NOTE

FROM THE UNITED STATES TO EUROPE: A COMPARATIVE STUDY OF PRODUCTION JOINT VENTURES

I. INTRODUCTION

For over a century the United States has championed antitrust legislation as a cornerstone of its free market economy. In the last decade, however, lawmakers have called for a reappraisal of established antitrust regulations. While global markets are expanding, strict antitrust legislation in the United States, in spite of its domestic benefits, is dulling industrial competitiveness.[1] At the same time, Japan, an integrated Europe, and other rapidly industrializing countries are exerting tremendous influence in the international trade arena. Many of these countries are realizing that antitrust policy cannot be ignored and are rapidly developing their own body of competition law.[2] The European Community (EC) in particular is legislating with a sense of urgency in order to facilitate the formation of the common market and prevent abuse of its integrated economy.[3]

With the growth of a global economy and the increase in the use of tariffs, quotas, and duties, a focus on the development of international joint ventures is becoming increasingly relevant.[4] This focus has been turning toward production joint ventures, a collaborative arrangement that offers tremendous potential for growth and economic benefit.[5] The United States recently has seen a number of production joint ventures

1. *See infra* note 14 and accompanying text.

2. *See Fair Trade Commission Issues Rules on Enforcement of Japan's Anti-Monopoly Law*, 8 Int'l Trade Rep. (BNA) No. 29, at 1077 (July 17, 1991) (discussing new antitrust guidelines); *Canadian Antitrust; Beware of the Poodle*, THE ECONOMIST, Apr. 7, 1984, at 70.

3. *See infra* part III.B.4. for a discussion of recent production joint venture legislation in the EC. *See generally* Vivienne Robinson, *Recent Developments in the Law of the European Community*, 2 DUKE J. COMP. & INT'L L. 1 (1992) (discussing recent developments in EC competition policy).

4. Joint ventures are formed by two or more entities or individuals in order to share mutually beneficial resources. *See* Joseph F. Brodley, *Joint Ventures & Antitrust Policy*, 95 HARV. L. REV. 1523, 1524-27 (1982).

5. H.R. REP. No. 516, 101st Cong., 2d Sess. 13 (1990). *See also* Alvin F. Lindsay III, *Tuning in to HDTV: Can Production Joint Ventures Improve America's High-Tech Picture?*, 44 U. MIAMI L. REV. 1159, 1168 (1990).

between corporate giants seeking to increase their competitive edge in the international markets.[6] In spite of the benefits that joint ventures offer, the law of the United States, as it stands today, is riddled with uncertainties that discourage potential collaboration.[7] Legislators are beginning to recognize that well defined legal standards are required in order to encourage the formation of production joint ventures.[8] EC competition policy, on the other hand, traditionally has been guided by clearer legislation and a more coherent body of case law; this has facilitated the development of joint ventures.[9]

The first part of this paper discusses the definition of a joint venture, the current state of antitrust laws applicable to joint ventures in the United States, and the rule of reason analysis. The second part examines existing laws applicable to production joint ventures in the EC and identifies the differences between the two systems. Finally, a controversial production joint venture is analyzed according to EC legal principles in order to compare the operation of the two systems.

II. THE HISTORY OF PRODUCTION JOINT VENTURES IN THE UNITED STATES

Free competition is the driving force of the economy in the United States. The Sherman Antitrust Act (Sherman Act) codifies the legal principles that guide this free market economy.[10] This Act is sometimes referred to as the "Magna Carta of free enterprise" and its importance is equated to the Bill of Rights' protection of fundamental freedoms.[11] It remains the cornerstone of United States competition law although it was enacted over one hundred years ago.

The Sherman Act, however, has not evolved adequately to deal with the dynamics of an emerging global marketplace.[12] To the drafters of the Sherman Act, " '[t]he Trusts' were real political dragons to be slain . . .

6. The most recent of these is the intended joint venture between Apple and IBM. *See* Louise Kehoe, *Apple, IBM Plan Rapid Development*, FIN. TIMES, Oct. 2, 1991, at 23.

7. *See infra* part II.B.1.

8. *See infra* part II.C.

9. *See infra* part III.

10. 15 U.S.C. § 1 et. seq. (1988). The Sherman Act

> rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.

Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958).

11. United States v. Topco Associates, 405 U.S. 596, 610 (1972).

12. Drafted with a regulatory focus limited to the domestic U.S. economy, the Sherman Act is infringing upon the ability of United States companies to compete in the global market. Former U.S. Attorney General Richard Thornburgh recently wrote that "[t]he purpose of antitrust laws is to promote healthy competition in the U.S., not to protect competitors . . . sometimes the antitrust laws

with a few dramatic but vague and novel tools. . . ."[13] Today's dragon is fierce foreign competition which threatens domestic companies that were previously dominant in the national and international markets.[14] As one congressional leader stated:

> American firms are no longer merely competing among themselves. They must compete in an international marketplace. Many high tech companies must compete especially against Japanese enterprises that have the support of the Japanese government, Japanese banks and Japanese labor all acting in concert. The odds are thus stacked against American business. This changing reality ought to prompt a revision of policies that hamper our ability to compete.[15]

Contributing to the difficulties faced by United States firms is the inconsistent judicial treatment of the Sherman Act. The Sherman Act accords the courts considerable leeway in interpreting its statutory provisions; the body of case law that has subsequently developed is extremely ambiguous and similar fact situations have led to different results.[16] This lack of uniformity coupled with the severe penalty of treble damages discourages collaboration.[17] Congress, during the past decade, has responded to this problem by enacting legislation that encourages the formation of joint ventures by limiting antitrust enforcement for joint ventures in the fields of research and development and production for exportation.[18]

With the growing popularity due to the undeniable benefits of production joint ventures, there is a demand for similar legislation in this field.[19] The Committee on the Judiciary's report on H.R. 4611[20] identifies a number of economic realities that make new legislation imperative: first, the costs involved in developing new technology and bringing it into the market place may be beyond the ability of single firms; second, the economics behind high tech manufacturing requires short life cycles for

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must be modified to remain true to their goal." Richard L. Thornburgh, *U.S. Firms Get Tripped in Race to the Marketplace*, WALL ST. J., Dec. 27, 1988, at A10.

13. Donald I. Baker, *Restating and Refining Remedies: The Trading Company Act, The Joint Research Act, and The Local Government Antitrust Act*, 55 ANTITRUST L.J. 499, 499 (1986).

14. The market for high technology is a prime example of the fierce competition facing U.S. industry. Only a decade ago, the U.S., with 5% of the world's population, was generating about 75% of the world's technology. Today the U.S. generates about 50%, and unless there are fundamental changes in technological policies, this figure is estimated to reach 30% in the next decade. H.R. CONF. REP. No. 571, 98th Cong., 1st Sess., pt. 1, at 8 (1983).

15. *The National Productivity and Innovation Act and Related Legislation: Hearings on S.1841 Before the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. 44 (1983) (statement of Senator Paul Tsongas).

16. *See discussion infra* part II.B.1.

17. *See infra* note 72 and accompanying text.

18. *See infra* part II.C.

19. Beginning early in the 101st Congress much legislation was introduced that took a variety of approaches to stimulating more cooperative activity by U.S. firms. *See infra* part II.C.

20. H.R. CONF. REP. No. 516, 101st Cong., 2d Sess. (1990). *See also infra* part II.C.3.

products and the need for rapid response time to meet consumer demands for variety and customized items; third, competing products may now provide a technology innovator no more than six to twelve months of exclusivity.[21] For this reason, firms in the United States need to develop and execute production strategies and scheduling with greater dispatch.[22]

A. Joint Ventures

The term joint venture is difficult to define. Much of this difficulty stems from the use of the term to describe many different types of interfirm contractual arrangements.[23] The Supreme Court has commented that "[p]erhaps every agreement and combination to restrain trade could be . . . labeled [a joint venture]."[24] Nonetheless, certain elements, when combined, distinguish a joint venture from a cartel, merger, or other combination:

1. The enterprise is under the joint control of unrelated parent firms;
2. Each parent firm makes a substantial contribution (in terms of expertise or resources or any combination thereof) to the joint enterprise;
3. The enterprise exists as a separate business entity from its parent firms; and
4. The joint venture creates offspring "capability in terms of new productive capacity, new technology, a new product, or entry into a new market."[25]

Production joint ventures specifically are designed to facilitate collaboration in the production of goods.[26] Despite the fact that courts generally perceive joint ventures as providing a public benefit,[27] merely

21. H.R. CONF. REP. No. 516 at 1.

22. *Id.* at 1-2; Thornburgh, *supra* note 12, at A10.

23. Brodley, *supra* note 4, at 1524.

24. Timken Roller Bearing Co. v. United States, 341 U.S. 593, 598 (1951).

25. Brodley, *supra* note 4, at 1525-26. *See also* Lewis Bernstein, *Joint Ventures in the Light of Recent Antitrust Developments: Anti-Competitive Joint Ventures*, 10 ANTITRUST BULL. 25, 25 (1965) (explaining that in a merger, two or more companies combine all of their assets to create a new entity but that the creation of a joint venture does not extinguish either of the venture partners).

26. This is true irrespective of whether the venture is also concerned with research and development or other activities. CHRISTOPHER BELLAMY & GRAHAM D. CHILD, COMMON MARKET LAW OF COMPETITION § 5-064 (3d ed. 1987).

