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EEC Antitrust Aspects of Production Joint Ventures

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The European Economic Community (EEC) antitrust law applicable to any proposed joint venture having effects within the EEC is contained in articles 85[1] and 86[2] of the Treaty of Rome (the Treaty). Article 85, the principal treaty

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1. TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY] art. 85 provides:

> 1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings; decisions by associations of undertakings, and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction, or distortion of competition within the common market, 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.
> 2. Any agreements or decisions prohibited pursuant to this article shall be automatically void.
> 3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
> • any agreement or category of agreements between undertakings;
> • any decision or category of decisions by associations of undertakings;
> • any concerted practice or category of concerted practices;
> which contributes to improving the production or distribution of goods, or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
> (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
> (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

The EEC Treaty, which is the treaty establishing the European Community, is *reported in* 1973 Gr. Brit. T.S. No. 1 (Cmnd. 5179-II) (official English trans.), 298 U.N.T.S. 11 (1958) (unofficial English trans.).

2. EEC TREATY art. 86 provides:

> 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 unfair trading conditions;
> (b) limiting production, markets or technical development to the prejudice of consumers;

provision affecting joint ventures, provides that any agreement between undertakings affecting trade between Member States and having its object or effect the prevention, restriction, or distortion of competition within the Common Market shall be prohibited and automatically void. Article 86, which prohibits the abuse of a dominant position by one or more undertakings within the Common Market, may also be relevant in certain circumstances.

Historically, EEC policy on production joint ventures, like other forms of joint enterprise, has been developed by the Commission of the European Communities (the Commission) in an ad hoc manner in its annual reports on antitrust policy and, above all, in its decisions in specific cases. This article is therefore devoted primarily to an analysis of these cases. Several other recent developments are also pertinent. In 1986 the Commission produced draft guidelines on the application of articles 85 and 86.[3] These guidelines largely follow the historical policy of the Commission as established in its decisions. To the extent that the guidelines supplement the case law, they are examined in this article. The Commission is presently preparing a new set of guidelines to replace the 1986 guidelines, although this project is at a preliminary stage.[4] Secondly, the EC Merger Control Regulation (MCR),[5] which went into force on September 21, 1990, specifically excludes joint ventures from its ambit, except those sufficiently autonomous to constitute a "concentration." The MCR's coverage of concentrative joint ventures is examined in more detail below.

This article first considers to what extent the Treaty provisions are applicable to companies based outside the EEC.

I. Jurisdiction

As mentioned above, article 85 prohibits agreements which have the object or effect of restricting competition within the Common Market and which may affect trade between Member States. Article 86 prohibits the abuse of a dominant position within the Common Market or a substantial part of it insofar as it may affect trade between Member States. Therefore, in the wording of these Treaty provisions, there is an apparent territorial limitation. The Commission has, however, in the past sought to extend the application of the antitrust rules extraterritorially.

In *Dyestuffs*,[6] an early decision involving proceedings under article 85 (although not in respect of a joint venture), the Commission clearly stated its position:

(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.

3. To this day, these draft guidelines have not been released by the Commission to the public.
4. *See infra* text part IV.
5. O.J. (L 257) 14 (1990) [hereinafter MCR].
6. J.O. (L 195) 11 (1969), [1969] C.M.L.R. D23.

> This decision is applicable to all the undertakings which took part in the concerted practices, whether they are established within or outside the Common Market . . . The competition rules of the Treaty are, consequently, applicable to all restrictions of competition which produce within the Common Market effects set out in Article 85(1). There is therefore no need to examine whether the undertakings which are the cause of these restrictions of competition have their seat within or outside the Community.[7]

On appeal[8] the Court of Justice (the Court) affirmed that the Commission had jurisdiction. The Court, however, based its judgment on the much narrower ground that the foreign defendants had acted within the EEC through their various subsidiaries, which were established there and found to have acted under the control of the parent companies. The Court thereby established the "single economic entity" doctrine.

Several years ago the Commission reaffirmed its intention to apply the effects doctrine. In *Wood Pulp*[9] the Commission fined members of a price-fixing cartel, which included U.S., Canadian, and Scandinavian companies all headquartered outside the EEC. Some of the enterprises did have branches or subsidiaries within the EEC, but some merely exported to the Community. The Commission claimed jurisdiction on the basis that the agreements and concerted practices directly produced substantial and intended effects within the EEC. A number of the *Wood Pulp* defendants appealed the Commission's decision,[10] asking the Court to consider whether article 85 could extend to foreign enterprises not having subsidiaries within the EEC.

The language of the *Wood Pulp* judgment avoided wholehearted support for the effects doctrine, but went a considerable way toward endorsing it in substance. The Court stated that "the decisive factor" is the place where the agreement is implemented,[11] and since the producers in the case implemented their pricing agreement within the Common Market, the Commission was correct to conclude that it had jurisdiction. Yet, the Court's explicit legal basis for this jurisdiction was the principle of territoriality. The Court stated that it was irrelevant whether the enterprises had branches, agencies, or subsidiaries within the EEC in order to make contact with purchasers within the EEC. The Court concluded that if the agreements were implemented within the EEC, then "the Community's jurisdiction to apply its competition rules to such conduct is covered by the territoriality principle as universally recognized in public international law."[12] In practice, however, there seems to be little difference between this "place of implementation" test and the effects doctrine.

7. [1969] C.M.L.R. para. 28.
8. Case 48/69, Imperial Chem. Indus. Ltd. v. Commission, 1972 E.C.R. 619, 1972 C.M.L.R. 557, 628.
9. O.J. (L 85) 1 (1985).
10. Cases 89/85 etc., A. Ahlstrom Oy v. Commission, 1988 E.C.R. 5193, [1988] 4 C.M.L.R. 901.
11. *Id.*, [1988] 4 C.M.L.R. para. 16.
12. *Id.* para. 18.

