.<sup>59</sup>

In lieu of seeking a formal opinion granting the exemption or negative clearance and waiting months for DG-IV action, the parties may request the Commission to issue a "comfort letter."<sup>60</sup> Similar to a U.S. Security and Exchange Commission "no-action" letter,<sup>61</sup> the comfort letter will not preclude litigation in national courts, but it probably can be relied upon as assurance that the Commission will not act absent fraud or material change in circumstance after the issuance of the comfort letter.<sup>62</sup>

55. Griffin, *supra* note 32.

56. Council Regulation 17, *supra* note 48.

57. *Id.*

58. *Id.*

59. *Id.*

60. See Riggs & Giustini, *supra* note 39, at 860 n.41. "A comfort letter is an administrative letter signed by an appropriate official of DG-IV stating that no action will be taken against the agreement or practice in question." *Id.*

61. "No-action" letters are issued by the staff of the Securities and Exchange Commission in response to queries from businesses regarding the applicability of the securities laws to their transactions. Receipt of a "no-action" letter generally assures the issuer that the SEC will not take action to regulate the transaction. CHARLES J. JOHNSON, JR., *CORPORATE FINANCE AND THE SECURITIES LAWS*, 15 (1990).

62. Valentine Korah, *Developments in EEC Competition Law in 1993*, Remarks at Int'l. Law Section Meeting of the ABA (Feb. 16, 1994) (notes on files with the author) (citing Sir Leon Brittan [former Director of DG-IV], *The Future of EC Competition Policy*, Speech Before the Centre for European Policy Studies, Brussels (Dec. 7, 1992), commenting:

It is true that a comfort letter does not provide complete legal security: the Commission may withdraw it at any time. In fact, however, this is far from true. A formal exemption decision may be revoked if certain conditions, specified in Article 8 of Regulation 17, are met. A comfort letter will only be withdrawn in the most extreme cases and only when the conditions of Article 8 are fulfilled. Such comfort letters therefore enable us to meet the needs of industry for rapid and secure decision-making in such cases.

The mechanics of Article 85 have also been augmented by the issuance of block exemptions by the Commission.<sup>63</sup> Under Regulation 418/85(1), Article 85(1) does not apply to agreements designed for joint R&D of products or processes and joint exploitation of the results of the R&D.<sup>64</sup> The regulation, however, contains caveats. For example,

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Professor Korah posited that "It is now arguable . . . that if one plans to enforce an agreement about which the Commission has sent a favourable comfort letter, one can require the Commission to proceed to a formal decision." (citing John Temple Lang, speaking in his personal capacity at the Fordham Corporate Law Institute in October 1993 (forthcoming 1994). *Id.* This would eliminate the commercial risk of trying to enforce agreements in national courts based on comfort letters which impliedly state that the agreements violate Article 85(1) and for which the national courts are powerless to grant exemption.

63. If an agreement or transaction falls within the scope of Article 85(1), only the Commission can grant an exemption. Regulation 2821/71 gives the Commission the power to grant prospective "bloc exemptions" to certain categories of agreement without review. Council Regulation 2821/71, *Application of Article 85(3) of the Treaty to Categories of Agreements, Decisions, and Concerted Practices*, 1971 O.J. (L 285) 46.

The principal block exemptions, in addition to the R&D block exemption, relate to:

1. exclusive distribution agreements — Regulation 1983/83 on *Block Exemption of Exclusive Distribution Agreements*, 1983 O.J. (L 173) 1. *See also Commission notice concerning Commission Regulations (EEC) No. 1983/83 and (EEC) No. 1984/83 of 22 June 1983 on the Application of Article 85(3) of the Treaty to Categories of Exclusive Distribution and Exclusive Purchasing Agreements*, 1984 O.J. (C 101) 2; Commission's *Notice on Exclusive Dealing Contracts with Commercial Agents*, 1962 O.J. 2921;
2. exclusive purchasing agreements — Regulation 1984/83 on *Block Exemption of Exclusive Purchasing Agreements*, 1983 O.J. (L 173) 5;
3. motor vehicle distribution and service agreements — Regulation 123/85 on *Block Exemption of Motor Vehicle Distribution and Servicing Agreements*, 1985 O.J. (L 15) 16;
4. patent licensing agreements — Regulation 2349/84 on *Block Exemption of Patent Licensing Agreements*, 1984 O.J. (L 219) 15;
5. industrial knowledge licensing agreements — Regulation 556/89 on *Block Exemption of Know-How Licensing Agreements*, 1989 O.J. (L 61) 1;
6. specialization. agreements — Regulation 417/85 on *Block Exemption of Specialization Agreements*, 1985 O.J. (L 53) 1; and
7. franchising. agreements — Regulation 4087/88 on *Block Exemption of Franchising Agreements*, 1988 O.J. (L 359) 46.

*See generally*, V. KORAH, AN INTRODUCTORY GUIDE TO EEC COMPETITION LAW AND PRACTICE (4th ed. 1990); Spencer Weber Waller, *Understanding and Appreciating EC Competition Law*, 61 ANTITRUST L.J. 55 (1992).

64. Such a block exemption for R&D joint ventures was issued in 1985 and updated in 1993. Commission Regulation 418/85 on the *Application of Article 85(3) of the Treaty to Categories of Research and Development Agreements*, 1985 O.J. (L 53) 5, updated 1993 O.J. (L 21) 8 (the "R&D Block Exemption").

all parties must have access to the results of the research and be free to exploit the results of the joint R&D.<sup>65</sup> If the parties are competitors, the parties must not supply more than 20 percent of the market for the goods being improved or replaced in order for the exemption to apply.<sup>66</sup> In addition, Article 3 sets time limits for the duration of R&D agreements.<sup>67</sup> Five years of joint exploitation is allowed for non-competitor joint venture partners once the jointly developed goods are on the market.<sup>68</sup> This five year period can be extended provided the parties' market share of the new product does not exceed 20 percent.<sup>69</sup>

Article 5 allows parties to include provisions that restrict the use of company proprietary data to joint venture use only.<sup>70</sup> Article 6 prohibits the parties from restricting their ability to conduct independent research in the same field or another area following the conclusion of the R&D program.<sup>71</sup> Such prohibitions are consistent with E.U. policies of proscribing exclusive dealing arrangements and barriers to market entry.<sup>72</sup>

Provided that the joint venture partners are confident that they meet the criteria of the block exemption, they may proceed with their business venture without notification to the Commission.<sup>73</sup> If the partners fear that the agreement contains clauses which may violate the exemption conditions, they may notify the Commission.<sup>74</sup> If the Commission fails to oppose the agreement within six months, the block exemption applies.<sup>75</sup>

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65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *See* R&D Block Exemption, *supra* note 64. These recent amendments to the block exemption permit joint sales of products beyond the manufacturing stage. Production joint ventures are exempt up to an aggregate market share of 20 percent. Full-function joint ventures which extend to the distribution stage are limited to a maximum market share of 10 percent to enjoy automatic exemption under the regulation. Commission Regulation 151/93 of December 23, 1992, amending Regulations 417/85, 418/85, 2349/84 and 556/89 on the application of Article 85(3) to certain categories of specialization agreements, R&D agreements, patent licensing agreements and industrial knowledge licensing agreements (allowing joint ventures to produce and distribute, providing that the companies concerned have a combined market share not exceeding 10 percent, and a combined global turnover of less than 1 million ECUs). *Id.*

70. *Id.* art. 5.