27. Judge Taft noted that the public derives an advantage when partners adopt restrictions to secure "the union of their capital, enterprise, and energy to carry on a successful business." United States v. Addyston Pipe & Steel Co., 85 F. 271, 280 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

labelling a production arrangement a joint venture will not shield it from antitrust regulation.[28]

B. Antitrust Law

Joint ventures are evaluated primarily under § 1 of the Sherman Act[29] — the linchpin of antitrust regulation.[30] Section 1 states that "[e]very contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or foreign nations is declared to be illegal."[31] Because a joint venture constitutes a partial combination, the crucial analysis is whether the venture is "in restraint of trade."[32]

The Sherman Act places a heavy burden on the judiciary to define an antitrust violation.[33] The courts have responded by developing the rule of reason analysis.[34] Although courts differ in their interpretation of this principle,[35] under the rule of reason it is acknowledged that all business arrangements impose some restraints on free trade, but only those arrangements that unreasonably restrain trade should fall within the coverage of the Sherman Act.[36] The essential test for the legality of a business practice is whether it suppresses or promotes overall competition.[37] Thus, when the anticompetitive effects of a business combination are outweighed by the ensuing procompetitive results, the combination is considered to be a reasonable restraint of trade.

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28. The courts have been circumspect in readily approving all combinations labelled as joint ventures. *See Timken*, 341 U.S. at 593.

29. 15 U.S.C. § 1 (1988).

30. THOMAS V. VAKERICS, ANTITRUST BASICS § 10.01 (1990). Joint ventures are subject to additional review and challenge under 15 U.S.C. § 2 (1988) (Sherman Act); 15 U.S.C. § 7 (1988) (the Clayton Act applies to joint ventures involving the acquisition of assets); 15 U.S.C. §§ 41-58 (1988) (FTC Act).

31. 15 U.S.C. § 1 (1988).

32. *Id.*

33. Senator Sherman stated in an address to Congress:

> [I]t is difficult to define in legal language the precise line between lawful and unlawful combinations. This must be left to the courts to determine in each particular case. All that we, as lawmakers, can do is to declare general principles, and we can be assured that the courts will apply them as to carry out the meaning of the law . . . . This bill is only an honest effort to declare a rule of action.

21 CONG. REC. 2455, 2460 (1890), *reprinted in* 1 LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 51, 122 (Earl W. Kintner ed., 1978).

34. *See* Bunker Ramo Corp. v. United Business Forms, Inc., 713 F.2d 1272 (7th Cir. 1983). The application of the "rule of reason" is triggered only after the plaintiff has met the initial burden of proving that the challenged conduct restrains competition. Los Angeles Memorial Coliseum Comm'n v. National Football League, 726 F.2d 1381, 1391 (9th Cir. 1984), *cert. denied*, 469 U.S. 990 (1984).

35. Brodley, *supra* note 4, at 1523-24.

36. *See, e.g.*, National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679 (1978).

37. *Id.*

The rule of reason requires a thorough investigation of the particular industry under review and a balancing of positive and negative effects of the agreement on competition.[38] Courts, however, refuse to look into agreements that plainly are anticompetitive, classifying them as per se illegal.[39] Although there has been some debate as to whether the per se rule is distinct from the rule of reason, the majority view is that the two are essentially the same analysis.[40]

The broad judicial discretion allowed under the Sherman Act has resulted in conflicting interpretations of the role of antitrust law. One commentator has noted that the conflicting application of antitrust laws has created a split personality within the judiciary, leading to conflicting decisions based on similar facts.[41] Beyond interpreting statutory language, the courts have used economic analysis[42] and have adopted a legislative posture[43] in defining the parameters of antitrust enforcement. Courts have added to the ambiguity in the field by analyzing cases in terms of all three of these elements.[44]

1. *The Rule of Reason Dissected.* In applying the rule of reason, four principal areas of inquiry can be identified:[45] the purpose of the arrangement, the existence of and need for market power in connection with the joint venture; whether there is a less restrictive alternative available, and the procompetitive or anticompetitive effects of the arrangement.[46] The

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38. *Bunker Ramo*, 713 F.2d at 1283.

39. *See, e.g.*, United States v. Topco Assocs., Inc., 405 U.S. 596, 607-08 (1972).

40. *See* William J. Sims, NCAA v. Board of Regents *and a Truncated Rule of Reason: Retaining Flexibility Without Sacrificing Efficiency*, 27 ARIZ. L. REV. 193 (1985).

41. Thomas C. Arthur, *Farewell to the Sea of Doubt: Jettisoning the Constitutional Sherman Act*, 74 CAL. L. REV. 263, 309-10 (1986). Arthur strongly suggests that the courts have wrongly interpreted judicial discretion to mean a "standardless delegation." Arthur argues that in actuality, the delegation to them was similar to "the power that every statute delegates to courts." *Id.* at 290.

42. The Supreme Court apparently misapplied economic theories regarding oligopoly and held that the mere exchange of price information which was freely available in other markets unduly affected prices in the corrugated container industry in the Southeast. United States v. Container Corp. of America, 393 U.S. 333 (1969).

43. The most forthright statement of this role came from Judge Learned Hand in *United States v. Associated Press*:

> [T]he injury imposed upon the public was found to outweigh the benefit to the combination, and the law forbade it. We can find no more definite guide than that. Certainly such a function is ordinarily 'legislative' . . . [b]ut it is a mistake to suppose that courts are never called upon to make similar choices.

United States v. Associated Press, 52 F. Supp. 362, 370 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945).

44. *See, e.g.*, Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S. 2 (1984).

45. *See* CLARK C. HAVIGHURST, HEALTH CARE LAW AND POLICY: READINGS, NOTES AND QUESTIONS 325-26 (1988).

46. *Id. See generally* 7 PHILLIP E. AREEDA, ANTITRUST LAW ¶¶ 1500-11 (1986) [hereinafter ANTITRUST LAW]; PHILLIP E. AREEDA, THE "RULE OF REASON" IN ANTITRUST ANALYSIS: GENERAL ISSUES 2-13 (1981).

main purpose of competition law should be kept in mind when undertaking this analysis — the laws protect competition, not the competitor.[47]

First, a court will inquire into the purpose of the arrangement in question. A court seeks to ascertain whether the arrangement is a naked restraint on competition or whether the restraints it imposes are merely ancillary to an overriding legitimate competitive purpose.[48] Generally, naked restraints are illegal under the per se rule.[49] Potential social benefits will not justify a restraint which suppresses competition.[50] Some naked restraints, however, may be permitted under the *de minimis* rule when the restraint affects only the nonprice dimensions of competition or merely seeks to address a market's failure to be perfectly competitive.[51] Even where the main purpose of an arrangement is procompetitive, a court may find that an ancillary restraint of trade is illegal because it is not imperative to the success of the arrangement.[52] Thus, the essential test is whether the challenged restraints are reasonably necessary to the success of a venture.[53] If the ancillary restraints are reasonably necessary, then they are generally permitted.[54]

The second area of judicial inquiry assesses the existence of market power. Market power refers to the ability of a firm to raise prices in a

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47. Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962).

48. 7 ANTITRUST LAW, *supra* note 46, ¶ 1501 (quoting United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898)).

49. *Id.*

50. National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 696 (1978) (allowing a worthy purpose defense for a naked restraint would be to set sail on a "sea of doubt").

51. *See* HAVIGHURST, *supra* note 45, at 326.

52. *But see* Continental T.V. Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977) (warning that second guessing business decisions in organizing joint ventures may expose the venture partners to high damages and reduce enthusiasm for collaborative activity).

53. *See* United States v. Timken Roller Bearing Co., 83 F. Supp. 284, 313 (N.D. Ohio, 1949), *modified*, 341 U.S. 593 (1951). The district court stated:

> If a joint venture or partnership is formed for the purpose of a lawful business enterprise and restraints result from the right to protect established business interests no violation of the law occurs. But if the association is formed for the purpose of continuing a combination to allocate exclusive sales territories in the world, to fix prices and to eliminate competition both within and without the combination, it cannot hide from the effects of the law under the cloak of a joint venture or a partnership.

Id. at 312. *See also* Yamaha Motor Co. v. FTC, 657 F.2d 971 (8th Cir. 1982) (striking down a joint venture which restricted Yamaha from competing in nonjoint venture products since the restriction was not reasonably necessary to the success of the joint venture); Daniel M. Crane, *Joint Research and Development Ventures and the Antitrust Laws*, 21 HARV. J. ON LEGIS. 405, 414 (1984).

54. *But see* United States v. Pan Am. World Airways, 193 F. Supp. 18 (S.D.N.Y. 1961), *rev'd on other grounds*, 371 U.S. 296 (1963). An airline company and a steamship line joined together to form a new airline. The initial agreement which prevented the parents from competing with the venture in its market was valid as reasonably necessary for the success of the joint venture. *Id.* However, once the venture was fully capable of competing with itself, the restraint was struck down because it was no longer ancillary. *See id.* at 34, 37-38 & n.17. *See also* United States v. E.I. DuPont De NeMours & Co., 118 F. Supp. 41, 218-22 (D. Del. 1953), *aff'd*, 351 U.S. 377 (1956).

defined market above the competitive level without becoming unprofitable.[55] The possession of market power is considered a prerequisite to a violation of the Sherman Act.[56] In order to ascertain whether a party has market power, a court must first define the relevant market in which to compute the party's market share.[57] This involves identifying a geographic area and a set of products or services that together constitute a distinct competitive arena.[58] The court must then compute the party's market share, consider entry barriers, and decide whether the company's share is large enough to support the contention that market power actually exists.[59]

Third, the court will ascertain whether the legitimate purpose of the agreement can be achieved through means less harmful to competition. This is a highly speculative area of inquiry and results in second guessing business decisions by the judiciary — an inquiry which they are not in the best position to undertake. A word of caution was sounded in *Continental T.V., Inc. v. GTE Sylvania Inc.*,[60] a case in which the Supreme Court stated that antitrust laws do not exist to organize business in specific ways. The Court noted: "We are unable to perceive significant social gain from channeling transactions into one form or another."[61] By second guessing alternatives to joint ventures, the courts also expose the participants to substantial damage awards, thus frustrating their incentive to collaborate.

