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Collaborative Joint Ventures for Research and Development Where Markets Are Concentrated: The Competition Rules of the Common Market and the Invalidity of Contracts

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Abstract

This Article describes the concerns of the European Commission's Competition Department about joint ventures for research and development and the problems caused for businessmen by the Commission's practice of exempting rather than clearing agreements that make the market more competitive. National courts may follow the Commission's practice in relation to Article 85(1), and they have no power to exempt. Consequently, ancillary restrictions on conduct that make it worthwhile for a party to contribute to a joint venture may not be enforceable.

ARTICLES

COLLABORATIVE JOINT VENTURES FOR RESEARCH AND DEVELOPMENT WHERE MARKETS ARE CONCENTRATED: THE COMPETITION RULES OF THE COMMON MARKET AND THE INVALIDITY OF CONTRACTS*

*Valentine Korah***

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* This Article by Professor Valentine Korah and the following Article by Mr. Barry E. Hawk, relating to joint ventures and their enforcement under European Community competition law, while complementary in certain areas, were conceived and written independently of each other. Neither author had the opportunity, prior to publication, to review the Article of the other. *The Editors.*

** Barrister; Professor of Competition Law, University College London; Visiting Professor, Fordham University School of Law, Spring 1991 and 1992; author of AN INTRODUCTORY GUIDE TO EEC COMPETITION LAW AND PRACTICE (4th ed. 1990) and five monographs on group exemptions from the competition rules, including R & D AND THE EEC COMPETITION RULES: REGULATION 418/85 (1986).

Chapter 12 of the INTRODUCTORY GUIDE analyzes the law relating to joint ventures. This Article develops that chapter and integrates the problems of invalidity with those of joint venture analysis. It is more opinionated and includes more recent material. The developments in the second half of 1990 were revolutionary.

I am greatly indebted to Mr. Christopher Ryder of the Washington, D.C. office of Milbank, Tweed, Hadley & McCloy for his collaboration on this Article. His perceptive review contributed greatly to the analysis of the material and the exposition of my arguments. Any errors remain my own.

I. *INTRODUCTION*

A. *Article 85 of the EEC Treaty*

Article 85(1) of the EEC Treaty[1] prohibits as incompatible with the Common Market agreements that may affect trade between Member States and which have the object or effect of restricting competition within the Common Market. Article 85(3) provides for exemption from this prohibition when collaboration leads to improvements in production or distribution or promotes technical or economic progress. Exemptions can be granted only by the Commission of the European Communities.[2] Agreements that infringe the article as a whole are void and unenforceable in respect of the provisions that restrict competition.[3]

Businessmen and politicians tend to believe that any collaboration to innovate must either be neutral or increase competition. They are surprised that exemption should be required. If the collaboration is unsuccessful, the market will punish the participants for wasting resources and there is no need for intervention on grounds of competition. Alternatively, if the venture is successful, the new technology will compete with the old, the firms enjoying the benefit of the results will be able to compete better in world markets, and costs and prices will fall or consumers benefit from better products.

The Commission accepts that in markets where there are many suppliers or which lack barriers to entry, joint ventures

1. Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 85, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II), 298 U.N.T.S. 3 (1958) [hereinafter EEC Treaty or Treaty].

2. Under article 9(1) of Regulation No. 17, the first regulation implementing Articles 85 and 86 of the Treaty, only the Commission can grant individual exemptions. Council Regulation No. 17/62, art. 9(1), 13 J.O. 204 (1962), O.J. Eng. Spec. Ed. 1959-62, at 87 [hereinafter Council Regulation No. 17]. Different regulations apply to transport, but again, national courts are not allowed to grant exemptions. In Council Regulation No. 19/65, 36 J.O. 533 (1965), O.J. Eng. Spec. Ed. 1965-66, at 35 and Council Regulation No. 2821/71, J.O. L 285/46 (1971), O.J. Eng. Spec. Ed. 1971, at 1032, the Council of Ministers empowered the Commission also to grant exemptions to specified categories of agreements. In Commission Regulation No. 418/85, O.J. L 53/5 (1985), on the application of Article 85(3) of the Treaty to categories of research and development agreements, the Commission exercised the power granted by Council Regulation No. 2821/71.

3. *See* EEC Treaty, *supra* note 1, art. 85(2); Société Technique Minière v. Maschinenbau Ulm GmbH, Case 56/65, [1966] E.C.R. 235, [1966] C.M.L.R. 357 (interpreting Article 85(2)).

are unlikely to restrict competition. Even if the venturers are unlikely to compete with their venture, other firms can.

Where markets are concentrated, it may be argued on the one hand that the joint venturers are unlikely to compete with each other or with their joint venture and that the number of possible suppliers is reduced. Moreover, the parties may accept ancillary restrictions on their conduct. On the other hand, if not more than one of the parties would have been able to achieve on its own the task of the joint venture, and if the ancillary restraints are required to make the venture viable, the market may be more competitive than it would have been without the joint effort. Not more than one party would have been able to enter the market independently of the other(s) and, possibly, the joint venture will have provided a competitive force more effectively than any one of the parties could have done alone.

Until recently, the Commission has habitually appraised the need to amalgamate complementary resources and accept ancillary restrictions when markets are concentrated only when granting an exemption under Article 85(3), and not when deciding whether Article 85(1) is infringed. The Commission has tended to stress the negative aspects of such collaboration in those industries where few firms are capable of substantial research efforts.[4] Until 1990, in formal decisions, joint ventures

4. There is, however, movement towards the view that ancillary restraints required to make viable a transaction that is not, in itself, anti-competitive do not infringe Article 85(1), so need no exemption. This view has been applied by the Court in cases not concerned with joint ventures, such as Pronuptia de Paris GmbH v. Pronuptia de Paris Irmgard Schillgalis, Case 161/84, [1986] E.C.R. 353, [1986] 1 C.M.L.R. 414. It now seems to be fashionable to refer to this as the "inherency" doctrine, which is based on German cartel law. The Commission decisions in *Elopak/ Metal Box—Odin* and *Konsortium ECR 900*, where joint ventures were at last cleared and not exempted, will be discussed at part V below.

In relation to joint ventures, see, for example, Jonathan Faull, *Joint Ventures Under the EEC Competition Rules*, 5 EUR. COMPETITION L. REV. 358, 364 n.10 (1984), where he refers to the U.S. doctrine of ancillary restraints, and Eric White, *Joint Ventures Under EEC Competition Law*, 16 INT'L REV. INDUS. PROP. & COPYRIGHT L. (IIC) 663 (1985).

The Commission has also accepted that joint ventures between competitors do not restrict competition *appreciably* and, consequently, do not infringe Article 85(1) where their market shares are not too great, and may be exempted if they are. *See infra* part V.C.

A third way in which the Commission has cleared joint ventures recently has been to treat them as concentrative and subject only to Article 86 and Council Regulation No. 4064/89, O.J. L 395/1 (1989), *corrected version in* O.J. L 257/13 (1990) have been found to infringe Article 85(1), although almost all have been exempted.

From the point of view of forming precedents, there is a crucial difference between, on the one hand, the view that collaboration restricts competition and must be exempted and, on the other, finding that it does not restrict competition and clearing the agreement. Only the Commission has power to exempt, and if a national court asked to enforce an agreement believes that it infringes Article 85(1), the most it can do is adjourn for the Commission to grant exemption.[5] From the point of view of the parties, too, the difference is crucial. An agreement that is cleared cannot be attacked for infringing the EEC competition rules, unless the notification was false or conditions have changed. An exemption can be given for only a limited period, and may be subject to conditions or obligations.

This Article describes the concerns of the Commission's Competition Department about joint ventures for research and development ("R & D") and the problems caused for businessmen by the Commission's practice of exempting rather than clearing agreements that make the market more competitive. National courts may follow the Commission's practice in relation to Article 85(1), and they have no power to exempt. Consequently, ancillary restrictions on conduct that make it worthwhile for a party to contribute to a joint venture may not be enforceable.

Usually joint venturers commit themselves to making investments from the results of which each must be able to profit without the fear that the other parties or outsiders will reap more than they have sown. Otherwise, venturers are unlikely to invest. Even joint ventures for R & D may not lead to intellectual property rights, so usually they include contractual terms ensuring that only the parties will be able to enjoy the

[hereinafter Merger Regulation]. *See infra* part VI; *see also* James S. Venit, *Oedipus Rex: Recent Developments in the Structural Approach to Joint Ventures Under EEC Competition Law*, WORLD COMPETITION, Mar. 1991, at 5, 8-9, 15-20, 28-29.

Nevertheless, the movement towards clearance is hesitant and inconsistent. In three recent decisions, discussed *infra* part V.D, the Commission has exempted under Article 85(3) joint ventures that, in my view, it should have cleared as not restricting competition.

5. *See infra* parts I.C, I.D.3.

results. Where the parties want the results for the same purpose, they are likely to need to ensure also that some do not exploit the ideas to the degree that there is insufficient demand left for the others to satisfy. They may also need to ensure that the results are in fact used and that the others do not carry on independent research that might compete with that of the joint venture.

Valid contractual provisions to enforce ancillary restrictions on conduct are vital in inducing joint ventures that may lead to innovation. Since the Commission lacks the resources to grant more than a very few individual exemptions each year, it is very important that agreements should not unnecessarily be treated as infringing Article 85(1), with the consequence that some provisions in the agreement would be void.

Very recently, the Commission has been clearing some joint ventures as not infringing Article 85(1) rather than exempting them. This is a most important development, discussed at parts V and VI below, and one which may lead to such agreements being more easily enforceable in the courts.

B. *Importance and Difficulty of Analyzing ex ante*

Perceived *ex post*, after the investment has been made and the results have been achieved, these ancillary restrictions are clearly anti-competitive. Once the results have been obtained it would be more competitive if the parties were free to compete with each other.

Perceived *ex ante*, however, at the time the parties were deciding whether to commit themselves to investment in R & D, the restrictions may be pro-competitive, if without them, or something like them, the parties would not have made the investment. One should compare the position that has resulted from the collaboration with that which would have occurred without it.[6]

6. *See* Opinion of Advocate General Roemer, Etablissements Consten SARL and Grundig-Verkaufs-GmbH v. Commission, Joined Cases 56 & 58/64, [1966] E.C.R. 299, [1966] C.M.L.R. 418. The Advocate General stated that:

> [p]roperly understood, therefore, Article 85(1) requires a comparison between two market situations: that which arises after the making of an agreement and that which would have arisen had there been no agreement. This concrete examination may show that it is not possible for a manufacturer to find an outlet in a particular part of the market unless he concentrates sup-

To decide whether the ancillary restrictions are pro- or anti-competitive is difficult. It may be hard to demonstrate that the parties would not have made their investment without the ancillary restrictions on conduct. Where the restrictions are not limited to the use of the results they make possible, it may be hard to establish that the results of the collaboration are more important than the restrictions.

It is hardly surprising that officials of the Commission, most of whom are jurists with little knowledge of microeconomics or experience in industry, should have tended to appraise agreements *ex post* when applying Article 85(1). They have exempted ancillary restraints on conduct under Article 85(3) when they are reasonable and necessary to induce the investments. The decisions appear contradictory, in that the very provision found to restrict competition within the meaning of Article 85(1) is exempted on the basis that it makes competitive conduct possible.

This practice of analyzing agreements *ex post* and finding that significant restrictions of conduct restricted competition and required exemption had the advantage that the difficult decisions were centralized in the Commission, which had a very wide discretion to grant exemptions. This was politically expedient, because the two Member States that had a national competition law in the 1960s had very different attitudes.[7] The

> ply in the hands of a sole concessionnaire. That would signify that in a given situation an exclusive distributorship agreement has effects which are likely only to *promote* competition. Such a situation can in particular appear when what is at issue is gaining access to an[d] penetrating a market.

Id. at 358-59, [1966] C.M.L.R. at 431-32 (emphasis in original).

The Court followed his example in *Société Technique Minière*, [1966] E.C.R. at 250, [1966] C.M.L.R. at 368-70, and in NV L'Oréal and SA L'Oréal v. PVBA De Nieuwe AMCK, Case 31/80, [1980] E.C.R. 3775, [1981] 2 C.M.L.R. 235. In *L'Oréal*, the Court stated that

> in order to decide whether an agreement is to be considered as prohibited by reason of the distortion of competition which is its object or its effect, it is necessary to consider the competition within the actual context in which it would occur in the absence of the agreement in dispute. To that end, it is appropriate to take into account in particular the nature and quantity, limited or otherwise, of the products covered by the agreement, the position and the importance of the parties on the market for the products concerned, and the isolated nature of the disputed agreement or, alternatively, its position in a series of agreements.

Id. at 3792, [1981] 2 C.M.L.R. at 253.

7. The French law was harsh on vertical agreements, perceived as supporting

practice of interpreting Article 85(1) widely had the grave disadvantage, however, that the Commission lacked the resources to grant many exemptions, and has never managed more than ten exemptions under Article 85(3) in a single year.

C. *Invalidity*

Since, by virtue of Article 85(2), agreements that infringe Article 85 are void in respect of the provisions that restrict competition, the practice of exempting rather than clearing agreements causes difficulty when the parties try to enforce their agreements. Since *SA Brasserie de Haecht v. the spouses Wilkin-Janssen*,[8] it has been clear that notification to the Commission with a request for exemption does not confer provisional validity on an agreement.[9] Only a formal exemption, which is binding on the parties to whom it is addressed, binds a national court. If a national court is persuaded that an agreement does not require exemption because it does not restrict competition or does not affect trade between Member States, the court cannot refuse to enforce its restrictive provisions by virtue of Article 85(2). A national court, however, has no power to grant an exemption, and it is widely thought that the enforcement by a national court of a contract that infringes Article 85(1) would amount to exempting it.[10]

In an action to enforce restrictive provisions of a joint venture agreement, or for damages for their breach, a national court might have to adjourn to enable the Commission to decide whether to exempt the agreement, and the defendant to the action would then be in a position to help the Commission

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the "black market." The German law was harsher on horizontal agreements, which might be naked cartels intended to restrict production and raise prices without supporting any pro-competitive activity.