71. *Id.* art. 6.

72. *See generally* BERMANN, *supra* note 44.

73. *Id.* at 771-73.

74. *Id.*

75. *Id.*

By restricting the block exemption to joint venture partners with less than 20 percent of the existing market, the Commission has favored the cooperation of small market players while maintaining its circumspection of large enterprises forming agreements to monopolize markets. However, the utility of the block exemption is undermined when companies are unable to adequately protect their proprietary data and still qualify for the exemption.<sup>76</sup>

### III. RECENT CHANGES EASING E.U. REGULATION

The deluge of routine notifications and the subsequent strain on the Commission's limited resources provided the catalyst for recent efforts to speed the clearance/exemption process. To this end, the Commission has issued a variety of notices and regulations broadening exemption criteria. In the joint venture area, the Commission chose to differentiate between two types of joint ventures: concentrative and cooperative — a distinction with key ramifications for business.

#### A. *Concentrative versus Cooperative Joint Ventures*<sup>77</sup>

The distinction between cooperative and concentrative joint ventures critically impacts the handling of joint venture approval in the E.U. Both cooperative and concentrative joint ventures "involve the creation of a new company performing activities to a greater or lesser extent independent from their [sic] parents, and they [sic] almost inevitably involve significant sunk costs."<sup>78</sup> A concentrative joint venture, however, is acted upon by the Commission within a maximum of five months but probably within thirty days.<sup>79</sup> On the other hand, there are no time constraints for Commission action concerning a cooperative joint venture.<sup>80</sup> While the difference in treatment of the two joint ventures is dramatic, the actual differences in the business ventures are much harder to discern.

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76. *Id.* at 773 (citing V. KORAH, AN INTRODUCTORY GUIDE TO EEC COMPETITION LAW AND PRACTICE 12.5 (4th ed. 1990)).

77. The distinction between merger-like concentrative joint ventures and cooperative joint ventures is alien to U.S. law, which scrutinizes all joint ventures by merger standards but provides exemption procedures. See Joseph Kattan, *Antitrust Analysis of Technology Joint Ventures: Allocative Efficiency and the Rewards of Innovation*, 61 ANTITRUST L. J. 937, 945 (1993).

78. Jones, *supra* note 34.

79. *Id.*

80. *Id.*

### 1. Concentrative Joint Ventures

Concentrative joint ventures are merger-like enterprises establishing an autonomous business which operates in fields unrelated horizontally or vertically to its parent companies.<sup>81</sup> Concentrative businesses fall under Regulation 4064/89 (hereinafter the "Merger Regulation") of 1989 if they are of a "community dimension."<sup>82</sup> When concentrative rather than cooperative joint ventures are formed, not only are strict time deadlines imposed on the Commission,<sup>83</sup> but member state laws do not apply<sup>84</sup> and the venture is permanently cleared; Article 85(3) exemptions, in contrast, force ventures into limited duration.

When classifying joint ventures as concentrative or cooperative, the Commission examines a variety of factors. The Merger Notice<sup>85</sup> lists requirements for concentrative ventures.<sup>86</sup> Among the requirements are the following:

- o Joint control must exist:<sup>87</sup> The parent companies must agree

81. Council Regulation 4064/89 (the "Merger Regulation") on *The Control of Concentrations Between Undertakings*, 1989 O.J. (L 395) 1 at art. 3(2):

An operation, including the creation of a joint venture, which has as its object or effect the coordination of the competitive behavior of undertakings which remain independent shall not constitute a concentration within the meaning of paragraph 1(b).

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

*Id.*

82. *Id.* Community dimension refers to aggregate business turnover which is calculated pursuant to Article 5(4) of the Merger Regulation, *supra* note 10.

83. The Commission must reach a preliminary conclusion on the proposed concentration within one month after receiving a completed notification. Merger Regulation, *supra* note 10 at art. 10(1). If the Commission has doubts as to whether the thresholds are met, it may conduct an investigation. *Id.* at art. 6(1)(c). Within four months of opening an investigation, the Commission must make its final decision. The four-month period may be "exceptionally" suspended where one of the concerned companies has been responsible for the Commission having to request further information. *Id.*

84. *Id.* art. 21(2).

85. 1990 O.J. (C 203) 10.

86. *Id.* For a discussion of decisions under the Merger Regulation see Anand S. Pathak, *EEC Merger Regulation Enforcement During 1992*, EUR. L. REV. cc132 (1993).

87. *Id.* See also Anand S. Pathak, *EEC Merger Regulation Enforcement During 1992*, EUR. L. REV. cc132 at cc138-39 (1993).

In the E.C., the term "joint venture" is a term of art. For purposes of E.C.

on decisions concerning the joint venture's activities.<sup>88</sup> Joint control can be based on legal, contractual, or other means.

o The joint venture must perform "all the functions of an autonomous economic entity."<sup>89</sup> It should not be dependent on the parent companies for the development and maintenance of its business.

o The joint venture must "not have as its object or effect the coordination of the competitive behavior of undertakings that remain independent of each other."<sup>90</sup>

In other words, if the joint venture operates in the same or similar markets as the parent companies, the joint venture will probably be deemed cooperative. Therefore, the plausibly anticompetitive aspects in the existing market justify the stricter treatment of cooperative joint ventures.

## 2. Cooperative Joint Ventures

If an agreement is deemed a "cooperative" joint venture, it falls under Article 85.<sup>91</sup> In 1993, the Commission updated its 1968 Notice on assessing cooperative joint ventures.<sup>92</sup> Under the latest guidance, DG-IV will examine, *inter alia*:

o The effect of the joint venture on actual or potential competi-

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competition law, a joint venture is an undertaking which is "jointly controlled" by the parent companies, that is, each parent has rights, whether by contract or otherwise, which confer the possibility of exercising decisive influence jointly with the other parents over the venture. For assessing the existence of joint control, the shareholdings of the parent companies in the venture are not dispositive; joint control may exist even though one of the parents holds a minority stake in the venture but has certain rights in the management of the venture which go beyond the normal protection of minority interests. Based on the Commission's practice, it is clear that a requirement under the notified agreement that the parents vote unanimously on the annual budgets, and strategic commercial and marketing plans, and any changes and amendments thereto, would normally constitute conclusive evidence of joint control.

