ANTITRUST ASPECTS OF THE JOINT VENTURE IN THE EUROPEAN ECONOMIC COMMUNITY *

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INTRODUCTION

This Article deals with antitrust problems which may confront a joint venture doing business in the European Economic Community.¹

For purposes of this Article, a "joint venture" is defined as a new business organization, formed by a number of already existing business enterprises which want to operate as partners for certain business purposes. The purchase of an equity interest by one enterprise in an existing business, and financial syndicates are not included within this definition. The respective proportion of equity participation by the partners in the joint venture may vary widely. Moreover, the joint venture may come about as a result of the combination of two or more partners whose existing business activities may be in a horizontal, vertical, or mixed relationship to each other. Also, the partners may be located anywhere in the world. This study will, however, focus on those joint ventures in which at least one participant is American, since in that situation the joint venture and the American partner may be subject to the impact of both the United States and EEC antitrust laws.

Other aspects of the joint venture, including the number of partners, their location, their competitive relationship, the size and nature of their respective businesses and of the joint venture, are all factors which, alone or in combination, may be relevant to the issue of legality under the applicable antitrust laws. It may be determinative whether the partners in the joint venture are actual or potential competitors with respect to the products or services offered by the joint venture, or whether the situation presents no such aspects. Likewise, it may be very important whether the joint venture is engaged

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¹ The European Economic Community will be referred to as the Common Market or EEC. It was established by the Treaty of Rome for the Establishment of the European Economic Community, March 25, 1957, 298 U.N.T.S. 14. Translations of the Treaty of Rome can be found in 51 AM. J. INT'L L. 865 (1957), and in CCH COMMON MARKET REP. Most of the translations of the Treaty and other foreign materials in this Article are by the author.

in distribution or manufacturing, or both types of activities, and to what extent the partners are engaged in similar practices. But because of the breadth of the subject, these factors will be discussed only briefly, except where any of them is especially relevant in a particular context.

Joint ventures, already representing a very substantial proportion of American business participation in Europe, are becoming an increasingly more common form of new United States investment in Western Europe.² It is not the purpose of this Article to discuss the virtues of the joint venture as a means of operating abroad; the relative merits of various forms of business in the EEC have been evaluated elsewhere.³ Once an American enterprise has decided to operate abroad,⁴ it may have many reasons for seeking local participation. The national partner may supplement capital, supply production and distribution facilities, or facilitate political support. Local participation may also facilitate the management and exploitation of industrial property rights, like patents and trademarks.

Although prior studies of the joint venture in Europe are, to a large extent, still valid, they were written before the establishment of the Common Market⁵ or before the implementation of the rules of the Treaty of Rome governing competition,⁶ at a time when a rather rhetorical climate prevailed. Now, in the light of recent developments in this field, the antitrust problems have assumed very practical significance and a tone of urgency. On March 13, 1962, Regulation 17, implementing articles 85 and 86 of the Treaty—⁷ the rules govern-

² \$1,500,000,000 was added to direct United States investments in Europe in 1960. \$300,000,000 of the increase represented cash outlays to acquire minority interests in existing manufacturing companies. 41 U.S. DEP'T OF COMMERCE SURVEY OF CURRENT BUSINESS 20, 21 (1961). The available figures do not segregate the contributions attributable to the formation of joint ventures per se. The Commerce Department reports that for the two-year period ending in June 1962, about 1,110 different United States companies initiated 2,197 foreign business ventures. Western Europe was the site of 51% of the new activity.

³ See Conard, *Organizing for Business*, in 2 AMERICAN ENTERPRISE IN THE EUROPEAN COMMON MARKET—A LEGAL PROFILE 1 (Stein & Nicholson ed. 1960). This book also analyzes the legal aspects of doing business in the EEC. For discussion of the American antitrust implications of doing business abroad as a joint enterprise, see BREWSTER, *ANTITRUST AND AMERICAN BUSINESS ABROAD* 200-23 (1958).

⁴ The economic considerations which attract American business to the Continent have been extensively discussed. See, e.g., Friedmann, *Legal Problems in Foreign Investments*, 14 BUS. LAW. 746 (1959).