A number of published Commission decisions have involved the application of article 85 to joint ventures having at least one non-EEC parent. For example, *De Laval/Stork*[13] concerned a joint venture established in the EEC by a U.S. company, and De Laval, and Stork, a Dutch company. The U.S. company operated in the EEC market through a wholly owned German subsidiary. The Commission held that article 85(1) applied since the joint venture would have led to the coordination of the parties' previously independent commercial activities within the EEC.

In *Henkel/Colgate*[14] a joint venture was established in Switzerland between Henkel, a German company, and Colgate-Palmolive, a U.S. company, which also had subsidiaries in the EEC. The purpose of the joint venture was to carry out research and development of detergents. The Commission found that article 85(1) was applicable to the transaction.

Rockwell/Iveco[15] involved a joint venture between Rockwell, a U.S. company, and Iveco, which is part of the Fiat group, to jointly manufacture rear axles for trucks in Europe. Article 85(1) was held to apply because Rockwell was already represented in the EEC by a subsidiary.

In each of the above three decisions, the Commission was able to assert jurisdiction over the non-EEC joint venturers. Although the ground for such jurisdiction was not clear, the economic entity theory would have been sufficient since, in each case, the U.S. parent and EEC subsidiary could have been deemed a single economic unit. Alternatively, the "quasi-effects" doctrine of *Wood Pulp* could have been employed since the joint ventures were implemented in the EEC.

With extraterritorial jurisdiction firmly entrenched in EEC antitrust law, one might ask whether there are limits to the Commission's competence over joint ventures. In theory, nothing would prevent the Commission from asserting jurisdiction over a joint venture between two non-EEC parties where neither the parties nor the joint venture itself has a presence within the Common Market, provided that the joint venture is implemented within the EEC. This basis for jurisdiction has yet to be tested, however, with respect to joint ventures. The Commission would probably not be interested in pursuing such cases unless the anticompetitive effects of such a joint venture within the EEC were substantial.

II. Application of Article 85

A. Article 85(1)

1. *Joint Control*

In 1976 the Commission defined a joint venture as an "enterprise subject to joint control by two or more undertakings which are economically independent

13. O.J. (L 215) 11 (1977).
14. O.J. (L 14) 14 (1972).
15. O.J. (L 224) 19 (1983).

of each other."[16] Both the 1986 draft guidelines[17] and the 1990 Commission Notice (Notice)[18] on concentrative and cooperative operations provide similar definitions.

The legal significance of the requirement of joint control deserves some explanation. Certainly, this test is crucial for determining whether a joint venture is concentrative.[19] In several recent decisions, however, the Commission has applied the test of joint control to operations that were clearly nonconcentrative as a condition to the application of article 85(1).[20] The second purpose of this rule, though it is unstated, is to distinguish joint nonconcentrative enterprises from other forms of concerted activity, such as agreements to partition markets or to fix prices, and to submit the former to a particular analysis and policy.

For purposes of the application of article 85, joint control does not require equal control. The Commission Notice states that joint control may be based on an agreement between the parent companies by which one parent obtains "a contractual right to take part in the control of the joint venture."[21] This suggests that the capacity to influence the commercial conduct of the joint venture is probably sufficient. This line of thinking is compatible with *BAT v. Commission*,[22] in which the Court held that such influence was necessary in order for a minority shareholding in a competing company to be subject to article 85(1). However, an agreement in which joint control is not obtained may nonetheless infringe article 85(1) if it contains restrictions that would otherwise infringe this Treaty provision.

2. *Actual or Potential Competitors*

As the Commission stated succinctly in its 1986 draft guidelines, "[c]ompetition between the parents can only be restricted if they are already actual or potential competitors."[23] Thus, as a second step in analyzing a joint venture, one must consider whether the parties are actual or potential competitors. This test must have a point of reference. Accordingly, the Commission has stated that the

16. E.C. COMM'N, SIXTH REPORT ON COMPETITION POLICY (1976), points 54–55 (Annual Competition Reports are available through the Office for Official Publications of the European Communities, Luxembourg).

17. According to the 1986 draft guidelines at 2, "JVs are undertakings which are jointly controlled by two or more other undertakings, the parent companies."

18. Commission Notice Regarding the Concentrative and Cooperative Operations Under Council Regulation (EEC) No. 4064/89, O.J. C203/10 (1990) [hereinafter Notice]. Point 7 of the Notice provides a definition of "joint venture" which is identical to that of the 1985 draft guidelines. *See also Aerospatiale/MBB* (Comm'n Decision of Feb. 25, 1991) (unpublished).

19. Notice, *supra* note 18, para. 14.

20. *See Elopak/Metal Box-Odin*, O.J. (L 209) 15 (1990), para. 22; *Mitchell Cotts/Sofiltra*, O.J. (L 41) 31 (1987), para. 18; *see also Cekacan*, O.J. (L 299) 64 (1990), paras. 26, 29.

21. Notice, *supra* note 18, para. 13.

22. Cases 142 & 156/84, British Am. Tobacco Ltd. & R.J. Reynolds Indus., Inc. v. Commission, 1987 E.C.R. 4487, [1988] 4 C.M.L.R. 24.

23. 1986 Draft Guidelines, at 13.

joint venture partners must be actual or potential competitors in the relevant product and geographic markets.[24]

a. Relevant Product Market

Assuming that the joint venturers are operating (or are deemed capable of doing so) in the same geographic market, as discussed below, they will be considered potential competitors if one partner could reasonably be expected to enter the product market of the other. A number of factors may be relevant in this respect. For example, if both partners have been developing the joint venture product separately prior to the establishment of the joint venture, the Commission is likely to find that but for the joint venture the parties would become direct competitors. This was the case in *GEC/Weir*,[25] in which the parties established a joint venture to develop and market sodium circulators, which are used to pump liquid coolant around the cores of nuclear reactors. Both parties had performed research and development on the early designs of the product, and were found by the Commission to have "considerable background experience within the field of the joint venture."[26] Consequently, they were held to be potential competitors.