*Id.*

88. *Id.* "There is no joint control where one of the parent companies can decide alone on the JV's [joint venture's] commercial activities." *Id.*

89. *Id.*

90. *Id.*

91. *Notice Concerning the Assessment of Cooperative Joint Ventures under Article 85 EEC*, 1993 O.J. (C 43) 2.

92. *Id.*



- tion between the parent companies<sup>93</sup>;
- o The impact of the joint venture on third parties;<sup>94</sup> and
- o The competitive effect of a full-function joint venture on its parents.<sup>95</sup>

Once a restriction on competition is found, the Commission examines whether the effect of this restriction is "appreciable."

This depends mainly on the market power of the undertakings concerned, the nature of the joint ventures activities in comparison to those of its parents and the extent to which third parties are foreclosed from the market. . . . [I]t follows . . . that competition is not restricted where co-operation in the form of a joint venture can objectively be seen as the only possibility for the parents to enter a new market or to remain present in a market, provided that their presence will strengthen competition or prevent it from being weakened.<sup>96</sup>

The Commission is zealous in its scrutiny of ventures demarcated as "concentrations" and frequently refuses concentrative status to agreements that the parent companies have designed to be concentrative.<sup>97</sup>

93. *Id.* Potential competition is examined according to the list of questions in the Commission's 13th Competition Report. *Id.*

94. *Id.* For example, a joint venture could foreclose market entry for its competitors if the joint venture partners have significant market power and control vital raw materials needed by competitors. 1990 O.J. (C 203) 10.

95. *Notice Concerning the Assessment of Cooperative Joint Ventures under Article 85 EEC*, 1993 O.J. (C 43) 2. See generally Dana W. Hayter, *Scapegoat for the Trade Deficit: Does EEC Antitrust Treatment of Joint Ventures Place the United States at a Competitive Disadvantage?*, 16 HASTINGS INT'L & COMP. L. REV. 391, 392 (1993).

96. Jones, *supra* note 34 at cc30.

97. Griffin, *supra* note 32 (commenting that numerous companies label all business ventures "concentrative" in an attempt to expedite approval of the venture and gain clearance — even to the point of making fundamental changes in the structure and scope of the venture. Nevertheless, the Commission frequently finds the agreements non-concentrative.); See *Renault/Volvo* (Case No. IV/M004, Nov. 7, 1990); 4 C.M.L.R. 297 (1991); *Mediobanca/Generali* (Case No. IV/M159, Dec. 19, 1991); *Flachglas/VEGLA* (Case No. IV/M168, Apr. 13, 1992); *Apollinaris/Schweppes* (Case No. IV/MO93, June 24, 1992); *Elf/Enterprise* (Case No. IV/MO88, July 24, 1991); *Sunrise* (Case No. IV/M176, Jan 13, 1992).

### 3. Structural Cooperative Joint Ventures

A new breed of joint ventures, called "structural cooperative joint ventures" has recently been recognized by the E.U.<sup>98</sup> Effective January 1, 1993, DG-IV instituted a new, self-imposed procedure in an effort to expedite approval for cooperative joint ventures, probably due to the inundation of notices of concentrative joint ventures.<sup>99</sup> The new procedure requires the Commission to issue a letter within two months of receiving notification.<sup>100</sup> The Commission will inform the company that the structural cooperative joint venture may proceed or warn the company that the Commission views the planned venture as anticompetitive.<sup>101</sup> DG-IV also develops a specific timetable for each "second-stage case and the parties are informed of the deadline the Commission has set for itself to render a final decision."<sup>102</sup>

#### B. EFTA - A New Player in E.U. Competition Law

In addition to understanding the shifting regulatory framework within the E.U., businesses must now comply with the requirements of a new competition entity. On January 1, 1994 the European Free-Trade Agreement (hereinafter "EFTA") Surveillance Authority emerged<sup>103</sup> as the European Economic Area (hereinafter "EEA") Agreement went into effect. The Surveillance Authority is the functional equivalent of DG-IV and oversees member compliance with the EEA rules.<sup>104</sup> The EEA created the "world's largest free trade

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98. See generally JOHN P. KARALIS, INTERNATIONAL JOINT VENTURES: A PRACTICAL GUIDE (West 1992) ("Joint Ventures may be either structural or contractual, or both. They also may conform to a statutory or other regulatory scheme. The cooperative relationship may be broad based or narrowly defined . . . Long term joint ventures, particularly those that are broad based, usually are best suited to a corporate structure. Short term or narrowly defined joint ventures often are better formulated contractually.") *Id.* §1.11.

99. COMPETITION POLICY, 1991 WL 11703 (D.R.T.), Eurupdate database, §7.7.2 *Acceleration of Procedures*, at 245. "These deadlines have no statutory force however and will be merely of persuasive force for the time being." *Id.*

100. *Id.*

101. *Id.*

102. Griffin, *supra* note 32, (characterizing these structural joint ventures as "almost concentrative . . . full-function[ing] . . . free-standing" ventures.) *Id.*

103. *EEA: The World's Biggest Free Trade Area*, ECONOMIST, January 8, 1994, available in DIALOG, Int-news File.

104. Telephone interview with Phillip Combs, Office of European Union, Department of Commerce (March 28, 1995).

The Surveillance Authority is responsible for ensuring that EFTA members fulfill their obligations under the European Economic Area. As such, it has

zone,"<sup>105</sup> incorporating the twelve members of the European Union with the five members of the European Free-Trade Association — Austria, Sweden, Finland, Norway, and Iceland.<sup>106</sup> The EEA's basic premise, similar to that of the Treaty of Rome, is the free movement of goods, capital, services, and people.<sup>107</sup>

Despite initial controversies over the jurisdiction of the EFTA Surveillance Authority<sup>108</sup> and the EFTA Court,<sup>109</sup> compromises have been reached. EFTA Surveillance Authority will decide cases where the effects are restricted to trade between Austria, Finland, Iceland, Norway, and Sweden, as well as cases involving firms with turnover on EFTA territory equal to or exceeding thirty-three percent of the turnover on EEA territory, except where trade with the E.U. is affected.<sup>110</sup>

Responsibility is shared out in the same way for negative clearance applications (Article 54 of the EEA Agreement) when the whole EEA territory is concerned by a dominant position. On

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certain powers comparable to the New European Commission — especially in the fields of competition, state aid, and procurement. The [Surveillance Authority] has the power to investigate infringement of EEA rules and to administer fines accordingly. The [Surveillance Authority] is governed by an independent board made up of five members, one from each participating member's state. The [Surveillance Authority] is based in Brussels and has a staff of about 100.