Finally, a court will balance the positive and negative effects of a business combination on the free economy. This last evaluation is necessary for a court to determine "whether or not the challenged restraint enhances competition."[62] Courts have yet to define, however, the precise manner in which this analysis should be undertaken.[63] The *NCAA* Court implied that a balancing test should be used, but it failed to explain how to assign relative weights to the two effects.[64] This lack of guidance has led to divergent decisions based on similar facts as demonstrated by the holdings in *Topco*[65] and *Broadcast Music*.[66] In *Topco*, the Court

55. William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 937 (1981).

56. Market power must also be established in order to bring an action for a violation of § 2 of the Sherman Act and § 7 of the Clayton Act. *See generally* United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945); Appalachian Coal v. United States, 288 U.S. 344 (1933); Chicago Board of Trade v. United States, 246 U.S. 231 (1918).

57. *See generally* Landes & Posner, *supra* note 55.

58. *Id.*

59. *Id.*

60. Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

61. *Id.* at 58 n.29.

62. NCAA v. Board of Regents of the Univ. of Okla., 468 U.S. 85, 104 (1984).

63. *See* Arthur, *supra* note 41, at 361.

64. *See* NCAA, 468 U.S. at 117-20.

65. United States v. Topco Assocs., Inc., 405 U.S. 596 (1982).

found that the allocation of markets, although necessary to the success of the venture, was a naked restraint constituting a per se antitrust violation.[67] Although market power is generally an essential consideration of a court under the rule of reason analysis, the *Topco* Court ignored this area of inquiry when making its determination.[68] On the other hand, in *Broadcast Music*, the Court upheld certain restrictions as procompetitive ancillary restraints although the two companies involved dominated the market.[69]

The growing popularity of joint ventures, in the face of this inconsistent judicial treatment, suggests a strong need for legislative action. Private suits and potential punitive damages further discourage production activity. These concerns were raised in Congressional hearings on H.R. 5041 by Joseph Crieghton, General Counsel and Vice President of Harris Corp.:

> Management continually asks me why we lawyers cannot provide a clear answer. They point out that they must make decisions. . . . [A]lthough there are 9 chances out of 10 of winning a law suit, if the one chance occurs and the law suit is lost, the disastrous effect upon the company will be exactly the same as if the odds had been reversed.[70]

2. *The Treble Damage Threat.* A second major disincentive to the growth of production joint ventures in the United States is the availability of treble damage awards to plaintiffs in civil suits. Many economists and politicians have suggested reasons to eliminate treble damage remedies.[71]

> [E]ven with a rational and sympathetic government policy, the fear of a private antitrust suit seeking treble damages, as well as attorneys' fees, is surely enough to inhibit any worthwhile ventures. The U.S. economy can ill afford the burden of such fear. Congress should consider amending the antitrust laws to eliminate antitrust uncertainty with respect to joint production ventures.[72]

There are, however, important reasons for permitting such recovery. Treble damages are meant to encourage the private enforcement of the

66. Broadcast Music v. Columbia Broadcasting System, 441 U.S. 1 (1979) (ASCAP & BMI issued blanket licenses to copyrighted musical compositions at negotiated fees).

67. *Topco Assocs.*, 405 U.S. at 608. The Supreme Court invoked the per se rule against a group of small grocers who had formed a joint venture to promote a commonly launched brand. Although the venture had a very small share of the relevant market, it designated an exclusive territory to each participant and thus constituted a naked restraint. *Id.*

68. *See Topco Assocs.*, 405 U.S. at 607-08.

69. *Broadcast Music*, 441 U.S. at 7.

70. *The National Productivity and Innovation Acts and Related Legislation: Hearings Before the Senate Committee on the Judiciary*, 98th Cong., 2nd Sess. 320 (1984).

71. J. Thomas Rosch, Introductory Remarks, *in A Reassessment of Antitrust Remedies*, 55 ANTITRUST L.J. 53, 54-56 (1986).

72. Thornburgh, *supra* note 12, at A10.

Sherman Act by providing an incentive to sue and the means to do so.[73] The question that deserves consideration is whether strict and widespread scrutiny of joint ventures is desirable in light of the tremendous growth potential that such arrangements offer. Without the incentive to sue afforded by treble damages, the number of meritless suits would be reduced. Additionally, challenges would be brought mainly by the Department of Justice (DOJ) and the Federal Trade Commission (FTC),[74] thereby enabling them to play a more direct and substantial role in the development of the law; uncertainty in the area of joint ventures would be reduced.

C. New Legislative Directions

Realizing the need for clarification and change, Congress amended the antitrust laws applicable to collaborative conduct in the key areas of research and development and product exportation.[75] This legislation has laid the foundation for several bills, recently introduced by Congress, which would facilitate the development of production joint ventures.[76] It is a distinct possibility that, with the enactment of the research and development and product export legislation, the proposed legislation for production joint ventures also will be passed.[77] Thus, an understanding of the principles of the research and development and production export legislation is critical to an understanding of the potential direction that production joint venture legislation might take.

1. *The Export Trading Company Act of 1982 (ETCA).* The ETCA[78] was enacted in response to complaints that exports of the United States were hampered by domestic antitrust laws. The ETCA establishes a system of certification for exporting associations (including those associations not solely involved in export). Certificates are issued jointly by the Department of Commerce and the DOJ to those applicants who meet certain standards.[79] This eliminates the threat of litigation, both govern-

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73. Rosch, *supra* note 71, at 54.

74. *Id.* at 56.

75. *See infra* part II.C.

76. Lindsay, *supra* note 5, at 1160, (citing Andrew Pollack, *The Setback for Advanced TV: Mosbacher, in Shift, Wants Wider Policy*, N.Y. TIMES, Sept. 30, 1980, at Y1).

77. *See infra* part II.C.3.

78. 15 U.S.C §§ 4001-4003, 4011-4021, 4051-4053 (1988 & Supp. 1991).

79. 15 U.S.C. § 4013 (1988 & Supp. 1991). The Act provides, in part:

> A certificate of review shall be issued to any applicant that establishes that its specified export trade, export trade activities, and methods of operation will -
> (1) result in neither a substantial lessening of competition or restraint of trade within the United States nor a substantial restraint of the exportation of any competitor of the applicant,
> (2) not unreasonably enhance, stabilize, or depress prices within the United States of the goods, wares, merchandise, or services of the class exported by the applicant,

mental and private, arising from participation in certain specified activities.[80]

2. *National Cooperative Research Act of 1984 (NCRA).* The NCRA[81] was enacted in order to promote research and development through joint ventures. The NCRA declares that joint research and development ventures are not per se illegal, and instructs courts that this type of joint venture should be considered under a reasonableness test, which takes into account all relevant factors affecting competition.[82] Under the NCRA, both the DOJ and the FTC are notified of the details of the joint venture.[83] After notification, the joint ventures are still subject to antitrust liability, but treble damages will not be awarded against defendants who have registered under the Act.[84]

3. *Prospects for Future Legislation.* There is a great deal of proposed joint venture legislation before Congress.[85] The most sweeping bill is H.R. 1604: The National Cooperative Production Amendments of 1991.[86] This bill proposes a NCRA type of notification for joint ventures, an elimination of treble damages, and a recovery of attorneys' fees from frivolous plaintiffs. Furthermore, it precludes the use of per se liability for research and development joint ventures. It judges the legality of such collaborative efforts "on the basis of reasonableness, taking into account all relevant factors affecting competition."[87]

> (3) not constitute unfair methods of competition against competitors engaged in the export of goods . . . exported by the applicant, and
> (4) not include any act that may reasonably be expected to result in the sale for consumption or resale within the United States of the goods . . . exported by the applicant.

Id. at § 4013(a).

80. Private parties may still sue if the standards are violated, litigation costs incurred may be awarded to a successful defendant, and damages are restricted to actual harm incurred. *See* H.R. REP. No. 516, 101st Cong., 2d Sess. 3 (1990).

81. 15 U.S.C. §§ 4301-4305 (1988 & Supp. 1991). *See also* Christopher O.B. Wright, *The National Cooperative Research Act of 1984: A New Antitrust Regime for Joint Research and Development Ventures*, 1 HIGH TECH. L.J. 135 (1986).

82. 15 U.S.C. § 4302 (1988 & Supp. 1991).

83. 15 U.S.C. §§ 4301-4305 (1988 & Supp. 1991). In addition, it should be noted that notification under the NCRA is different from certification under the ETCA.

84. 15 U.S.C. § 4303(a) (1988 & Supp. 1991).

The FTC and the Department of Justice "screen" rather than "adjudicate" the legality of ventures. Thus the protection provided by private suits is not eliminated, as applicants are under certification, and potentially illegal ventures may still be stopped despite agency inaction.

85. *See* Lindsay, *supra* note 5, at 1188-98.