⁵ See Eaton, *Joint Ventures*, in N.Y.S.B.A. SECTION ON ANTITRUST LAW, *ANTITRUST LAW SYMPOSIUM* 135, 141-44 (1952); Graham, *Antitrust Problems of Corporate Patents, Subsidiaries, Affiliates and Joint Ventures in Foreign Commerce*, 9 ABA ANTITRUST SECTION 32 (1956); Hale, *Collaborative Subsidiaries and the Antitrust Laws*, 42 VA. L. REV. 927 (1956).

⁶ For a recent discussion, see Nebolsine, *Antitrust Laws of the Common Market Countries*, 3 SOUTHWESTERN LEGAL FOUNDATION INSTITUTE ON PRIVATE INVESTMENTS ABROAD AND FOREIGN TRADE 211 (1961).

⁷ Regulation 17, [1962] JOURNAL OFFICIEL DES COMMUNAUTÉS EUROPÉENNES 204 [hereinafter cited as J.O.C.E.], CCH COMMON MARKET REP. ¶¶ 2401-2632, as

ing competition—came into effect. The Regulation subjects certain agreements which affect trade and competition in the Common Market, as specified by article 85, section 1, to notification to the EEC Commission. Furthermore, on April 6, 1962, the Court of Justice of the EEC, in the landmark case of *DeGeus v. Robert Bosch GmbH*,⁸ handed down its first decision on the applicability of article 85 and construed parts of the Regulation. At the threshold of a new era of EEC antitrust law, this study attempts to make a preliminary evaluation of the measure to which these antitrust laws are likely to be obstacles to the joint venture in the EEC. The findings may shed some light on whether these laws, in purporting to stimulate freer competition, will also promote, rather than stifle, the further commercial success of the joint venture in the EEC.

This study first examines to what extent joint ventures are subject to control by the national laws of EEC member states and by the Treaty of Rome. Consideration is then given to the applicability of the EEC antitrust provisions to the organic agreements establishing the joint venture. The joint venture is then studied functionally by evaluating the legality of some practices in which it, more than other forms of business corporations, is likely to engage. Finally, the interaction of United States and EEC antitrust laws will be briefly discussed. Throughout the study, a special attempt is made at detecting features that may be more conducive to the compatibility with, and therefore, to a more successful operation and management of the joint venture under, the EEC antitrust laws.

I. THE RIGHT TO ESTABLISH A JOINT VENTURE

The right of establishing a joint venture by any number of corporate partners, at least some of which have diverse citizenship, is

implemented by Regulation 27, [1962] J.O.C.E. 1118, CCH COMMON MARKET REP. ¶¶ 2651-57, as amended, [1962] J.O.C.E. 1655, CCH COMMON MARKET REP. ¶¶ 2441, 2461. The filing date has been extended to November 1, 1962, and, for agreements between only two parties, to February 1, 1963. Regulation 59, [1962] J.O.C.E. 1655, CCH COMMON MARKET REP. ¶ 2441. For a detailed analysis of the Regulation, see Weiser, *Freedom of Competition in the European Community: An Analysis of the Regulations Implementing the Antitrust Provisions*, 6 PAT., T.M. & COPYRIGHT J. OF RESEARCH & EDUC. 20 (1962). See generally Buxbaum, *Antitrust Regulation Within the European Economic Community*, 61 COLUM. L. REV. 402 (1961); Deringer, *Die erste Durchführungsverordnung zu den Artikeln 85 und 86 des EWG-Vertrages*, 2 WIRTSCHAFT UND WETTBEWERB 81 (1962); Deringer, *Les Règles concernant la concurrence dans le cadre du Marché Commun entrent en vigueur*, 44 REVUE DU MARCHÉ COMMUN 70 (1962); Gaspar, *Règlementation des ententes et des positions dominantes dans le Marché Commun*, Revue de Droit Intellectuel, Jan.-Feb. 1962, pp. 1-8; De Caluwé, *Premier Règlement d'Application des Articles 85 et 86 du Traité de Rome*, Revue de Droit Intellectuel, Jan.-Feb. 1962, p. 9.