*Id.*

105. *EEA: The World's Biggest Free Trade Area*, ECONOMIST, January 8, 1994, available in DIALOG, Int-news File.

106. *Id.* Austria, Sweden, and Finland recently joined the EU bringing the number of EU Member States to fifteen. Telephone interview with Nathaniel Herman, *Trade Information Hotline (1-800-USTRADE)*, (March 28, 1995).

107. *EEA: The World's Biggest Free Trade Area*, ECONOMIST, January 8, 1994, available in DIALOG, Int-news File.

EEA has been a long time coming. EFTA was created in 1960 more or less as a reaction to the European Economic Community, dominated by France and Germany. The mutual antipathy began to dissolve with bilateral free-trade agreements after 1973, and was dispelled in 1984 when EFTA and the European Community signed an agreement to create a so-called 'European Economic Space'. . . . A second reason for the delay has been the sheer difficulty of getting EFTA countries to accept the EU's legal strictures against monopolies and state aid.

*Id.*

108. The Surveillance Authority is based in Brussels. Interview with Phillip Combs, *supra* note 104.

109. The Court is based in Geneva. *Id.*

110. *EU: EC Competition Rules To Be Applied Throughout EEA Territory*, Agency Europe, January 7, 1994, available in DIALOG, Int-News File.

the other hand, if the dominant position only exists in the Community, requests must be addressed to the Commission and, if it only exists on EFTA territory, to the EFTA Surveillance Authority. Finally, Community-scale concentrations naturally remain under the responsibility of the Commission.<sup>111</sup>

The EFTA Surveillance Authority has adopted guidelines which correspond with E.U. competition rules.<sup>112</sup> For example, notices on exclusive distribution agreements and the "de minimis" notice excluding agreements of minor importance from the competition rules have been adopted by the EFTA Surveillance Authority.<sup>113</sup> Companies had to comply with the rules by July 1, 1994 although the rules governing concentrations and abuse of a dominant position have been in effect since January 1, 1994.<sup>114</sup>

In response to the emergence of the EFTA Surveillance Authority, the Commission has adopted new notification forms for companies requesting individual exemptions or negative clearances under Article 85 and 86 of the Treaty of Rome.<sup>115</sup> The Commission will also examine

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111. *Id.*

112. *EFTA: EFTA Surveillance Authority Approves First Text On Competition*, Jan. 13, 1994, available in DIALOG, Int-News File. Specifically, the Authority adopted ten notices and guidelines, identical to those of the E.U., to clarify EEA competition. The ten notices adopted cover:

1. Concentrations (enterprise transfer, joint acquisitions, concentrative joint-ventures);
2. Cooperative or concentrative nature of joint ventures;
3. Exclusive distribution or purchasing agreements which benefit from exemption under Article 53(3) of the EEA Agreement;
4. Distribution and services agreements;
5. Exclusivity contracts with commercial agents who are exempted;
6. Agreements, decisions, and concerted practices which are not considered mergers;
7. Import of goods from third countries which would be obstacles to trade in the EEA or lead to unfair competition;
8. Sub-contracting agreements;
9. Agreements of minimum importance (businesses with less than 5% market share with annual turnover of less the 200 million ECU);
10. Restrictions on competition in telecommunications.

*Id.*

113. *EU: EFTA Surveillance Authority Adopts Competition Notices*, European Commission Press Releases, Eur. Comm'n. Press Releases, Jan. 13, 1994, available in DIALOG, Int-News File.

114. *Id.*

115. *EC: Commission Adopts New Notification Forms Due To EEA Agreement*, Eur. Comm'n Press Releases, Dec. 20, 1993, available in DIALOG, Int-News File.

whether the notifications are within the scope of Articles 53 and 60 of the EEA Agreement.<sup>116</sup> When necessary, the notifications will be forwarded to the EFTA Surveillance Authority in accordance with Protocols 23 and 24 to the EEA Agreement.<sup>117</sup>

It remains unclear how the EFTA and E.U. authorities will, in practice, cooperate and coordinate competition policy.<sup>118</sup> The intent, however, is clear. EFTA intends to maintain the policies behind E.U. competition law while extending the scope of the law. For the practitioner, it is certain that yet another regulatory body, complete with its own court, must now be added to the list of regulatory obstacles that joint ventures must surmount. To the extent the policies of the E.U. are mirrored by EFTA, the impact and cost to businesses will be minimized.

#### IV. EUROPEAN DECISIONS

The decisions of the Commission granting, denying, or requiring revisions to existing agreements illustrate the highly subjective analysis required to determine whether an exemption or negative clearance should be granted. By employing a "rule of reason" analysis,<sup>119</sup> the Commission has left a trail of decisions which provide little guidance for businesses attempting to structure acceptable joint venture agreements.

##### *A. Are All Non-Minor Agreements Caught by Article 85(1)?*

Not all Commission decisions hinder exclusive joint venture arrangements. The Commission seems to be especially permissive with

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116. *Id.* "[C]ompanies may, with the exception of merger control cases, hand in their notifications not only, pursuant to those same Protocols, in any official Community language, but also in an official language of the EFTA States or the working language of the EFTA Surveillance Authority." *Id.*

117. *Id.*

118. To date, only one case has been handled under the EEA agreement. The concentration — a planned merger of the petrochemical businesses of Finland's Neste Oy and Norway's Den Norske Stats Oljeselskab — was approved by the Commission to form a 50-50 joint venture called Borealis. "A spokesman for the EFTA surveillance authority said the Commission had cleared the merger as under the EEA agreement it held on to any competence it already had to deal with mergers." *Belgium: EU Approves Neste/Statoil Venture*, Reuter Newswire, Feb. 18, 1994, available in DIALOG, Int-News File.