86. H.R. 1604, 102d Cong., 1st Sess. (1991).

87. H.R. REP. No. 516, 101st Cong., 2d Sess. 17 (1990) (discussing H.R. 4611, 101st Cong., 2d Sess. (1990), which is virtually identical in language to H.R. 1604).

D. A Case Study: The GM-Toyota Joint Venture

The FTC's assessment of the GM-Toyota joint venture[88] illustrates a significant agency approach to production joint ventures. Toyota and GM, respectively the first and third largest automobile manufacturers in the world, collaborated to produce a specific subcompact car not previously produced in the United States.[89] This arrangement was not treated as an outright merger by the FTC because the agreement called for only a partial integration of the resources of the two firms.[90]

Therefore, the FTC considered the arrangement to be a joint venture, after weighing the venture's procompetitive benefits against its anticompetitive burdens. The FTC concluded that prices would decrease with increased competition in the market for subcompact cars.[91] The GM-Toyota pricing formula was left intact since it had one considerable advantage — it decreased the need for the partners to agree on a price for the joint venture vehicles each year, reducing the need to exchange competitively sensitive information.[92] Moreover, prices were to be fixed through negotiations between the joint venture and GM.[93] Since the cars would be sold to GM for distribution through its own dealers, Toyota had no direct role to play in price determination.

Toyota's recent decision to set up a plant in the United States eliminated any concern that the venture would deter either Toyota or GM from entering the market alone. Concerned that unlimited production by the joint venture would discourage GM from innovating their own fuel efficient automobile, the FTC limited annual production to 250,000 vehicles.[94] The consent order of the Commission severely restricted the kinds of information the companies could share, thus diminishing the threat of anticompetitive conduct.[95] The parent companies were not prevented from competing in the subcompact market against each other as well as against the joint venture.[96]

The venture was approved for a limited period of twelve years.[97] The procompetitive benefits were found to outweigh the anticompetitive con-

88. General Motors Corp., 103 F.T.C. 374 (1984).

89. *Another Turn of the Wheel; Coming Together*, THE ECONOMIST, Mar. 2, 1985, at 6.

90. *General Motors*, 103 F.T.C. at 386.

91. *Id.* at 386-87.

92. *Id.* at 387.

93. *Id.* at 386.

94. *Id.* at 383.

95. *See id.* at 384.

96. *Id.* at 386.

97. *Id.* at 384. *But see id.* at 388-97 (two of the five commissioners dissenting).

cerns in light of the restraints.[98] In addition, the joint venture would allow GM to produce the car at a lower cost than if it were to rely on other production sources. An important consideration was that the venture would provide GM and the automobile industry in the United States an opportunity to learn firsthand from the Japanese system of manufacturing and management.[99]

E. Conclusions

More production joint ventures are likely in the future despite the fact that the proposed legislation does not substantially restructure the current law.[100] The enhanced role played by the federal agencies has instilled a degree of certainty in the rule of reason analysis. Federal agencies have adopted standards for prosecution of cooperative ventures and mergers in addition to employing a system of "business review letters."[101] Progressive administrative policies will also encourage joint ventures. For example, on March 14, 1991, the DOJ authorized a joint venture between the Recording Industry Association of America, Inc. (RIAA) and Bolt, Beranek and Newman Systems and Technologies Corp. (BNN).[102] These companies intend to develop new technology to control the unauthorized duplication of copyrighted work from analog sources (e.g., phonograph records and prerecorded cassettes) using digital audio tape recorders.[103] The Department concluded that it had "no present intention to challenge RIAA's proposed joint venture with BBN."[104]

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98. *See id.* at 386-87 (finding that the venture would increase the total number of cars available and allow consumers greater choice).

99. Walter W. Winslow, *Joint Ventures — Antitrust Problems and Opportunities*, 54 ANTITRUST L.J. 979, 983 (1985).

100. *See supra* part II.C.

101. These letters are issued by the Department of Justice and indicate the stance that will be taken by the agency. Although they are not binding, they are important in reassuring the confidence of applicants and reduce the risk involved in a proposed venture.

102. Recording Industry Assoc. of America, DOJ Response Letter (Mar. 14, 1991), *available in* WESTLAW, FATR-BRL Database.

103. *Id.*

104. *Id.* The letter mentions the following considerations:

> The joint venture offers the possibility of benefits and efficiencies in undertaking expensive and risky new product development without any significant diminution of competition in either the market in which the venture proposes to operate or in other markets where RIAA members compete or might compete.
>
> . . . [T]he joint venture does not prohibit RIAA members from using or developing competing technologies or otherwise restrict R&D competition among RIAA members. Nor does the joint venture foreclose access of RIAA members or other firms to existing related technology or impose any other collateral restraints.
>
> . . . [T]he joint venture does not increase the opportunity for collusion in these markets or otherwise affect the incentives of RIAA members or any other firms to compete.

Id.

III. DEVELOPMENT OF PRODUCTION JOINT VENTURES IN THE EUROPEAN COMMUNITY

Joint ventures are far more prevalent in Europe than in the United States.[105] This is the direct result of clearer legal standards and a more favorable attitude toward joint ventures. Indeed, the European Commission (Commission) considers the creation of a joint venture[106] to be "an appropriate response to three related problems: economic recession, the fragmentation of European industry, and foreign competition."[107] This section briefly highlights the position of joint ventures in the EC and analyzes the different treatment of production joint ventures under United States and EC competition laws.

The principles of competition law in the EC were incorporated into the Community's constitution, the EEC Treaty.[108] Although influenced heavily by United States antitrust law and theory,[109] the language and structure of the Treaty's competition provisions reflect different policy goals. The primary goal of EC competition policy is that of the EEC Treaty itself — the creation of a European common market. Thus, the main focus of the competition provisions is on eliminating private practices that interfere with market integration.[110]

Furthermore, EC competition jurisprudence stresses certain sociopolitical values such as fairness.[111] In contrast, antitrust law in the United States is concerned primarily with the antimonopolistic economic theory

105. Joint ventures in the European Community have increased dramatically; the number grew from 82 new joint ventures in 1984 to 156 in 1990. During that time period a total of 649 joint ventures were established in the European Community. COMMISSION OF THE EUROPEAN COMMUNITIES, EIGHTEENTH REPORT ON COMPETITION POLICY 240 (1989); COMMISSION OF THE EUROPEAN COMMUNITIES, TWENTIETH REPORT ON COMPETITION POLICY 231 (1990).

In comparison, the United States has had fewer joint ventures. Even where the United States government has begun to encourage joint ventures, its numbers still fall short of those in the EC. Under the NCRA's notification system, only 130 research and development joint ventures were registered between 1984 and 1990. This relatively low number represented an increase over the previous few years. Joel B. Eisen, *Antitrust Reform for Joint Production Ventures*, 30 JURIMETRICS J. OF L., SCI. & TECH. 253, 256 (1990).

106. The working definition of joint ventures in the EC is similar to that used in the U.S. *See* Jonathan Faull, *Joint Ventures Under the EEC Competition Rules*, 5 EUR. COMPETITION L. REV. 358, 358 (1984).

107. *Id.* at 359.

108. TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY] arts. 85-86. The EEC Treaty, also known as the Treaty of Rome, came into force on January 1, 1958.

109. Barry E. Hawk, *The American (Anti-Trust) Revolution: Lessons for the EEC?*, 9 EUR. COMPETITION L. REV. 53 (1988).

110. *Id.* at 54-56.

111. *Id.* at 56-62.

that underlies the Sherman Act.[112] Since the Sherman Act was intended to combat the power of the trusts, United States law in this area historically has been anticollaborative.[113] As a result, the policy of the EC is more conducive to the establishment of production joint ventures than the policy of the United States.

The institutional structure of the EC also has contributed to the differences between competition laws. While antitrust enforcement in the United States is administered by two federal agencies and many private plaintiffs, the EC vests most of its enforcement power in one body — the Commission.[114] Council Regulation 17/62 gives direct effect to the competition principles contained in the EEC Treaty and grants the Commission sweeping regulatory powers.[115] The Regulation permits the Commission to unilaterally declare the existence of a violation, assess fines, and impose penalties.[116] Although the European Court of Justice (ECJ) has the power to review the Commission's decisions,[117] it is removed from direct involvement in the regulatory process.[118]

The concentration of regulatory authority in the Commission limits the involvement of member states in antitrust enforcement. Although member states adopt European legislation, national courts are restricted in their interpretation of Community law.[119] In an effort to ensure the uniform interpretation of Community law, Article 177 of the EEC Treaty empowers the ECJ to review any issues of Community law which arise in national courts.[120] In fact, when a dispute reaches the highest appellate court of a member state, any question pertaining to Community law must be referred to the ECJ.[121]

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112. "[T]he economics component of competition policy in the two systems now differs considerably given the ascendancy of the Chicago school and the general shift in prevailing economic theories in the United States." *Id.* at 56.

113. *See supra* text accompanying notes 12-13.

114. The EEC Treaty establishes the Commission as the basic executive body responsible for ensuring that the provisions of the EEC Treaty are applied and exercising powers for the implementation of subordinate legislation which the Council of Ministers prescribes. EEC TREATY art. 155.

115. Council Regulation 17/62 of 6 February 1962, First Regulation Implementing Articles 85 and 86 of the Treaty, 1959-1962 O.J. SPEC. ED. 87 [hereinafter Regulation 17/62] came into force on March 13, 1962.

116. *Id.* arts. 10(3), 15, 16.

