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The Contemporary Antitrust Regulation of Joint Ventures in the European Economic Community

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THE CONTEMPORARY ANTITRUST REGULATION OF JOINT VENTURES IN THE EUROPEAN ECONOMIC COMMUNITY

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I. INTRODUCTION

The joint venture is a form of organization widely used in international business. Although anticompetitive effects of mergers, interlocking directorates, and cartels are more frequently the targets of enforcement efforts under antitrust laws than joint ventures, the latter can be equally effective in reducing competition in the market place.

The legal status of joint ventures in various jurisdictions has remained a subject of some confusion possibly because of their hybrid nature—not quite cartels, yet not quite mergers. This confusion still exists to some extent in the United States, despite the fact that the Supreme Court has held that section 7 of the Clayton Act, which is aimed specifically at mergers, is also applicable to joint ventures. Although it is not the purpose of this article to discuss antitrust policy toward joint ventures in the United States, the subject matter is important to American business firms, particularly those contemplating joint ventures with Common Market partners. When firms "domiciled" in different jurisdictions undertake joint operations, the antitrust inquiry may involve more than one set of antitrust laws, and it is quite likely that a restraint on competition which is legal in one forum may be illegal under the laws of another. This is especially true when the analysis involves United States and Common Market antitrust rules, primarily because the Treaty Establishing the European Economic Community (EEC Treaty) has no provision comparable to section 7 of the Clayton Act prohibiting anticompetitive effects resulting from mergers. Another major reason is the fact that the EEC Treaty contains a provision which provides an exemption for prohibited anticompetitive agreements meeting certain criteria. No such exemption is found in United States law.

The status of joint ventures in the Common Market has only recently become a subject of legal commentary, primarily because no cases involving joint ventures under the EEC Treaty's competition rules have been decided by the European Court of Justice. The principal source of Common Market antitrust policy toward this business form has consequently been the Commission of the European Communities—the so-called executive arm of the Community. Although the Commission has been somewhat slow in elaborating its position on this subject, it has now rendered several decisions which shed some light on its attitude toward joint ventures and has clarified its approach to some extent in several of its annual *Reports on Competition Policy.*

II. CHARACTERISTICS OF JOINT VENTURES

In the broadest sense, the term "joint venture"[1] may be applied to every situation where two or more persons or firms cooperate to achieve a common goal.[2] Because that definition is clearly too broad to describe accurately many situations upon which this article will focus, a much more practical definition is that set forth in the Commission's *Fourth Report on Competition Policy:* "A joint venture is generally defined as an enterprise subject to joint control by two or more undertakings which are economically independent of each other."[3] This definition is not entirely accurate, however, for in some instances formation of the joint venture may result in a concentration not only betwen each parent and the jointly-owned enterprise, but also between the parents themselves. The parents may then be said to have lost their economic independence.

Although it is not essential, the jointly-owned enterprise will usually possess its own corporate personality.[4] Therefore, the term "joint subsidiary" will be used interchangeably with the broader term "joint venture." Most joint subsidiaries will have only two "parents,"[5] which will share the stock of the venture equally, with each parent having a veto over decisions on the joint venture's activities.[6] Of course, a joint venture may have more than two parents or may be open to future participation by additional enter-

1. Other expressions may be used to refer to virtually the same concept. In the narrow sense of the term, other terms like joint subsidiary, jointly-owned subsidiary, or fifty-fifty corporation may be used. *See* Mok, *The Jointly-Owned Subsidiary ("Joint Venture") and Article 85 of the EEC Treaty,* in EUROPEAN COMPETITION POLICY 120 (1973).

2. Pitofsky, *Joint Ventures Under the Antitrust Laws: Some Reflections on the Significance of Penn-Olin,* 82 HARV. L. REV. 1007, 1007 (1969).

3. COMMISSION OF THE EUROPEAN COMMUNITIES, FOURTH REPORT ON COMPETITION POLICY 25 (1975) [hereinafter cited as FOURTH REPORT]; Boyle, *The Joint Subsidiary: An Economic Appraisal,* 5 ANTITRUST BULL. 303 (1960); Tractenberg, *Joint Ventures on the Domestic Front: A Study in Uncertainty,* 8 ANTITRUST BULL. 797, 798 (1963).

4. There may be situations where a parent will constitute a group of controlled undertakings, each having a separate legal personality.

5. The term "parents" will be used throughout this article to refer to the enterprises which own and control the joint venture.

6. Mok, *supra* note 1, at 121.

prises.[7] Stock in the joint subsidiary may also be divided unequally between the parents.

The various relationships which can result from formation of a joint venture exist on two levels: (1) between or among the parents; and (2) between the joint venture and each parent. At the first level, assuming that only two parents exist, the parents may have the following relationships:

1. horizontal—where both actually compete in the production, manufacture, or sale of like commodities within the same market;
2. horizontal complementary—where both are engaged in the same activity but in different geographic areas, or each producing different but related commodities in the same market (*e.g.*, where one is a manufacturer of small calculators and the other a manufacturer of large computers;
3. vertical complementary—where one sells to or buys from the other; or
4. conglomerate—where each is unrelated to the other.[8]

At the second level, the joint venture's relationship with a parent may also be either horizontal, vertical, or conglomerate. Naturally, its relationship to one parent may differ from its relationship to the other. The potential for anticompetitive effects is greatest when the joint venture and its parents are all horizontally related, and is least likely when the parties are unrelated.

III. ANTICOMPETITIVE EFFECTS OF FORMATION

A. *Direct Effects on Actual and Potential Competition*

Formation of the joint venture may directly affect either actual or potential competition between firms. A direct effect on actual competition will result where the joint venture is formed to perform certain activities in a market in which the parents are presently competing. If the parents terminate their individual performance of the joint venture's task, yet continue to participate in other basic activities in the concerned market, the creation of the joint venture normally will eliminate or substantially curtail competition between the parents in that particular market.[9] For example, if several independent producers of widgets create a joint subsidi-

7. *See, e.g.*, KEWA, 19 O.J. EUR. COMM. (No. L 51) 15 (1976); United Reprocessors, 19 O.J. EUR. COMM. (No. L 51) 7 (1976).

8. Mok, *supra* note 1, at 123-24.

9. Brodley, *The Legal Status of Joint Ventures Under the Antitrust Laws: A Summary Assessment*, 21 ANTITRUST BULL. 453, 456 (1976); Pitofsky, *supra* note 2, at 1012.

ary to sell their products, price competition between the parents will be eliminated. None of the independent producers would market its own products individually and prices would be determined jointly. The same is true on the supply side, where the widget producers create a subsidiary to act as a joint purchasing agency for the purchase of raw materials.[10] Similarly, where the subsidiary is formed for joint research, competition between the parents over improved production methods, product quality, or even selling efforts may be eliminated.[11]

Actual competition between a parent and outside firms may also be affected by joint venture formation. First, where the parents are vertically complementary and the joint subsidiary is horizontally related to one, formation of the subsidiary may restrain competition between the horizontal parent and outside firms.[12] Competitors of that parent may be effectively foreclosed from doing business with the non-horizontal parent. Second, where the joint venture is vertically related to the parents and possesses a natural monopoly over a particular stage of activity, competitors of the parents will usually be foreclosed from doing business with the joint subsidiary[13]—a so-called "bottleneck joint venture." Finally, where the joint venture is vertically related to the parents as a supplier to them, competitors of the joint venture may be foreclosed from doing business with the parents.[14]

The term "potential competition" refers to the prospect that a firm will enter a market as a new entrant.[15] The effect of *de novo* entry will be the addition of a new and independent competitor in the particular market with a theoretically beneficial effect on actual competition.[16] In the joint venture context, the term

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10. *See generally* Brodley, *supra* note 9, at 456, 466-71; Pitofsky, *supra* note 2, at 1012-13.

11. Henkel/Colgate, 15 J.O. COMM. EUR. (No. L 14) 14 (1972); Pitofsky, *supra* note 2, at 1012.

12. Mok, *supra* note 1, at 125.

13. Brodley, *supra* note 9, at 467-69. *See also* Mok, *supra* note 1, at 128. Mok discusses United States v. National City Lines, 186 F.2d 562 (7th Cir. 1951), *cert. denied*, 341 U.S. 916 (1951). In that case a bus transportation service sold preferred stock to producers of various bus parts. The arrangement was condemned under the Sherman Act because competitors of the stockholders were precluded from selling to the transportation service.

14. Brodley, *supra* note 9, at 467.

15. Bellis, *Potential Competition and Concentration Policy: Relevance to EEC Antitrust*, 10 J. WORLD TRADE L. 23, 24 (1976); *see* Mok, *supra* note 1, at 125; Pitofsky, *supra* note 2, at 1018-19.

16. "If [a firm] enters *de novo*, a number of beneficial effects on competitive conditions are likely to follow. First, it can be expected that the building of new

"potential competition" may also describe the likelihood that one or more of the parents would enter the joint venture's market independently, but for the joint venture.[17] If a sufficient number would otherwise have entered the market, then the formation of the joint subsidiary has effectively reduced the number of potential participants in the market, with a consequent detrimental impact upon competition.[18] It may be difficult to determine whether a particular parent firm would otherwise have entered the market.[19] Naturally, clear evidence[20] that a parent actually intended to enter independently may sometimes exist.[21] The American experience, however, has indicated that evidence of a subjective nature will often be equivocal[22] and unreliable.[23] Consequently, the determination

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capacity in the industry, by expanding supply, will bring a downward pressure on prices and erode the market power of existing firms. Second, the presence of a new competitor may also disrupt possible collusive patterns among market firms." Bellis, *supra* note 15, at 24 (footnotes omitted).

17. Potential competition obviously becomes important in those situations where at least one of the parents is not in actual competition with respect to the particular market for which the joint venture was formed. This would include the situation where the parents are actually competing in the joint venture's product market, but the joint venture is formed to enter a new geographic market.

18. *See* Bellis, *supra* note 15, at 25.

19. *See id.* at 28-32; Brodley, *supra* note 9, at 460, 473, 477; Pitofsky, *supra* note 2, at 1019-29.

20. If subjective evidence is relied upon, "there is no assurance that the current feelings of management about entry are in any way indicative of what the firm is actually going to do in the future." Bellis, *supra* note 15, at 29 (footnotes omitted); *see* Pitofsky, *supra* note 2, at 1020, 1022.

21. "[C]hecking corporate files may sometimes unearth very convincing evidence as to the firm's future plans. A strong argument that the firm is a potential entrant can indeed be made if documents are found clearly establishing that the firm had decided to enter the market under a procompetitive form . . . ." Bellis, *supra* note 15, at 28.

22. In looking at the facts of United States v. Penn-Olin Chem. Co., 378 U.S. 158 (1964), Pitofsky concludes:

> [A]ll that any reasonable observer could conclude by a subjective test is that it was an extremely close question what Olin would have done with respect to independent entry, that fully informed and experienced executives could have reached different conclusions on the proper course of action, and that it would simply be impossible, at the time of trial, to decide what that hypothetical decision would have been.

Pitofsky, *supra* note 2, at 1023. *See also* Brodley, *supra* note 9, at 477.

23. "Passing the fact that a subjective test requires an extensive investigation through a maze of evidence, its main disadvantage is that it lends itself easily to all sorts of manipulation by the interested firm. As Justice Marshall rightly observed in the *Falstaff* case [410 U.S. 526, 568 (1972)] 'any statement of future intent (by the firm) will be inherently self-serving.' " Bellis, *supra* note 15, at 28-29 (footnotes omitted).

should be an objective one.[24] In a few cases arising under the Sherman Act,[25] American courts have arguably adopted such an objective test, finding a high probability of entry based upon the current lines of commerce in which the prospective entrant competes, and its economic interest in entering the market.[26] Business posture is one indication of a firm's capacity to enter the market, and it has been suggested that a firm's capacity and interest are relevant factors in an objective determination,[27] as well as consideration of whether independent entry would have made available an acceptable level of profit.[28] The Commission of the European Communities has adopted an objective test, focusing on factors indicating the firm's ability to compete, and has completely ignored subjective elements.[29]

Whatever test is used, one of three relevant probabilities might be found: (1) two or more parents could have (or "would have" if a subjective test is used) entered the market but for the joint venture; (2) only one parent could have entered; or (3) none of the parents could have entered.[30] Where two or more parents could have otherwise entered, formation of the joint venture will obviously have a direct effect on competition. The entry of only one new firm in the form of a joint venture, rather than the independent parent firms, is in effect an agreement between the two or more potential entrants to share the market.[31] When these firms

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24. Bellis, *supra* note 15, at 29; Pitofsky, *supra* note 2, at 1024-29.

25. 15 U.S.C. §§ 1-7 (1976).