Other relevant factors which may lead the Commission to conclude that the parties are potential competitors are their ability to finance the development of the product and their familiarity with the technological processes involved. In *Kewa*[27] a number of West German firms, which were experts in reprocessing technology for oxide fuels, formed a joint venture to construct a reprocessing plant for nuclear fuels and to market the resultant product. None of the partners had previously engaged in the downstream supply market, but each was found to have the technical and economic resources to enter that market independently. Thus, they were potential competitors since the only real incentive to form the joint venture was to spread the risk of the investment.

In earlier decisions the Commission was inclined to find that the joint venturers were potential competitors, even in cases where they did not independently have the technology to develop and manufacture the relevant products at the time the joint venture was formed. The Commission was nevertheless ready to conclude that the partners were potential competitors if they were competitors in upstream or downstream markets, and, in some cases, had engaged in significant research and development as to the relevant product.

The culmination of this line of reasoning was manifested in *Vacuum Interrupters (No. 2)*.[28] In this case the joint venture was to manufacture vacuum interrupters, that is, pieces of equipment used to produce switchgears. The

24. *Mitchell Cotts*, O.J. (L 41) 31 (1987), para. 19.
25. O.J. (L 327) 26 (1977).
26. *Id.* para. 22.
27. O.J. (L 51) 15 (1976).
28. O.J. (L 383) 1 (1980).

Commission had previously found in *Vacuum Interrupters (No. 1)*[29] that the two original joint venturers, who both manufactured switchgears and had individually engaged in research and development of vacuum interrupters, were potential competitors.

In the *(No.2)* decision the Commission had to consider the recapitalization of the joint venture company with the addition of a new partner. This new partner was also a manufacturer of switchgears, but had no experience in the manufacture of vacuum interrupters, and apparently had not even performed any research to develop this product. Nevertheless, the Commission found that the new partner was a potential competitor because of its experience and expertise in the manufacture of the upstream product.

More recently, the Commission has shown greater reluctance to conclude that the parties are potential competitors. In 1983 the Commission indicated that it would take a practical approach to determining whether joint venturers were potential competitors.[30] In *Optical Fibres*,[31] *Mitchell Cotts/Sofiltra*,[32] and *Olivetti/Canon*[33] the Commission placed limits on the scope of application of this test. These were joint ventures where each partner contributed complementary technological know-how to the joint venture, but where not all the partners were fully experienced in the technology applicable to the development of the jointly manufactured product.

For example, in *Optical Fibres* several joint ventures were set up between Corning, a U.S. company that had developed optical fibers for use in communications, and various European cable manufacturers. The joint ventures were formed to pool the parties' respective optical fiber and cable know-how to produce optical cables. Neither Corning nor the European companies had any experience in the other parties' field; therefore, the Commission found they were not potential competitors in either the optical fiber or optical cable markets.

In *Mitchell Cotts* the parties, MCE and Sofiltra, set up a joint venture for the production and sale of air filters using micro-fine glass fibers. Prior to the joint venture, MCE manufactured air filtration equipment, whereas Sofiltra produced various glass products. MCE had relied exclusively on suppliers for glass fibers to be incorporated in its air filters. Since MCE had no manufacturing or research experience in glass fibers, its entry into the glass fiber market was unforeseeable. Consequently, the parties were not potential competitors.

Still a different case was presented in *Olivetti/Canon*. Here, Canon and Olivetti formed a joint venture for, among other things, the production and sale of laser printers. Whereas Canon was a major producer of this printer, Olivetti had no prior manufacturing or research experience in this product. On these facts, the

29. O.J. (L 48) 32 (1977).
30. E.C. COMM'N, THIRTEENTH REPORT ON COMPETITION POLICY (1983), point 55.
31. O.J. (L 236) 30 (1986).
32. O.J. (L 41) 31 (1987).
33. O.J. (L 52) 51 (1988).

Commission found that the parties were not potential competitors. Although the Commission could have arrived at this conclusion by mechanically applying *Mitchell Cotts*, the Commission used a different approach: Even if Olivetti were capable of developing the expertise necessary to build laser printers, it could not financially afford to do so in the rapidly evolving printer market.

The Commission in *Konsortium ECR900*[34] recently employed an approach similar to that in *Olivetti/Canon*. In this case AEG (Germany), Alcatel (Netherlands), and Oy Nokia (Finland), all of which were suppliers of telecommunications equipment, entered into a joint venture to develop and manufacture a pan-European digital cellular mobile telephone system (GSM) in their countries by 1991. As in *Olivetti/Canon*, it appeared that none of the parties had experience in this particular technology. However, they were found not to be potential competitors because the cost involved in developing GSM was "so great that realistically there is no scope for companies to act individually."[35]

Elopak[36] and *Cekacan*[37] are Commission decisions involving the food packaging industry. These cases demonstrate the nuances of analyzing potential competition when the parties are in neighboring markets.

In *Elopak* the parties, Elopak and Metal Box, formed a joint venture, Odin, to research and exploit a new form of paperboard-based package with a laminated metal lid, in which UHT-treated foods could be packaged, thus giving them a shelf life of several months. This shelf longevity was attributed, at least in part, to the aseptic filling of the UHT-treated package. Elopak's business was primarily in manufacturing cartons for liquids, rather than foods, and it did not have the technology for packaging UHT-processed foods with an aseptic filling. Metal Box, on the other hand, manufactured a wider variety of packages for foods and liquids. Metal Box had also developed and marketed an aseptically filled polypropylene container (with aluminum top) for liquids. However, Metal Box did not have any experience with the type of board cartons to be used for the joint venture product. Thus, the Commission concluded that "[n]either party could in a short term enter the market alone as such entry would require a knowledge of the other party's technology that could not be developed without a significant and time-consuming investment."[38]

Although *Elopak* was clearly more difficult for the Commission to decide because the parties were previously in related markets, one could reason that it was consistent with the result in *Optical Fibres* and *Mitchell Cotts* because neither of the parties had the know-how to develop this specific paper packaging. Thus, a significant investment would have been required to enter separately the specific product market.