8. Case 48/72, [1973] E.C.R. 77, [1973] C.M.L.R. 287.

9. Agreements made before Regulation No. 17 came into force and some other agreements do enjoy provisional validity if they were notified to the Commission in due time.

10. But see Alexis de Norre and his wife Martine, née de Clercq v. NV Brouwerij Concordia, Case 47/76, [1977] E.C.R. 65, [1977] 1 C.M.L.R. 378, where the Commission stressed the importance of legal certainty and argued that a national court should be able to enforce an agreement where it was clear from the Commission's past practice that it would not condemn the agreement. *Id.* at 82, [1977] 1 C.M.L.R. at 398. The Court never dealt with the issue. *See infra* part I.D.3 and note 23.

find anti-competitive effects. This legal uncertainty must have a chilling effect on joint ventures.

D. *Possible Ways of Dealing with the Commission's Case Load*

1. Formal Exemptions

The Commission has power to exempt agreements individually, provided that the agreements have been notified to it.[11] It has selected carefully the files that it has pursued to a formal decision, and gives priority to those that may establish new points, or deal with matters which it intends to exempt by regulation. Some priority is given to those that are the subject of litigation in a Member State.

Until 1990, all the formal decisions relating to joint ventures were exemptions. Problems arise when enforcing agreements that have not been the subject of formal decisions, or when the Commission requires alterations to be made to the contract after one party has performed more than the other.[12] The parties to an agreement with respect to which the Commission intends to adopt a formal decision may prefer an exemption to a negative clearance, since an exemption binds the parties to whom it is addressed,[13] while the terms of a negative clearance are very limited.[14] On the other hand, an exemption lasts only for a limited period and may be subject to conditions or obligations. Literally, a negative clearance cannot be subject to conditions, although the Commission may be prepared to adopt one only after the parties have "voluntarily" altered their agreement.

The greater problem is that national courts, which have no

11. This notification must be provided on form A or B, in accordance with Commission Regulation No. 27/62, 35 J.O. 1118 (1962), O.J. Eng. Spec. Ed. 1959-62, at 132, as amended by Commission Regulation No. 2526/85, O.J. L 240/1 (1985). This is a troublesome operation requiring management time to explain the structure of the market and the advantages of the agreement, as well as specialized and costly legal advice.

12. *See infra* part III.

13. *See* EEC Treaty, *supra* note 1, art. 169.

14. Council Regulation No. 17, article 2, provides that "the Commission may certify that, on the basis of the facts in its possession, there are no grounds under Article 85(1) or Article 86 of the Treaty for action on its part in respect of an agreement, decision or practice." Council Regulation No. 17, *supra* note 2, art. 2, O.J. Eng. Spec. Ed. 1959-62, at 88.

power to exempt, may follow the Commission's precedents on the application of Article 85(1).

2. Formal Exemptions in Short Form

In *BP/Kellogg*,[15] the Commission adopted its first short form exemption. One of the difficulties in adopting exemptions is that the Commission has to publish two items in the Official Journal, requiring translations into all the Community languages.[16] Under article 19(3) of Regulation No. 17, the Commission is required to publish its intention to take a favourable decision, and under article 21 it is required to publish the actual decision. In *BP/Kellogg*, the Commission stated the facts and the arguments of the parties in the first notice, and repeated them literally as the basis of its decision, adding less than one column of text stating the reasons for its exemption by reference to the arguments of the parties. The whole was published in less than three full pages of the Official Journal.[17]

The drawback of this procedure is that the reasons are very short. Article 190 of the Treaty requires the Commission to give reasons for its formal acts. It is doubtful whether the reasoning to support the finding that Article 85(1) was infringed was sufficient to satisfy Article 190, although the Court of Justice has not required very detailed reasons. Probably, the reasoning in *BP/Kellogg* was just sufficient to support the exemption. The validity of short form exemptions has not been tested in the Court and doubts of this kind have led to the Commission granting very few exemptions in short form.

3. Informal Comfort Letters

Most of the requests for exemption with which the Commission deals are closed informally with a "comfort letter." Even where markets are concentrated, some letters state that

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15. O.J. L 369/6 (1985), [1986] 2 C.M.L.R. 619.

16. There are now nine Community languages: Danish, Dutch, English, French, German, Greek, Italian, Portuguese and Spanish, as well as Erse, on translation into which the Irish do not insist. The problem will become so bad if the three Nordic countries and some of the East European countries and Turkey accede, that it may become possible for Member States to agree on only a few languages at least for some purposes.

17. The notice under article 19(3) was published in O.J. C 224/2 (1985). The formal parts of such decisions are identical, so hardly any translation is needed.

the agreement does not infringe Article 85(1) because not more than one of the parties could have achieved the task of the joint venture on its own,[18] and the restrictions of competition accepted are the minimum that were necessary to induce each party to collaborate. In private conversations and in speeches, Commission officials often state that where markets are not concentrated, Article 85(1) is not infringed,[19] but few of these comfort letters have been published.

Letters stating that the agreement is not prohibited by Article 85(1) are of some help when enforcing the agreement in a national court, although they are not binding on national courts.[20] Many such letters are written.[21] Another kind of

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18. In Optical Fibres, O.J. L 236/30 (1986), [1985-1988 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 10,813, Corning Glass could have manufactured the fibres without collaborating with BICC or Siemens, yet at paragraph 46, the Commission stated that no one of the joint ventures would have infringed Article 85(1) on its own. *Id.* at 36, ¶ 46, [1985-1988 Transfer Binder] Common Mkt. Rep. (CCH) at 11,898; *see* Valentine Korah, *Critical Comments on the Commission's Recent Decisions Exempting Joint Ventures to Exploit Research That Needs Further Development*, 12 EUR. L. REV. 18, 22-39 (1987) (discussing *Optical Fibres*).

Sometimes there are several firms, any one of which is capable of attempting the task that they agree to undertake jointly. Where, however, the demand is limited, it may be that once one of them enters the market the others would refrain from following it, as they would not expect the investment to be profitable. In that situation, the joint venture does not reduce the number of potential competitors.

19. Mr. Jonathan Faull comes close to saying it in print. Faull, *supra* note 4, at 361. In GEC-Siemens/Plessey, O.J. C 239/2 (1990), discussed *infra* part V.C, in the light of various circumstances affecting the structure of the market, the Commission accepted that a joint venture between competitors did not infringe Article 85(1) when the aggregate market shares of the parties were not excessive. The thresholds, however, are not specified.

20. Procureur de la République v. Bruno Giry and Guérlain S.A., Joined Cases 253/78 & 1-3/79, [1980] E.C.R. 2327, 2374, [1981] 2 C.M.L.R. 99, 135 [hereinafter The Perfume Cases].

In NV L'Oréal and SA L'Oréal v. PVBA De Nieuwe AMCK, Case 31/80, [1980] E.C.R. 3775, [1981] 2 C.M.L.R. 235, Advocate General Rieschl suggested that administrative letters have some sort of binding effect on the Commission:

> Indeed, it must be accepted—in this regard L'Oréal is certainly right—that, having regard to the principle that legitimate expectation must be upheld, the Commission may depart from the judgment arrived at by its officers only if the factual circumstances change or if its finding was reached on the basis of incorrect information.

Id. at 3803, [1981] 2 C.M.L.R. at 246. The Court ruled only that the administrative letter might be taken into account by the national court but was not binding on it. It did not consider the effect of the letter on the Commission. *Id.* at 3789-90, [1981] 2 C.M.L.R. at 251-52.

21. Faull, *supra* note 4, at 359. He said much the same thing in a speech at a conference organised by European Study Conferences [hereinafter ESC] in Brussels

comfort letter is less helpful. One stating that, for similar reasons, the agreement merits exemption may imply that the agreement is contrary to Article 85(1), since otherwise, it would need no exemption.[22]

Some of the comfort letters now being sent do not indicate why the Commission is closing the file, and it is not clear how a national court should apply them. They clearly do not amount to valid exemptions. Some people argue on the basis of the Commission's central role in the exemption process that a national court should enforce such agreements.[23]

4. Group Exemptions

The Commission has tried to solve the problem of invalidity by granting group exemptions. It was given power by Council Regulation Nos. 19/65 and 2821/71[24] to grant group exemptions for various categories of agreements. It has exercised this power in relation to joint ventures for R & D in Regulation No. 418/85.[25] The Commission has been very cautious, and few agreements can be brought within the terms of the regulation.[26]

Since 1984, when granting group exemptions, the Commission has often provided an opposition procedure under

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in November 1988. Jonathan Faull, Address at the ESC in Brussels (Nov. 1988). In most years, some 200 to 500 files are closed without a formal decision. One can check the figures in the annual reports on competition policy.

22. *See, e.g.*, Mario Siragusa, *Notifications of Agreements in the EEC: To Notify or Not to Notify*, 1986 FORDHAM CORP. L. INST. 243, 246–86 (Barry Hawk ed., 1987). He observes that the Commission does not see such letters as closing the file. A possibility of exemption remains. Orally, he has described such letters as "discomfort letters."

23. *See supra* note 10 and accompanying text.

In Delimitis v. Henninger Bräu AG, Case C-234/89 (Eur. Ct. J. Feb. 28, 1991) (not yet reported), Advocate General Van Gerven stressed the central role of the Commission in granting both group and individual exemptions. The Court stressed how seldom an exclusive purchasing agreement infringes Article 85(1) and, at paragraph 53, suggested that the Commission might help national courts to apply Article 85(1) by advising the national judge. *Id.* slip op. ¶ 53. The Commission is currently preparing a notice on the application of Article 85 by national courts.

24. Council Regulation No. 19/65, 8 J.O. 533 (1965), O.J. Eng. Spec. Ed. 1965-66, at 35; Council Regulation No. 2821/71, J.O. L 285/46 (1971), O.J. Eng. Spec. Ed. 1971, at 1032. There are also powers now being exercised by the Commission to grant group exemptions for particular sectors of the economy, such as sea and air transport and insurance.

25. O.J. L 53/5 (1985).

26. *See infra* part IV.

which if an agreement is of the kind exempted by the particular regulation and notified to the Commission, it will be exempt under the regulation even if it contains a clause that is not expressly exempted, provided that the Commission does not oppose the exemption within six months. The opposition procedure has not proved very successful in reducing the Commission's case load because the conditions for its application are tightly circumscribed. To come within the group exemption for R & D, for instance, the agreement must qualify under article 1, satisfy the conditions of articles 2 and 3, and contain no provisions "black-listed" by article 6.[27] We will see that most of the agreements that require exemption encourage investment by including black-listed clauses allocating customers, territories or the quantities that each party may supply. Consequently, the regulation rarely, if ever, applies.

5. Construe Article 85(1) More Narrowly

The paucity of formal decisions of exemption, the lack of legal effect attributable to informal ways of closing files, and the narrowness of the group exemption have created great difficulty for firms contemplating joint ventures to create new technology.

Some officials in positions of influence have always thought *ex ante* and seen the need for enforceable contracts. They have been prepared to write comfort letters stating that the agreement does not infringe the prohibition of Article 85(1).[28] Others have thought *ex post* under Article 85(1) and analyzed flexibly only under Article 85(3). The Commission still seems to clear one agreement and exempt another, when it is difficult to see how many of those exempted can have restricted any competition that was possible.[29]

In 1968, the Commission tried to facilitate collaboration in R & D. It issued a notice on co-operation agreements, in which it suggested that "agreements having as their sole object: (a) the joint implementation of research and development projects, (b) the joint placing of research and development

27. Commission Regulation No. 418/85, arts. 1, 2, 3, 6, O.J. L 53/5, at 7, 8, 10 (1985).

28. *E.g.*, Faull, *supra* note 4, at 359.

29. *See* cases cited *infra* part V.D.

contracts, [and] (c) the sharing out of research and development projects among participating enterprises" do not restrict competition contrary to Article 85(1), provided that the parties do not agree to limit their own R & D activities, or their right to use the results of the joint results.[30]

The notice was very limited and of little use when the parties hoped to use the results for the same purpose, since it did not include agreements where the parties allocated the market in any way or where the joint venture was to produce[31] or distribute the products resulting from the collaboration, nor when there was any element of exclusivity. Nevertheless, the Commission did acknowledge that even in concentrated markets some joint ventures might not infringe Article 85(1) and did not require exemption.

As stated at part I.B above, where, viewed *ex ante*, not more than one of the parties could have undertaken the task of the joint venture independently, and ancillary restraints were necessary to induce the innovation, they may well have made the market more competitive and are unlikely to have made it less competitive. It is vital, if firms in Europe are to keep up with the Americans and Japanese, that ancillary restraints be enforceable and that the parties can be advised, at the time they are negotiating their joint venture and deciding to invest, that such restraints will be enforceable. The four decisions adopted recently,[32] stating that joint venture agreements with

30. Notice on Agreements, Decisions, and Concerted Practices Concerning Cooperation Between Enterprises, § II(3)(a), J.O. C 75/3 (1968), *corrected in* J.O. C 84/14 (1968). The Commission qualified this statement by adding that specialization agreements may restrict competition if each party may end up holding blocking rights, unless they agree to give access to the others.

31. The Commission decided that the agreement in Beecham/Parke Davis, O.J. L 70/11 (1979), [1979] 2 C.M.L.R. 157, failed to qualify for clearance under these tests, probably because the collaboration extended to production as well as to research and development [hereinafter R & D]. It granted an individual exemption because, in effect, the agreement increased competition.

32. These are Elopak/Metal Box—Odin, O.J. L 209/15 (1990), [1991] 4 C.M.L.R. 832 [hereinafter Odin]; Konsortium ECR 900, O.J. L 228/31 (1990), Common Mkt. Rep. (CCH) [1990] 2 CEC 2082, discussed *infra* part V.A.6; GEC-Siemens/Plessey, O.J. C 239/2 (1990), where the Commission stated that even joint ventures between competitors do not infringe Article 85(1) unless their aggregate market share is substantial, discussed *infra* part V.C; and Metaleurop SA, O.J. L 179/41 (1990), [1991] 4 C.M.L.R. 222, discussed *infra* part V.B, where a concentrative joint venture was appraised only under Article 86.

exclusive provisions do not restrict competition are, therefore, warmly welcome.