⁸ Kleding-Verkoopbedrijf de Geus en Uitdenbogerd v. Robert Bosch GmbH, Court of Justice of the European Communities, April 6, 1962, 8 Recueil de la Jurisprudence de la Cour No. 13/61, [1962] J.O.C.E. 1081, CCH COMMON MARKET REP. ¶ 8003.

based on the laws regulating the right of establishing a corporation in the EEC.⁹ For the American partner, this right is generally predicated upon the treaties of commerce, friendship and navigation which grant American companies the right to carry on business in the member countries of the EEC.¹⁰ Moreover, the right of a company of one of the EEC countries to establish a business in another EEC country is being further liberalized by the Treaty of Rome which recognizes the "Right of Establishment" in articles 52 to 58. Article 52 provides:

[R]estrictions on the freedom of nationals of a Member State in the territory of another Member State shall be abolished. . . . Such progressive abolition shall . . . apply to restrictions on the setting up of agencies, branches, or subsidiaries by nationals of any Member State established in the territory of any Member State.¹¹

In addition, article 54 for the Council of the EEC proposes a general program for abolishing the restrictions existing within the Community on the freedom of establishment before 1963. This provision is broad enough to encompass joint ventures where the partners are from member countries in the EEC. Where the joint venture is established by partners comprising American and EEC nationals in an EEC country other than that of the EEC partner, there would be no obstacle to the establishment of the venture. The combined effect of the treaties discussed would insure this freedom of establishment.

The joint venture is also compatible with the policies expressed in other treaty provisions. Articles 67 to 73 are freeing the movement of capital within the EEC. The first directives¹² implementing them have introduced greater freedom in the issuance, offering, sale, and purchase of securities in the capital markets of Europe. Moreover, on this greater freedom of establishment and of movement of capital, there can be superimposed the equal treatment clause of article 221 of the Treaty which requires that: "Member States shall treat nationals of other Member States in the same manner, as regards

⁹ See generally Audinet, *Le Droit d'Etablissement dans la Communauté Economique Européenne*, 86 JOURNAL DU DROIT INTERNATIONAL 982 (1959).

¹⁰ The United States has a Treaty of Friendship, Commerce, and Navigation with the Federal Republic of Germany, Oct. 29, 1954, [1956] 2 U.S.T. & O.I.A. 1839, T.I.A.S. No. 3593; with Italy, Feb. 2, 1948, 63 Stat. 2255, T.I.A.S. No. 1965; with the Netherlands, March 27, 1956, [1957] 8 U.S.T. & O.I.A. 2043, T.I.A.S. No. 3942. In Belgium and Luxembourg, the right to establish a business has been freely granted to foreign enterprises. See Nicholson, *The Significance of Treaties to the Establishment of Companies*, in 2 AMERICAN ENTERPRISE IN THE EUROPEAN ECONOMIC COMMUNITY—A LEGAL PROFILE 153 (Stein & Nicholson ed. 1960).

¹¹ 298 U.N.T.S. at 37, 51 AM. J. INT'L L. at 886, CCH COMMON MARKET REP. ¶ 1301.

¹² [1960] J.O.C.E. 921-23, CCH COMMON MARKET REP. ¶¶ 1651-67.

financial participation by such nationals in the capital of companies within the meaning of Article 58, as they treat their own nationals.”¹³ Finally, article 220 provides for the negotiation of mutual recognition by member states of companies resulting from the merger of companies from different EEC member states.¹⁴ National legislation is being amended accordingly.

The total effect is to facilitate greatly cooperation by corporate parties with diverse citizenship in joint ventures within the member countries of the EEC. Indeed, it can be expected that no serious obstacle will impair the right of such a joint venture to establish itself in the EEC in the near future.

II. THE JOINT VENTURE UNDER NATIONAL LAWS

With the right of joint establishment thus essentially guaranteed, the national antitrust laws of the EEC members can be examined for their applicability to the joint venture.