34. O.J. (L 228) 31 (1990).
35. *Id.* part III(2)(a), at 33.
36. O.J. (L 209) 15 (1990).
37. O.J. (L 299) 64 (1990).
38. *Elopak*, O.J. (L 209) 15 (1990), para. 25.

Yet, reconciling the *Elopak* and *Cekacan* decisions is not simple. In the latter case, A&R and ECA entered into a joint venture to produce a new type of airtight packaging made of paperboard, which would be laminated with plastic and aluminum materials. This packaging would be used primarily for dry oxygen-sensitive food products such as peanuts, powdered milk, and cocoa. This "Cekacan" packaging would be new on the market, although A&R had been carrying out research into packaging systems employing the same materials as those used in Cekacan. On the other hand, ECA was involved in paperboard packaging, but had not been independently producing paperboard laminated with plastics and aluminum foil, as would be used in the Cekacan packaging. Nonetheless, in contrast to the *Elopak* case, the Commission decided that the parties must be considered potential competitors "in the use of methods similar to Cekacan methods and producing and selling laminates."[39] Although this reasoning lacks coherence, the conclusion was probably correct since the investment necessary for each party to have separately developed the Cekacan packaging was probably not prohibitive.

Another difficult case was presented in *KSB/Goulds/Lowara/ITT*.[40] Here, all four parties concerned were directly competing manufacturers of conventional water pumps. They entered into a joint venture to develop and produce a chrome nickel stainless steel component, which, when assembled into complete pumps, could withstand great internal pressure. The facts showed that only Lowara had the basic technology for developing these components. However, the Commission concluded that the other three parties could have acquired the basic knowledge by means of a license from third parties.[41] The Commission observed that at least three third-party manufacturers already had the basic technology. Again, however, this result could also have been obtained by taking into account the lack of substantial expense and risk in developing the joint venture product separately.

The above cases on relevant product market demonstrate that all but a few joint ventures implemented in the EEC are capable of eluding the threshold finding of potential competition. It would seem, as a minimum, that one of the parties must have no experience in research and development or in manufacturing prototypes of the relevant product. Another supporting argument would be that parties in related markets could not expect to enter the field of the joint venture in the absence of unreasonable risk and expense.

b. Relevant Geographic Market

The general approach taken by the Commission in determining the geographic market is to consider the area of the Common Market in which "competitive

39. *Cekacan*, O.J. (L 299) 64 (1990), para. 30.
40. O.J. (L 19) 25 (1991).
41. *Id.* para. 16.

conditions are broadly similar for the products concerned."[42] This market will normally be EEC-wide where supply and demand do not depend on national frontiers, and where national laws, transportation costs, and customer habits do not pose any obstacles.[43]

An interesting question is whether the parties are potentially competing in the relevant geographic market when one of the joint venturers that has acted in the global market has withdrawn from the European market or has never entered the EEC market before the establishment of the joint venture. In each of these situations the Commission has found that the parties were nevertheless potential competitors in the EEC market, especially when the non-EEC joint venturer was a substantial enterprise active in other markets.[44]

3. *Restrictive Effects on Competition*

Once the Commission has established that the joint venturers are potential competitors, it must then prove that the joint venture either restricts competition between the parties or in relation to third parties.[45] Restrictions between the parties are normally found in the agreement. For example, the Commission has found joint venture provisions restrictive where the:

- parties agree not to compete with the joint venture;[46]
- parents are obliged to obtain their entire supply or a minimum volume of the relevant product from the joint venture;[47]
- distribution is allocated either to the joint venture or among the parties;[48]
- parties standardize components used in the manufacture of a joint venture product;[49]
- joint venture is obliged to buy its components from one or more of the parents.[50]

Of particular relevance to production joint ventures, the Commission has held that the exchange of expertise and know-how in the product to be jointly developed is a restrictive provision that infringes article 85(1). This was the result in *Sopelem/Vickers*,[51] in which the parties formed a joint venture to develop sophisticated microscopes and related products.

42. *Mitchell Cotts*, O.J. (L 41) 31 (1987), para. 19.
43. *Olivetti/Canon*, O.J. (L 52) 51 (1988), para. 36.
44. *Iveco/Ford*, O.J. (L 230) 139 (1987); *De Laval/Stork*, O.J. (L 5) (1977). *But cf. Sanofi/Sterling Drug* (Comm'n Decision of June 10, 1991) (unpublished), in which the combination of the over-the-counter business of Sanofi and Sterling Drug, respectively French and U.S. pharmaceutical companies, resulted in a concentrative joint venture even though Sterling Drug remained in the over-the-counter business in the U.S. market.
45. 1986 Draft Guidelines, at 13.
46. *Kewa*, O.J. (L 51) 15 (1976); *GEC/Weir*, O.J. (L 327) 26 (1977).
47. *Rockwell/Iveco*, O.J. (L 224) 19 (1983); *Olivetti/Canon*, O.J. (L 52) 51 (1988).
48. *Sopelem/Vickers*, O.J. (L 70) 47 (1978).
49. *VW/MAN*, O.J. (L 376) 11 (1983); *see also Philips/Matsushita-DZB*, O.J. (C 220) 2 (1991).
50. *Iveco/Ford*, O.J. (L 230) 39 (1987).
51. O.J. (L 70) 47 (1978).

The restrictive effects of a joint venture must be "appreciable" in the relevant market. Effects will be appreciable where, for example, the joint venturers have sizeable EEC market shares,[52] or are significant participants in an oligopolistic market.[53] Effects may, however, be appreciable upon a much lesser showing. In *Olivetti/Canon*,[54] various restrictions in the joint venture concerned had an appreciable effect in the market for mid-range copiers, which was one of the joint venture products, even though Canon's EEC market share was only 6.7 percent and Olivetti was not in this market prior to the joint venture.