II. *THE COMMISSION'S CONCERNS ABOUT JOINT VENTURES THAT MAY RESTRICT COMPETITION*

The Court of Justice has not yet been called upon to consider the merits of any of the decisions on joint ventures, largely because few such agreements have been condemned, although some have been exempted for a period subject to conditions and obligations. Indeed, the Commission has been criticised for being too permissive under Article 85(3). It is difficult to assess this criticism, as insufficient market analysis is published in the decisions.

A. *Inherent Effect: Loss of Potential Competition*

The Commission may rightly be concerned by a reduction in the number of competitors when markets are concentrated.[33] One or more actual or potential competitors may be replaced by the joint venture. The Commission's published decisions mostly have related to concentrated markets, and have been concerned with collaboration to develop sophisticated technology.

Whether or not the joint venturers agree not to compete with their joint venture, the Commission's main concern until the early 1980s was that parties having a substantial equity interest would be deterred from competing with their joint venture regardless of whether they were already in the market or were merely potential competitors. Parties were found to be potential competitors even when the Commission recognized that there was no likelihood of their entering or remaining in the market independently.[34]

33. Mr. Faull says that "[joint ventures] between competitors with low market shares are *de minimis* if there are no other restrictions." Faull, *supra* note 4, at 363.
See GEC-Siemens/Plessey, O.J. C 239/2 (1990); *infra* part V.C (discussing *GEC-Siemens/Plessey*).

34. *See, e.g.*, Beecham/Parke Davis, O.J. L 70/11 (1979), [1979] 2 C.M.L.R. 157; Vacuum Interrupters, O.J. L 48/32 (1977), [1977] 1 C.M.L.R. D67. I criticized the latter in AN INTRODUCTORY GUIDE TO EEC COMPETITION LAW AND PRACTICE 198-99 (4th ed. 1990). In both decisions, the Commission accepted that the parties had decided to give up research in the area because of its high cost and the small chance of success.

Nevertheless, few joint ventures have been prohibited. The Commission usually has been impressed by the efficiencies made possible by collaboration, often between firms with complementary resources, and it has granted individual exemptions under Article 85(3). It is, however, often difficult to see how competition was restricted contrary to Article 85(1). If it were not, it would have been better to clear the collaboration on that ground.

The closer to the market that the joint venture extends, the more likely it used to be that the Commission would find that Article 85(1) will be infringed. Where a joint venture is confined to basic R & D, there may be no relevant product market in which competition could be restricted.[35] This will not be true of a production joint venture, although if each of the parties distributes the product independently of the joint venture considerable competition between them may remain. A joint venture that extends to distribution used to be exempted only if there was good reason for joint distribution,[36] but if the joint venture had appreciable effects on the market, it was unlikely to be cleared.[37]

B. *The Group Effect: Spill-Over*

In several decisions, the Commission has been concerned that once the parties find that collaboration is helpful, they may cease to compete aggressively with each other in other markets. In *WANO/Schwarzpulver*, for instance, the Commission was concerned that the parties to a joint venture for black powder also had interests in explosives, explosives accessories and safety fuses.[38] The joint venture would give "opportuni-

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35. Faull, *supra* note 4, at 366. Also see the discussion of Commission Regulation No. 418/85, recital 2, O.J. L 53/5 (1985), *infra* part IV.A.

36. This was done in De Laval/Stork, O.J. L 215/11 (1977), [1977] 2 C.M.L.R. D69, for the reasons discussed *infra* part III.

In Cekacan, O.J. L 299/64 (1990), Common Mkt. Rep. (CCH) [1990] 2 CEC 2099, and several other decisions discussed *infra* part V.D, the Commission exempted a joint venture that did extend to distribution.

37. *But see* Odin, O.J. L 209/15 (1990), [1991] 4 C.M.L.R. 832; Konsortium ECR 900, O.J. L 228/31 (1990), Common Mkt. Rep. (CCH) [1990] 2 CEC 2082; *infra* part V.A.6.

38. WANO/Schwarzpulver, O.J. L 322/26, at 31, ¶ 2(d) (1978), [1979] 1 C.M.L.R. 403, 412. This joint venture was not concerned with R & D, but provided ICI with an assured source of supply for its entire requirements of black powder from

ties and strong inducements" for market sharing in safety fuses.[39]

The parties may respond to the Commission's concern by arranging that only a limited number of employees work on the joint venture and that these do not come into contact with the parent's other employees more than is necessary. This is sometimes called a "Chinese wall." The parties may agree that the joint venture will hire its own personnel and that they will not themselves employ anyone that has worked for the joint venture. Nevertheless, it is difficult to prevent top management from realizing that collaboration on other products might be desirable.

C. *Foreclosure*

The Commission should be concerned by a bottleneck monopoly only when firms with independent access to rare resources combine to create a monopoly, in which case the Commission may want to ensure access for others.[40] The Commission should not be concerned when a joint venture develops a unique resource, since it is more competitive to have one source than none.

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a joint venture with a competitor after ICI's plant was burned down. The group effect was not the only cause for concern.

39. *Id.*

40. This concern may be exemplified by the Commission's informal action in *IGR Stereo Television*. This joint venture related to the joint purchase and exploitation of existing technology by German firms that competed with each other.

A trade association representing the German manufacturers of stereo television sets acquired the patent rights needed to make stereo television sets and granted licenses to its members. The Commission closed its file only when the association ended its refusal to grant licenses to a Finnish non-member operating in Germany. COMMISSION ELEVENTH REPORT ON COMPETITION POLICY 63 (1982).

Three years later the Commission reported that the license fees charged were too high, and it intervened again to persuade the parties to reduce the royalties. COMMISSION FOURTEENTH REPORT ON COMPETITION POLICY 76 (1985).

It is not clear whether there was more than one way of making stereo television sets, but the acquisition was collective. The transaction resembled a patent pool in as much as several competitors acquired exclusive rights to technology.

See also Tetra Pak I, O.J. L 272/27 (1988), [1990] 4 C.M.L.R. 47, where the holder of technology acquired the exclusive licensee of competing technology and was persuaded by the Commission to abrogate the exclusive element of the license.

The decision was confirmed by the Court of First Instance in Tetra Pak Rausing SA v. Commission, Case T-51/89, [1990] E.C.R __, [1991] 4 C.M.L.R. 334, on the narrow issue that the acquisition of an exclusive license exempted by regulation might infringe Article 86.

Nevertheless, the lack of substitutes is an example of the circumstances in which the Commission has power to intervene to withdraw the benefit of the group exemptions for collaboration in R & D and for patent or know-how licensing.[41] That power, however, is discretionary, and if the Commission seeks to exercise it, the parties have a chance to argue that the Commission should think *ex ante*, and not remove the incentives to developing technology jointly by taking away the protection on which the commercial activity was based.[42]

The Commission also is concerned that the joint venture may be over-inclusive and leave too few independent firms with particular technology or other resources to compete by collaborating with outsiders.[43] This may occur when more than one of the parties has a technological lead over outside competitors. In the two recent clearances where the parties had complementary technology, the Commission expressly mentioned that there were other competitors in each field, so that other joint ventures were not foreclosed.[44]

D. *Ancillary Restrictions—The Need for Each Party to Appropriate the Benefits of Its Investment*

Clearly, the Commission is right to check that cartel ar-

41. *See* Commission Regulation No. 2349/84, art. 9(2), O.J. L 219/15 (1984), *corrected version in* O.J. L 113/34 (1985) (patent licensing); Commission Regulation No. 418/85, art. 10(d), O.J. L 53/5 (1985) (R & D); Commission Regulation No. 556/89, art. 7(2), O.J. L 61/1 (1989) (know-how licensing).

42. *See* Faull, *supra* note 4, at 366 (pointing out that one of conditions for exemption is that competition not be eliminated).

43. See article 3 of the group exemption for R & D, Commission Regulation No. 418/85, O.J. L 53/5 (1985), which prevents the regulation from applying when the parties' aggregate market shares exceed 20 percent, discussed *infra* part IV.A.3. The Commission is concerned that if the aggregate market shares are too high, there may be no one with whom other firms may collaborate. Odin, O.J. L 209/15, at 19, ¶ 27 (1990), [1991] 4 C.M.L.R. 832, 841; Konsortium ECR 900, § II(2)(a), O.J. L 228/31, at 33 (1990), Common Mkt. Rep. (CCH) [1990] 2 CEC 2082, 2085; *infra* part V.A.6 (discussing decisions).

This kind of foreclosure may explain the Commission's refusal to exempt Eurosport in Screensport/EBU Members, O.J. L 63/32 (1991), Common Mkt. Rep. (CCH) [1991] 1 CEC 2092. Sky television was to collaborate with all the members of the European Broadcasting Union, the main suppliers of sports television programmes in Europe.

44. Odin, O.J. L 209/15, at 19, ¶ 27 (1990), [1991] 4 C.M.L.R. 832, 891; Konsortium ECR 900, O.J. L 228/31 (1990), Common Mkt. Rep. (CCH) [1990] 2 CEC 2082; *see infra* part V.A.6 (discussing decisions).

rangements are not attached to or concealed by a valid joint venture. Ancillary restrictions should be only as wide as is necessary to make the basic transaction viable. Under U.S. case law, ancillary restrictions need be only reasonably necessary, and it is irrelevant that a slightly less restrictive provision could be devised with the advantage of hindsight.[45] Nevertheless, unlike the Court,[46] the Commission seems to consider whether ancillary restrictions are justified mainly when granting an exemption under Article 85(3) and rarely when considering whether the agreement restricts competition contrary to Article 85(1).[47]

As suggested in part I.B above, unless each investor be satisfied that it will receive the agreed share of the benefits if the joint venture proves successful, he is unlikely to commit resources to a joint venture. Ensuring a return is difficult enough for a single innovating firm, especially when it is not clear whether patent protection will be possible and affordable, and third parties may take a free ride. When the work is done jointly, it is even more difficult to ensure that each party can appropriate the fruits of its investment and that the others do

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45. *See, e.g.*, United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898). Then-Circuit Judge Taft said: "Before such agreements [in partial restraint of trade] are upheld, however, the court must find that the restraints attempted thereby are reasonably necessary to the enjoyment by the buyer of the property, goodwill, or interest in the partnership bought; or to the legitimate ends of the existing partnership." *Id.* at 281.

Despite the different language of the Community decisions, there is no apparent difference of substance. The Commission does not always consider whether a slightly less restrictive alternative exists. See, for example, the Commission's Notice Regarding Restrictions Ancillary to Concentrations, O.J. C 203/5 (1990), which said that "[necessary] means that in their [the restrictions'] absence the concentration could not be implemented or could only be implemented under more uncertain conditions, at substantially higher cost, over an appreciably longer period or with considerably less probability of success. This must be judged on an objective basis." *Id.* § II(5), at 6.

See also Odin, O.J. L 209/15 (1990), [1991] 4 C.M.L.R. 832; *infra* part V.A.6.

46. *See, e.g.*, Pronuptia de Paris GmbH v. Pronuptia de Paris Irmgard Shillgalis, Case 161/84, [1986] E.C.R. 353, [1986] 1 C.M.L.R. 414; Remia BV and Verenigde Bedrijven Nutricia v. Commission, Case 42/84, [1985] E.C.R. 2545, [1987] 1 C.M.L.R. 1; Nungesser (L.G.) KG and Kurt Eisele v. Commission, Case 257/78, [1982] E.C.R. 2015, [1983] 1 C.M.L.R. 278; Société Technique Minière v. Maschinenbau Ulm, Case 56/65, [1966] E.C.R. 235, [1966] C.M.L.R. 357.

47. The Sub-Contracting Notice, O.J. C 1/2 (1979), is a notable exception. See also recital 2 to the R & D exemption, Commission Regulation No. 418/85, O.J. L 53/5 (1985), considered *infra* part IV.A.

not over-exploit the results.[48] It can be done only by contract, which must be enforceable.

Often it is impossible to foretell at the time the agreement is being negotiated how much the work will cost or whether it will be successful, let alone how successful. In which case it is difficult to specify in advance an appropriate royalty to be paid to the person whose input is more valuable or who exploits the results less. Where the work of the parties is interactive, it may be impossible for an arbitrator to attribute realistic relative values to the contributions, even *ex post*. Sometimes, neither contribution has any value without that of the other. Often the only possible formula for joint R & D where the parties expect to exploit the results for the same purpose is that each party will provide or pay for a specified proportion of the work or cost and that each will benefit from the results in the same proportion. Quotas may be agreed or the joint venture may sell on behalf of the parties.

There will almost inevitably be an important clause in the joint venture agreement restraining the parties from developing similar technology independently of the joint venture. Such a restriction may be justified on the ground that where a firm given confidential information is carrying on independent research or development, it is difficult to establish whether the confidential information has been misappropriated. Moreover, a party investing in developing new ideas must ensure that the ideas are used, and is likely to want to discourage its partners from developing competing technology.

Should these provisions be seen as anti-competitive restrictions or as ancillary restraints necessary to induce co-operation that may increase competition? For how long can they be shown to be indispensable? *Ex post*, the joint venture may result in a single seller, or ancillary restrictions may impose quotas on both parties and prevent each from licensing third parties. The joint venture may foreclose if there are no firms with which the remaining firms in an industry can collaborate. If there are only a few firms in a market protected by high entry barriers, these restrictions on conduct are important. Perceived after the results have been obtained successfully, the

48. Alexis Jacquemin & Bernard Spinoit, *Economic and Legal Aspects of Cooperative Research: A European View*, 1985 FORDHAM CORP. L. INST. 487 (Barry Hawk ed., 1986).

market might be more competitive if the parties competed with each other.

On the other hand, in some circumstances, without some form of quota and exclusive provisions, neither party could be sure of reaping the fruits of its investment in the joint research. To provide sufficient incentives, the protection may have to last well beyond the period of the research and development, so that the benefits can be reaped when the collaboration can be exploited. It is possible that neither party would supply its best technology if the other could use the technology to compete with it, or would be able to do so shortly. Such restrictions on conduct may thus be necessary for several years or even decades after the investment starts to bring in profits.[49] On this view, the restrictions are ancillary and may increase competition if they enable each party to appropriate the expected benefit of its investment and, so, make the joint venture viable.