117. EEC TREATY art. 173.

118. It is interesting to note that, although the Department of Justice has prosecutorial discretion in the U.S., the decision whether a violation has occurred is vested solely with the courts. *See supra* text accompanying notes 33-37.

119. *See* EEC TREATY art. 177.

120. *Id.*

121. *Id.* Under the provisions of Article 9(1) of Regulation 17/62, only the Commission is given the power to grant an exemption under Article 85(3). National courts can only rule upon Article 85(1), and any subsequent exemption must be obtained from the Commission. Regulation 17/62, *supra* note 115, art. 9(1). But see *infra* part III.B.3., for a discussion of the EC rule of reason.

Enforcement in the EC is further centralized because the legal environment inhibits the incentive for private entities to sue. While member states and natural or legal persons may file complaints directly with the Commission, these are usually disposed of through informal negotiation and recommendation procedures.[122] Additionally, since a great deal of power is concentrated in the Commission, private individuals confront many structural impediments when they pursue litigation.[123] Private Attorneys General are further discouraged because EC legislation does not allow for treble damages or contingency fees.

A. EC Decision Making and Enforcement

The capacity to enforce competition law comes through the enabling legislation and not directly from the EEC Treaty. Although Articles 85 and 86 of the EEC Treaty contain the substantive basis for the Community's competition law, they do not contain any provisions for its enforcement. Consequently, implementing legislation was necessary to effectuate the relatively abstract principles of competition law.[124] Several years after the EEC Treaty came into force, Regulation 17/62 was passed to establish more detailed rules and to provide a procedural machinery to enforce Articles 85 and 86.[125]

As discussed earlier, Regulation 17/62 vests the regulation and enforcement of EC competition policy almost exclusively with the Commission, the executive body for the EC which is responsible for carrying out and enforcing the provisions of the EEC Treaty.[126] Included among the powers granted to the Commission is the ability to approve exemptions under Article 85(3).[127] Given the broad scope of the prohibitions of Article 85(1), a large percentage of business undertakings must seek an exemption. The Commission's work load would increase enormously if it continually had to monitor all the business activities taking place in the Community.[128] To alleviate the policing burden placed on the Commission, Regulation 17/62 encourages self-reporting by setting up a notification system similar to that contained in the NCRA.[129] Upon reviewing

122. Regulation 17/62, *supra* note 115, art. 3.

123. To make an effective application to the Commission, a natural or legal person must claim a legitimate interest in the subject matter of the complaint. *Id.*

124. Provided that the Council adopts appropriate regulations and directives to give effect to the principles set out in the Articles 85 and 86. EEC TREATY art. 87(1).

125. *See* Regulation 17/62, *supra* note 115.

126. EEC TREATY art. 155. *See also supra* notes 114-18 and accompanying text.

127. *See* discussion *infra* part III.B.2.

128. This has given birth to the "European" version of the rule of reason. *See infra* part III.B.3.

129. Regulation 17/62, *supra* note 115, arts. 4-5. While notification is voluntary, an agreement cannot qualify for an exemption under Article 85(3) if the Commission has not been notified of its existence. *Id.* art. 4(1). Once the Commission is notified of an agreement, any activity under its

the competitive effects of an undertaking, the Commission may reach one of three decisions. First, if it determines that the agreement falls outside the jurisdictional reach of Articles 85(1) and 86, it may certify that there are no grounds for action by granting a negative clearance.[130] Second, if it determines that the agreement satisfies the four criteria in Article 85(3), it may grant an exemption.[131] Third, it can find that an infringement of the Treaty provisions has occurred and levy a fine against the concerned parties.[132]

However, the sheer size and scope of the jurisdiction created by the EEC Treaty coupled with the magnitude of exemption applications did not abate the workload of the Commission. The concentration of power in the Commission, its limited resources, and the complexity of the analysis continued to result in numerous long delays.[133] Two developments have eased this burden: the EC rule of reason analysis and the block exemption.[134]

B. Joint Ventures Under EC Competition Law

The definition of joint ventures in the EC is similar to that used in the United States.[135] However, the application of competition law in the EC generally is more predictable than in the United States. The substantive principles of competition law are contained in Articles 85 and 86 of the EEC Treaty. Article 85 states that agreements which affect trade between member states and restrict competition are unlawful. Article 86

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auspices will not be subject to fines for infringements of Articles 85 and 86 of the Treaty. *Id.* art. 15(5). Subsequently, if the Commission does grant an exemption, it will be retroactive to the date when the Commission was first notified. *Id.* art. 6(1). See *supra* part II.C.2., for a discussion of the NCRA.

130. Regulation 17/62, *supra* note 115, art. 2. *See* Commission Decision 90/410 of 13 July 1990 on Elopak/Metal Box, 1990 O.J. (L 209) 15.

131. Regulation 17/62, *supra* note 115, arts. 6, 8. Note that the Commission may issue comfort letters instead of a formal exemption or negative clearance, by intimating to the applicant that it is closing the file as it sees no need to take action under the competition laws. *See* BELLAMY & CHILD, *supra* note 26, § 11-005. The effect of this is:

> 1) The agreement remains notified so the protection from fines continues under Art. 15(5) of Reg. 17.
> 2) In contrast to a formal decision of exemption under Art. 85(3), national courts are not precluded from applying Art. 85(1) to the agreement, but may take account of such a letter or stay the proceedings pending a formal decision from the Commission.
> 3) The Commission is bound by the position taken in the comfort letter, unless there has been a material change of circumstances.

Case 31/80, L'Oreal v. De Nieuwe AMK, 1980 E.C.R. 3775, 3803, 2 C.M.L.R. 235, 246 (1981) (Advocate General Reischl).

132. Regulation 17/62, *supra* note 115, arts. 15-16.

133. D.G. GOYDER, EEC COMPETITION LAW 58 (1990).

134. *See infra* parts III.B.3.-B.4.

135. *See, e.g.*, Faull, *supra* note 106.

forbids "[a]ny abuse by one or more undertakings of a dominant position. . . ."[136] The same conduct can violate both of these provisions.[137]

1. *Article 85(1).* Article 85 is the main provision concerning collaborative activity within the EC. Paragraph (1) prohibits "all agreements . . . which have as their object or effect the prevention, restriction or distortion of competition within the common market. . . ."[138] The interpretation of this provision is very broad. In fact, the Commission often finds that a relatively slight limitation on the freedom of the parties amounts to a restriction on competition.[139]

A joint venture may be found to restrict competition under Article 85(1) where the participants are actual or potential competitors.[140] Joint ventures between actual competitors are likely to infringe upon Article 85(1), because competition between the venture partners clearly is affected. Even those joint ventures formed purely for research and development fall within the prohibition of paragraph (1) because they effectively eliminate the possibility of one firm gaining a competitive advantage over the other.[141]

Conversely, joint ventures formed by potential competitors do not overtly violate Article 85(1), since no existing competition between the partners is impaired. Previously, the Commission interpreted the notion of potential competition very broadly. If each collaborator had the potential to produce a certain product, the joint venture was considered to be prohibited by Article 85(1).[142] The Commission, however, changed its

136. EEC TREATY art. 86. This concept is similar to that of monopolization in the United States.

137. *See* Case 85/76, Hoffman-La Roche v. Commission, 1979 E.C.R. 461, 3 C.M.L.R. 211 (1979) (ruling that a company in a dominant position abuses that position when it enters into a restrictive tying agreement with its purchasers).

138. EEC TREATY art. 85(1). Article 85(2) declares all agreements which violate Article 85(1) "automatically void." *Id.* art. 85(2).

139. *See, e.g.*, Cases 56/64 & 58/64, Establissments Consten S.A. and Grundig-Verkaufs-GmbH. v. Commission, 1966 E.C.R. 429, 5 C.M.L.R. 418 (1966).

According to Article 155 of the Treaty, the Commission has the authority to decide upon the application of the law, subject to the review of the European Court of Justice under Article 173. EEC TREATY art. 155. In reviewing the application of Article 85(1), the ECJ has similarly applied a very broad test, maximizing the jurisdiction of the Commission to review undertakings. *See* Case 56/65, La Technique Miniere v. Maschinenbau Ulm G.m.b.H., 1966 E.C.R. 234, 5 C.M.L.R. 357 (1966).

140. Even if the participants are not actual or potential competitors, the agreement may still be prohibited by Article 85(1) if the joint venture will likely affect nonparty competitors within the market. IVO VAN BAEL & JEAN-FRANÇOIS BELLIS, COMPETITION LAW OF THE EEC 184-87 (1987).

141. This is where innovation is particularly critical to a firm's competitive ability. *See, e.g.*, Commission Decision 72/41 of 23 December 1971 on Henkel/Colgate Agreement, 1972 J.O. (L 14) 14, 16; Commission Decision 79/298 of 17 January 1979 on the Agreement Between Beecham Group Limited and Parke, Davis and Company, 1979 O.J. (L 70) 11, 17 (although in both cases the agreements fell within Article 85(1), Article 85(3) exemptions were granted).