In practice the Commission has found that where the joint venturers are actual or potential competitors, the joint venture will, due to its restrictive provisions, infringe article 85(1) unless the de minimis rule applies. The Commission's *Notice on Agreements of Minor Importance*[55] (Notice on Agreements) provides that certain agreements have a negligible effect on competition and are therefore not caught by article 85(1). These are agreements in which:

- the goods or services concerned or equivalent goods or services sold by the parties, which are not subject to the agreement, do not represent more than 5 percent of the total market for such goods or services;
- the market share is not exceeded by more than 10 percent during two successive financial years; and
- the aggregate annual turnover of the participating undertakings does not exceed 200 million ECU.

The 1986 draft guidelines expressly acknowledge the applicability of this de minimis formula to joint ventures.[56] However, these criteria provide only an indication of appreciable effects, and do not account for all cases.

Lastly, a joint venture which does not restrict competition between the parties, but which appreciably impedes competition in relation to third parties, may nonetheless infringe article 85(1). The Commission has held that such "risks of foreclosure" will not be present where a number of other companies are actually (or potentially) competing in the relevant product and geographic markets,[57] particularly where the existing or anticipated market shares of the joint venturers are small.[58] Historically, the Commission has found that where the parties were not potential competitors, third parties had no barriers to entry. Nonetheless, one should keep in mind that the test of "foreclosure risk" is independent from the determination of actual or potential competition.

52. *De Laval/Stork*, O.J. (L 215) 11 (1977).
53. *WANO Schwarzpulver*, O.J. (L 322) 26 (1978).
54. O.J. (L 52) 51 (1988).
55. O.J. (C 231) 2 (1986).
56. 1986 Draft Guidelines, at 11–12.
57. *Elopak/Metal Box-Odin*, O.J. (L 209) 15 (1990), para. 27; *GEC-Siemens/Plessey*, O.J. (C 239) 2 (1990), para. 18 ("Also taken into account in the assessment of appreciability [are] the high barriers to entry that exist in the public and large private switching sectors.").
58. *Mitchell Cotts/Sofiltra*, O.J. (L 41) 31 (1987), para. 19.

4. *Ancillary Restraints*

In its 1986 draft guidelines[59] the Commission distinguished between restrictions on competition that flow automatically from the formation of the joint venture and those that accompany the joint venture. Those additional restrictions which were economically connected with the joint venture would be treated in the same way as the joint venture itself if they were "indispensable," provided they did "not exceed in their scope, geographical extent or duration the limits of what is necessary for the setting up and operation of the [joint venture]."[60] Those restrictions deemed not economically connected to the joint venture or, if so connected, deemed not indispensable, would be treated under article 85(1), regardless of the outcome with respect to the joint venture. Regarding restrictions on the joint venture, those that defined the purpose of the joint venture, for example, specifying the product range and manufacturing site, would be deemed indispensable. Further, with respect to restraints on the parents, a ban on competing with the joint venture, at least during the start-up period, would be considered indispensable.

In the 1986 *Mitchell Cotts* decision, the Commission seemed to have implemented its internal guidelines on ancillary restraints with respect to joint ventures. In this case, as was noted above, the Commission found that the joint venturers were not potential competitors. Nor, the Commission added, was there a risk of foreclosure to third parties. Thus, the Commission was able to conclude that the "agreement . . . does not in itself fall within the terms of article 85(1)."[61] The Commission then considered whether various terms of the agreement were necessary, and found that a noncompetition clause was indispensable (and therefore did not appreciably restrict competition). By contrast, the joint venture's exclusive license to manufacture the relevant product in the assigned territory was not deemed strictly necessary and was deemed an appreciable restriction, although this term of the agreement obtained an individual exemption under article 85(3).

Similarly, in *Elopak/Metal Box-Odin*[62] the Commission drew a distinction between the joint venture itself, which received a negative clearance under article 85(1), and those restrictions which would have to be examined for their indispensability. This decision demonstrated that indispensability must be determined on a case-by-case basis. Here, as in *Mitchell Cotts*, the joint venture received an exclusive license to manufacture the relevant product. However, *Elopak* differs from *Mitchell Cotts*, in which Sofiltra, as party to the joint venture, was capable of competing with the joint venture in the manufacture of air filters. In *Elopak* the exclusivity related to a product that neither party had been able to

59. *See* 1986 Draft Guidelines, at 22–23.
60. *Id.* at 22.
61. O.J. (L 41) 31 (1987), para. 19.
62. O.J. (L 209) 15 (1990).

develop separately. This was an important factor for the Commission in its finding that the exclusive license to Odin did not infringe article 85(1).[63]

5. *Exclusion of Concentrative Joint Ventures from Scope of Articles 85-86*

Under the MCR[64] "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 the MCR and shall not therefore be covered by it.[65] Such cooperative joint ventures remain subject to articles 85 and 86. However, the MCR also provides that 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 . . . shall constitute a concentration,"[66] which would be subject to the MCR provided it has a Community dimension.

The Commission has recently published a set of guidelines indicating how this provision of the MCR relating to the definition of concentrative joint ventures is to be interpreted.[67] This Notice defines in some detail the concept of a joint venture within the meaning of the MCR, and considers in what circumstances such a joint venture might be concentrative.