III. *CONDITIONS AND OBLIGATIONS MAY BE ATTACHED TO AN EXEMPTION*

The Commission has increased its discretionary powers by exempting joint ventures for R & D rather than stating that they do not infringe the prohibition of Article 85(1). Its exclusive power under Regulation No. 17 to grant individual exemptions has enabled it to attach conditions and obligations to an exemption.[50]

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49. It may be impossible to calculate in advance the period required. It will depend, *ex ante*, on a discounted cash flow analysis. The expected cost of the investment must be recouped from the chances of profit.

It is usually unclear, when a joint venture is being negotiated what it will cost, whether it will be successful and what prices can be charged on exploiting the results. The expected profits must be discounted by the likelihood of failure and the lag of benefits after costs. Moreover, a risk premium will apply, since most firms are risk averse and R & D, especially joint R & D, is inherently risky.

If the parties are not permitted to restrict competition between each other for long enough to recoup the costs and a reasonable profit, they will have less incentive to make the investments.

Until recently, however, the Commission assumed that any firm sufficiently interested to invest in a joint venture was a potential competitor even if, as in Vacuum Interrupters, O.J. L 48/32 (1977), [1977] 1 C.M.L.R. D67, it had given up the work individually because of the high cost and small chance of success.

50. The exemptions must be for a limited period, so the Commission has an-

In *De Laval/Stork*,[51] for instance, De Laval was part of a large U.S. group of companies just beginning to sell compressors and turbines in Europe. Stork was part of a Dutch group of companies operating under a technology license[52] from De Laval and had an under-used factory and a more effective sales force in Europe. The firms were beginning to become actual competitors,[53] but had complementary strengths to contribute. The Commission exempted the collaboration for fifteen years from the joint venture, but subject to conditions that would enable Stork to operate independently thereafter.

The market was one in which each order had to be specifically designed by adapting basic designs. A single team of engineers had to negotiate a contract with a client, cooperate technically with each client to design a product, work out a production program and carry out the after-sales service, which was an important element of competition. Contrary to its preferred practice, the Commission exempted a transaction which included joint sales as well as joint design and manufacture.

The Commission wished to ensure, however, that when the agreement expired each party would be entitled to a license of the technology that had been licensed to the joint venture, but on a most favoured licensee basis, rather than on the basis agreed by the parties. It required that each be entitled to sell products made thereby not only in the Common Market but also outside, presumably throughout the world. The Commission's condition may have affected the commercial balance of the agreement, since 85 percent of the products made by the joint venture were derived from the basic designs contributed by De Laval. Worse still, since each party provided some

other chance to intervene when they expire. Often, it requires that it be informed about specified activities and progress.

51. O.J. L 215/11 (1977), [1977] 2 C.M.L.R. D69.

52. The license was granted in 1969, two years before the joint venture agreement. *Id.* § I(C), at 12, [1977] 2 C.M.L.R. at D76. The Commission perceived the collaboration only as of 1971, *id.* § I(D)(3), at 14, [1977] 2 C.M.L.R. at D76, by which time Stork was just viable in the market as a result of the license. Had the collaboration been perceived as of 1969, when the license was granted, it is not clear that Stork would have been able to enter. *Id.* § III(12), at 17, [1977] 2 C.M.L.R. at D82.

53. *Id.* § II(4), at 15, [1977] 2 C.M.L.R. at D78. Six years later, by the time of the decision in 1977, the parties supplied between 10 and 15 percent of the various products affected. *Id.* § III(12), at 17, [1977] 2 C.M.L.R. at D82.

technology to the joint venture, each was placed in a position to renegotiate the entire agreement at the time the Commission suggested or required amendments. Each could refuse to renegotiate the contract as required by the Commission, leaving the exclusive provisions unenforceable. Indeed, if the parties do not agree to amend their agreement, it might be argued that the joint venture between actual or potential competitors was, itself, void. That would be most unsatisfactory.

I have no reason to think that any renegotiation took place. Fear of a condition being imposed, however, has deterred some firms from notifying their joint ventures to the Commission. Seen *ex post*, when De Laval had already made its technology available to the European firm, the changes required by the Commission may have made the market more competitive. Each firm may be more competent to enter the field when the exemption expires.[54] The decision has deterred other firms from notifying joint ventures, however, and the risk of having to renegotiate may deter some firms from entering into a joint venture that otherwise would have been viable and have increased competition. Many firms abide by their agreements even when they are not enforceable because they value their reputation for commercial honesty or because they need a good relationship with the other party in other markets, but an opportunity to renegotiate does increase the risk of the other party not performing.

When dealing informally with joint ventures, sometimes before they are finally concluded, but sometimes several years afterwards, the Commission often identifies its concerns, and the parties are under considerable pressure to amend their agreements to meet them.[55] The opportunity to renegotiate at this stage also deters some parties from notifying agreements and a few from making them.

IV. *THE GROUP EXEMPTION, REGULATION NO. 418/85*

One of the ways in which the Commission attempted to

54. In De Laval/Stork [2], O.J. L 59/32 (1988), [1988] 4 C.M.L.R. 714, however, the Commission renewed the exemption because, during a recession in the industry, the joint venture did not thrive. The Commission decided that the parties still needed to collaborate to enter the market effectively. *Id.* § II(B)(6), at 34, [1988] 4 C.M.L.R. at 718.

55. *See, e.g.*, Faull, *supra* note 4, at 359.

confer legal validity on joint ventures that might make the market more competitive was to grant a group exemption. By the mid-1980s, members of the Commission were making speeches claiming that the Community favoured research and development, even if carried out in collaboration.[56]

A. *Collaboration Limited to R & D Seldom Infringes Article 85(1)*

The most important provision in the regulation may well be its second recital, which reiterates what was said in the notice on cooperation agreements of 1968:[57] "[A]greements on the joint execution of research work or the joint development of the results of the research, up to but not including the stage of industrial application, generally do not fall within the scope of Article 85(1) of the Treaty."[58]

Eric White, who drafted the regulation, states[59] that this confirms the earlier notice and suggests that the Commission might no longer follow its earlier decisions asserting that agreements merely discouraging R & D infringe Article 85(1).[60] Moreover, article 1(1)(c) of the regulation also contains language that was not strictly necessary and which casts doubt on whether joint R & D not extending to joint exploitation does often infringe Article 85(1).

The idea behind recital 2 is that basic research which does not envisage any commercial product in particular is unlikely to affect competition in any particular market. So, collaboration on basic research does not infringe Article 85(1) and need not be brought within the terms of the group exemption.

56. *E.g.*, Commission Press Release, IP (84) 471 (1984).

57. *See supra* part I.D.5.

58. Commission Regulation No. 418/85, recital 2, O.J. L 53/5, at 5 (1985). The Commission qualified this statement by adding in recital 2:

> In certain circumstances, however, such as where the parties agree not to carry out other research and development in the same field, thereby forgoing the opportunity of gaining competitive advantages over the other parties, such agreements may fall within Article 85(1) and should therefore not be excluded from this Regulation.

Id.

59. White, *supra* note 4, at 667.

60. *Id.* Although, as stated *supra* part I.D.4, the Commission is empowered to grant group exemptions to certain kinds of agreements, it has no power to grant group negative clearances. A recital in a group exemption that specified kinds of agreements that do not infringe Article 85(1) may be a device for remedying this *lacuna* in its powers.

B. *Narrow Ambit of the Group Exemption*

The exemption is, however, narrow.[61] It exempts three kinds of agreement for collaboration in R & D: (1) joint R & D; (2) joint R & D together with its exploitation; and (3) joint exploitation of the results of collaboration in R & D carried out by the same parties under an earlier agreement.[62]

Joint venturers will often be concerned that the other parties may carry out similar R & D on their own or with third parties, because it is so difficult to establish whether they are misappropriating technology contributed to the joint venture.[63] Contractual restraints for this purpose, however, may prevent the application of the group exemption. Article 4(1)(a) and (b) permits an obligation not to carry out R & D independently in relation to a field closely connected to the program, while article 6(a) blacklists such a clause relating to an unconnected field. If the parties define their program fairly broadly, they may be better able to prevent some from taking a free ride on the others' technology.

Further difficulty is caused when the parties want to ensure that each gets a share of the exploitation sufficient to induce its investment. The exemption does not apply where

61. I analyzed its provisions in the context of the case law of the Commission in VALENTINE KORAH, R & D JOINT VENTURES AND THE EEC COMPETITION RULES: REGULATION 418/85 (1986). I analyzed it more shortly and stressed the narrowness of its application in Valentine Korah, *Research and Development, Joint Ventures and the European Economic Community Competition Rules*, 3 INT'L J. TECH. MGMT. 7 (1988).

62. Article 2 of Commission Regulation No. 418/85, O.J. L 53/5 (1985), imposes conditions relating to the terms of the transaction, while article 3 imposes conditions relating to market share and duration. Article 4 lists certain ancillary restrictions that are also exempted, and article 5 other provisions unlikely to restrict competition but which are exempted just in case they are caught by the prohibition of Article 85(1) of the EEC Treaty, *supra* note 1. Paragraph 2 of articles 4 and 5 extends their scope to provisions having a similar but lesser effect. Article 6 provides the black list of provisions that prevent the application of the exemption.

There follow the provisions usual in a block exemption: the opposition procedure; the confidentiality of information given thereunder; a definition of "connected undertakings;" a provision for the Commission to terminate the exemption by decision; and transitional provisions relating to agreements made before the regulation was adopted, and which are amended to come within its terms. The regulation applies from March 1, 1985 until the end of 1997, when it is likely to be revised and readopted.

63. This was accepted by the Commission in Odin, O.J. L 209/15, at 20, ¶ 32 (1990), [1991] 4 C.M.L.R. 832, 843.

there is joint distribution.[64] Even joint production is permitted only if the results are decisive.[65] Each party may want to ensure that too big a slice of the results is not sold by the others. Article 6(c) prevents the regulation from applying where the parties "are restricted as to the quantity of the contract products they may manufacture or sell or as to the number of operations employing the contract process they may carry out." "Restricted" is a broad term, so it is not possible to circumvent the provision by limiting the raw materials or factory space to be used to make the products.[66] The allocation of customers is prevented by article 6(e), save in so far as a field-of-use restriction is permitted by article 4(1)(e).[67]

Limited territorial protection between the parties is permitted, although less than under the group exemptions for technology licensing or distribution, since the parties to a joint venture may well be competitors or potential competitors.[68] Article 4(1)(d) permits a restriction on manufacturing in the

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64. Commission Regulation No. 418/85, arts. 2(e), (f), O.J. L 53/5, at 8 (1985).

65. *Id.* art. 2(d).

66. Mr. Ryder, whom I thank at the beginning of this Article, has raised the possibility of using royalties to ensure adequate returns. Each party might be required to pay royalties to the joint venture in an amount at least equal to the cost savings of the innovation. The parties could thus share in the benefit in proportion to their investment, regardless of the degree to which each exploits the discovery. Article 5(1)(f) and (g) white-lists as not infringing Article 85(1) of the Treaty an obligation to pay royalties to other parties for unequal contributions or services, or unequal exploitation, as well as an obligation to share royalties obtained from outsiders. The difficulty would be, as in other contexts, devising the formula for calculating the appropriate royalty.

To go further and provide that the royalties increase with the degree of exploitation might come within the broad language of article 6(c) and prevent the application of the regulation.

67. Article 4 of Commission Regulation No. 418/85 provides that

> [t]he exemption provided for in Article 1 shall also apply to the following restrictions of competition imposed on the parties: . . .
>
> (e) an obligation to restrict the manufacture of the contract products or application of the contract processes to one or more technical fields of application, except where two or more of the parties are competitors within the meaning of Article 3 at the time the agreement is entered into.

Commission Regulation No. 418/85, art. 4, O.J. L 53/5, at 9 (1985). It is not clear how far this goes, as it is not clear what is meant by a "technical field of application."

68. Contrast article 5 of the two group exemptions for technology licensing: the patent licensing agreements, Commission Regulation No. 2349/84, O.J. L 219/15 (1984), *corrected version in* O.J. C 113/34 (1985), and the know-how licensing agreements, Commission Regulation No. 556/89, O.J. L 61/1 (1989), which go far towards excluding horizontal agreements.

territories reserved to the other parties. Since such a clause contemplates joint exploitation, the agreement would be exempt only when the results of the collaboration are sufficiently important to qualify under article 2(d). Article 4(1)(f) allows protection against the other parties actively seeking customers in a reserved territory for a period of five years after the goods are first put on the market in the Common Market, but article 6(f) blacklists any further territorial restrictions on sales. From the outset, each party must be permitted to accept unsolicited orders.

Given the importance of integrating the Common Market it seems surprising that the Commission permits some territorial protection, rather than quotas or joint sales, which might be expected to divide the Common Market less.

Often a joint venture is set up with the objective of finding an outlet for some by-product, but although the parties may agree to buy the contract products only from the person who manufactures them under the agreement, they may not agree that the producer should buy its raw materials only from the parents or one of them.[69] Article 6(g) also causes difficulty. The exemption does not apply where the parties "are prohibited from allowing third parties to manufacture the contract products or apply the contract processes in the absence of joint manufacture."[70] Eric White explains that an obligation to license third parties only with the consent of the other parties is exempted by article 1, and the Commission fears that in the absence of joint manufacture, it might lead to a policy of neither producing nor licensing outsiders at all.[71] Where, however, at least one of the parties is exploiting the technology individually, there seems to be no policy reason for including this item in the black list.

C. *Conclusion on Group Exemption*

I have never seen an agreement that clearly came within the group exemption. Where the parties are not at least strong

69. Such a provision was exempted in Cekacan, O.J. L 299/64 (1990), Common Mkt. Rep. (CCH) [1990] 2 CEC 2099, on the ground that it was necessary if the parties were to form the joint venture. In my view, that provision should, in that event, have been cleared.