26. Brodley, *supra* note 9, at 459-60.

27. Bellis, *supra* note 15, at 29; Pitofsky, *supra* note 2, at 1024-25. *See also* Brodley, *supra* note 9, at 458, 460.

28. Bellis, *supra* note 15, at 29; Pitofsky, *supra* note 2, at 1028. Pitofsky admits that such a criterion might give rise to complex problems, but suggests that without it the other criteria are insufficient.

29. Bellis, *supra* note 15, at 35-36. Bellis cites the following Commission decisions: Sopelem, 15 J.O. COMM. EUR. (No. L 13) 47 (1972); Wild-Leitz, 15 J.O. COMM. EUR. (No. L 61) 27 (1972); Jaz-Peter, 12 J.O. COMM. EUR. (No. L 195) 5 (1969); Clima Chappeé-Buderus, 12 J.O. COMM. EUR. (No. L 195) 1 (1969); Alliance de Constructeurs Français de Machines-Outils, 11 J.O. COMM. EUR. (No. L 201) 1 (1968). Bellis also cites the *Quinine Cartel* cases before the Court of Justice of the European Communities as indicating the Court's acceptance of the Commission viewpoint: Boehringer Mannheim GmbH v. Commission of the European Communities, [1967-1970 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8085; Buchler & Co. v. Commission of the European Communities, [1967-1970 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8084; ACF Chemiefarma N.V. v. Commission of the European Communities, [1967-1970 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8083.

30. Mok, *supra* note 1, at 125; Pitofsky, *supra* note 2, at 1012, 1019.

31. *See* Mok, *supra* note 1, at 129.

are all horizontally related and the joint venture is formed to enter a new geographic market, the effect on competition may be so pronounced that it can be equated with an elimination of actual competition.[32] Regardless of the particular configuration, however, if two or more parents had the ability to enter and did not, the effect on competition is substantial. If only one parent could have entered independently, the effect will vary, depending on whether one or more of the parents is already active in the market for which the joint venture was formed. If none of the parents is already active in the joint venture's market, the formation of the joint venture causes no direct loss to potential competition, assuming that the joint venture is as efficient a competitor as the parent would have been.[33] On the other hand, if the joint venture is formed to operate in a market where a parent is already active, arguably no new competitive force is added to the market, at least where the already competing parent can substantially influence the business policies of the joint venture.[34] Consequently, if the *other* parent would have independently entered the market but for the formation of the joint venture, its failure to do so *does* reduce the future number of firms in the market, thereby reducing potential competition.[35] If none of the parents could have otherwise entered, hypothetically there is no direct effect on potential competition, since formation of the joint venture creates a new competitor which would not otherwise have existed.[36]

B. *Indirect Effects on Competition*

There are also indirect effects which may result from formation of the joint subsidiary. These effects are actually possible results of joint operation of the venture. The most significant has been labeled "group effect":[37] the danger that legitimate collusion be-

32. Brodley, *supra* note 9, at 459-60.

33. Pitofsky, *supra* note 2, at 1060.

34. *Id.*

35. United States case law indicates that where one parent is in the market and the other is not and where certain factors are present, the joint venture will probably be held unlawful under the Clayton Act. The factors are "where (1) the in-the-market parent has a monopoly or dominant market position, (2) the other parent is a substantial, clearly recognized potential entrant, and (3) there are no other, or very few other potential entrants . . . ." Brodley, *supra* note 9, at 476.

36. *See* Pitofsky, *supra* note 2, at 1049-59.

37. Sidmar, *in* EUROPEAN COAL AND STEEL COMMUNITY, THE HIGH AUTHORITY, 11th GENERAL REPORT ON THE ACTIVITIES OF THE COMMUNITY, pts. 346-49, at 320-25 (1963) [hereinafter cited as Sidmar I, 11th GENERAL REPORT]; *see* Linssen, *Joint*

tween the parents over the joint venture's affairs will spill over into other aspects of the parent's activities.[38] The "group effect" is also called the "common corporate meeting ground"[39] effect, referring to the risk that individual parents, meeting to make decisions regarding the joint venture's business affairs, "may end up by regulating their [own] conduct in accordance with policy lines jointly determined in the interest of the operation of the new joint venture."[40] The essential concern in this regard is not that the parents will actually enter collateral restrictive agreements or undertake concerted practices, but that they will have the *opportunity* to do so,[41] and that the greater the opportunity the greater the probability that they will exercise it. One commentator expresses "justifiable doubt that business strategists can treat one another as belligerents in one market when they are allies in another."[42] Another author states that "it is inconceivable that firms engaged cooperatively in one industrial area would not act the same way in others."[43] It has been suggested by other commentators, however, that this opportunity does not necessarily increase the probability of collusion, since "there are so many opportunities for competitor collaboration already available to business managers so inclined that it seems unwarranted to give much weight to the additional opportunity supplied by regular meetings among representatives of the parent companies in connection with the joint ventures' business affairs."[44] Whether or not the opportunity is viewed as necessarily increasing the probability of collusion, one generalization has come to be accepted: The group effect risk is greatest where the parents are actual competitors and diminishes rapidly as their relationship moves from horizontal complementary or vertical complementary to conglomerate.[45]

Subsidiaries; The S.H.V.—Chevron Case, 13 COMM. MKT. L. REV. 105, 108 (1976); Mok, *supra* note 1, at 126.

38. Brodley, *supra* note 9, at 478; Linssen, *supra* note 37, at 108, 110; Pitofsky, *supra* note 2, at 1013-14, 1032-35.

39. Mok, *supra* note 1, at 125 (quoting Boyle).

40. FOURTH REPORT, *supra* note 3, at 26.

41. *See* Pitofsky, *supra* note 2, at 1032.

42. Mok, *supra* note 1, at 126 (quoting Dixon, *Joint Ventures: What is Their Impact on Competition?,* 7 ANTITRUST BULL. 397, 407 (1962)).

43. United States v. Minnesota Mining and Manufacturing Co., 92 F. Supp. (D. Mass. 1950).

44. *See* Pitofsky, *supra* note 2, at 1033.

45. *See* FOURTH REPORT, *supra* note 3, at 26; Mok, *supra* note 1, at 126; Pitofsky, *supra* note 2, at 1030-31, 1034-35. *See also* Brodley, *supra* note 9, at 481; Linssen, *supra* note 37, at 108.

Where the joint venture competes with the parents in the same product and geographic market, as where all produce and sell a standardized product, the group effect can necessarily be inferred as long as the market share of each parent is so substantial that each must consider the other's prices in setting its own.[46] Where such a configuration is involved, the following results may be expected:

> Obviously the parent companies in setting prices at which the joint venture will sell, must take into account the effect of any such sales on their own sales volume, and each can use its fifty percent stock ownership to block sales by the joint venture at undesirable price levels. By the same token, each parent company will have to peg its own prices at a level which will not substantially undercut competitive prices of the venture so as to avoid the awkward situation in which it undersells its own subsidiary.[47]

In agreeing on the joint venture's prices, the parents are effectively adopting mutually agreeable prices for their own products.

In other configurations, the inference is often not as conclusive and may have to be supported by additional evidence of collaboration. Additional evidence may be necessary even where the parents are actual competitors such as where the joint venture's output is either sold separately by each parent or is used by the parents as raw material.[48] In order to make their own management decisions,

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In the *Fourth Report* the Commission stated: "Even in the absence of particularized agreements or concerted practices, it can be assumed that restrictive arrangements are more likely to be made in cases in which the parties involved are in effect competitors." FOURTH REPORT, *supra* note 3, at 26. "[T]he common meeting ground theory does not play a big part if the parents are not competitors, and no part at all if the parents are completely unrelated . . . ." Mok, *supra* note 1, at 126.

On the basis of relevant American decisions Brodley concludes that a few tentative principles regarding group effect may be propounded. The first and foremost principle is that,

> the stronger and more direct the existing competitive relationship between the parents, the greater the anticompetitive risk. Second, if there is evidence of parent collusion relating to the joint venture's line of business, either prior to the formation of the joint venture of thereafter, the anticompetitive risk increases. Third, the specific management and operating arrangement governing the joint venture can increase or decrease the risk of collaborative action between the parents. Fourth, the greater the economic incentives for collusive action, the greater the anticompetitive risk.

Brodley, *supra* note 9, at 480-91.

46. Pitofsky, *supra* note 2, at 1034.

47. *Id.*

48. "In both cases the parents, in order to make sensible investment and

the parents will have to agree on the joint venture's level of production via an exchange of data about each other which could lead to uniformity of action *inter sese.* Since this data is probably available through other sources, however, additional proof of parental collusion is necessary before the group effect inference can be drawn. It is not clear whether all authors agree on the latter point. As will be seen later, the Commission of the European Communities draws the inference in the above type cases with respect to production and investment, but not with respect to price—at least where the parents themselves produce more of the concerned products than the joint venture.[49]

Another indirect effect which may occur is termed the "stifling" effect. The stifling effect involves the risk that when joint venture growth begins to threaten a parent's own plans, it will be stifled by the parent. The risk is obviously greatest where the joint venture actually competes with one or both parents, but will also exist where product or geographic expansion is contemplated for the joint venture into an area in which one or more of the parents are also contemplating entry.[50] Where the relationship between the parents and the joint venture is basically conglomerate, the risk is probably insignificant.[51]

IV. Regulation of Anticompetitive Effects in the European Communities

A. *Article 85, Paragraph 1 and Mergers*

The principal provision of the Treaty Establishing the European Economic Community (EEC Treaty) for regulating anticompetitive agreements and concerted practices between enterprises is article 85. Under paragraph 1 of this article,

> The following shall be deemed to be incompatible with the Common

management decisions, would have to agree in advance as to the capacity and level of operation of the joint venture, and the exchange of data between the parent companies would tell each company a good deal about the future marketing intentions of the other. In certain market settings—for example, a tight oligopoly market with fully standardized products—an exchange of that kind of information might tend to facilitate uniform price conventions and may have to be outlawed, or at least regulated, under the antitrust laws. But anticompetitive tendencies, if any, would be generated here by an exchange of information which may be available to alert business managers through other sources." *Id.* at 1035.

49. Solmer, 18 O.J. Eur. Comm. (No. L 49) 13 (1975); *see* text accompanying notes 119-20 *infra;* notes 165-69 *infra.*

50. Pitofsky, *supra* note 2, at 1035.

51. *Id.* at 1038.

> Market and shall hereby be prohibited: any agreements between enterprises, any decisions by associations of enterprises and any concerted practices which are likely to affect trade between the Member States and which have as their object or result the prevention, restriction or distortion of competition within the Common Market . . . .[52]

It might be assumed that formation of a joint venture causing one or more of the anticompetitive effects discussed previously would clearly be subject to the article 85, paragraph 1 prohibition if the "affect trade between Member States" requirement were also met, but this is not necessarily the case.

Most joint ventures are neither genuine cartels nor genuine mergers.[53] On the other hand, some are clearly cartels and others are "more like mergers, especially if the parents cease their independent activities and continue their existence merely as holding companies."[54] The Commission has adopted the policy that article 85 will not apply to concentrations which are intended to bring about a permanent change in the ownership of the enterprises concerned.[55] Mergers in which several formerly independent enterprices regroup under one economic direction can meet this requirement.[56] The Commission, however, stated in its 1966 *Memorandum on the Concentration of Enterprises in the Common Market* that where a merger occurs in the form of a joint venture and the parents thereafter remain economically independent, the arrangement will be carefully scrutinized to determine whether, apart from changes in ownership, the parents are entering into and applying restrictive agreements or engaging in concerted practices.[57]

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52. Treaty Establishing the European Economic Community, March 25, 1957, art. 85, para. 1, 298 U.N.T.S. 11 [hereinafter cited as EEC Treaty].

53. Mok, *supra* note 1, at 132.

54. *Id.*

55. COMMISSION OF THE EUROPEAN COMMUNITIES, MEMORANDUM TO THE GOVERNMENTS OF THE MEMBER STATES ON CONCENTRATION OF ENTERPRISES IN THE COMMON MARKET, CCH COMM. MKT. REP. No. 26, ¶ 58, at 27 (1966) (out of print) [hereinafter cited as 1966 MEMO]. The *1966 Memo* is summarized in COMMON MKT. REP. (CCH), New Developments (Apr. 1965-Dec. 1969), ¶ 9081 at 8171-73.

56. *Id.* ¶ 21, at 13.