119. The rule of reason analysis is used by the United States' Department of Justice to evaluate the legality of joint ventures under the National Cooperation and Research Act of 1984, *supra* note 11.

regard to joint ventures which focus on European R&D. In *SHV/Chevron*,<sup>120</sup> the companies formed a joint venture to sell petroleum products in the E.U. This agreement — a harbinger of the “concentrative” joint venture — was granted a negative clearance by the Commission.<sup>121</sup> The Commission viewed the joint venture as similar to a partial merger because the companies transferred all of their related assets to the joint venture.<sup>122</sup> These assets included their independent distribution networks and related plant equipment. In addition, the companies agreed to withdraw from distribution of the products and were unlikely to return to the market.<sup>123</sup>

By viewing the agreement as a partial merger, the Commission effectively allowed a permanent exclusive agreement to be formed between the companies.<sup>124</sup> The Commission also allowed the non-competition clause to stand, thereby ensuring that the new venture would receive no competition from its parents.<sup>125</sup>

The Commission’s recent permissive decisions in *AEG/Alcatel*<sup>126</sup> and *Elopak*<sup>127</sup> rendered Article 85(1) inapplicable to the ventures in each case.<sup>128</sup> In *AEG/Alcatel*, a consortium of major German, French, and Finnish electronics and telecommunications firms formed a venture to develop, manufacture, and sell digital cellular mobile phones throughout the E.U.<sup>129</sup> At the time the consortium was formed, six other consortia were being formed for the same purpose.<sup>130</sup> The Commission permitted the venture by granting a negative clearance.<sup>131</sup> It reasoned that the investment cost and time schedule did not permit the individual players to compete in the same industry.<sup>132</sup> Hence, there was no threat of unfair competition to avoid.

The Commission also granted a negative clearance for a joint ven-

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120. Commission Decision 75/95, 1975 O.J. (L 38) 14.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Alcatel Espace/ANT Nachrichtentechnik* (AEG, Alcatel and Oy Nokia), Commission Decision 90/46, 1990 O.J. (L 32) 19.

127. *Elopak/Metal Box-Odin*, Commission Decision 90/410, 1990 O.J. (L 209) 15.

128. *Id.*

129. *Alcatel Espace/ANT Nachrichtentechnik* (AEG, Alcatel and Oy Nokia), Commission Decision 90/46, 1990 O.J. (L 32) 19.

130. BERMANN, *supra* note 44, at 797.

131. *Alcatel Espace/ANT Nachrichtentechnik* (AEG, Alcatel and Oy Nokia), Commission Decision 90/46, 1990 O.J. (L 32) 19.

132. *Id.*

ture in *Elopak*.<sup>133</sup> The joint venture was established to develop and exploit a new-carton and carton-filling technology.<sup>134</sup> The agreement included grants of non-exclusive licenses and restrictions on the use of industrial knowledge after termination of the joint venture.<sup>135</sup> The Commission decided that the parties were not competitors because they occupied different sectors of the packing industry and were unlikely to undertake the development risk independently.<sup>136</sup> Competition was not distorted, therefore, and the restrictions in the agreement were reasonable.<sup>137</sup>

These decisions reflect the Commission's permissiveness towards joint R&D where European companies are involved. Given the global competitiveness of technology and the significant economic gain to be realized, the Commission almost certainly will continue to view pan-European technology joint ventures more benignly.

#### *B. If Caught by Article 85, What Merits Exemption Under 85(3)?*

The Commission does not automatically condemn agreements which clearly fall within the scope of Article 85. Exemptions are available and are liberally granted for joint ventures involving R&D although past Commission decisions are inconsistent.

In *Vacuum Interrupters*,<sup>138</sup> the Commission granted an exemption, withdrew it when a larger buyer of the product joined the joint venture, and later granted a second exemption<sup>139</sup> as new competitors emerged in the market place. Initially, two large UK firms initiated independent research on a new switching technology before concluding that the research was too expensive to pursue individually.<sup>140</sup> After abandoning their individual research, these companies joined together to form a joint venture.<sup>141</sup> The Commission viewed the agreement as falling within the scope of Article 85(1) because the two firms remained competitors.<sup>142</sup> Nevertheless, the Commission exempted it under Article

133. *Elopak/Metal Box-Odin*, Commission Decision 90/410, 1990 O.J. (L 209) 15.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. Commission Decision 77/160, 1977 O.J. (L 48) 32.

139. *Vacuum Interrupters*, Commission Decision 80/1332, 1980 O.J. (L 383) 1.

140. VALENTINE KORAH, *EC COMPETITION LAW AND PRACTICE* 111 (3d ed. 1986).

141. *Id.*

142. *Id.*

85(3). The exemption, revoked when the product's buyer joined the venture, was reinstated later as competition in the newly created market grew.<sup>143</sup>

The Commission's holding that the initial joint venture was encompassed by Article 85(1) is confusing in light of the fact that the technology did not exist at the time the joint venture was formed; as a result, potential competition was unlikely to exist since other firms faced market barriers.<sup>144</sup> The competitors that eventually entered the market were licensees of the joint venture.<sup>145</sup> The Commission viewed the "loss of the highly improbable but conceivable potential competition . . . as having both the object and effect of restricting competition."<sup>146</sup>

In *De Laval/Stork*,<sup>147</sup> the Commission removed provisions of an agreement and conditioned the granting of an exemption.<sup>148</sup> The joint venture agreement involved an American company, De Laval, and its technology licensee, Stork, jointly producing and distributing compressors and turbines in the E.U.<sup>149</sup> The companies' consumers consisted of large power companies and the joint venture partners' combined market share was approximately ten to fifteen percent. Significant competition existed from multi-national corporations.<sup>150</sup> The joint venture agreement dealt only with production and manufacturing of the turbines.<sup>151</sup> No R&D was included in the agreement.<sup>152</sup>

While the Commission ultimately accepted the *De Laval/Stork* agreement, it did so only after mandating changes in its exclusivity and licensing provisions.<sup>153</sup> The Commission found the concessions already made by the companies to be inadequate and required that consumers be able to approach either company directly in the event the joint venture was unable to satisfy the consumers' requirements.<sup>154</sup> To effect the Commission's fiat, the joint venture's exclusivity provisions were made operable only for the first phase of the joint venture. The Commission

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143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at 112.

147. Commission Decision 77/543, 1977 O.J. (L 215) 11.

148. Regulation 17, *supra* note 17, art. 8(1) permits the Commission to attach conditions and obligations to a declaration of exemption. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*



viewed any exclusivity beyond the initial phase as not "indispensable" to the agreement.<sup>155</sup>

The Commission's refusal to accept the *De Laval/Stork* agreement as originally proposed was probably due in part to the Commission's misperception of the market effects of the joint venture. Because the companies would undoubtedly realize increased profits and productivity gains from their cooperation, the Commission seemed to view them as the sole beneficiaries of the agreement. Moreover, as no R&D was included in the joint venture, no new products were being brought to market. Therefore, the Commission reasoned, consumers were unlikely to appreciably benefit from the agreement, except possibly from increased ease of service.

This analysis fails to reach the likely net effect of the terms of the agreement. First, efficiency gains would almost certainly result in lower cost to the consumers, and ultimately, lower cost to the EEC. Given the companies' small combined market share, monopolistic pricing was unlikely. Substantial price increases would further reduce the partners' market share, given the existing competition.