70. Commission Regulation No. 418/85, art. 6(g), O.J. L 53/5, at 10 (1985).

71. White, *supra* note 4, at 695.

potential competitors, the agreement may well not restrict competition.[72] When they are, it is likely that each will need some protection to ensure that the others do not obtain too much of the benefit if the R & D is successful. Joint sales are not exempted,[73] and quotas or the allocation of customers are blacklisted. Only limited territorial protection is permitted, or a field-of-use restriction. All too often one cannot foretell the likely value of the results or cost of the R & D, so it is seldom possible to specify royalties for unequal exploitation or contributions.

There is the additional difficulty about having to permit other parties to sub-license background technology where the exploitation of the results requires such a license. Care must also be taken to see that the restriction on carrying out R & D independently of the joint venture does not extend beyond closely connected fields. So the regulation seldom applies.

The most important provision in the group exemption is the recital stating that collaboration confined to R & D rarely infringes Article 85(1), although where the parties need the results for the same purpose they are likely to need restrictions on exploitation.

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72. *See* Odin, O.J. L 209/15, at 19, ¶ 27 (1990), [1991] 4 C.M.L.R. 832, 841; Konsortium ECR 900, O.J. L 228/31 (1990), Common Mkt. Rep. (CCH) [1990] 2 CEC 2082; Optical Fibres, O.J. L 236/30 (1986), [1985-1988 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 10,813; *infra* parts V.A.3, V.A.6 (discussing decisions).

73. Draft Notice on the Appraisal of Collaborative Joint Ventures, IV/647/91-EN (Eur. Comm'n Jan. 1992) [hereinafter Draft Notice]; *see* Barry Hawk, *Joint Ventures Under EEC Law*, 15 FORDHAM INT'L L.J. 303, 345 app. (1991-1992) (reprinting text of Draft Notice). The memorandum accompanying the draft stated that the Commission may amend the regulation so as to include joint distribution by a joint venture subject to a market share limit of 10 percent.

In June 1991, a senior official, Mr. Götz Drauz, speaking in his private capacity at a conference organised by ESC in Milan, stated that the Commission is thinking of revising the regulation so as to permit joint sales. This should make it far more useful. On the other hand, joint selling cuts out all competition in distribution between the parties, so it is anomalous that other less extreme forms of protection, such as quotas not extending to the total turnover, should remain black listed. Let us hope they will not.

V. GROUNDS ON WHICH AGREEMENTS MAY BE HELD NOT TO INFRINGE ARTICLE 85(1)

A. *More Realistic Attitude to be Taken Towards Potential Competition*

Even before starting to draft the group exemption, the Commission took other steps to reduce the number of cases where it would have to grant individual exemptions. In my view, this is the more satisfactory course, although the precedents have not been consistent.

1. Commission's *Thirteenth Report on Competition Policy*

In its *Thirteenth Report on Competition Policy*[74] for 1983, the Commission stated that it would look more realistically before finding that the parties to a joint venture are potential competitors.[75] It said that the Commission would consider each party's ability to finance the operation independently, the productive capacity of each party, its familiarity with the process technology, the size of the demand, and the distribution facilities of each party, as well as the ability of each to bear the risk.

It seemed that the Commission was prepared to analyze the situation *ex ante*, at the time the joint venture was entered into and neither party had access to the other's resources. Businessmen and their advisers hoped for clearance, not exemption, of agreements between those with complementary resources, or where the risk was too great for a single firm, and so on.

Jonathan Faull, one of the two officials who dealt with most joint ventures in the coordination division of the Commission's Competition Department at that time, stated that "supply rather than demand considerations are likely to be important."[76]

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74. COMMISSION THIRTEENTH REPORT ON COMPETITION POLICY 50-52 (1984).

75. *Id.* at 50, ¶ 55 (stating that "all relevant factors must be taken into account which determine not only actual but also potential competition. The Commission is determined to make its assessment of potential competition in the most realistic way possible.").

76. Faull, *supra* note 4, at 361. This is significant, because in other areas of competition law, the Commission has frequently defined relevant markets by reference only to demand conditions, which frequently operate more rapidly.

2. *BP/Kellogg*

In its next two decisions, the Commission indeed did not find that the parties were potential competitors, but in the first case, *BP/Kellogg*,[77] found that ancillary restrictions it described as "reasonable and necessary" restricted competition and required exemption. The parties had complementary technology: BP had begun to develop a catalyst it thought would be useful for making ammonia; Kellogg designed and built process plants. BP realized that it could not complete the development of the process without help. The two firms agreed to collaborate to design a plant to make ammonia using BP's catalyst. BP agreed to sell its catalyst only to Kellogg's customers, and Kellogg agreed not to invest in developing ways of producing ammonia that did not use the catalyst, without notifying BP and giving it a chance to withdraw from the contract. This arrangement for limited exclusivity on both sides was found to restrict competition contrary to Article 85(1), but was exempted on the ground that the ancillary restrictions were reasonable and necessary. If they were reasonable and necessary to induce the investment, it is difficult to see how they restricted any competition that was possible.[78]

The Commission does not always speak with one voice or think with one mind. Different officials perceive problems differently. Although there seems to be an increasing tendency to approach transactions *ex ante*, there have been occasions where this is not done under Article 85(1) but only under Article 85(3).

3. *Optical Fibres*

In *Optical Fibres*,[79] Corning Glass had developed optical fibres which revolutionized the technology used for telecommunications networks. It entered into two joint ventures to produce the fibres with makers of telephone cable in Europe,

77. O.J. L 369/6, at 8, ¶ 15(c) (1985), [1986] 2 C.M.L.R. 619, 623.

78. The parties did not operate in the same markets, but the Commission might have thought that the agreement foreclosed other technology. There would be no one with the catalyst with whom other process plant designers could collaborate and no other process plant designers with whom anyone finding a catalyst for making ammonia could collaborate.

79. O.J. L 236/30 (1986), [1985-1988 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 10,813. *See generally* Korah, *supra* note 18.

one with BICC in the United Kingdom and one with Siemens in the Federal Republic of Germany. There were two other joint ventures in the Common Market, one between Corning and a French cable maker, which was likely to be exempted once it had been renegotiated to conform to the joint ventures with BICC and Siemens, and another was being negotiated by Corning with a Spanish firm. Corning had also granted licenses to firms in other Member States.

The Commission expressly found that each individual joint venture did not restrict competition, since the parties contributed complementary technology.[80] Unaided, the cable makers could not have produced the fibres, nor Corning the cables. The Commission also found, however, that the network of joint ventures with a common technology provider restricted competition and required exemption since the market in which the joint venture sold was concentrated.

The Commission accepted that a license to a joint venture is a good way to disseminate technology[81] and stated that each joint venture would not infringe Article 85(1) because neither party could enter the other's market. This was the precedent for which we had been waiting since the Commission's *Thirteenth Report* stating that where not more than one of the parties could enter the market, a joint venture does not have an inherent anti-competitive effect.

In *Optical Fibres*, the Commission added that a network of joint ventures does infringe Article 85(1) when a provider of technology has a substantial interest in and control over each joint venture and the market is oligopolistic.[82] It stressed Corning's influential position in the joint ventures. From the remedies imposed, its theory seems to be that Corning might prevent the expansion of one joint venture in order to protect one or more of the others.

It granted an exemption only after several changes were made to the agreement: (a) Corning reduced its managerial control, (b) the sales licenses ceased to be exclusive, (c) the

80. Optical Fibres, O.J. L 236/30, at 36, ¶ 46 (1986), [1985-1988 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 10,813, at 11,898.

81. *Id.* at 38, ¶ 59, [1985-1988 Transfer Binder] Common Mkt. Rep. (CCH) at 11,900.

82. *Id.* at 37, ¶ 48, [1985-1988 Transfer Binder] Common Mkt. Rep. (CCH) at 11,899.

territorial protection was reduced below that permitted by the patent licensing regulation, (d) either party was entitled to expand the capacity of the joint venture, either with the consent of the other or, if that was refused, by paying for the additional capacity and taking a larger share of the output, (e) the Commission required Corning to give both the other party and the joint ventures an option for a non-exclusive license of the technology on termination, and (f) several other provisions were added to ensure that information about each joint venture's prices and output was not passed on to the others. It is not clear how far most of these changes were compelled by the Commission.

Personally, I doubt whether it was necessary to ensure that Corning did not restrict the expansion of one joint venture in order to enable another to maintain high prices. The technology was revolutionary, and the holder had a huge incentive to increase production in order to develop improvements before its competitors could exploit the technology as its patents expired. Paul Lasok has observed, however, that the theory applies more forcefully when the common party contributes something other than technology.[83]

4. *Mitchell Cotts/Sofiltra*

In *Mitchell Cotts/Sofiltra*,[84] too, the Commission held that an exclusive know-how license from Sofiltra to a joint venture between it and Mitchell Cotts for making sophisticated air filters did not restrict competition in the market for manufacture because only Sofiltra had the technology to make the filters, and the parties' aggregate market share in the Common Market was too small to foreclose others.[85] It held, however, that the exclusive license to the joint venture to produce and sell did restrict competition and required exemption since Sofiltra could compete for sales with the joint venture.[86] It is not easy to reconcile these two paragraphs. How could the joint ven-

83. Mr. Lasok made this observation at a meeting of the Brussels Chamber of Commerce organised by M. P. Madou shortly after the decision was published.

84. O.J. L 41/31 (1987), [1988] 4 C.M.L.R. 111 [hereinafter Mitchell Cotts].

85. *Id.* at 35-36, ¶¶ 20, 23, [1988] 4 C.M.L.R. at 119-21.

86. *Id.* at 35, ¶ 20, [1988] 4 C.M.L.R. at 119-20. Contrast Konsortium ECR 900, O.J. L 228/31 (1990), Common Mkt. Rep. (CCH) [1990] 2 CEC 2082, discussed *infra* part V.A.6.

ture have sold at all without a license to make the sophisticated filters? The Commission seems to have slipped into *ex post* thinking.[87]

The case was particularly interesting because the Commission cleared an ancillary restraint whereby the joint venture agreed not to compete with the parents, although such clauses are blacklisted by the block exemption for R & D. This seems to remain the Commission's view: in the draft notice,[88] the Commission confirmed that

> [w]hen a JV involves the creation of new production capacity or the transfer of technology from the parent companies, the obligation imposed on the JV not to manufacture or market products competing with the licensed products may be regarded as ancillary; the JV must seek to ensure the sucess of the new production unit, without depriving the parent companies of the necessary control over exploitation and dissemination of their technology. [*Mitchell Cotts* cited].[89]

5. *BBC Brown Boveri/NGK*

In *BBC Brown Boveri/NGK*,[90] the Commission exempted a joint venture agreement which, in my view and that of others,

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87. Contrast Konsortium ECR 900, O.J. L 228/31 (1990), Common Mkt. Rep. (CCH) [1990] 2 CEC 2082, *infra* part V.A.6.

Also contrast the Draft Notice, *supra* note 73:

> A clause which bars the parent companies from competing with the JV or from competing actively with it on its territory, at least during the starting-up period, may be regarded as ancillary. Additional restrictions relating to quantities, prices or customers, and bans on exports obviously go beyond what is required for the setting-up and proper operation of the JV.
>
> The following in particular have been regarded as necessary during the starting-up period of a JV designed to enable a parent company to become established on a new market: territorial restrictions imposed on that parent company, through the grant to the JV of an exclusive manufacturing licence, in respect of fields of application or product markets in which both the JV and that parent company are active. [*Mitchell Cotts* cited].
>
> On the other hand the grant to the JV of an exclusive exploitation licence has been regarded as necessary (without any time-limit other than the duration of the JV itself) in cases where the parent company granting it was not active in the same field of application or on the same product market as that for which the licence was granted. [*Odin* cited].

Draft Notice, *supra* note 73, *reprinted in* Hawk, *supra* note 73, app. at 364.

88. Draft Notice, *supra* note 73, *reprinted in* Hawk, *supra* note 73, app.

89. *Id.*, *reprinted in* Hawk, *supra* note 73, app. at 363.

90. O.J. L 301/68 (1988), [1989] 4 C.M.L.R. 610.

should have been cleared as it did not restrict any competition that was possible without it. BBC was trying to develop a sodium sulphur battery for use in vehicles, but lacked technology in the ceramics required for insulation. NGK had developed the technology for ceramics and was prepared to pay for the R & D, but had no access to technology relating to batteries. The Commission alleged that NGK would become a potential competitor of BBC when it acquired the latter's technology through its share in the joint venture[91] and that, consequently, its agreement not to export from the Far East products made by using BBC's technology to those parts of the Common Market where BBC did not enjoy patent protection infringed Article 85(1) and required exemption.[92]

This must be an aberration. The Commission implied in *BP/Kellogg*, and stated expressly in *Optical Fibres*[93] and *Mitchell Cotts*,[94] that collaboration does not, in itself, restrict competition where not more than one of the parties could have accomplished the task of the joint venture independently. In deciding whether the parties were potential competitors, the Commission looked *ex ante* to the position that would have existed without the joint venture and license. In *BBC Brown Boveri/ NGK*, the Commission accepted that neither could have developed the insulated batteries without the other, and therefore should have cleared the arrangement.

6. *Odin* and *Konsortium ECR 900*

In 1990, the Commission adopted two decisions clearing joint ventures involving R & D which were fully in line with its statement of intention in the *Thirteenth Report on Competition Policy*. In *Elopak/Metal Box—Odin*,[95] the parties agreed to collabo-

91. *Id.* at 69, ¶ 5, [1989] 4 C.M.L.R. at 612.

92. *Id.* at 71, ¶ 18, [1989] 4 C.M.L.R. at 615. It also stated that the obligations of NGK and the joint venture not to carry out joint R & D with other parties restricted competition. *Id.* at 70-71, ¶17, [1989] 4 C.M.L.R. at 615. In Mitchell Cotts, O.J. L 41/31 (1987), [1988] 4 C.M.L.R. 111, such an obligation was cleared as an ancillary restraint necessary to make the joint venture viable.

93. O.J. L 236/30, at 36, ¶ 46 (1986), [1985-1988 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 10,813, at 11,898.