142. Commission Decision 77/160 of 20 January 1977 on Vacuum Interrupters Ltd., 1977 O.J. (L 48) 32 [hereinafter Commission Decision 77/160].

policy in its *Thirteenth Report on Competition Policy.*[143] To determine whether potential competition is likely to be impaired, the Report states that a realistic approach must be taken and lists four relevant categories of inquiry:

> *Input*: Does the investment involved substantially exceed each partner's individual financing capacity? Does each partner have the necessary know-how and input access?
>
> *Production*: Is each partner familiar with the process technology? Does each partner produce inputs for or products derived from the joint venture's production and does each partner have access to the necessary production facilities?
>
> *Sales*: Is there sufficient actual or potential demand to make it feasible for each partner to manufacture alone? Does each partner have access to the necessary distribution facilities?
>
> *Risk*: Could each partner bear alone the technical and financial risks associated with the joint venture's production operations?[144]

A guiding principle in this analysis is whether the partners have the capacity to compete independently in the prevailing commercial, financial, and economic conditions. Market structure, barriers to entry, credit availability, and terms of the partnership agreement are all relevant to this analysis.[145]

A variation on the concept of potential competition is the network effect.[146] In *Optical Fibres*,[147] the Commission found that different joint venture agreements in different member states were prohibited by Article 85(1). Because Corning was an active participant in each venture, the Commission reasoned that the otherwise independent collaborations were in fact related.

> Corning's active participation in the joint ventures cannot be compared with a straightforward financial investment in or licensing of several independent third parties. Firstly, the joint ventures depend fully on Corning's technology and its implementation by a technical manager appointed by Corning. Secondly, the fact that Corning is a partner in each joint venture creates a network of closely inter-related companies which are otherwise competitors. Given this network of inter-related and the technological dependence of the joint ventures on a common partner, they cannot be expected to compete with each other to the same extent as if they were unrelated competitors relying on different partners and different technologies.[148]

143. COMMISSION OF THE EUROPEAN COMMUNITIES, THIRTEENTH REPORT ON COMPETITION POLICY (1984).

144. *Id.* at 51.

145. Faull, *supra* note 106, at 361.

146. VAN BAEL & BELLIS, *supra* note 140, at 186.

147. Commission Decision 86/405 of 14 July 1986 on Optical Fibres, 1986 O.J. (L 236) 30.

148. *Id.* at 37.

In addition to its analysis of the nature of the relationship between joint venture partners, the Commission will examine the effect of joint ventures on third parties. Whether third parties are adversely affected will be a question of fact in each case. Factors that the Commission will consider include: alterations in the structure of the market making it more difficult for third parties to compete;[149] cooperation between the joint venture partners that may reduce their willingness to cooperate with third parties in the same field;[150] an actual or potential reduction in the number of suppliers;[151] and other factors that may deter the partners from buying from third parties.[152]

2. *Article 85(3).* Paragraph (1) of Article 85 essentially is a clause establishing jurisdictional reach. By prohibiting a broad range of business undertakings, paragraph (1) maximizes the authority of the Commission to regulate competition in the member states. Paragraph (3) of Article 85 provides an exception to paragraph (1) by declaring it inapplicable in certain cases.[153] Paragraph (3) sets out four separate criteria that must be met before an exemption from a paragraph (1) prohibition can be granted. Each deserves an independent analysis.

a. Does the agreement contribute to "improving the production or distribution of goods or to promoting technical or economic progress . . ."?[154] The parties must show that the agreement does indeed yield progress or improvements which will counter any restrictions on competition.[155] Moreover, the improvement or progress must not merely benefit the parties themselves, but must have the potential of benefitting third parties.[156] The interpretation given to these concepts is usually broad and "responsive to many different types of economic progress and technical advance."[157] The decision in *GEC/Weir* exemplifies this type of inquiry.[158] In this case, GEC/Weir formed a network of contractual arrangements for the joint production, development, and sale of sodium circulators. The parent companies were each allocated primary responsibility for cer-

149. *E.g.*, Commission Decision 77/160, supra note 142.

150. Commission Decision 77/781 of 23 November 1977 on GEC-Weir Sodium Circulators, 1977 O.J. (L 327) 26 [hereinafter Commission Decision 77/781].

151. *Id.*

152. Commission Decision 78/921 of 20 October 1978 on WANO Schwarzpulver, 1978 O.J. (L 322) 26.

153. *See* Commission Decision 90/46 of 12 January 1990 on Alcatel Espace/Ant Nachrichtentechnik, 1990 O.J. (L 32) 19; Commission Decision of 6 May 1991 on Du Pont/Merck (not yet published).

154. EEC TREATY art. 85(3).

155. GOYDER, *supra* note 133, at 118.

156. *Id.* at 120.

157. *Id.* at 121.

158. Commission Decision 77/781, *supra* note 150.

tain defined areas. Despite the many restrictions on competition in the agreement, an exemption under Article 85(3) was granted.[159] The Commission found that the parties possessed complementary skills that would facilitate the development of the product and diminish associated risks.[160] Furthermore, since neither party was capable of developing the new product alone, the threat to competition was minimal.[161] Both parent companies would acquire expertise in the field, thus enabling them to compete independently following the termination of the venture. Weir, in particular, would be a stronger competitive force in the industry.[162]

b. Does the venture allow "consumers a fair share of the resulting benefit . . ."? [163] The term consumers is interpreted to include a broad category of people and is not limited to the final purchaser or retailer. This interpretation stems from the use of the expression *utilisateurs* in the French text of the EEC Treaty.[164] In keeping with the liberal attitude of the Commission, benefits include a variety of economic advantages and are not restricted to reductions in price. The ease with which the Commission is convinced about benefits trickling down to the *utilisateurs* has led to the criticism that the analysis does not receive the thoroughness it warrants.[165]

c. Does the agreement "impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives . . ."? [166] This is similar to the less restrictive alternative concept under the rule of reason analysis in the United States.[167] The participants must show that the restrictions imposed by the agreement are tailored strictly to the valid purposes of the agreement. A well-known case failing this inquiry is *Consten Grundig*.[168] The exclusive dealership agreement that entitled Consten to distribute Grundig products in France met the first two conditions above.[169] The trademark however, was misused to exclude parallel imports. The ECJ found that excluding parallel imports was not necessary

159. *Id.* at 36.

160. *Id.* at 33.

161. *Id.*

162. *Id.*

163. EEC TREATY art. 85(3).

164. *See, e.g.*, Commission Decision 68/319 of 17 July 1968 on ACEC/Berliet, 1968 J.O. (L 201) 7, 9 [hereinafter Commission Decision 68/319] (upholding an agreement concerning the development and marketing of buses equipped with an electrical transmission system which would eventually benefit operators of bus companies).

165. See GOYDER, *supra* note 133, at 121.

166. EEC TREATY art. 85(3)(a).

167. *See supra* notes 60-61 and accompanying text.

168. Cases 56/64 & 58/64, Etablissements Consten S.A. and Grundig-Verkaufs-GmbH v. Commission, 1966 E.C.R. 299, 5 C.M.L.R. 418 (1966).

169. *Id.* at 348-350, 5 C.M.L.R. at 477-80.

for the performance of the agreement and the agreement was struck down.[170]

d. Does the agreement "afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question"?[171] This sets a limit beyond which considerations of general economic policy cannot be allowed to prevail over the maintenance of effective competition in the common market. Nonetheless, "[e]xperience suggests . . . that an agreement that clearly satisfies the other criteria in Article 85(3) is unlikely to fail under this one."[172]

In spite of the obvious similarities between the two analyses, there is a fundamental distinction. Courts and agencies in the United States are empowered to balance all the pro and anticompetitive aspects of the arrangement, and they have extensive flexibility with regard to the factors they may take into account.[173] On the other hand, the Commission is restricted to inquiring into whether the joint venture satisfies all of the criteria of Article 85(3).[174] This is in stark contrast to the overall balancing test under the rule of reason analysis in the United States.

3. *The European Rule of Reason.* The phraseology of Article 85(1) supports the creation of a rule of reason in EC competition law. This Article prohibits all "agreements . . . that affect trade between Member States and have as their object . . . the prevention, restriction or distortion of competition within the common market. . . ."[175] Given the collaborative nature of joint ventures it is possible that all joint ventures will need to seek exemptions provided by Article 85(3). This, however, has not been the case, as the ECJ has developed its own concept of the rule of reason to define the scope of the term distortion.[176] In so doing the ECJ has both qualified and narrowed the jurisprudential construction of this term. The ECJ has held that joint venture agreements do not fall within Article 85(1) if their restrictions on competition are genuinely necessary to the successful functioning of the venture.[177] Under the European anal-

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170. *Id.* at 346, 5 C.M.L.R. at 476.

171. EEC TREATY art. 85(3)(b).

172. *See* DERRICK WYATT & ALAN DASHWOOD, THE SUBSTANTIVE LAW OF THE EEC 387 (1987).

173. *See supra* part II.B.1.

174. GOYDER, *supra* note 133, at 116-17.

175. EEC TREATY art. 85(1).

176. *See* Ernst Steindorff, *Article 85 and the Rule of Reason*, 21 COMMON MKT. L. REV. 639 (1984).