Furthermore, the Commission failed to analyze the role of the consumer in *De Laval/Stork*. Major electricity companies, capable of exercising significant countervailing pressures on De Laval, were not the type of consumers likely to be disadvantaged from the cooperation of the two companies. Had the cooperation acted like a monopoly or cartel, the calculus clearly would have differed. However, the relatively small market share, the power of the consumers, and the efficiencies likely to result from the cooperation strongly suggest that the Commission was overzealous in its application of Article 85. Such caution unnecessarily hampers joint venture formation by removing the exclusivity incentives that, in large part, entice companies to pool scarce resources in a gamble to increase profits.

The problems faced by the *De Laval/Stork* agreement could have been avoided if the agreement was structured as R&D, subsequent production, and marketing of improvements to the existing turbine technology. By incorporating R&D, and since the companies, though competitors, occupied less than twenty percent of the market, the block exemption criteria would have been satisfied. The cooperation and production could continue as long as the party's market share did not exceed twenty percent.

Currently, the Commission appears to be adopting a more pragmatic, favorable view of such innovative cooperation, especially when a

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155. *Id.*

benefit to the E.U. or its consumers is evident. In *United Technologies/MTU*,<sup>156</sup> the Commission exempted a long-term joint venture for commercial aircraft engines, finding that the joint venture partners were not at the same level of competition in the jet engine market and the largest market share in the relevant E.U. market was nineteen percent. The agreement provided for coordination of existing programs and R&D.<sup>157</sup>

In *Ford/Volkswagen*,<sup>158</sup> the Commission approved a fifty-fifty joint venture to develop and produce a multi-purpose vehicle in a new Portuguese plant:

The cooperation enables the partners to competitively offer a high-quality product, designed for the specific needs of European consumers, in the relatively new and low volume MPV market segment in a comparatively short time. . . . [T]he beneficial results of the cooperation could not, to that extent, be achieved otherwise. The partners, each acting on its own, could not develop and produce the MPV in the same conditions so rapidly and efficiently in Portugal as their cooperation will enable them to do.<sup>159</sup>

In *Exxon/Shell*,<sup>160</sup> the joint venture to produce linear low density polyethylene (LLDPE) in France was approved by the Commission after substantial modifications to the parties' original agreement. The Commission objected and required that all dispensable restrictions be removed from the agreement. In granting an exemption, the Commission considered the fact that this venture would establish the first plant of its kind in the Community. The Commission stated that the venture "implied a high degree of production flexibility," enabling the French plant to produce different grades at a cost attractive enough to consumers to encourage conversion of old equipment.<sup>161</sup> Moreover, the Commission noted that the venture would not eliminate competition with respect to a substantial part of the market.<sup>162</sup>

In *DuPont/Merck*,<sup>163</sup> the Commission issued a comfort letter for a

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156. 1992 O.J. (C 279) 2; 4 C.M.L.R. 84 (1993).

157. 1992 O.J. (C 279) 2; Jones, *supra* note 34, at cc38.

158. 1993 O.J. (L 20) 14.

159. *Id.*

160. 1993 O.J. (C 92) 3.

161. *Id.*

162. *Id.*

163. Press Release 1P(91)381, May 6, 1991.

fifty-fifty joint venture for pharmaceuticals. The Commission reasoned that the venture "will add a new and substantial competitor on the world market rather than eliminate a competitor through a merger."<sup>164</sup> This new competitor would enhance consumer choice, create new employment, and bring important new drugs to the market in a relatively short time, hence contributing to technical and scientific progress.<sup>165</sup>

In these four cases, the Commission demonstrated increased flexibility towards joint ventures in high-technology areas. All of these ventures were designed to improve state-of-the-art technology. Through these ventures and their resulting technology gains, the E.U. as a whole benefits with regard to competitors in the United States and Asia. In addition, a concomitant benefit is realized by E.U. consumers through reduced prices and/or greater availability of goods. While the Commission exerted its influence on the provisions of the Exxon/Shell agreement, the overall tolerance for joint venture agreements appears greater today than when the Commission decided the *De Laval/Stork* and *Vacuum Interrupters* cases.

A useful contrast is provided by *Screensport/EBU*,<sup>166</sup> one of the rare cases in which the Commission refused to exempt a joint venture. The joint venture in question was one establishing a transnational satellite channel dedicated to sports broadcasting. The Commission was not convinced that the joint venture was indispensable given the backing of the venture by its only potential competitor.<sup>167</sup> In addition, the implied restrictions on competition were not vital, nor was there a concomitant benefit to consumers.<sup>168</sup> Perhaps by materially changing their venture,

164. *Id.*

165. *Id.*

166. 1991 O.J. (L 63) 32.

167. *Id.*

[T]he Commission is not convinced that a transnational sports channel such as Eurosport could only come into existence on the basis of such a joint venture between a group of members of the EBU [European Broadcasting Union], with the backing of the organization itself, and the most likely main competitor capable of creating an alternative venture. . . . [T]he creation of a joint venture on the basis of the present Agreements is excessive, and the implied restrictions of competition cannot be regarded as indispensable to the establishment of a dedicated sports channel with a transnational dimension capable of rivalling other sports channels to the benefit of the consumers.

*Id.*

168. *Id.*

[T]he consumer may be better served by being able to make an informed choice between at least [*sic*] two channels offering an equally wide variety of European sports programmes, including the major international events, which may differ in style, presentation, quality and content. In those circumstances,

the parties could have obtained an exemption, but the fact that the channel would eliminate competition in sports broadcasting and did not involve high technology development probably outweighed all other factors. This decision underscores the limits on the Commission's tolerance of restrictive joint ventures which provide no scientific gains and eliminate competition.

*C. Decisions Under the Merger Regulation — Still Little Consistency*

Although presented to the Commission as "concentrative" joint ventures, often in an attempt to expedite DG-IV action, many joint ventures fail to satisfy the Commission's test for concentrations. In *Baxter/Nestle*,<sup>169</sup> the Commission deemed a venture to jointly develop, manufacture, and market clinical nutrition products as having failed to qualify as a concentration.<sup>170</sup> The Commission's reasoning was based on the revocability of the exclusive technology licenses by the parents, the parents' continuing role in manufacturing as subcontractors, and the parents' role in continuing to conduct the majority of relevant R&D.<sup>171</sup>

[T]he parents did not effect a complete and permanent withdrawal from the . . . markets but have kept their joint ventures dependent on access to their research and development, technology, manufacture and trademarks. The parties also have the possibility of reverting at any time to the previous position. This applies in particular to Baxter, which retains the necessary distribution channels to hospitals and pharmacies for its other pharmaceutical products. These distribution channels can at any time be used for the distribution of clinical nutritional products.<sup>172</sup>

In sum, the joint venture parents remained active in the market in violation of Commission rules.