94. Mitchell Cotts, O.J. L 41/31, at 35, ¶19 (1987), [1988] 4 C.M.L.R. 111, 119.

95. O.J. L 209/15 (1990), [1991] 4 C.M.L.R. 832. The notice under article 19(3) of Council Regulation No. 17, *supra* note 2, O.J. Eng. Spec. Ed. 1959-62, at 87, was published three years earlier, which may indicate an internal struggle within the

rate, through Odin, their joint venture, to develop a carton with a metal lid that could store particulate food that was sensitive to oxygen, together with the machinery for making and aseptically filling the cartons. Metal Box had technology relating to metal containers, and Elopak had technology relating to the making and filling of cartons in aseptic conditions. Both elements of technology were required to develop the new container, as was further work by the joint venture.

The Commission found that there was no inherent anticompetitive effect, because neither firm was even a potential competitor of the other in relation to the R & D.[96] Each lacked the other's technology, which made it very unlikely that either would take the risk of developing such a product independently.[97] This perception *ex ante* is quite incompatible with *BBC Brown Boveri* and most welcome.

The Commission stated that the parties did not compete, actually or even potentially in other activities, so there was no danger of the collaboration extending to other fields.[98] It added that the creation of the joint venture was not likely to foreclose similar possibilities of collaboration for other potential competitors. Apart from the fact that no market had yet developed on which to assess effects on competition, there were other can makers with the kind of technology Metal Box was providing, and other firms with non-exclusive licenses for the Excello technology for making cartons. The Commission concluded:

> 28. As the parties could not realistically be regarded as competitors, actual or potential, and the creation of the joint venture entails no foreclosure risk, and the agreement does not involve the creation of a network of competing joint ventures,[99] the agreements to establish Odin do not

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Commission as to whether to clear or exempt the agreement. For further discussion of *Odin*, see Hawk, *supra* note 73, at 330-31.

96. Odin, O.J. L 209/15, at 19, ¶ 28 (1990), [1991] 4 C.M.L.R. 832, 841.

97. *Id.* at 18-19, ¶¶ 24-25, [1991] 4 C.M.L.R. at 840.

98. *Id.* at 19, ¶ 26, [1991] 4 C.M.L.R. at 841. For example, there was no group, or spill-over, effect.

99. A reference to its decision in Optical Fibres, O.J. L 236/30 (1986), [1985-1988 Transfer Binder] Common Mkt. Rep. (CCH) ¶10,813, where the Commission was concerned that a technology provider which was party to several joint ventures might restrain production in one, to keep up prices for another.

fall within the terms of Article 85(1).[100]

The Commission went on to analyze the ancillary provisions to ensure that they were no more than were necessary to ensure the establishment and proper functioning of the joint venture. The exclusive license of the parties' technology to Odin within the joint venture's field of use was necessary to guarantee to each party that the other would devote its full efforts to the project. This exclusivity was permitted to continue beyond the start-up period because it had been necessary to induce the parties to license their existing technology and invest in further development. This goes further than the open exclusive license cleared in *Nungesser (L.G.) KG and Kurt Eisele v. Commission*[101] in that the exclusive territory might continue beyond the period when the technology was new. It was the first time the Commission has cleared such a clause in a joint venture, but there were several special circumstances: the license related mainly to know-how, one element of which was to be provided by each parent and which required further development; Odin was also to develop the necessary machinery; the exclusive licenses were limited to a narrow field of use; and there were no express restrictions as to price, quantity, customers or territory.[102]

Odin also received a non-exclusive license to improvements in the parents' technology. The parties were entitled to carry on R & D in closely related and competing fields, provided that they used neither each other's know-how nor that of Odin. The Commission accepted that these limitations were necessary to protect the confidentiality of the know-how of

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100. Odin, O.J. L 209/15, at 19, ¶ 28 (1990), [1991] 4 C.M.L.R. 832, 841.

101. Case 258/78, [1982] E.C.R. 2015, [1983] 1 C.M.L.R. 278. The Court ruled in that case that an open exclusive license under plant breeders' rights for an important new variety did not, in itself, infringe Article 85(1) owing to the investments by the innovator and the licensee. *Id.* at 2054-55, ¶¶ 56-58, [1983] 1 C.M.L.R. at 353. In subsequent decisions the Commission has never applied this ruling, since it states that better technology for doing something already known is not new. *See* VALENTINE KORAH, KNOW-HOW LICENSING AGREEMENTS AND THE EEC COMPETITION RULES—REGULATION 556/89, at 33-34 (1989).

102. Odin, O.J. L 209/15, at 20, ¶ 31 (1990), [1991] 4 C.M.L.R. 832, 842. Such a provision was hardly necessary since the joint venture was to produce and distribute. Neither party suffered the risk of over-exploitation of the results by the other.

each party. The parents were to receive non-exclusive licenses of technology developed by Odin for other fields of use.

On termination, each party was to have the right to use the know-how of the joint venture, and the know-how of the other party in the same field as the joint venture. This would make it easier for each party to terminate the joint venture, and would help to prevent Metal Box from restricting the activities of Odin. The Commission expressed some concern that Odin might compete with one of its parents. It is feared that this is another example of *ex post* thinking. Without the joint venture, Metal Box would not have had to compete with it. So, if Elopak could not have developed the technology on its own, no possible competition was eliminated. In the instant case, however, the Commission accepted that adequate safeguards had been built into the contract to ensure that Metal Box was unlikely to restrain its joint venture from competing with it. The reference to these safeguards is reminiscent of the safeguards in *Optical Fibres*, based on the thinking of Joseph Brodley.[103] The Commission seems less concerned that Metal Box might hesitate to compete strongly with its joint venture.

The ancillary restrictions accepted by the parties were very slight. Nevertheless, the decision is very important in showing the willingness of the Commission to clear a joint venture for an indefinite period that extended to joint distribution.

In its press release,[104] the Commission said that the case has wider significance and stands for the principle that, where the establishment of a joint venture is itself not caught by Article 85(1), all reasonable restrictions necessary for the formation and efficient operation of the joint venture will also escape the prohibition. The agreement was cleared although it extended to joint distribution.[105]

The precedent is potentially very important. Provisions blacklisted by the group exemption for R & D such as territorial protection or quotas may be reasonable and necessary to

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103. Joseph Brodley, *Joint Ventures and Antitrust Policy*, 95 HARV. L. REV. 152 (1982).

104. Commission Press Release, IP (90) 582 (July 23, 1990). The statement was not repeated in the COMMISSION TWENTIETH REPORT ON COMPETITION POLICY (1991), but is confirmed in the Draft Notice, cited *supra* note 73.

105. This prevented the application of the regulation exempting collaboration in R & D.

induce the parties to invest in joint R & D.[106] So may limited exclusivity.

This decision was followed two weeks later by another clearance: *Konsortium ECR 900.*[107] Fifteen post, telegram and telephone administrations, including all of those in the EEC, agreed to introduce a pan-European public digital cellular mobile telecommunications service—GSM—in their countries in 1991. This would enable people to use a single mobile phone in all fifteen countries. There was to be a uniform standard with two or three specified interfaces, although the technology was not required to be uniform. This planned GSM system did not yet exist when the decision was adopted. Invitations to tender were published in January 1988. Three corporate groups formed Konsortium ECR 900 in order to submit joint tenders for system equipment, which did not include end products (mobile telephones). Eight other individual firms or consortia emerged as possible suppliers.

The Commission found that the three firms in Konsortium ECR 900 could not have developed and produced the systems individually. Not only was the development cost of the order of DM300-500 million, there was a limited number of sufficiently qualified engineers to develop the system rapidly. The risk was substantial, as there were only fifteen buyers of systems conforming to the GSM standard. The short deadlines would prevent the cost being spread over time and the education of further engineers. The invitations for tender expressly referred to consortia and bidding syndicates, which shows that buyers from the consortium accepted the need for collaboration.

The Commission held that not only did the joint development and manufacture not restrict competition within the Common Market, joint sales did not do so, either. Since none of the parties could have manufactured individually, they would have had nothing to sell without the joint venture.[108] This reasoning *ex ante* is most important. If without joint R & D the parties would not have developed the results, joint sales,

106. This is not accepted in the Draft Notice. *See* Hawk, *supra* note 73, app. (reprinting Draft Notice).

107. O.J. L 228/31 (1990), Common Mkt. Rep. (CCH) [1990] 2 CEC 2082.

108. Contrast Mitchell Cotts, O.J. L 41/31 (1987), [1988] 4 C.M.L.R. 111, discussed *supra* part V.A.4.

quotas, or other allocations of the market might be cleared on similar reasoning, although in *Odin* the Commission expressly stated that there were no such limitations on the joint venture. The motivation of *ECR Konsortium 900* is extraordinarily short for a decision that seems to depart from earlier precedents and that is related to an agreement between three competitors. The Commission did not consider whether the habit of collaboration might have been extended to other fields. Given that eight other consortia or individual firms were able to make bids, foreclosure cannot have been a problem.

It is surprising that no analysis of the ancillary terms is given to ensure that they were the minimum necessary,[109] except in relation to a party excluded from the consortium for breach of contract. Such a party forfeited its right to use the technical documentation of the others. The Commission found that this did not restrict competition on the ground that use of the others' technology would enable a party in breach to obtain an unjustified competitive benefit *vis-à-vis* the other parties. The Commission asserted that such competition would not be based on performance, a term that seems to be drawn from the Court's judgments on abuse of a dominant position.

This decision goes further than *Odin* in that it is not based on the ancillary restrictions being very narrow. It goes less far in that the parties can each terminate at the end of 1993 and subsequent years. Basically, it was a consortium to make bids to provide systems in the fifteen countries by 1991.[110] Both cases are important in that they analyse the market realistically under Article 85(1), and interesting as they seem to indicate that the Commission is more willing to accept joint sales than it is to accept sales quotas or exclusive territories supported by export bans.[111] Yet both kinds of provisions serve the same function of protecting each venturer from over-exploitation by the others, and joint distribution removes all possibility of

109. Officials must now be under pressure to draft their decisions as shortly as possible to save the need for translations and space in the Official Journal.

110. The consortia to build the Channel tunnel were also cleared by decision. Eurotunnel, O.J. L 311/36 (1988), [1989] 4 C.M.L.R. 419.

111. Compare *supra* note 73 and accompanying text, where I mention the possibility of the group exemption for R & D being extended to cover joint sales, but not quotas.

competition between the parties, while quotas can be drafted to permit some.

B. *Concentrative Joint Ventures*

Ever since the Commission's memorandum of 1966 on concentrations, it has occasionally held that a joint venture is not forbidden by Article 85(1) where it amounts to a partial concentration.[112] The idea has reappeared in the Merger Regulation,[113] which treats concentrative joint ventures as mergers. If they are large enough, they are subject to control under the regulation, but if not, no implementing regulation applies.[114] They enjoy provisional validity under Article 85 but are subject to the application of Article 86 in national courts. They can be controlled under the Merger Regulation only if they create or strengthen a dominant position and under Article 86, probably, only if they strengthen one.[115] The distinction between collaborative and concentrative joint ventures is unclear in principle and practice.[116] The Commission has tried to explain it.[117]

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112. *E.g.* SHV/Chevron, O.J. L 38/14 (1975), [1975] 1 C.M.L.R. D68. The concept was narrowed in De Laval/Stork, O.J. L 215/11 (1977), [1977] 2 C.M.L.R. D69, but reappeared in an informal decision, Montedison/Hercules (Himont), COMMISSION SEVENTEENTH REPORT ON COMPETITION POLICY 66 (1988).

See Venit, *supra* note 4, at 8-9, 15-21, 28-29, for a short history.

113. Council Regulation No. 4064/89, art. 3(2), O.J. L 395/1 (1989), *corrected version in* O.J. L 257/13 (1990).

114. *Id.* art. 21, O.J. L 257/13, at 15 (1990).

115. In its statement of objections in British American Tobacco Co. and R.J. Reynolds Indus. Inc. v. Commission, Joined Cases 142 & 156/84, [1987] E.C.R. 4487, [1988] 4 C.M.L.R. 24 [hereinafter Philip Morris], the Commission is said to have challenged under Article 86 a merger that strengthened the dominance of the target company, not the bidder. *Id.* at 4489, [1988] 4 C.M.L.R. at 27.

116. *See generally* Hawk, *supra* note 73 (describing theological distinction between collaborative and concentrative joint ventures).

117. *See* Commission Notice Regarding Concentrative and Cooperative Operations Under Council Regulation No. 4064/89, O.J. L 395/1 (1989), on the Control of Concentrations Between Undertakings, O.J. C 203/10, at 11, ¶¶ 15-36 (1990).

The positive criterion is that the joint venture should perform on a lasting basis all the functions of an autonomous economic entity and not depend on its parents for some of them.

The negative criterion is that the agreement should "not have as its object or effect the co-ordination of the competitive behaviour" of parents *inter se* or between one or more of them and the joint venture. *Id.* at 12, ¶¶ 20-30. The parents must withdraw entirely from the field of the joint venture, and have no horizontal or vertical relationships with it.

In *Metaleurop SA*,[118] two companies transferred all their interests in lead and zinc into a joint venture, 35 percent of whose shares were owned by the public. The parents retained sufficient control only to protect their investment. Both left the lead and zinc markets entirely. The merger clearly was concentrative. Shortly before the Merger Regulation came into force, the Commission adopted a decision that did not mention Article 85(1). It considered only that Article 86 was not infringed.

It is not stated why Article 85 was ignored. The joint venture supplied about 20 percent of the zinc market and 29 percent of the lead market, more than enough to exceed the *de minimis* rule as it was applied in the 1980s. A possible explanation is that the merger could have been controlled under article 2(c) and (d) of the Merger Regulation, had it been in force, only if it had created or strengthened a dominant position as a result of which effective competition would be significantly impeded in the Common Market or a substantial part of it. Under this test, most concentrative joint ventures are cleared, even if the firms' aggregate turnover be above the relevant thresholds. It would be anomalous to apply the stricter test of Article 85 so soon before the Merger Regulation came into force. In the Commission's *Twentieth Report on Competition Policy*,[119] the decision is classified as a merger rather than as a joint venture.