57. *Id.* ¶ 58, at 27. The Commission's advisory group of professors had recommended that article 85 should apply to concentrations where the enterprises involved remained juridically distinct units following the concentration. The Commission rejected this view, primarily because it felt that too many concentrations would fall under article 85, paragraph 1. Reasonable concentrations would have to escape via article 85, paragraph 3, which was considered inappropriate for concentrations. *Id.* ¶ ¶ 53-56, at 24-26; *see* Canellos & Silber, *Concentrations*

B. *Concentrated Joint Ventures*

Since publication of the *1966 Memorandum,* the Commission has dealt with several joint venture cases and has clarified its earlier opinion. Its present position is that "joint ventures may amount either to a form of restrictive practice or to a merger" and that whether a given joint venture falls within either category "can only be settled in the light of specific circumstances on a case by case basis."[58] Concentrated joint ventures, however, are clearly considered to be an exception. Normally, formation of a joint subsidiary which causes the restrictive effects discussed previously and which affects trade between Member States will fall within the prohibition of paragraph 1. Nevertheless, it is appropriate here to discuss the exception before the rule. A finding of concentration would seem to obviate the necessity of examining formation of a joint subsidiary in light of the requirements of article 85, paragraph 1.[59]

It is important to note that formation of joint ventures may create a concentration at two different levels. Formation will always be treated as bringing about a concentration between the joint subsidiary on the one hand, and the parents on the other, because the parents acting jointly can control the activity of the subsidiary. This first level of concentration will be referred to as "joint venture" concentration. It is also possible that a joint venture formation may effect a concentration between or among the parents. It is this second level, which will be referred to as

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in the Common Market, 7 COMM. MKT. L. REV. 5, 152 (1970); Mok, *supra* note 1, at 136. The Commission appears not to have totally rejected the advisory group's view point where joint ventures are involved, however. *See* 1966 MEMO, *supra* note 55, ¶ 58, at 27.

58. COMMISSION OF THE EUROPEAN COMMUNITIES, SIXTH REPORT ON COMPETITION POLICY 38 (1977) [hereinafter cited as SIXTH REPORT].

59. Apparently, if the joint venture parents are deemed to have merged, the Commission's focus is not upon whether the requirements for prohibition under article 85, paragraph 1 are present. In fact, once a merger is found, the joint venture agreement should be immune to prohibition. However, comments by the Commission in the *Sixth Report* and in decisions to be discussed in this article indicate that this is not a hard and fast rule. At any rate, whether or not merger results in immunity, the Commission will issue a negative clearance in accordance with Regulation 17, just as it would if the formation agreement had been examined in light of article 85, paragraph 1, and the requirements for prohibition therein had been found lacking. *In re* Application of Steenkolen-Handelsvereeniging NV & Chevron Oil Europe, 18 O.J. EUR. COMM. (No. L 38) 14 (1975) [hereinafter cited as SHV/Chevron]; *see* Regulation 17, 5 J.O. COMM. EUR. 204 (1962).

"parental" concentration, which has raised difficulties in attempting to apply article 85, paragraph 1 to certain joint ventures. When only a joint venture concentration is present, the formation agreement will always be scrutinized under article 85. Where a parental concentration is also present, however, the Commission has adopted a policy to the effect that article 85 will generally not apply.

1. Concentration Between the Parents

(a) *Total Integration.*—The Commission has ruled that where enterprises transfer all their individual assets to a joint subsidiary and become holding companies, article 85 will generally not apply because "such a situation will usually be considered to constitute a merger."[60] For example, in 1964 a Belgian photography firm, *Agfa*, and a German photography firm, *Gavaert,* merged by forming two equally and jointly owned subsidiaries with identical boards. Both firms transferred all of their individual assets to the two subsidiaries.n61 The Commission viewed this as a total integration, the parents retaining their identities only as management holding companies with no economic independence.[62] The parents had effected a total parental concentration. Consequently, article 85 did not apply to the formation agreement.[63]

(b) *Partial Integration.*—When the parents transfer all assets related to a particular activity in a given product market to a joint subsidiary and both continue to retain individual assets and engage in other activities in the same market, no parental concentration is deemed to be present.[64] For example, where two firms are engaged in production and marketing activities in the widget market and transfer only their marketing assets to a joint subsidiary,

60. SIXTH REPORT, *supra* note 58, at 38; FOURTH REPORT, *supra* note 3, at 26.

61. LAYTON, CROSS FRONTIER MERGER IN EUROPE, HOW CAN GOVERNMENT HELP? 25 (1971). Two other firms, Dunlop and Pirelli, merged by creating holding companies into which they transferred their assets and operations. Each acquired large shares of the other's subsidiaries. The Commission reached the same conclusion regarding this merger as it had reached for Agfa/Gevaert. FOURTH REPORT, *supra* note 3, at 26.

62. FOURTH REPORT, *supra* note 3, at 26.

63. The language used by the Commission in the *Sixth Report* indicates that this may not always be the case. "The prohibition will not *in general* be taken to apply to cases in which the parent companies transfer all their assets . . . . Such a situation will *usually* be considered to constitute a merger." SIXTH REPORT, *supra* note 58, at 38 (emphasis added).

64. *See* text accompanying notes 9-11 *supra.*

they have created a joint selling agency which is clearly prohibited by article 85.[65]

Suppose, however, that two parents transfer all of their assets related to a particular activity on a given product market to joint subsidiaries. One of the parents continues to participate in different activities on the concerned market, and the other parent no longer participates at all in that market but continues to be active in others. This was the situation in *SHV/Chevron*.[66] One parent, Chevron, was primarily engaged in various activities in the petroleum market; the other, SHV, primarily participated in activities in markets other than that of petroleum.[67] Each had independent distribution networks for certain petroleum products, however. They set up a number of jointly and equally owned subsidiaries to which they transferred all of their assets relating to distribution of the petroleum products. Consequently, SHV virtually disappeared from the petroleum market as an independent entity.[68] Both parents ceased to engage independently in the distribution of the products in question and entered into an agreement not to compete with respect to these products without prior consent of the other.

If SHV had been a producer of petroleum products and had otherwise remained in the petroleum market, this arrangement might have been nothing more than the creation of a prohibited joint selling agency as mentioned above. The Commission found, however, that a real concentration had been created, not only between each parent and the joint venture, but also between the parents themselves.[69] The Commission stressed the "lasting

65. SIXTH REPORT, *supra* note 58, at 38; FOURTH REPORT, *supra* note 3, at 25.

66. SHV/Chevron, 18 O.J. EUR. COMM. (No. L 38) at 14.

67. Chevron belonged to an integrated international petroleum group which engaged in crude oil production, oil refining and distribution, and petrochemicals. SHV was primarily engaged in coal distribution, chain stores, transport, trade in technical products, and construction. SHV/Chevron, 18 O.J. EUR. COMM. (No. L 38) at 15. *See* Linssen, *supra* note 37, at 105 n.1.

68. By virtue of SHV's oil exploration activity, however, there was always the chance that it would come into possession of crude oil in the future.

69. The language the Commission used to make this point is a bit confusing in view of the language which had been used by the High Authority in the decisions under the ECSC Treaty. The Commission said: "For both Chevron and SHV this brings about a real concentration between each of them and their joint subsidiaries, confined to the distribution of the products specified by the agreement." SHV/Chevron, 18 O.J. EUR. COMM. (No. L 38) at 15. This could be interpreted as referring to only a joint venture concentration between the subsidiary and each parent. However, in view of the other aspects of the *SHV/Chevron* decision and of the Commission's comments in the *Fourth Report*, the statement

change" in the structure of the parents' companies brought about by the transfers of assets.[70] SHV had ceased to be a wholesale buyer of the relevant products and both parents had ceased to retail the products separately. "Most of the other aspects of the agreement suggest that what is really happening is that the distribution side of Chevron's and SHV's business is being integrated into the new trading structure of the Calpam subsidiaries."[71] The Commission also pointed out that the subsidiaries were formed for a period of 50 years and said this suggested a permanent transfer of assets by the parents to them.[72]

In the *Fourth Report on Competition Policy,* the Commission termed the *SHV/Chevron* situation a partial integration because the parents retained economic activities in fields other than those turned over to the joint ventures. It stated further than in respect to the activities turned over to the subsidiaries, the parents took the form of holding companies "after transferring to the joint ventures . . . the necessary infrastructure for the supply of the relevant product. They thereby lost their economic independence on the markets concerned, where they could act only through their joint subsidiaries, which had been created through transfers of assets needed for their operation."[73] In the *Sixth Report on Competition Policy,* the Commission attempted to distill from the above the essence of its policy on partial mergers. Four points were stressed: First, to effect an excluded partial merger, a transfer of assets seems to be required. Second, a merger will be present only in exceptional cases. Third, such cases will arise "only where the parent companies *completely and irreversibly* abandon business in the area covered by the joint venture . . . ."[74] Finally, the Commission added a factor not previously considered—the partial inte-

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must have been intended to mean not only a joint venture concentration, but also a parental one.

70. Linssen argues that the change might not necessarily be all that "lasting."

> [F]or Chevron and Standard Oil of California, as world-wide producers and distributors, no serious obstacles appeared to exist to the resumption of distribution of petroleum products in so small a geographic area (Benelux, Denmark and Germany). SHV, an important trading and transport company, might also have been able to take up distribution of the products again.

Linssen, *supra* note 37, at 112-13.

71. SHV/Chevron, 18 O.J. EUR. COMM. (No. L 38) at 15.

72. Such a contractual term could easily be avoided by mutual consent of the parties. Linssen, *supra* note 37, at 113.

73. FOURTH REPORT, *supra* note 3, at 27.

74. SIXTH REPORT, *supra* note 58, at 38-39.

gration must not "weaken competition in other areas, and particularly in related areas, where the firms involved remain formally independent of each other."[75]

The partial merger policy was further clarified in the case of *De Laval/Stork*.[76] The issue therein was apparently raised because one of the parent firms, Stork, transferred certain assets (its plant facilities) to the joint venture. The Commission again stressed the factors set forth in the *Sixth Report*, in finding no partial merger present. It is obvious from *De Laval/Stork* that the most important question in the partial merger context is whether the parents remain actual or potential competitors in the joint venture's market after the formation of the joint venture. To answer this question, the Commission applies the "complete and irreversible abandonment" test, which involves analysis of two questions: (1) whether the parents have given up "all their existing capacity to compete actually or potentially" and (2) whether the parents have ceased "to do business in the industry."[77]

The first question relates to parental transfer of assets to the joint venture. The Commission's reference to this criterion in *De Laval/Stork* creates a bit of semantic confusion, since in one paragraph the Commission implies that only one parent must abandon business in the "area covered by the joint venture" and in the next paragraph the Commission requires that "the parties" give up all their existing capacity to compete, presumably in that same area. Both requirements, though seemingly contradictory, are necessary for a finding of partial merger, although the scope and meaning of the terms used by the Commission require further clarification. This point is best demonstrated by example. If both parents turn over all their existing capacity for marketing widgets to a joint venture and yet continue to manufacture the product, nothing more than a joint sales firm, which is clearly prohibited by article 85, paragraph 1, has been created. However, if at least one parent ceases all manufacturing and other activities in the widget market, though remaining active in other unrelated product markets, and transfers jointly with the other parent all its existing capacity for marketing the involved product, then an excluded partial merger will result.[78] Obviously, the same is true when both parents cease all activities in the widget market, remain active in others, and

75. *Id.* at 39.

76. De Laval/Stork, 20 O.J. EUR. COMM. (No. L 215) at 15.

77. *Id.* at 16.

78. This was the situation in SHV/Chevron. *See* text accompanying notes 107-10 *supra*. This situation assumes that only two parents exist and that all other relevant criteria are met.

transfer all assets relating to activities in the widget market to a joint venture. In fact, the second question seems to make this a prerequisite for partial merger, raising additional problems in interpreting the requirement that only one parent need abandon joint venture-related business. The second question is whether the parties have ceased to do business in the industry.[79] If "industry" includes all activities in the relevant product market, the Commission must provide additional interpretation. This was clearly not the case in *SHV/Chevron* and any further endorsement of the above interpretation would in fact overrule that decision.

The *De Laval/Stork* decision also demonstrates that other factors will be considered in determining whether the "complete and irreversible abandonment" test has been met. Terms in the formation agreement may be indicative of the parties' intent. For example, terms which limit the joint venture's activities to a specific territory and restrict parental activities in the joint venture's area would not be required once the parents actually abandon business in that area. Furthermore, terms of the agreement which limit the period of life of the joint venture to a relatively short term (five years in *De Laval/Stork*) and which give the parents a right to terminate the joint venture agreement will also be viewed as indicating less than complete and irreversible abandonment.[80]

The opinion in *De Laval/Stork* also mentions the criterion referred to in the *Sixth Report,* regarding the effect of formation on parental competition in areas outside the field of the joint venture. The Commission's reference to this effect indicates that the "complete and irreversible abandonment" test is only one of two important tests, both of which must be present before the Commission will find an excluded partial merger. In determining that the *De Laval/Stork* joint venture did not constitute such a merger, the Commission stated:

> It is not the case that at least one of the companies has completely and irreversibly abandoned business in the area covered by the joint venture nor that it is certain that the pooling of this area of business will weaken competition in other areas, particularly in related industries, where the firms involved remain formally independent of each other.[81]

This statement implies that, despite a finding of complete and irreversible abandonment, if the Commission finds a potential for

79. De Laval/Stork, 20 O.J. EUR. COMM. (No. L 215) at 16.
80. *Id.*
81. *Id.* at 15-16.

the spill-over of parental cooperation into other areas of parental activity, it will not conclude that an excluded partial merger is present. Although a likelihood of "spill-over" will exist only where the parents remain actual competitors in areas other than that of the joint venture, the full implications of this "spill-over" test will have to be supplied by the Commission in future decisions and reports.