Industrial policy goals have also led to inconsistent Commission

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it is the consumer who decides ultimately which/how many channels of this kind should eventually succeed.

*Id.*

169. Case No. IV/MO58, Feb. 6, 1991.

170. *Id.*

171. *Id.*

172. *Id.*

decisions under the Merger Regulation.<sup>173</sup> For example, in *Aerospatiale/MBB*,<sup>174</sup> a helicopter joint venture was approved despite the adverse effect on E.U. competition. "Presumably, the Commission took into account arguments that the joint venture would permit more effective competition against American rivals and discounted the cost to consumers of a more concentrated market."<sup>175</sup> Conversely, the Commission later refused to be swayed by industrial policy concerns in *Aerospatiale-Alenia/de Havilland*<sup>176</sup> involving a proposed joint venture for turbo-prop aircraft. For the first time, the Commission declared a concentration incompatible with the Common Market, believing the joint venture would constrict E.U. competition.<sup>177</sup>

In the narrowly approved *Steel Tubes Venture*,<sup>178</sup> DG-IV's merger task force initially opposed the venture between French, Italian, and German companies based on the fact that, if allowed to proceed, a "dominant duopoly"<sup>179</sup> would be formed.<sup>180</sup> The task force did not discuss ties between parents or allege collusion. The venture was approved, probably more a result of politics than economics.<sup>181</sup>

#### D. Why the Different Treatment?

The factors considered by the Commission to distinguish concentrations from cooperative joint ventures are apparent: concentrations, like mergers, create a new company and the potential collusion between competitors is theoretically eliminated when the parents withdraw from the joint venture's business area. While the idea of concentrations is that the new company will be competing in the market place with other similar companies, this is often not the reality. Rather than benefitting

173. See Alyssa A. Grikscheit, *Are We Compatible?: Current European Community Law on the Compatibility of Joint Ventures with the Common Market and Possibilities for Future Development*, 92 MICH. L. REV. 968, 1019-21 (1994).

174. *Aerospatiale/MBB*, Commission Decision of 25 February 1991, 1991 O.J. (C 59) 13.

175. Grikscheit, *supra* note 173, at 1020.

176. *Aerospatiale-Alenia/de Havilland*, Commission Decision of 2 October 1991, 1991 O.J. (L 334) 42.

177. *Id.*

178. Andrew Hill, *Commission Is Split On Steel Tubes Venture*, FIN. TIMES, Jan. 26, 1994, at 2. The three companies would occupy 36 percent of the market, while Sweden has 33 percent and Spain has 15 percent. *Id.*

179. Griffin, *supra* note 32.

180. *Id.*

181. The Commissioners' votes followed country lines with the DG-IV Director abstaining and the Italian, French, and German Commissioners voting in favor of approving the venture. Griffin, *supra* note 32.

consumers, concentrations can leave fewer firms competing in the market. They ultimately create one new company to operate exclusively where two or more had once competed.

In the *SHV/Chevron* venture, the new company had few competitors and the collaboration was more likely to result in cooperative, monopolistic practices than two competing parent companies forming a joint venture. This is even more probable in regulated industries such as petroleum production where there are fewer market players and less competition. Moreover, this exclusive cooperation was in perpetuity, unlike shorter term joint ventures such as the *De Laval/Stork* and *Vacuum Interrupters*. These shorter-term joint ventures leave two companies in the market place following the dissolution of the venture. Also, each has the capability to supply consumers with their products.

The Commission also appears blindsighted by the transfer of assets in a concentration from the parents to the new venture. While this signals a relinquishing of control of the market, it also represents a concentration of the business in one entity guaranteed to face no competition from its parents. Moreover, the concomitant benefit to consumers and furtherance of E.U. competition policy appears less in many concentrations, as in the *SHV/Chevron* case, where two competitors are effectively eliminated. In the final analysis, many concentrations appear more likely to act in contravention of the Treaty of Rome principles than cooperative joint ventures.

Recent cases, such as *AEG/Alcetal* and *Elopak*, involved attempts to compete globally and develop cutting-edge technologies. Unlike the *SHV/Chevron* and *De Laval/Stork* joint venture agreements, these cooperative efforts focused on R&D. The Commission's tolerance of the restrictions contained in the agreements reflects its recognition that, without certain exclusive benefits to the companies and protections for technology, the companies are unlikely to cooperate and pool investment. While the *Elopak* companies were deemed not to be competitors, they did constitute major players whose cooperation would effect the competitiveness of the market. Despite this fact, the Commission superficially dismissed this problem by deciding that they would not have undertaken the R&D efforts alone due to cost. *Elopak*, with facts identical to that of *Vacuum Interrupters* thereby received an opposite analysis by the Commission. While the Commission's decisions are enigmatic and brightline rules are almost nonexistent, the Commission's approach appears to reflect its recognition that the benefits of cooperative research and development typically outweigh the problems caused by the anti-competition effects of the agreement, at least in the short term.

The Commission recently issued a notice to help demystify their

process of exemption and clearance pursuant to Article 85.<sup>182</sup> Among the key criteria which the Commission purports to examine are the following:

1. Is the joint venture likely to prevent, restrict, or distort competition between the parents?<sup>183</sup>
2. Will the joint venture's operation appreciably affect the competitive position of third parties (*i.e.*, regarding supplies and sales)?<sup>184</sup>
3. If the venture is a full-function business, what is the relationship between the parent and the joint venture?<sup>185</sup>

Despite the listing of criteria to be examined by DG-IV in granting exemptions or clearances, there is room for improvement. Legal uncertainty continues to plague businesses forming new ventures due to the subjectivity of the analysis.

Industry finds it difficult to judge whether an agreement is covered by the European regime. In theory, the Commission's jurisdiction extends only where an agreement has a significant and foreseeable effect on intra-state trade within the EU. In practice, the test as to whether there is such an effect is so wide as to make it virtually impossible for companies to say with any precision that the rules do not apply to any particular agreement. Uncertainty is increased by the Commission's continued assertion of jurisdiction in cases where the effect on intra-Union trade appears insignificant.<sup>186</sup>

## V. RECOMMENDATIONS

The serious criticisms leveled at DG-IV's practices and procedures have led to suggestions for improvement.<sup>187</sup> The Confederation of British Industry has launched a six-point plan for reform of competition policy. In addition, the UK House of Lords Select Committee on the European Communities is calling for improvement in the Commission's handling of competition cases.<sup>188</sup>

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182. *Notice on the Assessment of Cooperative Joint Ventures Pursuant to Article 85(1) and 85(3)*, 1993 O.J. (C 43) 2.