To be considered concentrative, the joint venture must first fulfill the positive condition of performing the function of an autonomous economic entity on a lasting basis.[68] The joint venture must act as an independent supplier and buyer on the market, and must intend or be able to carry out its activities for an unlimited, or at least a long, time. Even more significant than the joint venture's duration are the financial, human, and material resources available to it, which should ensure the venture's existence and independence in the long term.[69] Perhaps the most significant question to consider is whether the joint venture is able to exercise its own commercial policy, and in particular, to determine its own competitive behavior independently. As the Notice states, "[i]f the [joint venture] depends for its business on facilities that remain economically integrated with the parent companies' businesses, that weakens the case for the autonomous nature of the [joint venture]."[70]

For the joint venture to be regarded as concentrative, there must also be an absence of coordination of competitive behavior, both between the parents and

63. *Id.* paras. 30–31.
64. MCR, *supra* note 5.
65. *Id.* art. 3(2).
66. *Id.*
67. *See* Notice, *supra* note 18.
68. *Id.* para. 6.
69. *Id.* para. 17.
70. *Id.* para. 18.

between the parents and the joint venture.[71] The Commission will determine whether it is reasonably foreseeable that as a consequence of the establishment of the joint venture, "the competitive behavior of a parent or of the [joint venture] on the relevant market will be influenced."[72] Coordination is likely to be absent where the parents withdraw entirely and permanently from the market of the joint venture and from neighboring markets.[73] The Notice does, however, acknowledge that some form of cooperation or understanding between the parents is an inevitable feature of a joint venture.[74] This will not necessarily prevent the joint venture from being concentrative. The risk of competitive coordination will be less if the parents limit their influence on the joint venture to strategic and financial concerns rather than market-oriented decisions.

The effect of a concentrative joint venture falling within the ambit of the MCR is that it must be notified in advance to the Commission, which will perform an antitrust analysis of the transaction based on a test of market dominance. Except in limited circumstances, the transaction must also be suspended for most, if not all, of the duration of the Commission's analysis. Consequently, joint ventures that are concentrative, but below the thresholds, do not have to be notified or suspended. Nevertheless, concentrative joint ventures outside the scope of the MCR will not escape the Commission's attention entirely. The Commission has indicated that it reserves the right to apply articles 85 and 86 to concentrations (including concentrative joint ventures) where the aggregate worldwide turnover is between two and five billion ECU, and where the EEC-wide sales of each of at least two parties are between 100 and 250 million ECU.[75]

For joint ventures that are borderline cases (where it is not clear whether they constitute cooperative or concentrative joint ventures), it may be prudent to notify the Commission in any event, since the failure to notify and suspend transactions caught by the MCR can result in severe fines.

B. Article 85(3)

1. *Individual Exemptions*

Article 85(3) sets forth various criteria for exempting transactions from the applications of article 85(1) where they are found to have infringed this Treaty provision. Paragraph (3) provides that article 85(1) may be declared inapplicable to any agreement which:

71. *Id.* para. 20.

72. *Id.*

73. *Id.; see, e.g., Baxter/Nestlé/Salvia* (Comm'n Decision of Feb. 6, 1991) (unpublished), in which Baxter and Nestlé established a joint venture to take over the parties' clinical nutritional assets. The Commission found that this joint venture was not concentrative, and was therefore outside the scope of the MCR because, among other reasons, the parties remained in business in the field of the joint venture. *But cf. Sanofi/Sterling Drug, supra* note 44.

74. Notice, *supra* note 18, para. 21.

75. Council Declarations, *printed in* [1990] 4 C.M.L.R. 314, at 318–19.

- contributes to improving the production or distribution of goods, or to promoting technical or economic progress; and
- allows consumers a fair share of the resulting benefits; but that neither
- imposes on the undertakings concerned restrictions not indispensable to the attainment of these objectives; nor
- affords such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Essentially, this is a two-part test consisting of two positive and two negative criteria. If the joint venture fulfills the first part of the test and results in the stated beneficial effects, then it is likely to be exempted unless the anticompetitive aspects of the joint venture outweigh its benefits.

The first positive criterion is essentially a public policy test. Any joint venture satisfying this test will almost inevitably provide a resulting benefit to consumers, and thereby satisfy the second criterion.

When applying the negative criteria, the Commission considers not only the specific restrictions contained in the joint venture agreement, but also the general indispensability of the joint venture. Where the Commission finds that no form of cooperation less than a joint venture could have achieved the desired objectives as economically or efficiently, then it will usually be considered indispensable. Under the final criterion, the Commission must consider the severity of the anticompetitive effects of the joint venture. It will examine the structure of competition in the Community and assess the joint venturers' position in the market. Where the joint ventures are small players in the EEC market, or where competition is ensured due to the continued existence of other independent competitors, or where the joint venture increases the parties' market shares in part of the EEC market other than that in which the joint venture operates, then the Commission is likely to find no significant effect on competition.

The Commission has a history of authorizing joint ventures, particularly those that involve the development of high technology or the transfer of new technology to the Community, since they are regarded as important for industrial progress in the EEC.

The following cases illustrate the Commission's historical approach:

a. Vacuum Interrupters (No. 1)[76]

As mentioned earlier,[77] this was a joint venture to develop and manufacture vacuum interrupters, an intermediate product used to produce switchgears. Both parties had attempted to develop the product independently, but had been hampered by exorbitant development costs. The Commission took the view that the joint venture was justified to avoid the loss of time and expense that would have been incurred if the parties had been forced to pursue their programs separately.

76. O.J. (L 48) 32 (1977).
77. *See supra* text accompanying note 29.

The Commission further noted that this product was only in the development stage in the EEC, whereas there had been a "steady expansion demand" for it in the United States and Japan. The Commission considered it very important to encourage the EEC industry's development of vacuum interrupters before imports flooded the Community.

Although the Commission was silent as to the general indispensability of the joint venture itself, it found that clauses prohibiting the parties from competing with the joint venture[78] and requiring them to purchase the product from the joint venture were indispensable.

b. Olivetti/Canon[79]

Canon, a Japanese manufacturer, transferred to Olivetti, an Italian company, its know-how in copiers, facsimile machines, and laser printers under a joint venture agreement for the development and manufacture of these products within the EEC. Canon had a clear lead over its Italian partner in these areas of technology. Thus, the Commission concluded that Olivetti had been spared huge research and development costs in developing the products. The Commission was also keen to endorse the technology transfer to a European enterprise from a leading Japanese manufacturer:

> The joint venture enables a transfer of the benefit of advanced technology to Olivetti, a Community undertaking, in markets where technology is of crucial importance. An important part of the transferred technology comes from an undertaking, Canon, which is a leader of innovation and whose policy is [research and development] oriented . . . It is reasonable to expect that . . . this technology . . . will contribute to improving the technological patterns of the EEC industry and ultimately its competitivity. This will result in improving production and distribution and technical progress.[80]