177. *See, e.g.*, Case 16/84, Pronuptia de Paris G.m.b.H. v. Pronuptia de Paris Irmgard Schillgallis, 1986 E.C.R. 353, 1 C.M.L.R. 414 (1986) (finding that while a franchising arrangement which imposed restrictions on the conduct of the franchisees did not, in and of itself, violate Article 85 (1), the specific agreement in question did violate Article 85 (1) as a result of an exclusive territory clause coupled with the obligation to sell from only the franchised outlet). An ancillary restraint is the U.S. equivalent to this concept.

ysis, a joint venture is compatible with Article 85(1) when its selective distribution system is based on qualitative nondiscriminatory criteria.[178]

The ECJ is most willing to construe a restraint as genuinely necessary when the restraint encourages innovation. In *L.C. Nungesser KG & Kurt Eisele v. Commission*,[179] the French national agricultural institute granted an exclusive maize seed patent to a dealer in Germany. After complaints were filed by the dealer's competitors, the Commission initiated proceedings against the defendants, alleging their agreement to be an illegal restraint of trade. The ECJ held that the restraint did not fall within Article 85(1).[180] The Court distinguished between an open exclusive general license, where the licensor refrains from licensing anyone else in that same territory, and a protected exclusive license, where the parties propose to eliminate all competition from licensees in other territories. The former encouraged technical innovation and was held to be lawful; however, the latter was found to be per se unlawful.[181]

The European rule of reason is a narrow inquiry developed mainly to relieve the excessive burden imposed on the ECJ and the Commission. It enables national courts to play a role in antitrust enforcement by concluding that a particular agreement does not fall within Article 85(1). Although national courts still have no power to grant an exemption under Article 85(3), their ability to use the rule of reason often eliminates the need for a joint venture agreement to seek an exemption under 85(3).[182]

4. *Block Exemptions*. To expedite the applications for Article 85(3) exemptions, the Commission has issued several regulations granting block exemptions to certain types of agreements that the Commission finds desirable.[183] Block exemptions are issued for categories ranging from exclusive distribution agreements[184] to franchise agreements.[185] Generally, the

178. *See* Case 26/76, Metro v. Commission, 1977 E.C.R. 1875, 1905, 2 C.M.L.R. 1, 36 (1978).

179. Case 258/78, L.C. Nungesser KG & Kurt Eisele v. Commission, 1982 E.C.R. 2015, 1 C.M.L.R. 278 (1983).

180. *Id.* at 2070, 1 C.M.L.R. at 354.

181. *Id.* at 2068-69, 1 C.M.L.R. at 352-53. The ECJ held "the grant of an open exclusive license, that is to say that a license which does not affect the position of third parties such as parallel importers and licensees from other territories, is not in itself incompatible with Art. 85(1) of the Treaty." *Id.* at 2069, 1 C.M.L.R. at 353.

182. GOYDER, *supra* note 133, at 348.

183. Power to enact these regulations is vested in the Commission by Council Regulation 19/65 of 2 March 1965 on Certain Categories of Agreements and Concerted Practices, 1965-1966 O.J. SPEC. ED. 35; Council Regulation 2821/71 of 20 December 1971 on Categories of Agreements, Decisions, and Concerted Practices, 1971 III O.J. SPEC. ED. 1032.

184. Commission Regulation 1983/83 of 22 June 1983 on Categories of Exclusive Distribution Agreements, 1983 O.J. (L 173) 1.

exemptions are of limited duration.[186] The possible block exemptions for production joint ventures are classified in Regulations 417/85 and 418/85;[187] they came into force on March 1, 1985, and are valid until December 31, 1997. The broad policy underlying both regulations is to grant block exemptions to specialization and research and development agreements on terms that are fairly generous. The exemptions, however, are subject to specified thresholds designed to prevent excessive elimination of competition.[188]

Article 1 of Regulation 417/85 provides that the block exemption covers:

> [A]greements on specialization whereby, for the duration of the agreement undertakings accept reciprocal obligations: (a) not to manufacture certain products or have them manufactured, but to leave it to other parties to manufacture the products or have them manufactured; or (b) to manufacture certain products or have them manufactured only jointly.[189]

Article 3(a) of this Regulation restricts its availability to agreements where the combined market share represented by the specialization and other similar products of the participating undertakings does not exceed 20 percent in the Community or a substantial part of it.[190] Article 3(b) restricts the availability of the block exemption to those cases where the aggregate annual turnover of participating companies does not exceed ECU 500 million.[191] Turnover is calculated by reference to total turnover in all goods and services in the preceding financial year, excluding tax and sales between participating undertakings.[192] Further, the Regulation expressly limits the types of restrictions on competition that agreements seeking exemptions can use.[193] The list of permissible restrictions on competition is not exhaustive, so other restrictions that do not offend Article 85(1)

185. Commission Regulation 4087/88 of 30 November 1988 on Categories of Franchise Agreements, 1988 O.J. (L 359) 46.

186. WYATT & DASHWOOD, *supra* note 172, at 387-88.

187. Commission Regulation 417/85 of 19 December 1984 on Categories of Specialization Agreements, 1985 O.J. (L 53) 1 [hereinafter Commission Regulation 417/85]; Commission Regulation 418/85 of 19 December 1984 on Categories of Research and Development Agreements, 1985 O.J. (L 53) 5 [hereinafter Commission Regulation 418/85].

188. WYATT & DASHWOOD, *supra* note 172, at 393.

189. Commission Regulation 417/85, *supra* note 187, art. 1.

190. *Id.* art. 3. What is a "substantial part" is a question of fact in each case, dependent on the geographic area in which the dominant position is alleged to exist and the product market in that area. *See* BELLAMY & CHILD, *supra* note 26, § 8-037.

191. Commission Regulation 417/85, *supra* note 187, art. 3(b). 1 ECU = $1.27 (appx.), WALL ST. J., Jan. 31, 1992, at C17.

192. Commission Regulation 417/85, *supra* note 187, art. 6.

193. *Id.* art. 2.

may be included without prejudicing the availability of a block exemption.[194]

An agreement can be exempted automatically if the Commission does not oppose it within six months after receipt of official notification by the parties.[195] This is so even if the turnover limits laid down in Article 3 are exceeded.[196] The other conditions of the Regulation, however, must be met. This procedure is probably beneficial to parties who form a part of a larger group, but do not have a strong position in the relevant market.[197] Regulation 418/85 applies to agreements for the purposes of:

> (a) joint research and development of products or processes and joint exploitation of the results of that research and development;
> (b) joint exploitation of the results of research and development of products or processes jointly carried out pursuant to a prior agreement between the same undertakings; or
> (c) joint research and development of products or processes excluding joint exploitation of the results, insofar as such agreements fall within the scope of Article 85(1).[198]

Article 3(2) of this Regulation provides that an exemption will not be available to those firms whose combined shares do not exceed twenty percent of the market for such products or a substantial part of it.[199] The Regulation also lists provisions that must be included in the agreement, those that may be included in the agreement, and those that are forbidden.[200] If the agreement complies with Articles 2 and 3 of the regulation, but contains restrictive clauses not covered by Articles 4, 5, and 6, parties may notify the Commission of the agreement, which will be treated as an exempted transaction unless the Commission formally opposes the exemption within six months of notification.[201]

C. The GM-Toyota Case Study in Europe

The attitude of the Commission toward joint ventures is well expressed in their Draft Guidelines:

> [J]oint ventures normally contribute substantially to improving the production and distribution of goods, promote technical and economic progress, serve the interest of consumers and by that contribute to the attainment of the Community's general economic objectives. . . . This is particularly the case where the joint venture by means of rationaliza-

194. *See* Bellamy & Child, *supra* note 26, § 5-061.
195. Commission Regulation 417/85, *supra* note 187, art. 4(1).
196. *Id.*
197. Bellamy & Child, *supra* note 26, § 5-063.
198. Commission Regulation 418/85, *supra* note 187, art. 1 (the Regulation does not apply to agreements concerning joint sales).
199. *Id.* art. 3(2).
200. *Id.* arts. 2, 4-6.
201. *See* Bellamy & Child, *supra* note 26, § 5-027.

tion, introduction of new improved products or processes or the opening up of new markets, serves as an instrument of innovative competition in a structurally competitive market. In general, the Commission will take a favorable view of joint ventures involving major new investment.[202]

Analyzing a United States case under EC law is a helpful way to highlight the differences between the two antitrust systems. The GM-Toyota joint venture is well-suited for such an experiment. The reasons for selecting this case are twofold: it is a decision by a federal agency, making it more suitable for comparison with decisions by the European Commission, and it is a very comprehensive examination of a production joint venture by United States courts.

1. *An Analysis Based on Article 85(3).* Since GM and Toyota are actual competitors, each with large market shares, it is assumed that the GM-Toyota venture would fall within the general prohibitions of Article 85(1).[203] It is also assumed that it would not qualify under Regulations 417/85 and 418/85, since the aggregate turnover of the undertakings would definitely exceed the ECU 500 million limit.[204] Therefore, an analysis under Article 85(3) is required.[205]

a. Does the agreement contribute "to improving the production or distribution of goods or to promoting technical or economic progress . . ."?[206] The Commission "attaches significant weight to the fact that a joint venture may be the means, either immediately or in the long run, of bringing about an improvement in the competitive structure."[207] The Chairman of the FTC specifically acknowledged that the GM-Toyota joint venture would produce such a result. In its consent order, the Chairman recognized that to the extent that "the Japanese system can be successfully adapted to the United States, the venture should lead to the development of a more efficient and competitive U.S. industry."[208]

The Commission will also provide exemptions for joint ventures, even between large companies, where it is satisfied that the venture enables the parties to overcome technical difficulties and financial risks asso-

202. Commission of the European Communities, Principles Governing the Assessment of Joint Ventures Under the Competition Rules, Doc. IV/471/85 — EN 7 [hereinafter Draft Guidelines].

203. *See supra* part III.B.1. See also *supra* part II.D., for the facts of the GM — Toyota joint venture.

204. *See supra* note 191 and accompanying text.