The *GEC/Weir Sodium Circulators* decision,[82] which involved a similar type of spill-over in a non-partial merger context, indicates that the basis for cooperation in areas outside the field of the joint venture is the association of executives of the parent firms to conduct the business of the venture. This association would exist in most partial merger situations as well, but the climate is not as conducive to cooperation in a partial merger context as when the "group effect" restriction relates to competition in the joint venture's market. In the latter instance a stronger case for prohibition can be made because of the generally accepted maxim that the parents will not compete with the activities of the joint venture and will therefore govern their own activities in the joint venture's market in accordance with the policies jointly determined for the venture.[83] In the partial merger context, however, the objectionable effect on competition is merely inferred from the opportunity for collusion, because executives of the parents must work together to conduct the affairs of the venture. This is analogous to the situation in which additional evidence of collusion should be present before a violation of antitrust rules is found.[84] The Commission has not yet expressly adopted this viewpoint, however.

(c) *Collateral Agreements Not to Compete.*—The *SHV/Chevron* decision raises another issue: the effect of a finding of partial merger on a collateral agreement not to compete. As already mentioned, the *SHV/Chevron* agreement establishing the joint subsidiaries contained a collateral or ancillary agreement under which the parties agreed not to compete with each other without prior consent with respect to the products turned over to the subsidiary. Before the decision, the agreement had included an additional clause whereby the parents agreed not to compete with respect to other petroleum products not distributed by the joint

82. GEC/Weir Sodium Circulators, 20 O.J. EUR. COMM. (No. L 327) at 32.

83. *Id.* at 31; *see* Pitofsky, *supra* note 2, at 1034; text accompanying notes 45-49 *supra*.

84. Pitofsky, *supra* note 2, at 1035; note 48 & text accompanying notes 48-49 *supra*.

subsidiaries.[85] Since the Commission considered the latter clause to be covered by article 85, paragraph 1, the parents deleted it. The Commission found, however, that the agreement not to compete in the joint venture's market was not prohibited by article 85, paragraph 1. Unfortunately, the reasoning in the Commission's decision is not entirely clear.[86] The Commission stated that the agreement assured SHV that the assets turned over to the joint venture would not depreciate in value as a consequence of competition by Chevron. On the other hand, it stated that Chevron had no conceivable interest in competing with its own fifty percent-owned subsidiaries; moreover, the Commission determined that SHV was unlikely to reenter the market as a competitor. On the basis of those three factors, the Commission concluded that the agreement not to compete in the field of the joint venture could not be said to involve an "appreciable restriction of competition."[87] With the possible exception of the first point stressed by the Commission, there is nothing in its treatment of the noncompetition clause to indicate that the Commission considered the agreement a consequence of the concentration and therefore a dependent restriction not subject to article 85.[88] Rather, it appears that the Commission considered the agreement in light of the requirements for prohibition in paragraph 1 of article 85, and concluded that the prohibition would not apply because the restriction did not meet the noticeability criterion read into the third requirement for prohibition in article 85, paragraph 1 by the Commission[89] and Court of Justice.[90]

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85. SHV/Chevron, 18 O.J. EUR. COMM. (No. L 38) at 15. The other products were lubricating oil, diesel fuel, and petrol in the Benelux area and Denmark. *Id.*

86. *Cf.* Linssen, *supra* note 37, at 114. Linssen states that, with regard to the noncompetition clause, the Commission "maintained a curious line of reasoning, which amounted to a mixture of concentration and cartel arguments." *Id.*

87. The main agreement between Chevron and SHV also allowed Chevron to fix the price for asphalt, one of the products to be distributed by the joint venture. The Commission held that this aspect of the agreement was compatible with article 85, because only Chevron had sold the particular product before. SHV/Chevron, 18 O.J. EUR. COMM. (No. L 38) at 15. Apparently the Commission meant that since the parents had not been in competition over the price of asphalt prior to formation and that since SHV was unlikely to reenter the market once it transferred its distribution assets to the subsidiary, there could be no restriction of competition.

88. For a possibly contrary interpretation, see Linssen, *supra* note 37, at 114.

89. Commission notice of May 27, 1970, 13 J.O. COMM. EUR. (No. C 64) 1, 1-2 (1970).

90. Volk v. ETS Vervaecke, 8 COMM. MKT. L.R. 273 (1969) [hereinafter cited as *Volk/Vervaecke*].

In the *Sixth Report,* however, the Commission adopted a different approach to justify its conclusion in *SHV/Chevron* that article 85 did not apply to the noncompetition clause. Normally agreements not to compete are manifestly subject to article 85 when they have their own distinct legal and economic effect. Where such clauses are stipulated in mergers, a more flexible approach is necessary. The question then becomes whether the clause is acceptable as an integral part of the legitimate purpose of the main agreement.[91] Because the Chevron agreement provided SHV with the assurance that the value of its transferred assets would not be reduced, the agreement "was a condition precedent to the formation of the joint venture."[92] In short, the agreement not to compete over joint venture products was upheld because it was an integral part of the excluded partial merger. The Commission complicated the issue, however, by reviving the other criteria mentioned in the decision itself. For example, the Commission attempted to clarify further its holding in *SHV/Chevron* by distinguishing it from its later *KEWA* decision.[93] In *KEWA,* the Commission held that an agreement among the parents not to compete in the joint venture's field was prohibited by article 85, paragraph 1. The Commission distinguished the *SHV/Chevron* noncompetition agreement from that in *KEWA* on the basis that the parents in *SHV/Chevron* were no longer potential competitors in the joint venture's field, whereas the *KEWA* parents were. This distinction is a valid one. However, the Commission could have clarified its policy regarding collateral noncompetition agreements by pointing out the most basic distinction between the two decisions: *SHV/Chevron* was a case involving partial merger and *KEWA* was not. An excluded partial merger finding is premised upon the conclusion that the joint venture parents are no longer potential competitors in the joint venture's field and that no cooperation is likely to spill over into areas of parental activity outside the joint venture's field. Article 85, paragraph 1, will not apply to agreements where the parties are not actual or potential competitors in the area covered by the agreement and where there is no spill-over effect, at least where the agreement has no effect on competition with third parties. Consequently, if an excluded partial merger has been effected via formation of a joint venture and if a collateral noncompetition agreement pertains directly to the joint venture's area of activity, there is no

91. SIXTH REPORT, *supra* note 58, at 42.

92. *Id.*

93. 19 O.J. EUR. COMM. (No. L 51) 15 (1975); *see* text at notes 144-49 *infra.*

basis for the application of article 85, paragraph 1, to the collateral agreement.

When the noncompetition clause covers areas outside the field of the joint venture, however, different considerations arise. Generally speaking, the parents will retain freedom to act independently in non-joint venture areas of activity. Stated differently, the elimination of parental freedom of action outside the field of the joint venture is not a natural consequence or an integral part of the formation of an excluded partial merger. As the Commission stated in its *Sixth Report:* "[W]here a non-competition clause agreed by parent companies does not concern a joint venture's area of activity, it is generally to be considered a restriction of competition within the meaning of Article 85(1), whether the joint venture is regarded as a restrictive agreement or as a merger."[94]

2. Applicability of Article 86 to Joint Ventures Effecting Concentrations Between the Parents

Although in the *1966 Memorandum* the Commission felt that article 85 should not apply to concentrations,[95] it reached the opposite conclusion with respect to the applicability of article 86, which prohibits the abuse of dominant positions.[96] The memorandum described two situations of concentration to which article 86 might apply: where a firm in a dominant position employs abusive market practices to compel a weaker firm to merge with it; and where a dominant firm merges with a viable competitor and thereby eliminates remaining competition on the market.[97] The Commission felt that the second situation could bring about the same harmful results as the behavior described in article 86(b), "the limitation of production, markets or technical development to the prejudice of consumers." In both situations, the Commission required that one of the parties to the merger be in a dominant

94. SIXTH REPORT, *supra* note 58, at 42.

95. 1966 MEMO, *supra* note 55, at 27.

96. *Id.* ¶ 59, at 27-30. The Commission felt that the obstacles to applying article 85, see note 57 *supra,* did not exist for article 86. Article 86 prohibits action by one or more enterprises, to the extent that such action affects trade between Member States, whereby improper advantage is taken of a dominant position within the Common Market or a substantial part thereof. EEC TREATY, *supra* note 52, art. 86. The Commission felt that all forms of concentrations could be treated alike and that under article 86, there would be no problem of revocable exemptions or mandatory nullity of agreements. 1966 MEMO, *supra* note 55, at 27; *see* Canellos & Silber, *supra* note 57, at 153.

97. 1966 MEMO, *supra* note 55, ¶ 65, at 29-30; *see* Canellos & Silber, *supra* note 57, at 153.

position. Several commentators have argued, however, that this need not be the case so long as dominant position results from the merger.[98] Their argument is based upon a reading of article 86 itself, which prohibits action by one or more enterprises to take advantage of a dominant position. For example, where a particular market is oligopolistic, firms participate in the market share in a sort of collective "economic dominance." If two such firms merge to acquire the "competitive benefits of consolidating the collective dominant position in the hands of one entity," then arguably each participant has taken advantage of the collective dominant position by undertaking to merge.[99] In other words, it is arguable that two firms not individually in dominant positions could merge so as to create a dominant position and fall within article 86.

Although the Commission has never expressly adopted this particular reasoning, it has taken a case involving facts similar to the second situation in the *1966 Memorandum* before the Court of Justice in the *Continental Can* case[100] and received acceptance by the Court in principle. The Commission had held in its decision that Continental Can abused its dominant position within the meaning of article 86 by acquiring a Dutch manufacturer of the same products, because the acquisition "in practice eliminated [competition] for the products in question."[101] Thus the possibility exists that joint venture formations which fall outside the sphere of article 85 may be caught by article 86 where they amount to parental concentrations.[102] It is also arguable that joint venture formations which do not amount to concentrations between the parents could fall within the *Continental Can* rationale where the formation has the effect of substantially eliminating competition between the parents. Article 85 would normally apply in such cases, however.

The Commission has not expressly adopted the reasoning with regard to non-dominant firms which create a dominant position by

98. P. VERLOREN VAN THEMAAT, ROME CONFERENCE REPORT 34-35; Canellos & Silber, *supra* note 57, at 162 (citing Mestmäcker, *Unternehmenzusammenschlusse nach Artikel 86 EWG Vertrag*, in 2 FESTSCHRIFT FUR WALTER HALLSTEIN 348 (*The Combination of Enterprises under Article 86 EEC Treaty*, in MEMORIAL VOLUME FOR WALTER HALLSTEIN)).

99. *Id.*

100. Europemballage Corp. & Continental Can Co. v. Commission, 12 Comm. Mkt. L.R. 199 (1973) [hereinafter cited as Continental Can].

101. Commission Decision of Dec. 9, 1971, 15 J.O. COMM. EUR. (No. L 7) 26 (1972), 11 Comm. Mkt. L.R. D31 (1972). Complete elimination of competition need not be required. *See* Continental Can, 12 Comm. Mkt. L.R. at 225.

102. *See* Mok, *supra* note 1, at 135.

merger; nevertheless, such reasoning could also be applied in the joint venture area. The formation of a concentrated and dominant joint venture by two non-dominant parents could arguably fall within article 86. The Commission appears to ignore this possibility in the *SHV/Chevron* decision, stating only that the *Continental Can* type situation was impossible in the context of *SHV/Chevron.*[103] Neither Chevron nor SHV, said the Commission, had a sufficient share of the market to hold a dominant position. One author has suggested that the Commission failed to consider the possibility because it was unnecessary "since Calpam's market share was unlikely to constitute a dominant position."[104] By the same reasoning, however, it was also unnecessary to mention the *Continental Can*-type possibility. The more likely explanation is that the Commission was unwilling at this point to adopt the "dominant joint venture" reasoning.[105]

A number of the problems resulting from the non-applicability of article 85 and the limited usefulness of article 86 will be obviated if the Commission's proposal for a Regulation on the Control of Mergers is adopted by the Council. The regulation would give the Commission power to prohibit concentrations which hinder effective competition within the Common Market.[106] Article 85 would presumably continue to be applicable to independent restrictions of competition which are not the natural consequence of the merger. Article 86 would likewise continue to be applicable to concentrations which are outside the scope of the Regulation[107] and which at least fall within the *Continental Can*-type situation.