The Commission found that the formation of the joint venture was an indispensable requirement, and that any lesser form of cooperation would not have achieved the desired results:

> The benefits of the increase of research and development, the improvement of technology [and] the strengthening of competitivity of the European industry through the transfer of technology could not be achieved without the joint venture. Without that cooperation, costs of [research and development] and production would be spread over a smaller number of units, and this would result in either an insufficient improvement of the products manufactured by one or both of the companies, or higher prices of those products."[81]

c. Carbon Gas Technologies[82]

Here the parties undertook the joint development of a coal gasification process, the construction of plants, and the marketing of the resultant products. The

78. *Compare with* approach of Commission in *Mitchell Cotts* and *Elopak/Metal Box*, *supra* note 20 and accompanying text.
79. O.J. (L 52) 51 (1988).
80. *Id.* para. 54(b).
81. *Id.* para. 56.
82. O.J. (L 376) 17 (1983).

Commission wished to encourage the development of a new technology which could lessen the Community's dependence on crude oil as a source of energy, and provide a more efficient and environmentally sound alternative to coal. Moreover, the Commission approved the liaison between companies with complementary know-how and expertise. One partner specialized in basic process technology, another in the construction of large-scale industrial plants, and the third in petroleum refining. In the Commission's view, the combining of the parties' complementary expertise would "simplify and accelerate the transition of the desired coal gasification technology in question from the planning and research stage to that of large scale industrial application."[83]

On the issue of general indispensability, the Commission found that "a mere agreement on the exchange or granting of licenses or an agreement on specialization could not guarantee attainment of the object of the cooperation in the same way as complete pooling."[84] Further, since the joint venture was in competition with other parties to develop the product, the Commission found that there was no real likelihood of it eliminating competition. "Various gasification methods are already undergoing tests in the Community and elsewhere, and others are at the development stage. A number of leading firms in the Community are engaged in tapping this market . . . Under the circumstances, effective competition is guaranteed in this field."[85]

On the basis of the Commission decisions, there is room for optimism that a production joint venture will qualify for an individual exemption under article 85(3). However, in order to obtain such an exemption, the parties must notify the Commission of the joint venture on Form A/B. Unlike the MCR, nonconcentrative joint ventures are not mandatorily notified under articles 85 and 86. The following issues, however, must be considered when notification is contemplated: First, the Commission is under no time limit in delivering its decision. In practice, exemptions are not granted or refused until several years after the notification has been filed. Second, whether the Commission would open an investigation when the parties fail to notify is usually impossible to predict, except where the transaction is severely restrictive, attracts press coverage, or a third-party competitor brings the transaction to the Commission's attention. Third, if notice of the transaction is given, the parties will necessarily divulge to the Commission a great deal of sensitive information about themselves and their position in Europe (although Commission officials have a duty to guard the confidentiality of business secrets).[86] Fourth, the exemption is granted for a specific term[87] that often, but not necessarily, covers the duration of the joint venture. If the exemption period expires prior to the termination date of the joint

83. *Id.* at 20.

84. *Id.*

85. *Id.* at 21.

86. Reg. 17, art. 20. Regulation 17, the first council regulation implementing articles 85-86 of the EEC Treaty, is *reported in* O.J. ENG. SPEC. ED. 1959–62, at 87.

87. *Id.* art. 8(1).

venture, renewal of the exemption is possible provided that the conditions of article 85(3) are satisfied.[88] Fifth, the exemption applies only to events occurring after the filing date of the notification.[89] Thus, where the joint venture has already been in effect for several years prior to its notification, the exemption cannot cover this previous period, even where the facts are clear that an exemption would have been granted had it been applied for. Sixth, the notice of applying for the exemption is published in the Official Journal of the European Communities (Official Journal) with an invitation to third parties to make comments.[90]

Due to these various issues, joint venturers often decide to forgo the notification exercise entirely (at their peril) or to seek informal Commission approval of the transaction by means of a so-called comfort letter.

2. *Block Exemptions*

In certain circumstances, it may be possible to bring a joint venture within one of the existing block exemptions without having to file a notification with the Commission. However, joint venturers will encounter problems in satisfying the terms of the block exemptions. The only two that do not specifically exclude joint ventures are those concerning specialization agreements[91] and research and development agreements.[92]

a. Specialization Block Exemption

Article 1 of this block exemption provides that article 85(1) of the EEC Treaty shall not apply to specialization agreements where reciprocal obligations are imposed: (i) not to manufacture certain products or to have them manufactured, but to leave it to other parties to manufacture the products or have them manufactured; or (ii) to manufacture certain products or to have them manufactured jointly. Therefore, Regulation 417/85 (the Regulation) applies to production joint ventures. Unfortunately, the Regulation places limitations on the clauses that may be included in a joint venture agreement, which has the effect of severely restricting the applicability of this block exemption.

Use of the exemption has three major drawbacks: First, the block exemption is available only where the parties have a combined market share of 20 percent or less in the EEC or a substantial part thereof with respect to the relevant product, and the aggregate turnover of the parties does not exceed 500 million ECU,[93] provided that neither the market share nor turnover limits are exceeded by 10 percent in any two consecutive financial years. However, if an agreement

88. *Id.* art. 8(2).
89. *Id.* art. 6(1).
90. *Id.* art. 19(3).
91. Commission Regulation 417/85, O.J. (L 53) 1 (1985).
92. Commission Regulation 418/85, O.J. (L 53) 5 (1985).
93. Commission Regulation 417/85, *supra* note 91, art. 3(1)(a)-(b), 3(2).

exceeds the above turnover limitations, it may nonetheless benefit from the opposition procedure; that is, it will be automatically exempted if it is notified to the Commission and is not opposed by the Commission within six months.[94] Second, the joint venture agreement may require the parties to purchase the product from a party or from the joint venture, except where a third party may offer better terms and the party charged with manufacture is not prepared to offer the same terms.[95] Third, the joint venture agreement may grant to one or more of the parties the exclusive right to distribute the joint venture product, provided that this does not render it difficult for third parties to obtain the product.[96]

Apart from the permitted restrictions contained in articles 1 and 2, the Regulation is not applicable. Thus, joint venture agreements containing clauses providing for joint research and development and sharing of know-how, for mandatory exchange of prior know-how and expertise, and for preventing the parties' independent use of patents or know-how acquired as a result of the joint venture, should all be prevented from coming within the block exemption.

b. Research and Development Block Exemption

The Regulation applies to agreements for research and development with or without joint exploitation, or alternatively, to exploitation following a prior research and development agreement.[97] However, the applicability of this block exemption to productive joint ventures is subject to a number of conditions.