C. GEC-Siemens/Plessey: *Appreciable Effects*

In *GEC-Siemens/Plessey*,[120] the Commission adopted a new method of clearing joint ventures by raising the thresholds below which it decides that any restrictions of competition are not appreciable. It accepted that a joint bid by GEC and Sie-

118. O.J. L 179/41 (1990), [1991] 4 C.M.L.R. 222. The Commission did not expressly address the question whether Article 85 might apply. It considered only Article 86, presumably because it considered that the agreement transferring all the parties' activities concerning lead and zinc to a joint organization was concentrative. The joint venture was to carry on mining, R & D, purchase and sales and had independent managing bodies. 35 percent of the shares were held by the public, a substantial blocking minority.

119. COMMISSION TWENTIETH REPORT ON COMPETITION POLICY 91-92 (1991).

120. O.J. C 239/2 (1990). *See generally* Venit, *supra* note 4. This was a decision dismissing a complaint by an unwilling target company. The file was closed by a comfort letter sent to the bidders. *See also* Hawk, *supra* note 73, at 328-29.

mens for Plessey did not have the object or effect of restricting competition appreciably in most of the markets involved. The bidders intended to divide Plessey's assets between them, some to be held and exploited jointly and others to be appropriated to a single parent. The joint venture for some assets affected the structure of the market rather than enabling the parties to collaborate on a new activity. Although the three undertakings involved were competitors in some fields and potential competitors in others,[121] most of the markets were sufficiently competitive for the Commission to conclude that any restriction of competition was not appreciable.

In relation to Plessey's traffic control systems, which were to go to Siemens, the Commission added that Siemens had no appreciable sales in the United Kingdom and Plessey none in Germany. At paragraph 23, the Commission states that the market is becoming increasingly international. So, Siemens and Plessey must have been capable of entering the other's geographic market, soon. The Commission stated, however, that it is hard to enter national markets save through acquisitions.[122] It added that the buyers were largely monopsonistic and powerful enough to protect themselves. There were many other suppliers, most of them confined to a single Member State.

The Commission did not refer to possible spill-over effects into other activities of Siemens and GEC, nor did it mention that the joint bid interfered with the market for corporate control, as it had done in *Irish Distillers*.[123] This is welcome. A joint bid interferes with that market only if other firms would value the target company less highly. This is likely to be the case only where the acquisition by a competitor would increase

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121. GEC-Siemens/Plessey, O.J. C 239/2, at 3, ¶ 15 (1990).

122. Contrast the Commission's first decision under stage two of the Merger Regulation, Alcatel/Telettra, O.J. L 122/48, at 51-54, ¶¶ 23-49 (1991), [1991] 4 C.M.L.R. 778, 784-89, where the Commission stressed the ability of firms not then providing telephone equipment in Spain to enter that market, although the appropriate directive allowing for free movement does not come into force in Spain as soon as it does elsewhere.

123. COMMISSION EIGHTEENTH REPORT ON COMPETITION POLICY 85 (1989) explains that the Commission saw the bid for Irish Distillers as allocating markets. It does not mention the market for corporate control, which figured at an earlier stage of its proceedings. It may already have been playing down the effects on the market for corporate control by the end of 1988, when writing the report.

its market power. So, the possibility should not require separate analysis.

GEC and Plessey had been operating their telecommunications business through a joint venture, which was to be reorganised and owned as to 60 percent by GEC and 40 percent by Siemens. Given the high barriers to entry and the size and importance of the firms on their respective national markets, and Siemens's importance throughout the Common Market, the Commission found that the joint bid did appreciably affect competition between the target company and the acquirers and trade between Member States in relation to public and large private switching and transmission.[124] Nevertheless, the joint venture enabled massively expensive R & D to be amortised over a larger turnover, and was likely to promote technical progress. The buying power of customers would prevent the geographic division of markets. So the joint venture merited exemption.[125]

The proceedings were ended by a letter dismissing the complaint and a comfort letter to the parties who had notified the agreement to bid jointly. In the case of a bid which successfully went ahead, there is no need to ensure that the parties will be able to enforce their contract years later. It used to be said that an exemption which must be limited in time was not suitable to mergers or acquisitions. I am told that the comfort letter was not limited in time.

The Commission had never previously published a decision dismissing a complaint, and took a year to decide to do so. It must be indicating that its decision marked a new departure. The Commission is using the *de minimis* rule at far higher

124. GEC-Siemens/Plessey, O.J. C 239/2, at 3 (1990). The Commission did not decide whether the agreement relating to integrated circuits had appreciable anticompetitive effects, since it also merited exemption if it had such effects on the ground that it would enable the high cost of R & D to be amortised over a larger turnover. *Id.* at 5. In relation to Article 85(1), the Commission observed that the parties had relatively low market shares in a very competitive market and that their activities were complementary. *Id.*

125. *Id.* at 6, ¶ 34. The Commission concluded that the acquisition would lead to a "wider range of more technologically advanced products" more rapidly. *Id.* at 4, ¶ 23. No substantial strengthening of GEC and Siemens on their respective geographic markets is expected. *Id.* The economies of scale in R & D depended on some close and irreversible bonds between the companies. *Id.* at 4, ¶ 24. Competition would not be eliminated given the increasing internationalisation of the particular markets. *Id.* at 4, ¶ 3.

thresholds than previously, and reducing the difference in the substantive law applicable to concentrative and collaborative joint ventures.[126] The Commission considered the structural matters, such as the sophistication of buyers, potential competition from other Member States and the difficulty of entering save through an acquisition. These are the kind of considerations relevant under the Merger Regulation, but being taken into account when the parties are able to coordinate their activities through their joint holdings of parts of Plessey's business. Concentrative joint ventures will be prohibited only if they create or strengthen a dominant position and the test for collaborative ones seems to be approaching that. The decision is important in the long term and not only as the Merger Regulation was about to come into force.

The new practice of treating the restriction as not appreciable in the absence of high aggregate market shares may enable the Commission to dispose favourably of many more cases than formerly, because fewer formal decisions of exemption will have to be adopted and translated into eight other languages for publication in the Official Journal. It enables the Commission to avoid all its causes for concern, not just the problem of actual or potential competition, but also the group effects, foreclosure and ancillary restraints. Moreover, the latter may be exempted even when they are subject to Article 85(1).[127]

On the other hand, I am concerned that as national barriers are removed, oligopolies at the national level may be replaced by oligopolies at the Community level.[128] In telecom-

126. It is not intended to explain this distinction, to which I refer *infra* part V.E, as it is complex, unsatisfactory and more relevant to a discussion of the Merger Regulation than to an article on collaborative joint ventures. For a perceptive discussion see Hawk, *supra* note 73, and Venit, *supra* note 4.

The agreement to make a joint bid for Plessey may have been a concentration as to some markets and a joint venture for others where Plessey's assets were to be held jointly. In its *Nineteenth Report on Competition Policy*, the Commission discusses the case under the heading, "Mergers and Concentrations." COMMISSION NINETEENTH REPORT ON COMPETITION POLICY 81 (1990).

127. On the basis of Nungesser (L.G.) KG and Kurt Eisele v. Commission, Case 258/78, [1982] E.C.R. 2015, [1983] 1 C.M.L.R. 278, it used to be arguable that an ancillary restraint that went too far to be cleared under Article 85(1) could not even be exempted under Article 85(3).

128. There is concern that the substantive test of the Merger Regulation, cited *infra* part VI, is whether the merger creates or strengthens a dominant position as a

munications we have had very concentrated national markets, and mergers and joint ventures are being held not to infringe Article 85 when they bring together potential competitors from different parts of the Common Market. We are not told the market shares of the three firms either in the United Kingdom or in the Common Market as a whole.[129] It is difficult to know whether the Commission has been too *laissez-faire*.

In the draft notice on cooperative joint ventures,[130] the Commission repeats the market shares that it stated were relevant to agreements generally in its notice on minor agreements. It has not followed *GEC-Siemens/Plessey* in raising them. This surprises me, and it should be remembered that the notice is only a draft circulated for comment.

It does state, however, that where market shares do not exceed 10 percent where the collaboration extends to distribution, and 20 percent in other cases, it plans to send comfort letters of the exempting kind. It is unfortunate that it does not feel free to send comfort letters of a clearing type, which would make it easier to enforce the ancillary restrictions.

The Commission now has three grounds it may give for not interfering with joint ventures: first, it may state that the inherent effect is not anticompetitive, and clear ancillary restraints as being necessary to make it viable, *et cetera*, as in *Odin* or *ECR Konsortium 900*; second, it may invoke the test of ap-

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result of which competition is significantly impeded. Unless the Court develops a concept of joint dominance, or of individual dominance with market shares in the twenties, provided that there are only a few other firms which are not competing aggressively, there is danger of mergers leading to oligopoly that will not be subject to control.

129. Without knowing the market shares, it will be difficult to advise clients whether their agreements require notification and exemption.

The U.K. Monopolies and Mergers Commission investigated the probable effects of the same merger in the United Kingdom. MONOPOLIES AND MERGERS COMMISSION, THE GENERAL ELECTRIC COMPANY PLC: SIEMENS A.G. AND THE PLESSEY COMPANY PLC, A REPORT ON THE PROPOSED MERGERS, Cm. 676 (Apr. 1989). It stated at paragraph 6.58 that

> GPT [the joint venture between Plessey and GEC] supplies about 65 per cent of public switching equipment in the United Kingdom, but about 90 per cent of digital (Systems X and System Y) equipment supplied to BT. Siemens does not supply public switching equipment in the United Kingdom, but is among the largest world suppliers of public switching equipment, and its EWSD system is installed, or ordered for installation, in 33 countries throughout the world.

130. Draft Notice, *supra* note 73, *reprinted in* Hawk, *supra* note 73, app.

preciability used in *GEC-Siemens/Plessey*; or, third, if it considers the joint venture is concentrative, it will not be subject to Article 85, but only to the Merger Regulation or Article 86 in national courts.[131]

D. *Recent Exemptions under Article 85(3)*

There are some very recent decisions, formal or incomplete, in which the Commission has failed to clear joint ventures that seem to have had no restrictive effects on competition.[132] They show that the Commission's decision to clear the

131. The Commission may also propose remedies to bring an infringement even of Article 85 to an end under Article 89 of the Treaty, and competent national competition authorities may forbid or exempt agreements under Article 88, but these sanctions are not very effective in the absence of compulsory powers to obtain information or of the ability to impose fines.

132. The joint venture to allocate the design of sophisticated electronic components to be used on satellites between Alcatel Espace/ANT Nachrichtentechnik, O.J. L 32/19 (1990), [1991] 4 C.M.L.R. 208, was exempted and not cleared on January 12, 1990, some six months before *Odin* and *Konsortium ECR 900*. Even on the narrowest possible market definition, the aggregate shares of the parents did not exceed 20 percent of the market. The parties' resources in this field seem to have been too small to enable them to compete for making the equipment in world markets. It is difficult to see how the joint venture foreclosed any competition that was possible without it. It may be argued that *Odin* represents a change in view since then. For a more detailed discussion of *Alcatel Espace*, see Hawk, *supra* note 73, at 331-33.

Cekacan, O.J. L 299/64 (1990), Common Mkt. Rep. (CCH) [1990] 2 CEC 2099, however, was exempted on October 15, 1990—two months after the clearing decisions. Contrary to earlier precedents, such as *Mitchell Cotts*, the Commission did not analyze it as a joint venture, since one party was to hold most of the shares in the joint subsidiary. For a more complete discussion of *Cekacan*, see Hawk, *supra* note 73, at 333-34. KSB/Goulds/Lowara/ITT, O.J. L 19/25 (1991), Common Mkt. Rep. (CCH) [1991] 1 CEC 2009 [hereinafter KSB], was exempted on December 12, 1990, some four months after the decisions in *Odin* and *Konsortium ECR 900*. In both decisions, when considering Article 85(1), the Commission perceived the relationship of the parties *ex post*. In *KSB*, the conclusions under Article 85(1) contradict the findings under Article 85(3). *Id.* at 30-31, ¶¶ 15-33 (1991), Common Mkt. Rep. (CCH) [1991] 1 CEC at 2016-22; *see* Hawk, *supra* note 73, at 335.

Screensport/EBU Members, O.J. L 63/32 (1991), Common Mkt. Rep. (CCH) [1991] 1 CEC 2092, is significant, because the Commission refused even to exempt a joint venture on grounds, partly, of foreclosure. On the one side was a consortium of members of the European Broadcasting Union, i.e., undertakings that transmitted television programmes and that were entitled to use all the programmes on the Eurovision link, and on the other side, Sky television, which transmitted by satellite. It is not clear that without the help of a firm transmitting by satellite, the individual members of the EBU could have started a channel devoted only to sports programmes separately. Perhaps a competitor to Sky would have been encouraged to provide a competing sports channel had fewer members of the EBU been tied to Sky. On the other hand, neither of the firms transmitting by satellite would have had easy access agreements in *GEC-Siemens/Plessey*, *Odin* and *Konsortium ECR 900* cannot be relied on when joint ventures are being negotiated in the future. The failure of the Commission to coordinate the policy affecting its published decisions has the unfortunate effect of increasing the risks of collaboration.[133] It is greatly hoped that the Commission will affirm its intention to clear joint ventures that do not restrict any competition that would have been possible without the joint venture.

E. *The Commission's Draft Guidelines on Joint Ventures*[134]

Early in January 1992, the Commission sent to the ambassadors of Member States a discussion document and draft no-

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to sports events throughout the Common Market. It might have been more realistic to have exempted the agreement for a few years and enabled another firm transmitting by satellite to bid then for the members of EBU.

It is possible that the three last decisions had already been almost finalised before a change in policy was accepted throughout DG IV, as indicated in the press release that reported the *Odin* decision. In 1990, while the Merger Task Force was being established, senior management in DG IV must have had little time to spare for coordination. It is hoped that cases like these will not be exempted in the future, but found not to infringe Article 85(1).

In Alupower-Chloride, O.J. C 152/3 (1990), [1990] 4 C.M.L.R. 739, the Commission will probably close its file on sending a comfort letter; we are not told whether this will be of the clearing or "merits exemption" type.