205. The relevant market is assumed to be that for subcompact cars within the European Community.

206. EEC TREATY art. 85(3).

207. BELLAMY & CHILD, *supra* note 26, § 5-076. *See also* Commission Decision 77/781, *supra* note 150.

208. General Motors Corp., 103 F.T.C. 374, 388 (1984).

ciated with the development of advanced technological products.[209] The GM-Toyota venture was established to produce a subcompact vehicle which previously had never been produced in the United States.[210] By pooling complementary technology and resources, the venture partners intended to develop a new product at a lower cost.[211]

The Commission, in *Continental/Michelin*, upheld a similar joint venture formed to develop a new run-flat tire system for passenger cars.[212] This joint venture consisted of an agreement to develop a new model of tire between the first and second largest tire manufacturers in the EC.[213] Patents and expertise were to be exploited jointly through a common entity in which each party would hold an equal interest and licenses would be given to all interested competitors on reasonable terms.[214] In deliberating whether an Article 85(3) exemption would be granted to the Continental/Michelin joint venture, the Commission was not deterred by the large size of the undertaking.[215] The Commission was convinced that Continental would be unable to develop the product in a reasonable period depending solely on its own resources.[216] The Commission thus is not likely to look with disdain upon a joint venture solely because the agreeing parties (GM-Toyota) are the first and third largest producers of automobiles in the world.[217]

b. Does the venture allow "consumers a fair share of the resulting benefit . . ."?[218] It cannot be disputed that the *utilisateurs* would share in the resulting benefit;[219] there would be more subcompact cars available in the market. Additionally, both manufacturers will have learned from their cooperative experience, thus making the market more competitive. It is, thus, unlikely that the Commission will find that the consumers would not get a fair share of the resultant benefit from the GM-Toyota venture, especially considering the finding of the FTC Chairman that the GM-Toyota joint venture would "increase the total number of small cars avail-

209. COMMISSION OF THE EUROPEAN COMMUNITIES, SEVENTH REPORT ON COMPETITION POLICY, point 150 (1978).

210. *General Motors Corp.*, 103 F.T.C. at 376.

211. *See* Andrew Pollack, *Japan Technology Monitored by Worried U.S. Competitors*, N.Y. TIMES, May 7, 1984, at A1.

212. Commission Decision 88/555 of 11 October 1988 on Continental/Michelin, 1988 O.J. (L 305) 33 [hereinafter Commission Decision 88/555].

213. *Id.* at 34.

214. *Id.* at 35.

215. *Id.* at 39 (relying on Commission Decision 72/41 of 23 December 1971 on the Henkel/Colgate Agreement, 1972 O.J. (L 14) 14, stating that joint research is permissible even between parties having large market shares).

216. Commission Decision 88/555, *supra* note 212, at 39.

217. *See supra* note 89 and accompanying text.

218. EEC TREATY art. 85(3).

219. *See supra* note 164 and accompanying text.

able in America, thus allowing consumers a greater choice at lower prices. . . ."[220]

c. *Does the agreement "impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives . . ."?*[221] The inquiry undertaken here is essentially the same as the less restrictive alternative inquiry made by the United States courts.[222] This analysis requires that the individual restrictions be "tailored strictly to the valid purposes of the agreement. . . ."[223] According to the Chairman of the FTC, the purposes of the GM-Toyota venture are threefold: to increase production; to decrease costs; and to exchange technology, know-how, and expertise.[224] The parties attempted to tailor their agreement to achieve these objectives. So that the anticompetitive effect of the arrangement would not "spill over"[225] into the market as a whole, the venture was expressly limited to the production of a specific model of automobile.[226] Furthermore, the parties were to remain free to compete against one another, as well as against the joint venture.[227]

In the *Rockwell/Iveco*[228] production joint venture, the Commission granted an exemption reasoning that the agreement led to the emergence of a new and more efficient competitor, the rationalization of production capacity, and better use of new technology.[229] The two joint venture partners were the largest truck rear drive axle manufacturer in the United States, which had a presence in the EC, and the second largest truck manufacturer in the EC; Rockwell was unable to afford to set up a manufacturing facility on its own.[230] A more modest solution was not sufficient, and the production joint venture was deemed indispensable.[231]

While on its face, the terms of the GM-Toyota agreement appear narrowly tailored to the joint production of the subcompact, several troubling issues remain. The Chairman of the FTC chose to deal with

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220. *General Motors Corp.*, 103 F.T.C. at 387.

221. EEC TREATY art. 85(3)(a).

222. *See supra* notes 60-61 and accompanying text.

223. GOYDER, *supra* note 133, at 122.

224. *General Motors Corp.*, 103 F.T.C. at 389.

225. GOYDER, *supra* note 133, at 122.

226. *General Motors Corp.*, 103 F.T.C at 376 (Toyota Motor Corporation — General Motors Corporation Memorandum of Understanding, Feb. 17, 1983) ("The JV would be limited in scope to this vehicle and this agreement is not intended to establish a cooperative relationship between the parties in any other business.").

227. *Id.* at 386.

228. Commission Decision 83/390 of 13 July 1983 on Rockwell/Iveco, 1983 O.J. (L 224) 19, 24.

229. *Id.* at 25.

230. *Id.* at 19-21.

231. *Id.* at 26. Joint distribution was justified by the high cost of opening up a market for third party axle supply to compete with the established system of in-house axle manufacture in the European automobile industry. *Id.*

these issues by further narrowing the agreement; the annual production of the subcompact was limited to 250,000 units, the time frame for the collaborative effort was limited to twelve years, and certain information transfers were precluded.[232] It is foreseeable that the European Commission might also tailor the agreement with respect to marketing, exchange of information, price setting and duration, to ensure that the venture would not have anticompetitive repercussions.

There is some criticism about the quality of this third inquiry as made in context of the GM-Toyota joint venture — notably, why the same benefit could not be derived from GM collaborating with a smaller Japanese manufacturer.[233] This objection may be dismissed if one accepts that the best results in any joint venture can only be derived by combining the most efficient manufacturers in the business. The Commission did not seem too concerned about this potentially controversial view in the Continental/Michelin venture. Assuming that this line of reasoning would find favor with the Commission, the venture should not stumble on this inquiry.

d. Does the agreement "afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question"?[234] As discussed above, this is the least problematic of the requirements.[235] In *Synthetic Fibres*, the Commission granted an exemption to a crisis cartel set up to reduce the structural overcapacity in the sector.[236] The nine largest European manufacturers of synthetic fiber agreed to reduce their production capacity for six types of synthetic textile by thirteen percent.[237] This was done in order to bring supply and demand back into balance. Here the agreement was exempted because the coordinated capacity reductions involved only one element of the signatories competitive strategies and the signatories had strong competition from non-EC suppliers.[238] Consequently, there was no danger of the signatories eliminating significant competition.[239] It is most unlikely that the GM-Toyota venture would fail this test, especially since the venture is introducing an additional competitor in the market.

232. *General Motors Corp.*, 103 F.T.C at 374.

233. Joseph F. Brodley, *The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress*, 62 N.Y.U. L. REV. 1020, 1029 (1987).

234. EEC TREATY art. 85(3)(b).

235. *See supra* part III.B.2.d.

236. Commission Decision 84/380 of 4 July 1984 on Synthetic Fibres, 1984 O.J. (L 207) 17.

237. *Id.* at 18.

238. *Id.* at 24.

239. *Id.*

2. *Some Conclusions Under 85(3).* While it appears that the GM-Toyota joint venture would improve the production and/or distribution of subcompact cars in the EC, it is not immediately clear that the Commission would grant an exemption under Article 85(3). First, both venture partners control a large market share and thus the venture would necessarily be subject to close scrutiny by the Commission.[240] Second, it is not clear that GM lacks either the technology or resources to develop a subcompact on its own.

However, given the limited restrictions on competition imposed by the venture and the liberal attitude of the Commission, it is more probable than not that the Commission would grant an Article 85(3) exemption. Despite the fact that Article 85(3) requires a four step analysis, the Commission places special significance on the first and third inquiries.[241] An official of the Commission, in interpreting these two primary stages of the analysis, listed key factors which, if present, would justify the granting of an exemption under Article 85(3).[242] The GM-Toyota joint venture agreement comports with several of these standards.

According to this official, a joint venture that is tailored to the "exploitation of complementary technology, know-how, and expertise" and enables the parties to "overcom[e] technical difficulties, including previous failures by one party" will be looked upon favorably by the Commission.[243] The Chairman of the FTC specifically recognized that the GM-Toyota joint venture "offers a valuable opportunity for GM to complete its learning of more efficient Japanese manufacturing and management techniques."[244]

IV. CONCLUSION

The EC invites joint ventures to charge their economic markets while the United States clings to historic and stale notions of antitrust law. Because the European system is more centralized and less uncertain, it is more nurturing to joint ventures. In addition, European industry is not stifled by the threats of Private Attorneys General and treble damages. As a result, European industry enjoys a certain confidence that industry in the United States lacks, and joint ventures are more commonplace. By codifying the modern rule of reason standard and dispensing with private enforcement, the United States Congress can instill new con-

240. *See, e.g.*, Commission Decision 78/921 of 20 October 1978 on WANO Schwarzpulver, 1978 O.J. (L 322) 26.

241. GOYDER, *supra* note 133, at 183.

242. Faull, *supra* note 106, at 364.

243. *Id.*

244. *General Motors Corp.*, 103 F.T.C. at 387-88.

fidence in the domestic business community and encourage the formation of joint ventures. The United States might then be more fertile ground for the establishment and development of production joint ventures.

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