183. *Id.* para 17.

184. *Id.*

185. *Id.*

186. Robert Rice, *Business and The Law: A Burden on Business - EU Competition Law Has Come Under Fire For Wasting Time*, FIN. TIMES, Feb. 1, 1994, at 16.

187. *Id.*

188. *Id.*

Among the recommendations currently being considered are those to abolish the turnover element of the "de minimis"<sup>189</sup> test under Article 85, to raise substantially the market threshold under the "de minimis"<sup>190</sup> test, and to revamp the block exemptions in order to guide companies towards drafting agreements which do not need Commission clearance.<sup>191</sup> The thrust of these recommendations is to narrow the scope of businesses encompassed by the treaty and provide clear, objective criteria for the evaluation of agreements.

Meanwhile, for the practitioner, structuring a joint venture to fit the E.U. guidelines can save time, expense, and provide a modicum of legal certainty. The following are the key routes to E.U. approval:

Type of Agreement	Notice Required?	Results?
DE MINIMIS (Under 5% MARKET SHARE)	OSTENSIBLY, NO NOTICE REQUIRED	PENALTIES IF NOTICE WAS ACTUALLY REQUIRED
BLOCK EXEMPTION AGREEMENT	NO NOTICE REQUIRED. IF UNCERTAIN EXEMPTION PERTAINS, NOTIFY AND DG-IV MUST ACT WITHIN 6 MONTHS OR EXEMPTION APPLIES.	PENALTIES IF NOTICE WAS ACTUALLY REQUIRED AND WAS NOT UNDERTAKEN
CONCENTRATIVE JOINT VENTURE	NOTICE REQUIRED, DG-IV MUST ACT WITHIN 1 MONTH	DG-IV OFTEN RULES THAT JV IS NOT CONCENTRATIVE
STRUCTURAL COOPERATIVE JOINT VENTURE	NOTICE REQUIRED, DG-IV MUST ACT WITHIN SELF-IMPOSED DEADLINE OF TWO MONTHS	COULD SURPASS TWO MONTHS IF SECOND-STAGE INVESTIGATION IS LAUNCHED
*NOTIFICATION OF ART. 85(1) JOINT VENTURE FOR INDIVIDUAL CLEARANCE UNDER ART. 85(3)  *OFTEN DONE SIMULTANEOUSLY	NOTICE REQUIRED PER REGULATION 17, WAIT OF APPROX. 18 MONTHS. NO FINES WILL ACCRUE DURING WAITING PERIOD IF AGREEMENT FOUND TO VIOLATE TREATY.	DG-IV CAN FORCE AMENDMENTS TO JOINT VENTURE AGREEMENT, REMAINING TERMS NOT VOIDED.

189. *Notice Concerning Agreements of Minor Importance*, *supra* note 26.

190. *Id.*

191. *Id.*



Type of Agreement	Notice Required?	Results?
REQUEST COMFORT LETTER	SHORTER WAITING PERIOD. SEEN BY SOME AS ADMISSION THAT AGREEMENT VIOLATES ART. 85 POSING PROBLEMS WITH CONTRACTUAL ENFORCEMENT OF AGREEMENT IN NATIONAL COURTS.	NOT BINDING ON NATIONAL COURTS; NOT TECHNICALLY AN EXEMPTION BUT INCREASES LIKELIHOOD THAT JV WILL NOT BE QUESTIONED
*NOTIFICATION-REQUEST FOR NEGATIVE CLEARANCE UNDER ART. 85 (1)	NOTICE REQUIRED PER REGULATION 17; WAIT OF APPROX. 18 MONTHS. NO FINES WILL ACCRUE DURING WAITING PERIOD IF AGREEMENT FOUND TO VIOLATE TREATY.	IF NOT CLEARED, MUST NOTIFY AND REQUEST 85(3) EXEMPTION.
NOTIFY EFTA SURVEILLANCE AUTHORITY IF APPLICABLE	RULES TO DATE IDENTICAL TO DG-IV	COVERS NORWAY, SWEDEN, ICELAND, FINLAND, AND AUSTRIA
NOTIFY MEMBER STATE COMPETITION AUTHORITY IF APPLICABLE (MERGERS, CONCENTRATIVE JVS ARE EXEMPT FROM MEMBER STATE LAW)	RULES VARY FROM MEMBER STATE TO MEMBER STATE	PENALTIES CAN BE LEVIED IN NATIONAL COURTS

## VI. CONCLUSION

The Commission has come a long way towards improving its previously enigmatic procedures for approval. Through notices on criteria for exemption and deadlines for reaction to notification, the Commission appears to be striving to improve its tarnished image and oft-criticized reputation.<sup>192</sup> E.U. and U.S. antitrust authorities are now cooperating in antitrust matters: greater uniformity in decision making should

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192. The Merger Task Force has created its own internal coordination shop to examine inconsistent decisions in recognition of their inconsistencies. Griffin, *supra* note 32.

result.<sup>193</sup>

The Commission's disparate conclusions as to the acceptability of the agreements are almost certainly a product of the inherent subjectivity involved in assessing whether the terms of the agreement ultimately help or hinder competition, result in a benefit to E.U. consumers, and are "indispensable." While time and the reality of cutthroat technological competition appear to have softened the Commission's outlook, a company's best bet seems to lie in block exemptions or concentrations, if it is able to qualify (*i.e.* market share is small enough, *etc.*). By falling within block exemptions, the companies are insulated from fines and avoid the rigorous scrutiny of the Commission under Regulation 17.<sup>194</sup> The Merger Regulation ensures that a quick approval or rejection will be forthcoming from the Commission.<sup>195</sup>

Absent the applicability of these approaches, a company has no choice but to comply by notifying the Commission. The best insurance for securing a negative clearance appears to be careful drafting of exclusivity provisions to avoid overbreadth, coupled with compelling arguments indicating a benefit to the consumer and community. Through these approaches, joint ventures may escape the Commission's scrutiny and interference.

The Commission, unduly motivated by politics and market perceptions, needs to focus on providing clear policy decisions which can guide businesses in structuring their ventures. Waiving fines for post-notification periods and distinguishing between concentrative and cooperative joint ventures is a poor panacea for an unfair and inefficient process. More objective criteria and broader exemption regulations would better serve the business community while ensuring that the E.U.'s goals are accomplished. In sum, the policies of Articles 85 and 86 are clear and laudatory, while the criteria for exemption are not.

*A. Lynne Puckett*

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193. Agreement Between the Commission of the European Communities and the Government of the United States of America Regarding the Application of Their Competition Laws, signed Sept. 23, 1991.

194. Regulation 17, *supra* note 18.

195. Merger Regulation, *supra* note 10.