In Ford/Volkswagen, O.J. C 182/8 (1991), [1991] 4 C.M.L.R. 798, however, the Commission announced its intention to grant an exemption subject to conditions for a joint venture to design and produce a multi-purpose vehicle, with the comfort of a car, but the additional luggage space of a light van. Renault has a market share of 58 percent of this segment of the vehicle market. The segment is difficult to enter as very substantial investment is required to design a vehicle and tool up. The minimum efficient scale is estimated to be 110,000 units a year, while total demand in the EEC is not expected to exceed 350,000 units a year. The Commission stressed that the market shares of the parties for cars or, possibly, for passenger cars, is 26 percent, but I cannot see why that is relevant, since it does not look as if there is room in the market for both firms to enter independently of each other, in which case, this agreement too should have been cleared.

In Fiat/Hitachi, O.J. C 206/3 (1991), the Commission stated that it intended to exempt a joint venture agreement to make hydraulic excavators of a size used in road construction, and hydraulic cylinders for use therein and for other purposes, although Fiat was withdrawing entirely from the market, and the expected market share of the joint venture was not likely to exceed 16 percent.

133. Contrast the uniformity of the views on the analysis of joint ventures of U.S. scholars as diverse as Robert Pitofsky, Phillip Areeda and Robert Bork. *Antitrust Issues for a New Administration*, *in* THE CONFERENCE BOARD, RESEARCH BULLETIN NO. 233, at 16-19 (Betty Bock ed., 1989).

134. I am grateful to the editors of the *Fordham International Law Journal* for giving me a chance to add this section to the Article at the last minute before publication.

tice on the future treatment of cooperative joint ventures.[135] It hopes to receive comments on these and to publish a notice as to how it intends to deal with cooperative joint ventures.

It accepts that cooperative joint ventures are

> governed by legal provisions which are less favourable than those applicable to concentrative JVs:
> —they tend to fall within the very broad scope of Article 85(1), which prohibits any appreciable restriction, whereas concentrative JVs can be prohibited only if they exceed the dominance threshold;
> —they do not benefit from any block exemption since cooperation extending to distribution is excluded from the field of application of Regulations (EEC) No 417/85 (specialization) and No 418/85 (R&D), while Regulations (EEC) No 2349/84 (patent licences) and No 556/89 (know-how licences) do not apply to relationships between the parent companies and the JV where the parties are competitors;
> —individual exemptions—unlike a decision declaring a concentration compatible with the common market or a decision not to oppose a concentration, adopted under Regulation (EEC) No 4064/89—may be granted only for a limited period and can be withdrawn;
> —the procedure applicable to cooperative JVs under Regulation No 17/62 is lengthy (two years on average), whereas that applicable to concentrative JVs is much quicker (one month in many cases and no more than five months in all others).[136]

The Commission calls the situation "discriminatory." It plans to do something about it, but not everything that I would like to see done. Even if the notice be adopted in its present form, it will bind no one except the Commission, although national courts asked to enforce a contract may take it into account.

The Commission does not propose consistently to perceive joint ventures, *ex ante*, from the time when each party must be assured that it will be able to appropriate the benefit of the joint venture to itself. Sometimes it looks *ex post*. Conse-

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135. *See* Draft Notice, *supra* note 73, *reprinted in* Hawk, *supra* note 73, app.

136. Discussion Paper on the Future Treatment of Cooperative Joint Ventures, IV/647/91-EN, at 1-2 (Eur. Comm'n Jan. 1992).

quently, it does not draw the distinction so cogently used by Judge Taft[137] between naked restraints that are intended only to blunt competition, and ancillary restraints that make viable some legitimate transaction. The distinction it draws between restraints inherent in the transaction is not spelled out, but seems to differ somewhat.

1. Possible Extensions of Group Exemptions

It is considering amending the group exemptions for specialisation and R & D to permit joint sales when the market shares do not exceed 10 percent. This would enable the parties to appropriate the benefit of their investment in such cases. It is, however, not stated at what date the 10 percent would be measured. If the test is applied as the parties increase their market share, it would help only in the initial period. I hope it is applied once and for all when the agreement is made. That is the time when the parties have to decide whether to invest. If a risky investment proves successful, that adds to the competition already in the market.

Moreover, I can see no reason why other ways of allocating the market are not to be treated equally favourably. They are no more restrictive of competition than are joint sales and may be less so.

The Commission is also considering the amendment of the group exemptions for technology licensing to permit them to apply to licences from each parent to the joint venture, even when the parents are competitors.

2. In Relation to Individual Notifications

The Commission lists various kinds of joint ventures that fall outside Article 85(1). It repeats the statement in its *Thirteenth Report on Competition Policy* that it will look realistically before deciding that the parties are potential competitors.[138]

It repeats the *de minimis* rules as stated in 1986. There is no sign that the limit of appreciability was raised generally in *GEC-Siemens/Plessey*.[139]

It proposes to impose voluntary self restraint and deal

137. United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898).
138. Commission Thirteenth Report on Competition Policy 50-52 (1984).
139. O.J. C 239/2 (1990).

with individual cooperative joint ventures within five months, provided that the parties are content with an unpublished comfort letter. In some respects these may state that Article 85(1) is not infringed. Such a letter is helpful when enforcing the ancillary restraints, since a national court may take the Commission's view into account. A letter stating, however, that the agreement merits exemption may imply that it does infringe Article 85(1), and because a national court cannot grant an exemption, it may make it very difficult to enforce the ancillary restraints. The distinction between clearing and "merits exemption" type comfort letters is very important. Unfortunately, the Commission defines the situations where competition is not restricted[140] not only by reference to whether the parents compete with each other, but largely on the terms of the nature of the restrictions.

A joint venture between competing firms is unlikely to be caught by Article 85(1) if the joint venture performs all the functions of the firm and can operate like an independent firm, provided that the parents have abandoned the market as well as neighbouring markets and those up- or down-stream. This exception for "full function joint ventures" that are not dependent on their parents for raw materials, R & D or marketing,[141] reflects the Merger Regulation and is an unfortunate example of the Commission perceiving the situation *ex post*. Once the parents have irreversibly left these markets, it may be that they are unlikely to compete with their joint venture. Nevertheless, the practical result is that where parties are contemplating a joint venture they are strongly induced to leave the neighbouring markets. This must be even more anti-competitive than the equity interest in the joint venture reducing the incentive of the parents to compete with it.

The Commission is likely to close individual files by sending a letter stating that the agreement merits exemption when the joint venture will create substantial new capacity or increase that of its parents, provided that if the joint venture extends to marketing, the market share does not exceed 10 per-

140. Draft Notice, *supra* note 73, § II(C)(2), *reprinted in* Hawk, *supra* note 73, app. at 354-58.

141. Of course, such a joint venture is dependent on its parents in the sense that each will usually be able to veto important decisions on the board of the joint venture.

cent or in other cases 20 percent. It states that within these limits, the risk of creating entry barriers is not too great, in which case, it is unfortunate that the comfort letters will not state that Article 85(1) is not infringed, thereby making it easier to enforce the agreement.

The Commission deals with ancillary restraints in a way reminiscent of the Court's judgment in *Pronuptia de Paris GmbH v. Pronuptia de Paris Irmgard Schillgalis.*[142] Additional restrictions of conduct

> directly related and necessary to the JV must be assessed together with the JV itself and be treated, in the light of the rules of competition, as ancillary restrictions if they remain subordinate in importance to the main object of the JV. In particular as concerns the necessity of the restriction, it is proper not only to take account of its nature, but equally to ensure that its duration and subject-matter, and geographical field of application, do not exceed what the creation and operation of the JV reasonably requires.
>
> If a JV does not *per se* fall within the scope of Article 85(1), then neither do any additional agreements which, while they restrict competition,[143] are ancillary to the JV in the manner described above.
>
> Conversely, if a JV falls within the scope of Article 85(1), then so will any ancillary restrictions. The same exemption criteria will then apply to both, and no specific justification need be given as regards the ancillary restrictions.[144]

I have difficulty in telling what restrictions are to be treated as inherent in the joint venture. Where joint sales or other means of allocating the market made possible by the joint venture are necessary to induce the investment, why are such provisions not considered inherent in the transaction and appraised as part of the joint venture itself?

142. Case 161/84, [1986] E.C.R. 353, [1986] 1 C.M.L.R. 414.

143. *See id.* at 381, ¶¶ 14-15, [1986] 1 C.M.L.R. at 442. The Commission still seems to be unwilling to admit that restrictions of conduct needed to make viable a transaction that may increase competition do not restrict it. It seems to be invoking the German theory of inherent restrictions: in the case of legitimate transactions, minor restrictions that are inherent in the transaction are not anti-competitive. The problem is to foretell what transactions will be treated as legitimate. Agreements likely to restrict production and raise prices clearly will not be treated as legitimate.

144. Draft Notice, *supra* note 73, *reprinted in* Hawk, *supra* note 73, app. at 362.

The Commission is also working on a draft notice concerning the application of Articles 85 and 86 in national courts, in which it makes it clear that it does not intend to grant formal decisions of exemption unless there is a matter of policy involved. Consequently, most files will be closed by comfort letters and it remains very important whether the Commission analyses the need for ancillary restrictions under Article 85(1) or (3).

3. Conclusion on the Draft Guidelines

The Commission has been expecting to issue guidelines on joint ventures "this year" for over half a decade. The prospect now looks imminent.

Some progress had been made. Where market shares are low, joint sales may be allowed and ancillary restraints will be judged as part of the joint venture itself.

To a lawyer brought up on U.S. antitrust law, however, the result seems muddled. The concept of ancillary restraint used by the Commission is based on a concept of inherency which is not spelled out and seems to differ from the U.S. idea of an ancillary restraint that is necessary to make viable some kind of collaboration which increases competition. I am not clear whether the pro- and anti-competitive effects will have to be balanced. Where neither party alone could have achieved the task of the joint venture, there may well be nothing to balance.

Since the Commission does not intend to grant many individual decisions of exemption, it is very important that the competitive appraisal should take place under Article 85(1) as was done in *Delimitis v. Henninger Bräu AG.*[145] I regret that many notifications of a cooperative joint venture will be followed by a comfort letter stating that it merits exemption, or merely that it is closing the file. Let us hope that the Commission can be persuaded to change its mind on this.

VI. *CONCLUSION—THE CLEARANCE OF JOINT VENTURES*

In 1990, there were three major innovations enabling the Commission to clear joint ventures of which it approves. In

145. Case C-234/89 (Eur. Ct. J. Feb. 28, 1991) (not yet reported).

Odin and *Konsortium ECR 900*, it cleared joint ventures involving R & D by stating that the parties were not actual or potential competitors, that the ancillary restraints were necessary to make the transaction viable, and that there was no restriction of competition. If these precedents were followed consistently, parties could ensure that each is able to reap where he has sown and provide the incentive to risky investments.

In *GEC-Siemens/Plessey*, the Commission suggested that in the light of specified structural considerations any restrictions of competition, even between competitors or potential competitors, were appreciable only where their shares of a national market were very important. The Commission seemed to be indicating that when a joint venture does not create substantial market power within a Member State an agreement does not infringe Article 85(1), and even when they have substantial market power, the agreement may be exempted. The Commission is still not limiting Article 85(3) to agreements that clearly restrict competition but that produce other benefits for the economy. It implied that the joint bid increased competition in the long run.

The decision is more revolutionary than *Odin* and *Konsortium ECR 900*, and I am somewhat concerned that it may enable firms with market power at a national level to combine with those from other Member States and create Common Market oligopolies. I would like the Commission to articulate in public the reasons why it did not see this as a danger. It seems, however, as if the Commission may be having second thoughts, since there is no mention of raising the threshholds of appreciability in the draft notice of the Commission now circulating for comment.

Some joint ventures such as *Metaleurop*[146] have been found to be concentrative and treated as outside the prohibition of Article 85(1). They may be subject to control under the Merger Regulation, but Regulation No. 17 no longer applies to such joint ventures,[147] so Article 85 can hardly be enforced against such agreements, although national courts might apply

146. O.J. L 179/41 (1990), [1991] 4 C.M.L.R. 222; *supra* part V.B (discussing regulation).

147. Article 22 of the Merger Regulation, *supra* note 4, O.J. L 257/13, at 15 (1990), prevents the implementing regulations from applying to concentrative joint ventures even below the thresholds.

Article 86 and national authorities may apply national law to concentrations below Community thresholds. The test under Article 2(c) and (d) of the Merger Regulation is whether the joint venture creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the Common Market or a substantial part of it. Under this test, most concentrative joint ventures must be cleared, whether the firms' aggregate turnover is above or below the relevant thresholds. The threshold of market power necessary to infringe the regulation is far higher than under Article 85(1).

The higher threshold of appreciable effects used in *GEC-Siemens/Plessey* and the decision not to apply Article 85(1) to concentrative joint ventures enable the Commission to clear more joint ventures, and it can save its resources by doing this by comfort letter without taking a formal decision under Article 85(3) of the Treaty. It may have gone too far, however, and left itself with no powers to prevent national oligopolies becoming Common Market oligopolies as the barriers to interstate trade in the public sector are reduced.

It is said that there is a battle currently raging between the Legal Service, which wants to clear many joint ventures as outside Article 85(1), and some officials in DG IV who are reluctant to abandon control and who apply the old doctrine that any important restriction of conduct restricts competition.[148] Until it is resolved politically, it will be difficult to give clear advice to clients as to whether their agreements require exemption. This leaves them uncertain as to the enforceability of ancillary restrictions required to make investments worthwhile.

Competition presupposes markets, and markets presuppose exclusive rights and the performance of agreements to transfer them. In a sinful world, this presupposes some method of enforcing agreements. It is the nature of contracts to restrict conduct. Consequently, many restrictions of conduct are necessary to enable competition to operate. It is vital that these should not be treated as requiring exemption in most cases.

My own hope is that more joint ventures should be cleared

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148. Since this was written, it seems that DG IV has won the battle, at least for the time being.

on the reasoning used in *Odin*, but I am concerned that the other two arguments may go too far.

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