3. Joint Venture Concentration—Between the Joint Venture and the Parents

As discussed previously, joint venture formation may effect a

103. *See* SHV-Chevron, 18 O.J. EUR. COMM. (No. L 38) at 15.

104. Linssen, *supra* note 37, at 116.

105. Mok, *supra* note 1, at 135. It should be noted that a dominant joint venture which abuses its dominance in operation and meets the other requirements of article 86 would certainly be covered by that article. Unlike the other possibilities, however, in this case the joint venture's existence is not in issue.

106. The Commission has proposed to the council a draft regulation under the EEC Treaty on the control of concentrations between undertakings, based on articles 87 and 235 of the Treaty. Draft Regulation on the Control of Concentrations between Undertakings, [1973-1975 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 9586 [hereinafter cited as Draft Regulation]. It appears doubtful that the regulation will be adopted by the Council in the immediate future.

107. *See also* D. BAROUNOS, D. HALL & J. JAMES, EEC ANTITRUST LAW 199 (1975).

concentration at two different levels: (1) between the parents (parental concentration) and (2) between the joint venture or joint subsidiary, and the parents (joint venture concentration). Formation of a joint subsidiary will always be treated as bringing about a joint venture concentration, because the parents acting jointly can control the activity of the subsidiary. Total and partial parental concentrations are governed to a certain extent by the Commission's policy that concentrations are not generally subject to the article 85, paragraph 1, prohibition. The Commission has adopted a different view with respect to joint venture concentration.

It may be useful for purposes of perspective to examine the early policy of another Community institution, the High Authority,[108] toward anticompetitive effects growing out of joint venture concentration. The High Authority dealt with joint subsidiaries falling within the jurisdiction of the Treaty Instituting the European Coal and Steel Community (ECSC Treaty).[109] The High Authority's approach is interesting because it concludes that anticompetitive effects growing out of the joint venture concentration could not be reached under article 65 of the ECSC Treaty which prohibits restrictive agreements.[110]

Regulation of competition under the ECSC Treaty must necessarily be different from regulation under the EEC Treaty because the former contains a provision dealing with the anticompetitive effects of concentrations in article 66. Paragraph 1 of article 66 requires that transactions creating concentrations, whether by merger or other means of acquiring control, must receive prior authorization by the High Authority. Paragraph 2 requires *inter alia* that the High Authority authorize the concentration if it finds that the transaction does not confer power on the persons or enterprises concerned to "hinder effective competition in a substantial part of the market for those products. . . ."[111] The Authority ini-

108. The Commission of the European Communities adopted the role of the High Authority pursuant to the Treaty Establishing a Single Council and a Single Commission for the European Communities, April 8, 1965, 10 J.O. COMM. EUR. (No. 152) 2 (1967).

109. Treaty Instituting the European Coal and Steel Community, April 18, 1951, 261 U.N.T.S. 140 (1957) [hereinafter cited as ECSC Treaty].

110. The Court of Justice has ruled that "a common intention inspired the drafting of" article 85 of the EEC Treaty and article 65 of the ECSC Treaty. Geitling Ruhrkohlen-Verkaufsgesellschaft v. High Authority, [1962] C.J. Comm. E. Rec. 165, 1 Comm. Mkt. L.R. 113, 150 (1962).

111. ECSC Treaty, *supra* note 109, art. 66, para. 2. The other requirements are that the persons or enterprises not have power "to influence prices, to control or restrain production or marketing . . .; or to evade the rules of competition

tially felt that agreements to form joint subsidiaries fell outside both articles 65 and 66.[112] The first indication of a change in attitude appeared in the *August/Thyssen* decision of September 27, 1961,[113] in which the High Authority authorized a steel producer to acquire 50 percent of the shares of another steel producer. Prior to this transaction, the acquired firm had been solely owned by a firm primarily engaged in the distribution of iron and steel products. The issue before the Authority was[114] whether the resulting joint venture concentration met requirements for authorization in article 66, paragraph 2. The Authority found that joint control of the subsidiary would restrict competition between the parents in their production outside the joint subsidiary. The Authority determined, however, that this restriction was insufficient to warrant denial of authorization under article 66, paragraph 2.[115]

The restriction on competition referred to in *August/Thyssen* was labeled the "group effect" in the *Sidmar* decision of April 1962.[116] In *Sidmar*, four groups of steel producers formed a joint subsidiary for production and other activities. The Authority found a joint venture concentration between each parent and the subsidiary because the parents could jointly determine the activity of the subsidiary within the meaning of Decision No. 24/54.[117] No

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resulting from the application of the present Treaty, particularly by establishing an artifically privileged position involving a material advantage in access to supplies or markets." *Id.*

112. Sidmar I, 11th GENERAL REPORT, pts. 346-49, at 323.

113. August/Thyssen, EUROPEAN COAL AND STEEL COMMUNITY, THE HIGH AUTHORITY, TENTH GENERAL REPORT ON THE ACTIVITIES OF THE COMMUNITY 213 (1962) [hereinafter cited as TENTH GENERAL REPORT].

114. The report of the *August/Thyssen* decision is not in much detail.

115. The High Authority found that the share of the German market affected was only about 20 percent, which was not a substantial part of the market for those products. August/Thyssen, TENTH GENERAL REPORT at 214.

116. Sidmar I, 11th GENERAL REPORT at 324.

117. Paragraph 1 of article 66 confers power on the High Authority to define the elements of control through the acquisition of which concentrations are effected, which it did on May 6, 1954, after consultation with the Council. Decision of May 6, 1954, No. 24/54, J.O. COMM. EUR. 345 (1954). Elements of control were defined as "rights or contracts which, either separately or jointly, or having regard to the considerations of fact and law involved, make it possible to determine how an undertaking shall operate as regards production, prices, investments, supplies, sales, and appropriation of profits." Linssen, *supra* note 37, at 106. Consequently, since the parents can jointly determine how the joint venture will operate, together they control the joint venture within the meaning of the High Authority's decision. Because the control of the subsidiary is exercised jointly, formation of the subsidiary effects a concentration between each parent and the subsidiary under article 66, paragraph 2.

parental concentration existed between the parents, however, because none could exercise control over the other either jointly or severally. Nevertheless, competition between them was bound to be affected since the independent parents exercised group control and produced the same or similar products as the subsidiary. Interestingly, however, this "group effect" was held not to constitute an independent restriction under article 65 because it was "part and parcel" of group control, *i.e.*, of the joint venture concentration.[118] Since it was a natural result of the joint venture concentration, it would be scrutinized solely under article 66, paragraph 2.[119]

The notion that "group effect" would not constitute an independent restriction was again applied in the *Solmer* decision,[120] in which the Commission allowed the addition of a third parent to a previously authorized joint venture configuration.[121] Under the agreement in *Solmer,* the subsidiary's products were turned over entirely to the parents. Each received an amount in proportion to its capital contribution and distributed its portion through its own independent sales network. In each case, the parent's own production of the concerned product exceeded that of the joint venture. The Commission again found only a joint venture concentration present and held that the group effect would restrict competition between the parents over investment and production. In this case, however, the restriction was found patently insufficient to warrant an examination even under article 66, paragraph 2. Because each parent marketed its portion of the subsidiary's output independently and each parent's production exceeded that of the joint venture, it was felt that the group effect would not extend to competition over price or marketing. Consequently, the Commission did not attempt to gauge the extent of the anticompetitive effects on investment and production under article 66, paragraph 2.

The High Authority in *Solmer* felt that the group effect restriction was a natural result of the joint venture concentration. It has reached a different conclusion in cases in which parents entered into an actual agreement to further restrict their competition following formation of a subsidiary. After the authorization in the *Sidmar* decision, the parents entered an additional agreement to

118. Sidmar I, 11th GENERAL REPORT at 324-25.

119. "The extent of the restrictive effects arising must be assessed at the time the concentration takes place, so that authorization may have to be refused if the implications of the concentration, including the group effect, are not in conformity with criteria of article 66." *Id.*

120. Solmer, 18 O.J. EUR. COMM. (No. L 49) 13 (1975).

121. *See* Linssen, *supra* note 37, at 109.

create a central bureau for allocating orders among them, to share profits from the sale of products covered by the agreement, and to allocate transportation costs.[122] The High Authority found, in effect, that whatever impact "group effect" might have on competition between the parents, they nevertheless retained freedom to act independently of one another. Consequently, an actual agreement between them which restricted or eliminated this freedom of action could not be considered a consequence of the concentration and was thus an independent restriction subject to article 65.

The position of the High Authority under the ECSC Treaty may be summarized by the following three statements: First, the particular joint subsidiary formations scrutinized were found to involve only joint venture concentrations, which were present because the parents were able to jointly control the activity of the subsidiary. Second, joint control was found to bring about a "group effect" restriction on competition between the independent parents which was a natural consequence of joint control and thus not an independent restriction subject to article 65.[123] Finally, since the parents still possessed freedom to act independently after the joint venture concentration despite the group effect, collateral agreements to restrict this freedom were deemed independent of the concentration and subject to article 65.

It is not clear that this reasoning would be applied to formations which directly affect competition between the parents. For example, suppose the *Sidmar* parents had formed the subsidiary to market their products, thereby eliminating price competition between them. The elimination of competition would clearly be the natural consequence of formation, which presumably would amount to a joint venture concentration within the meaning of Decision No. 24/54. Under the "part and parcel" reasoning, such a restriction would probably not be considered an independent restriction for article 65 purposes. It would nevertheless fall within the scope of article 66, paragraph 2.

The Commission's approach toward joint ventures under the EEC Treaty has differed from that under the ECSC Treaty, perhaps because the EEC Treaty lacks a provision comparable to article 66 of the ECSC Treaty.[124] The Commission nevertheless does not view the anticompetitive effects of the joint venture concentration as immune from the EEC Treaty article covering restrictive agreements. In dealing with joint ventures under the pro-

122. Sidmar, 10 J.O. COMM. EUR. 717 (1967) [hereinafter cited as Sidmar II].
123. For an opinion on this point, see Linssen, *supra* note 37, at 110.
124. Draft Regulation, *supra* note 106.

visions of the EEC Treaty, the Commission has obviously abandoned the ECSC "part and parcel" approach, especially where direct effects on parental competition result from formation. Although the Commission has been slow in so stating, this position is equally clear where the indirect group effect results. Decisions under the EEC Treaty involving these effects will therefore be discussed in a separate section.

C. *The Rule: Joint Ventures as Restrictive Agreements*

Only total mergers like that of Agfa and Gevaert will usually fall outside the scope of article 85. Partial mergers will also escape scrutiny under article 85, but only if the Commission is satisfied that there is little likelihood of spill-over of parental cooperation into areas in which the parents remain formally independent.[125] Every other arrangement may escape only by either avoiding the requirements for prohibition in article 85, paragraph 1, or meeting the conditions for exemption in article 85, paragraph 3. The paragraph 1 requirements for prohibition are as follows: (1) an agreement between undertakings, (2) affectation of trade between Member States, and (3) affectation of competition within the Common Market. The joint venture context apparently raises no special difficulties regarding the first two requirements.[126] On the contrary, the decisive question in this context is "whether coopera-

125. *See* De Laval/Stork, 20 O.J. EUR. COMM. (No. L 215) at 16; SIXTH REPORT, *supra* note 58, at 39.

126. *See* Mok, *supra* note 1, at 138. However, regarding the first criterion, it should be recognized that anticompetitive effects can evolve out of several different aspects of the joint venture situation. The joint venture itself will normally be created by agreement. Consequently, where the mere formation of the joint venture will directly give rise to anticompetitive effects (*e.g.*, formation of a joint sales subsidiary), it is the agreement to form which is prohibited. Where the anticompetitive effects are only indirectly related to the formation, as where group effect restrictions result from operation, it would seem more accurate to say that the prohibition should relate to concerted practices or agreements occurring during operation. If the Commission prohibits the actual formation of the joint venture where group effect is involved, it must consider that even indirect effects of the agreement to form entitle it to prohibit the formation itself.