First, the joint research and development work must be performed within the context of a program with defined objectives, and the parties must have access to the results of the work.[98] Second, if there is to be joint exploitation, this may only relate to results that either are protected by intellectual property rights or constitute know-how that makes a substantial contribution to technical or economic progress.[99] Moreover, the results of the joint research and development must be *decisive* for the manufacture of the contract products or the application of the contract processes.[100]

The Regulation also requires that the joint venture or any third party charged with the manufacture of the relevant product as a result of the joint research and development shall supply them only to the parties.[101] The joint venture cannot supply third parties directly.

Finally, where the joint venturers are competing manufacturers, the block exemption is only valid for the duration of the research and development program, if any, and for a further period of five years in the event of joint explo-

94. *Id.* art. 4(1).
95. *Id.* art. 2(1)(b).
96. *Id.* art. 2(1)(c).
97. Commission Regulation 418/85, *supra* note 92, art. 1(1)(a)-(b).
98. *Id.* art. 2(a)-(b).
99. *Id.*. art. 2(d).
100. *Id.*
101. *Id.* art. 2(e).

ration, provided that, at the time the agreement is entered into, the parties' combined production of products capable of being improved or replaced by the contract products does not exceed 20 percent of the market for such products in the Common Market or a substantial part thereof.[102]

III. Application of Article 86

Article 86 provides that 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. Article 86 does not provide a public policy defense analogous to article 85(3), which allows for exemptions (or comfort letters), and this Treaty provision is not subject to the de minimis rule. Article 86 will be relevant to joint ventures in certain limited circumstances:

- Where a joint venturer individually holds a dominant position, the creation of a joint venture may amount to an abuse.[103]
- Where the parties to the joint venture hold a joint dominant position, the creation of a joint venture may constitute an abuse.[104]
- Where a joint venture holds a dominant position itself, certain conduct on the part of the joint venture could amount to an abuse, such as the refusal to supply the relevant product to competitors or the imposition of export bans on national distributors.

IV. Proposed Joint Venture Guidelines

The Commission has informally confirmed that its 1986 draft guidelines will be replaced by a second version, which should be approved in the spring of 1992. Unfortunately, as of this writing DG IV has not prepared a draft of these new guidelines.[105] Although one may expect that the new guidelines, like the 1986 draft, will restate Commission policy as reflected in its decisions, a DG IV source has indicated that the new guidelines should have several new features.

First, the Commission will establish an internal procedure for the effective, rapid examination of joint ventures. The precedent for this approach is the Commission's existing practice of informal settlement. In the case of joint ventures, the Commission would invite an informal discussion of the transaction, which could be followed by a comfort letter. The comfort letter would then be published in the Official Journal and would receive the full backing of the

102. *Id.* art. 3(2).
103. *See WANO Schwarzpulver, discussed in* E.C. COMM'N, EIGHTH REPORT ON COMPETITION POLICY (1979), point 136.
104. 1986 Draft Guidelines, at 23.
105. It would appear that these guidelines, like those relating to the MCR, will be produced by DG IV without the formal approval of the Commission or the Council.

Commission.[106] Moreover, the Commission would seek to conduct its examination of the joint venture within a two- to six-month period.

Secondly, the Commission plans to expand the existing specialization and research and development block exemptions to apply more practically to production joint ventures.

Third, the Commission is debating whether the guidelines will contain a special de minimis rule that would apply to production joint ventures under article 85. The thresholds of the Commission's Notice on Agreements[107] are believed too low for joint ventures.

Fourth, the Commission hopes to formalize its recent practice on ancillary restraints, as established in the *Mitchell Cotts*[108] and *Elopak*[109] decisions.

Lastly, the guidelines should provide greater clarity as to how the Commission defines actual and potential competitors.

V. Conclusion

The trend of the Commission has been to encourage joint ventures in the EEC, subject to the proviso that they do not contain unreasonable terms. In preparing the forthcoming guidelines, the Commission is taking new steps to ensure the reliability of its policy, the transparency of its procedure, and speedy resolution of cases. One may expect the business community to welcome these developments in much the same way as it reacted to the MCR—with some measure of relief.

Nevertheless, article 85(3), like the appraisal criteria of the MCR, is ambiguous enough to allow political factors to enter the equation. The burden therefore rests on legal counsel to ensure that the Community policy on joint ventures is implemented equitably and without prejudice to non-EEC companies. In areas of strategic importance to the Community, such as automobiles and electronics, non-EEC joint venturers would be wise to emphasize the benefits of their planned transaction for EEC industry.[110]

106. An example of this approach is provided in *GEC/Siemens/Plessey*, O.J. (C 239) 2 (1990).
107. *See supra* note 55 and accompanying text.
108. O.J. (L 41) 31 (1987).
109. O.J. (L 209) 15 (1990).
110. *See e.g. Fiat/Hitachi*, O.J. (C 206) 3 (1991) (hydraulic excavators); *Ford/Volkswagen*, O.J. (C 182) 8 (1991) (multi-purpose vehicles); *Philips/Matsushita DZB*, O.J. (C 220) 2 (1991) (standardized framework for commands between various audio/video consumer electronic products).