Furthermore, at the time of formation or thereafter, the parents can enter collateral agreements relating to their behavior outside the joint venture which will have to be judged independently of the agreement to form the joint venture under article 85, paragraph 1. The same is true, of course, where the parents make decisions regarding the activity of the joint venture after formation which restrict competition with outside firms. Here, if the decisions can not be considered agreements or concerted practices, then perhaps they can be considered decisions by an association of enterprises.

tion through the joint venture will have the object or effect of appreciably restricting competition between the parent companies or between them and other companies."[127]

It should be noted that this statement indicates a refinement on the "affect competition" requirement which has been added by the Commission and Court of Justice—the affectation of competition must be appreciable or noticeable.[128] The joint venture context may call for application of this standard in a different manner than usual. The presence of "group effect," according to one author, may warrant an examination for noticeability, not only for the particular market for which the joint venture was formed, but also for other markets of the parents.[129]

The Commission made no reference to the "stifling effect" restriction either expressly or implicitly in the *Sixth Report,* because there is no basis for applying article 85, paragraph 1 to an agreement which has this effect. The "stifling effect" is the danger that growth and expansion of the joint venture which threatens a parent's own plans will be prevented by that parent. If joint venture formation necessarily results in the so-called joint venture concentration, the "stifling effect" should be considered outside the scope of article 85. As an integral part of the concentration, it is excluded under the same reasoning as that applied by the Commission to noncompetition agreements relating to activities which are the subject of a partial merger. Even if this approach is not acceptable, Commission decisions like *Christiani/Nielsen*[130] and *Kodak,*[131] and Court decisions like *Beguelin Import Co. v. G.L. Import Export,*[132] all dealing with the so-called "intra-enterprise conspiracy," would preclude prohibition.[133]

127. SIXTH REPORT, *supra* note 58, at 38.

128. *See* Volk-Vervaecke, *supra* note 90; Commission Notice, note 89 *supra.* The Commission has attempted to provide a rough standard having no legal effect by which to gauge noticeability, in terms of the market constituted by the products concerned and the annual turnover of the companies involved. Commission Notice, *supra* note 89, at 2.

129. Mok, *supra* note 1, at 138.

130. Christiani/Nielsen, 12 J.O. COMM. EUR. (No. L 165) 12 (1969), 8 Comm. Mkt. L.R. D36 (1969).

131. Kodak, 13 J.O. COMM. EUR. (No. L 147) 24 (1970), 9 Comm. Mkt. L.R. D19 (1970).

132. [1971] C.J. Comm. E. Rec. 949, 11 Comm. Mkt. L.R. 81 (1972).

133. Under either the *Christiani* or the *Kodak* rationale prohibition would be precluded. In *Christiani* the Commission held that a wholly-owned subsidiary could not be expected to compete with its parent, which has the power to control the subsidiary's behavior even without an agreement. An agreement dividing a market between them merely amounts to an allocation of tasks within one eco-

The *Sixth Report* statement refers to affectation of competition "between the parent companies or between them and other companies." Three situations were mentioned earlier in which formation of a joint subsidiary would have a direct effect on competition between outside firms and either the parent or the subsidiary.[134] The *Sixth Report* statement indicates that where the affected competition is between the subsidiary and outside firms, it is not subject to the prohibition. Although in that case,[135] an effect on competition arguably occurs, it is difficult to term that effect a "prevention, restriction, or distortion of competition" within the meaning of article 85, paragraph 1. Whether the other two situations involving effects on competition between the parents and outside firms are those envisaged by the Commission in the *Sixth Report* remains to be seen. Even if they are, the Commission seems to have placed an odd limitation on the applicability of the prohibition.

Immediately following the statement mentioning the affectation of competition between the parents and other companies, the Commission adds: "For the prohibition on restrictive practices to be applicable in respect of such a formation the parent companies of the joint venture must at least have been potential competitors."[136] This statement was obviously not intended to apply to the above situation, but rather to the situation where an agreement to form a joint venture affects competition between the parents. It profides, therefore, a starting point for a discussion of such agreements. For the prohibition to apply where a formation agreement affects competition between the parents, the parents must have been actual or potential competitors.

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nomic unit. In *Kodak* (which should actually be viewed under the first requirement for prohibition), the Commission held that since subsidiaries can not behave independently in an area governed by their sole parent, coordinated activities of the subsidiaries upon instructions from the parent could not result from an agreement or concerted practice. In the joint venture context, if a parent has sufficient control to unilaterally prevent joint venture expansion, the situation is really no different from that in *Kodak.* If the parent exercises its veto to prevent joint venture expansion, there is no agreement involved. If, however, the parent acts with the actual or tacit agreement of the other parent, the decision for the joint venture to refrain from expansion could be viewed as the mere allocation of tasks between entities within one economic unit.

134. *See* text accompanying notes 12-14 *supra.*

135. *See* text accompanying note 14 *supra.*

136. SIXTH REPORT, *supra* note 58, at 38.

1. Direct Effects on Actual Competition

As the Commission stated in the *Sixth Report,* application of the Community competition rules does not depend on the legal form which may have been chosen by the firms concerned, but depends instead upon the economic realities of the situation. Joint ventures with the sole purpose of combining certain functions of the firms involved, as in the case of joint buying organizations, joint selling agencies and joint research and development companies, have each been held to be restrictive in nature.[137] If such agreements appreciably affect competition in the Common Market and trade between Member States, article 85 will apply whether or not the joint venture takes the form of a separate legal entity, such as a subsidiary.

These principles are clearly demonstrated by the *Henkel/Colgate*[138] and *United Reprocessors*[139] decisions.[140] Henkel and Colgate were both large manufacturers of detergents, a market in which competition over improved methods of production, product quality, and selling efforts was extremely intense, thus enhancing the importance of research. Following individual failures in this area, the parties decided to create a joint research subsidiary to which each transferred its individually acquired knowledge, undertaking to transfer any future acquisitions as well. Although the parties retained the freedom to conduct research individually, the Commission found first, that in fact the joint subsidiary would do all the research because of the high cost involved and because each party had previously failed in its individual research efforts and second, that the parties had agreed to turn over future discoveries to the subsidiary. Consequently, since it was impossible for any of the parties to acquire a technical advantage over the other individually, competition between them in research matters would be eliminated or largely diminished. The other conditions for prohibition being present, the Commission found article 85, paragraph 1, applicable but granted an exemption under paragraph 3. The corporate structure of the cooperation played no part in the Commission's reasoning.[141]

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137. *Id.*

138. Henkel/Colgate, 15 J.O. COMM. EUR. (No. L 14) 14 (1972).

139. United Reprocessors, 19 O.J. EUR. COMM. (No. L 51) 7 (1976).

140. A more recent decision also demonstrates these principles. The decision involved a joint venture for research and development of microscopes, stereomicroscopes, and micro-densitometers and for their distribution. Commission Decision of Dec. 21, 1977, 21 O.J. EUR. COMM. (No. L 70) 47 (1978).

141. Mok, *supra* note 1, at 137.

In *United Reprocessors,* three operators of plants for the reprocessing of nuclear oxide fuels entered an agreement to coordinate their investment in the reprocessing area. One of the three, KEWA, was not yet an operator but had undertaken to build a plant in the next decade, and was consequently treated by the Commission as an actual competitor. The three also established a joint subsidiary for marketing the reprocessing services performed or to be performed by the parties and for allocating reprocessing work among the parents' plants. The Commission viewed the arrangement as a general cooperation agreement prohibited by paragraph 1 of article 85, but qualifying for an exemption under paragraph 3. In discussing the requirements for prohibition in paragraph 1, the Commission mentioned formation of the subsidiary only briefly as a means to fix prices for oxide fuels. The subsidiary's role was not even mentioned in the discussion of work allocation. At any rate, formation of the subsidiary to market the product and allocate supply clearly eliminated competition between the parents over price.[142] Again, the corporate structure of this portion of the cooperation was not important to a finding of a paragraph 1 prohibition.

2. Direct Effects on Potential Competition

As discussed earlier,[143] potential competition becomes important in those situations where the parents are not in actual competition in the particular product or geographic market for which the joint venture is formed. The problem again is the probability that one or more parents would have entered that market but for the joint venture. Competition is generally affected directly by formation of the venture only where two or more parents would have entered.

The *KEWA* decision[144] involved just such a situation. Four German firms planned to build and operate a plant for reprocessing nuclear fuels and marketing the products. They set up a jointly and equally owned subsidiary, KEWA, to which they entrusted the task either of building or operating such plant or of acquiring shares in a company for the same purpose. The parties agreed not to operate in the reprocessing area other than through KEWA. None of the parents was actually engaged in the reprocessing mar-

142. The Commission does discuss the subsidiary's role in the determination of whether the restrictions on competition are indispensable to the attainment of exemptible objectives. *See* United Reprocessors, 19 O.J. EUR. COMM. (No. L 51) at 12.

143. *See* note 17 & text accompanying notes 15-36 *supra.*

144. 19 O.J. EUR. COMM. (No. L 51) 15 (1975).

ket, although all four jointly owned a small experimental reprocessing plant at Karlsruhe. KEWA bought shares in United Reprocessors, the joint subsidiary, and as a consequence, KEWA's parents agreed not to build their own proposed joint plant.[145]

Curiously, in finding that the requirements for prohibition in article 85, paragraph 1 were met in the KEWA situation, the Commission focused not upon the agreement to form the joint subsidiary, but upon the undertaking by the parties not to operate in the reprocessing field except through the subsidiary.[146] In its comments on the decision in the *Sixth Report,* the Commission again focused upon the collateral agreement, rather than upon the agreement to form the subsidiary, as restricting potential competition between the parents.[147] It is possible that the subsidiary would not have operated as a reprocessor or seller of reprocessed products until sometime in the distant future. The parents had agreed as part of the United Reprocessors deal that KEWA would delay building its reprocessing plant. The United Reprocessors subsidiary was to act only as a joint marketing agency for reprocessed fuels, and KEWA had nothing to supply for sale. In the meantime, KEWA merely acted as a medium for investment in United Reprocessors. Apparently little or none of the parents' investment was being directed to the building of a plant with productive capacity. Arguably, each parent had the ability to invest outside the joint venture in reprocessing capacity. Consequently it could not be said at that time that formation of KEWA affected potential competition in the reprocessing area.

The Commission determined that a specific agreement not to compete in that area, however, was a different matter. Although the parents were not actual competitors, "the fact that they all possess reprocessing technology makes them from now on potential competitors."[148] The specific agreement not to compete was therefore held to be prohibited by article 85, paragraph 1, although it qualified for an article 85, paragraph 3 exemption. The Commission focused upon one objective factor—possession of reprocessing technology—to determine that each of the four parents was a potential market entrant at some point in the future.[149]

In the next reported Commission decision, *Vacuum Inter-*

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145. *Id.*

146. *See* COMMISSION OF THE EUROPEAN COMMUNITIES, FIFTH REPORT ON COMPETITION POLICY 43 (1976).

147. SIXTH REPORT, *supra* note 58, at 39.

148. KEWA, 19 O.J. EUR. COMM. (No. L 51) 15, 18 (1976).

149. *See* notes 19-20 & accompanying text *supra.*

rupters,[150] the Commission apparently prohibited formation of a joint subsidiary under article 85, paragraph 1 because it eliminated potential competition, even though the agreement qualified for an article 85, paragraph 3 exemption. As in *KEWA*, the joint venture was formed to enter a new product market, and the parents were actual competitors in other areas. The two parents were located in the United Kingdom, as was the subsidiary, and both produced a large variety of heavy electrical equipment, including switchgear apparatus. The joint subsidiary was formed solely to produce vacuum interrupters, a component of switchgear apparatus, and was vertically related to both parents. Although the parents were still cooperating in certain areas,[151] the Commission found that their potential for competition in other areas had not been reduced. One of the terms of the formation agreement was that the parents would not manufacture vacuum interrupters for sale individually and that neither they nor their other subsidiaries would purchase vacuum interrupters elsewhere as long as the joint subsidiary remained willing and able to supply them on competitive terms. The joint subsidiary was the only producer of vacuum interrupters in the EEC, where there was not yet a real market for the product. The construction and operation of these products raised enormously complex problems requiring extremely large investments.

Even though each parent had felt it would be impossible to enter the market for vacuum interrupters alone, the Commission found the parents to be potential competitors on the basis of the following factors:

> their experience in the field of heavy electrical equipment and their ability to manufacture components therefor, the extent and quality of their research and development work, some of which was concentrated in the field of vacuum interrupters, their skill in producing electrical equipment generally and the natural growth of their activities in the field of manufacture of electrical equipment.[152]

Consequently, formation of the subsidiary eliminated potential competition because it prevented two firms which otherwise could have entered independently from doing so. The Commission did not state, however, that formation restricted competition. It prohibited the venture because it was formed "on such terms that

150. Vacuum Interrupters, 20 O.J. EUR. COMM. (No. L 48) 32 (1977).

151. One parent was a wholly-owned subsidiary of an American firm which had cooperated in other areas with the other parent. *Id.*

152. *Id.* at 36.

[the parents] deprive themselves of the possibility of developing and selling that product independently of, and in competition with each other."[153] This language may be construed as referring to the undertaking by the parents not to manufacture or buy vacuum interrupters except through the joint subsidiary. The agreement was in essence an undertaking by them not to operate in the vacuum interrupters field except through the subsidiary, similar to the prohibited undertaking in *KEWA*.

The Commission may have adopted the view that the agreement to form the joint venture is insufficient by itself to preclude parental entry independently of the joint venture. An additional binding undertaking by the parents not to operate except through the subsidiary may be necessary before the prohibition in article 85, paragraph 1 will apply. This supposition is supported by the Commission's treatment of *KEWA* and *Vacuum Interrupters* in the *Sixth Report.* After explaining the *KEWA* decision in terms of the separate undertaking by the parents not to operate in the reprocessing field other than through the joint subsidiary, the Commission stated in the next paragraph that a similar line of reasoning was applied in *Vacuum Interrupters.*[154]

Where the joint venture is created to enter a new geographic market in which it will manufacture and sell substantially the same products manufactured and sold in *other* geographic markets by the parents, apparently a different result is required. In such a

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153. *Id.*

154. SIXTH REPORT, *supra* note 58, at 40. The Commission's discussion of the *Vacuum Interrupters* decision at pages 89-90 of the *Sixth Report* seems to contradict this statement.

The Commission discussed the "affect trade between Member States" requirement in this decision at some length, since both parents as well as the joint subsidiary were located in the United Kingdom and a market did not yet exist in the EEC for the product in question. The reasoning used by the Commission is in part similar to the "restriction of economic interpenetration" reasoning used by the Court of Justice in Vereeniging van Cementhandelaren v. Commission, 12 Comm. Mkt. L.R. 7 (1973). Since there are no other manufacturers of vacuum interrupters in the Common Market, said the Commission, formation of a joint venture by two potential manufacturers affects the structure of competition in the Common Market and thus trade between Member States. If the parents had entered separately, an export trade with other Member States would have developed within the framework of competition between the two parents. Exports from the U.K. are now likely to start earlier and under a different pattern. Also, formation of the joint subsidiary, by two producers of electrical equipment which already supply most of the large customers for these products in the U.K., is likely to prevent other firms in the other Members States from being able to break into the U.K. market. Vacuum Interrupters, 20 O.J. EUR. COMM. (No. L 48) 32.

situation, American courts equate the effect on potential competition resulting from formation with an elimination of actual competition, as mentioned previously.[155] The Commission is apparently willing to apply the prohibition to the formation agreement itself, as the comments on such an arrangement in the *Sixth Report* seem to indicate.[156] For example, two firms wanted to create a joint subsidiary to enter the French market in order to improve their share of that market vis-á-vis more powerful competitors. Although one parent was well-established in the Community on the particular product market, the other was relatively new. The joint subsidiary's products, which were to carry a new trademark, would have been substantially the same as products manufactured and distributed by the parents in other countries. Appparently, the parties to the agreement withdrew it after the Commission voiced its objections. The *Sixth Report* implies that the Commission probably would have found that each parent could have entered the French market separately, but for the joint subsidiary. It is not entirely clear whether the agreement to form alone would have been sufficient for application of article 85, because the Commission also mentioned anticompetitive effects evolving out of the trademark arrangement. The Commission felt that having a trademark for the subsidiary's products which was different from the parents' trademarks "would impede effective competition between the products of the two firms and of the joint venture."[157]

3. The Group Effect

The first Commission decision under the EEC Treaty in which the group effect restriction[158] played a role was *Bayer/Gist-Brocades.*[159] Two drug manufacturers, Bayer and Gist, needed larger quantities of raw penicillin and an intermediate product, 6-APA, in order to meet increased demand. Each firm was already producing both products and had to decide whether to increase plant capacity or to enter long-term supply contracts in order to acquire the extra quantities needed. To meet their mutual needs, they agreed that Bayer would expand its 6-APA production and Gist would expand its production of raw penicillin. Each contributed financially to the other's expansion and each was required to supply the other to the extent of the latter's investment in the

155. *See* note 32 & accompanying text *supra.*
156. SIXTH REPORT, *supra* note 58, at 91.
157. *Id.*
158. *See* discussion of "group effect" restriction at section III.B *supra.*
159. Bayer/Gist-Brocades, 19 O.J. EUR. COMM. (No. L 30) 13 (1976).

former's expansion. Originally, the parties had planned to carry out their expansion programs through jointly and equally owned subsidiaries, but the Commission objected that the subsidiaries would provide a vehicle for joint control of production and investment, which was incompatible with article 85. The parties thereafter withdrew the subsidiaries from their plans. Without the subsidiaries, the remainder of the agreement was held to constitute a specialization agreement with long-term supply contracts, which was contrary to article 85, paragraph 1, but eligible for an article 85, paragraph 3 exemption.[160]

The Commission indicated that formation of the subsidiaries would have precluded the exemption because the resulting restrictions on competition would not have been indispensable to the specialization agreement. If the Commission's comments on the subsidiaries had stopped there, one might easily have concluded that the restriction resulting from formation was the above described group effect restriction. The Commission stated, however, that under the revised arrangement, each firm would have been able to expand production of its specialized product as it deemed necessary. On the other hand, if the new 6-APA and raw penicillin plants had originally been transferred to joint subsidiaries, it

> would have had the effect of bringing the production of raw penicillin and 6-APA and investment under joint control. Since each firm was to be equally represented, both in the management of the subsidiary and on the coordinating committee, either would have been able to veto any management decision with which it did not agree. The result would inevitably have been that output would have been determined by joint agreement; neither firm would have been able, without the other's approval, to increase the quantities available to it for resale to other firms or for processing, and hence to increase, to the detriment of the other, the quantities supplied to the market by it.[161]

This language creates difficulties in that it implies that formation of the subsidiaries would have left neither parent free to act independently of the other in the production and investment of raw penicillin and 6-APA. This would normally be true only if formation of the subsidiaries had the direct effect of eliminating competition between the parents or the effect of bringing about a concentration between them. The facts set out in the decision, however, indicate that both parents would have been free to carry on indi-

160. *Id.*
161. *Id.* at 20.

vidually the same activities as the subsidiaries. Consequently, it seems unlikely that the Commission was reaching either of these conclusions. Furthermore, the Commission indicated that competition with respect to production and investment would have been restricted, which suggests that joint production subsidiaries such as that in *Solmer* were envisaged.

Apparently, all of the subsidiaries' output would thus have gone to the two parents for individual or independent marketing, based upon the parents' reason for cooperating withone another. The Commission in *Solmer,*[162] as well as subsequent commentators, have concluded that joint production subsidiaries could lead to a restriction of competition over production and investment. Both the Commission and the commentators, however, discussed the restriction in terms of the "group effect," which is not normally associated with a complete elimination of parental freedom of action in the concerned areas.[163] Whether the Commission had actually abandoned the old "part and parcel" argument that "group effect" is the natural consequence of the joint venture concentration and hence not an independent restriction thus remained a matter of doubt. The Commission clarified the *Bayer/Gist* decision in its *Sixth Report on Competition Policy,* however, indicating that its basis for opposing creation of the joint ventures in that case was clearly the "group effect," referring in that context to a possible carry-over of collusion into areas other than production and investment of raw penicillin and 6-APA. Formation of the joint subsidiaries "would have led not only to joint control over investment and production in relation to the two products but also, in view of the economic importance of earlier production stages, to cooperation between the parent companies on the markets for processed penicillin and final products."[164]

162. *See* note 49 *supra.*

163. Pitofsky, *supra* note 2, at 1035. The effect is complicated in the case of raw penicillin because investment costs for expanded production are high. A decision by one firm not to allow expanded joint subsidiary production of raw penicillin (the "stifling effect") might prevent the other from undertaking to expand its own individual capacity because of the high costs involved. However, neither firm is absolutely precluded from expanding internally and in any case, individual expansion under the *present* set up is still affected by the high costs.

164. SIXTH REPORT, *supra* note 58, at 39. One will recall that Pitofsky felt, where joint production subsidiaries were involved, that additional evidence of probable collusion was necessary in order to allow the group effect inference to be drawn. Pitofsky, *supra* note 2, at 1035. Although very little is mentioned about it, a coordinating committee was to be set up by Bayer and Gist along with the joint subsidiaries. Bayer/Gist Brocades, 19 O.J. EUR. COMM. (No. L 30) at 16.

The *Sixth Report* also includes another previously unreported case in which the Commission found a violation of article 85, paragraph 1.[165] Two firms attempted to increase their production capacity on a rather large scale by forming a joint subsidiary in which each parent would be equally represented. Each parent would receive half of the subsidiary's output at cost. One was to use its share of the output primarily for processing into finished goods. The other was to sell its share, which represented most of its turnover, to outsiders. The two firms had a considerable share of the market in Western Europe. The Commission found that because the market for the concerned goods was ologopolistic, "the common determination of the joint venture's business policy would inevitably lead to coordination of commercial activities between the parents and, in particular, to the alignment of prices."[166] This decision is important because it takes the *Solmer* and *Bayer/Gist* treatments of joint production subsidiaries a step further. According to this decision, price competition, as well as production and investment decisions, may be affected by formation of a joint production subsidiary. The distinguishing factor appears to be the joint venture's capacity for production of the concerned goods in relation to that of the parents. The Commission said that the joint venture's capacity was to be "the equivalent of a substantial proportion of the capacity already operated by one of [the parents]."[167] In addition, one of the firms was to sell its share of the joint venture's product to outsiders, "these sales representing the bulk of its own turnover."[168]

Finally, both parents had a substantial share of the market for the goods, and the market was oligopolistic. In this situation, it is likely that the parents would agree on prices for the concerned products, especially since one parent retained most of its share of the joint venture's output for processing into finished products. It obviously had an interest in ensuring that its competitors who acquired semi-finished products for further processing from the other parent did so at a noncompetitive price. By contrast, in *Solmer* the parents each produced a larger quantity of the con-

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Perhaps the Commission considered that the presence of the coordinating committee was sufficient additional evidence to conclude that joint control of the subsidiaries would lead to a restriction of competition between the parents. Pitofsky, *supra* note 2, at 1012.

165. SIXTH REPORT, *supra* note 58, at 91.

166. *Id.*

167. *Id.*

168. *Id.*

cerned product than they received for sale from the joint subsidiary.[169] The High Authority thus concluded that each parent would pursue an independent pricing policy, despite probable collusion over production and investment.

A subsequent decision, *De Laval/Stork,*[170] involved a situation in which the group effect could necessarily be inferred.[171] Stork, a Dutch firm, and De Laval International, an American firm, formed a joint venture in the Netherlands to research, manufacture, sell and maintain steam turbines, compressors, and pumps for steam turbines. The joint venture had no legal personality and, under Dutch law the parents remained jointly and severally liable for all obligations of the venture up to the amount of the venture's assets. Each parent owned equal shares of the venture. Stork's contribution was in cash; De Laval's contribution was in expertise. After a certain period, Stork transferred its plant to the joint venture and provided the technical staff required for operating plant facilities. De Laval was to provide a management staff to handle the daily affairs of the business, with major management decisions requiring the consent of both parents. The American parent, International, was effectively controlled by one of the largest conglomerates in the United States,[172] which had been involved in producing and selling steam turbines and related products throughout the world. The United States group had already penetrated the European Community market via export of the relevant products. The Dutch parent similarly controlled by a larger Dutch group was already producing and selling the relevant products on the European market before the joint venture was formed. Both joint venture parents continued to manufacture their turbine products and to market them in the Community. The Commission determined that the aim of the parents in creating the joint venture was "to increase De Laval International's penetration of the European market and to expand the business of [the Dutch parent] in the field of compressors and industrial turbines."[173] The Commission determined further that the parents remained either actual or potential competitors in the European market after formation of the venture. The American company was at least a potential competitor in the

169. *See* text accompanying notes 71 & 72 *supra.*.

170. De Laval/Stork, 20 O.J. EUR. COMM. (No. L 215) 11 (1977).

171. *See* Pitofsky, *supra* note 2, at 1034; text accompanying notes 46-47 *supra.*

172. De Laval was a subsidiary of another United States corporation, De Laval Turbine, Inc., which was directly controlled by a large United States conglomerate, Transamerica Corp.

173. De Laval/Stork, 20 O.J. EUR. COMM. (No. L 215) at 13.

European market, because it was engaged in the same market in the United States, because it already possessed the necessary expertise, and because its financial position enabled it to make any necessary investments. In fact, the American firm could have been considered an actual competitor in the European market because it was already exporting the relevant products for sale in the European Community. Under the joint venture agreement, each parent retained the right individually to sell the products in the Community and each parent could still use separately the results of joint research carried out by the venture. The Commission concluded that the object and effect of the formation agreement was to restrict and distort competition within the Common Market.[174] Since the "consent of both parties is required for any major decision concerning the activities of the joint venture,"[175] the Commission determined that anticompetitive effects would result from the "consultations which will inevitably have to take place between [the parents]." The Commission explained its decision:

> Even if an increase in competition between the joint venture and other companies in business on the relevant market results from the agreement, the effect of the agreement is to eliminate competition between the two parties on the same markets, both as regards research and as regards production and marketing. The two companies have therefore deprived themselves of the opportunity for autonomous costing and pricing, which would be available if their activities were separate. By exchanging information connected with their competitive ability they not only destroy the independence of their market conduct but also remove uncertainty as regards their future behavior towards their competitors.[176]

This language suggests that the Commission will always draw the group effect inference where the joint venture actually competes with the parents on the same market. The Commission infers that the parents will exchange information which will destroy the independence of their own market conduct when they inevitably consult over activities of the joint venture. In effect, the Commission conclusively presumes that an agreement to form the joint venture will "eliminate" competition between the parents in the field of the joint venture.

The next "group effect" decision, *GEC/Weir Sodium*

174. The Commission nevertheless granted an article 85, paragraph 3 exemption.

175. *Id.* at 16.

176. *Id.*

Circulators,[177] involved a joint venture agreement between two United Kingdom firms to develop, produce, and sell sodium circulators for commercial fast reactors. One parent, Weir, held diverse interests in the development, manufacture, and sale of pumps, aircraft equipment, and steel foundry products (including high precision steel castings). The other parent, GEC, likewise held pertinent interests in the development, manufacture, and sale of pumps and aircraft instrumentation, and was a user of foundry products and high precision steel castings. In addition, GEC was quite active in other markets. As no separate entity was to be formed, the joint venture agreement allocated tasks between the parents. Weir was to provide expertise, work, and components in the field of pump technology and hydraulics. Similarly, GEC was to contribute expertise and components in the field of nuclear reactor technology, instrumentation, and mechanical and electrical engineering.[178] The activities of the joint venture were to take place at factories and facilities of the parents. Under the agreement the parents were to share knowledge and expertise regarding sodium circulators, whether acquired while working in the context of the joint venture or acquired previously. Either parent, however, was free to act independently if a potential customer refused to contract with the joint venture or if the other parent refused to support the joint venture in accepting a contract for sodium circulators.

The Commission held that formation of the venture violated article 85, paragraph 1, but that the joint venture agreement was entitled to a paragraph 3 exemption. The agreement was held to restrict competition between the parents in the field of the joint venture and in related fields because the parents "are likely to coordinate their conduct and be influenced in what would otherwise have been their independent decisions and activities."[179] The Commission found that the group effect was operative at two distinct levels of parental activity: first, in the field of the joint venture, and second, in other fields where the parents are engaged in "overlapping, related, and competitive activities."[180] At the first level, in the field of the joint venture,[181] the Commission ruled that the parents were actual competitors in the field of sodium circula-

177. GEC/Weir Sodium Circulators, 20 O.J. EUR. COMM. (No. L 327) 26 (1977).

178. *Id.* at 27.

179. *Id.* at 31.

180. *Id.* at 32.

181. *See* text at notes 170-74 *supra.*

tors, and held that the effect of forming the joint venture and conferring equal control on the parents was to destroy the ability of either parent to "make independent business decisions on any matter of importance relating to sodium circulators."[182] Even though the parents had expressly agreed that in certain instances one or the other could act independently in producing and selling the involved product,[183] the Commission felt that the likelihood of independent action was nonexistent, since "[p]arent parties will not in general compete with the activities of joint ventures in which they hold substantial stakes . . . ."[184]

At the second level, the Commission ruled that where parents held related interests in areas outside the field of the joint venture, formation of a venture was "likely to provide opportunities and inducements . . . to enlarge their common activities and impair free competition between [the parents] in those other areas."[185] The Commission found that the parents were not only horizontally competitive in other markets, but were also vertically related—with one parent being a producer and the other a consumer of steel foundry products. The Commission felt that in this case the continued association within the joint venture of senior employees from both parents could "be expected to lead to an impairment of competition between [the parents] also in these other areas."[186] This "spill-over" of cooperation into parental areas of activity outside the field of the joint venture has already been discussed as being important in the context of partial mergers. Outside the context of partial mergers, however, it would appear to be of little significance and would never alone lead to a prohibition of the formation agreement. Where no partial merger is involved, it will always be subordinate to the group effect at the first level discussed above, or to a direct elimination of competition in the joint venture's field.

De Laval/Stork and *GEC/Weir* underscore another important point—whether the joint venture possesses a separate legal identity in the form of a subsidiary or its foreign equivalent is irrelevant for purposes of the group effect inquiry. These decisions clearly indicate that, unlike the High Authority in decisions under the

182. *Id.*

183. The parties were free to act independently when potential customers refused to contract with the joint venture and when one of the parents declined to support the venture in accepting a contract for sodium circulators. *Id.* at 29.

184. *Id.* at 31.

185. *Id.* at 32.

186. *Id.*

ECSC Treaty, the Commission will treat the group effect as a restriction independent of the concentration between the joint venture and, the parents. The reason for this divergence from ECSC practice is probably grounded in the absence in the EEC Treaty of a provision comparable to article 66 of the ECSC Treaty. In the absence of such a provision, if the group effect is not caught by article 85, paragraph 1, it escapes regulation altogether.[187]

4. Exemption Under Article 85, Paragraph 3

Once a joint venture arrangement is found to have been prohibited by article 85, paragraph 1, the Commission can declare the prohibition inapplicable under article 85, paragraph 3,[188] if the four conditions of that paragraph are met.[189] Article 85, paragraph 3 basically operates to save those joint venture arrangements which are reasonable in the sense that objective benefits outweigh negative effects on competition.[190] To date, the Commission has refused to grant the exemption in only three joint venture arrangements—*Bayer/Gist-Brocades* and the two unreported cases mentioned in the *Sixth Report.*

According to the *Report,* decisions thus far indicate at least two general categories of joint ventures which will not be granted an exemption—when benefits are insubstantial and competition in the market will or may be substantially reduced, and when the joint venture's object could as easily be achieved by less restrictive means. The first category includes joint ventures "formed by large firms in different Member States with the object or effect of coordinating their conduct in the market."[191] An example of a joint venture falling within this category would be the *Sixth Report* case[192] involving a joint production subsidiary for the manufacture of

187. *See* text at note 124 *supra.*

188. The Commission alone has the power to declare paragraph 1 inapplicable. Regulation No. 17, *supra* note 59, at 207.

189. The four conditions are: (1) contribution to improving the production or distribution of goods or to promoting technical or economic progress; (2) allowing consumers a fair share of resulting benefits; (3) not imposing restrictions which are not indispensable to the attainment of the above objectives; and (4) not affording the concerned firms the possibility of eliminating competition in respect of a substantial part of the products in question. EEC Treaty, *supra* note 52, art. 85, para. 3.

190. "[T]he main question is whether the joint venture offers substantial objective benefits to offset the disadvantages for competition." SIXTH REPORT, *supra* note 58, at 40.

191. *Id.*

192. *Id.* at 92; *see* text accompanying notes 165-69 *supra.*

semi-finished products for use or sale by the parents. No real benefits of a public nature could be said to result from the agreement, since its purpose was merely to expand the existing capacity of the parents. On the other hand, it was bound to result in a substantial restriction of competition in the market for the parent's finished goods or for the semi-processed goods because the parents had a substantial share of both markets for Western Europe. In addition, the structure of these markets was oligopolistic.[193] Another example in the first category is the *Sixth Report* case in which potential competition was eliminated when competing parents created a joint venture in order to enter a new geographic market.[194] The objective in that case was to develop an inroad in the new geographic area against established competitors. Under those facts, formation of the subsidiary could hardly be said "to contribute to the improvement of the production or distribution of goods or to the promotion of technical or economic progress."[195]At any rate, potential competition would almost certainly have been eliminated by formation, since each parent had the capacity to enter the new geographic area on its own. Apparently, the market was oligopolistic and the firms held large shares of the market.[196] The negative effect on competition clearly outweighed the minimal positive benefits.

The *Bayer/Gist-Brocades*[197] joint subsidiaries fall within the second category. The Commission felt in that case that the parental objective—increasing available quantities of raw and semi-processed penicillin for use in medicinal preparations—could be achieved through less restrictive means than joint subsidiaries. Formation of the subsidiaries would have led to a coordination of production and investment for the penicillin, and collusion would have carried over into other parental activities. Furthermore, formation of the jointly-owned subsidiaries might have eliminated parental ability to produce penicillin independently of the joint venture. On the other hand, cooperation in the form finally agreed upon would achieve the parental objective without the above anti-competitive effects. Consequently, the restrictions resulting from formation of the subsidiaries were not indispensable to the attainment of permissible objectives, and an exemption would not have

193. SIXTH REPORT, *supra* note 58, at 92.
194. *Id.; see* text accompanying notes 155-56 *supra.*
195. EEC Treaty, *supra* note 52, art. 85, para. 3.
196. SIXTH REPORT, *supra* note 58, at 40.
197. 19 O.J. EUR. COMM. (No. L 30) 13 (1976); *see* text accompanying notes 159-61 *supra.*

been available if the subsidiaries had been formed.

In cases falling within the second category, the test is not one of balancing benefits against harms. Rather, the factual situations suggest that permissible, positive, and beneficial objectives might have been reached by less restrictive means. Where such objectives exist, the Commission will be reluctant to deny the paragraph 3 exemption. Before refusing a paragraph 3 exemption, the Commission will "consider whether the imposition of obligations and conditions can reduce the restriction of competition to the minimum indispensable to attain the objective of the agreement."[198]

V. Conclusion

The authors of the EEC Treaty believed that a system of undistorted competition was essential to the establishment of a true Common Market, and article 85 was included in the Treaty to ensure that political borders would not be reinstated as a result of private business agreements. Joint ventures can be as effective as other mechanisms of cooperation in affecting interstate trade or partitioning national markets. Though the obvious inclination has been to treat joint ventures as mergers (as, for example, the approach utilized by the High Authority under the ECSC Treaty and by the United States Supreme Court in the *Penn-Olin* case[199]), in the absence of a merger provision in the EEC Treaty, the Commission has had little choice but to treat joint venture formations as agreements in restraint of trade, subject to article 85.

The Commission's apparent reluctance to take this step and its eventual willingness to do so is especially interesting in light of its continuing policy that article 85 does not apply to mergers. When the Commission first enunciated its merger policy it made clear that joint ventures might represent one form of merger requiring a different approach. Indeed, joint venture formations are now clearly subject to the article 85, paragraph 1 prohibition, except in those rare situations in which formation results in an integration between the parents. In other cases where formation gives rise directly to anticompetitive effects, or indirectly via the "group effect," article 85, paragraph 1 will act to prohibit the formation unless one of the requirements for prohibition therein is not met. The most basic prerequisite for paragraph 1 prohibition in the joint venture context is that the parents must have been actual or potential competitors. Since this will normally be the case, most joint

198. Sixth Report, *supra* note 58, at 40.

199. United States v. Penn-Olin Chem. Co., 378 U.S. 158 (1964).

ventures which affect trade between Member States will be prohibited. Nevertheless, if the benefits of the formation outweigh the effects on competition, the joint venture may escape prohibition via an article 85, paragraph 3 exemption. All but three joint ventures considered by the Commission thus far have escaped by this route.

Partial mergers will be treated as a rarity, as will joint venture formations resulting in total parental integration. To effect an excluded partial merger, the parents must satisfactorily demonstrate to the Commission not only that they have completely and irreversibly abandoned their independent role in the business activity turned over to the joint venture, but also that the partial integration will not weaken parental competition in areas where the parent firms remain formally independent. Finally, agreements collateral to a partial merger which restrict parental freedom of action in areas not related to the joint venture's activities will normally fall within the provisions of article 85, paragraph 1. On the other hand, collateral agreements which pertain to parental activity in the joint venture's line of trade will escape article 85 prohibition.

Although the Commission has been slow to formulate the issues and clarify certain aspects of its position in the joint venture area, a definite policy is taking shape. The Commission's task is now one of expounding its position more fully and of persuading the European Court of Justice that its policy is the correct one. The Court of Justice has not yet dealt with the joint venture problem, because none of the Commission's decisions in this area has been challenged. It is still possible, though unlikely, that the Court would take an approach different from that of the Commission. For the present, however, except in rare instances, joint venture formations will clearly be treated as restrictive agreements subject to article 85.