Section 1 of the West German Law Against Restraints of Competition of July 27, 1957 states that: “[A]greements made by enterprises or associations of enterprises for a common purpose . . . are invalid insofar as they are apt to influence, by restraints of competition, the production or market conditions with respect to the trade in goods or commercial services.”¹⁵ This provision, by its very language, is of broad applicability, but it does not explicitly refer to any particular form of business organization. In a recent case, the court avoided altogether the issue of the applicability of section 1 to the joint venture, but stated that: “The joint exploitation of trade opportunities by joint means of a joint company formed for such purposes does not contain monopolistic powers”¹⁶ The case has been

¹³ 298 U.N.T.S. at 87-88, 51 AM. J. INT’L L. at 931, CCH COMMON MARKET REP. ¶ 6329.

¹⁴ 298 U.N.T.S. at 87, 51 AM. J. INT’L L. at 930, CCH COMMON MARKET REP. ¶ 6327.

¹⁵ [1957] 1 Bundesgesetzblatt 1081 [hereinafter cited as CARTEL LAW], reprinted in English in 1 EUROPEAN PRODUCTIVITY AGENCY OF THE ORGANISATION FOR EUROPEAN ECONOMIC CO-OPERATION, GUIDE TO LEGISLATION ON RESTRICTIVE BUSINESS PRACTICES (1960) [hereinafter cited as OEEC GUIDE]. See generally Schapiro, *The German Law Against Restraints of Competition—Comparative and International Aspects* (pts. 1-2), 62 COLUM. L. REV. 1, 201 (1962).

¹⁶ Decision of Appellate District Court, April 4, 1957 (Städterklame II), in WuW/E OLG 245 (4 WuW 281 (1959)).

A note on citations: WIRTSCHAFT UND WETTBEWERB [hereinafter cited as WuW] is a journal which publishes European and EEC antitrust law materials. It also publishes case reports of several tribunals in volumes entitled WuW ENTSCHEIDUNGSSAMMLUNG ZUM KARTELLRECHT. These will be hereinafter cited as: WuW/E OLG (Appellate District Court); WuW/E BKARTA (Federal Cartel Office).

The yearly reports of the Federal Cartel Office—BERICHT DES BUNDESKARTELLAMTES ÜBER SEINE TÄTIGKEIT IM JAHRE SOWIE ÜBER LAGE UND ENTWICKLUNG AUF SEINEM AUFGABENGEBIET—will be hereinafter cited as BKARTA REP. preceded by the applicable year.

cited in support of the position that joint venture agreements do not come within the purview of section 1 at all.¹⁷ The German Federal Cartel Authority—The Bundeskartellamt (BKartA)—likewise did not decide on the applicability of article 1 when the BKartA granted a temporary exemption to a jointly owned fish fillet producing enterprise under section 5(2) which it labelled a rationalization cartel.¹⁸ While the claim of total nonapplicability of section 1 may be too broad, what may be significant is the fact that the joint German venture had to notify the BKartA in order to apply for an exemption under the German law.

Even more significant is the clear policy statement issued by the BKartA suggesting a distinction between non-competitors, for which article 1 should not apply, and competitors, for which a sort of rule of reason should apply, but only, apparently, if the partners are not capable of carrying out the commercial purpose alone. The BKartA stated that:

A joint enterprise comprising similar participants is allowable when the participants are not in the position to carry out the purpose alone. Whether the joint enterprise will be likely, first, to make possible a sharing of competition, or whether its effect will consist in influencing the market conditions by shrinking competition, can only be decided after consideration of all the circumstances of any particular case.¹⁹ [But, on the other hand:] Where enterprises having different business branches form a joint enterprise for the purpose of carrying out a construction or an industrial undertaking together, there is no violation of article 1 of the German Cartel Law; the partners of the joint enterprise are not in competition with respect to each other.²⁰

Thus, a rule would appear to emerge that where the participants are competitors which are not in the position to carry out the purpose of the venture alone, their agreement, though not prohibited, would require an exemption from the applicability of section 1. It appears to leave the way clear to non-competitors and, in particular, to partners whose business relationship is vertical.

The only other section of the German Cartel Law which may be relevant to joint ventures is section 23. That provision requires that corporate acquisitions and mergers in which twenty percent or more of the market for any line of goods or commercial services will be brought

¹⁷ Rasch, *Kartellvertrag oder Gemeinschaftsunternehmen*, 1 WuW 79 (1961).

¹⁸ Kieler Fischgrosshandels Case, 1959 BKART A REP. 26.

¹⁹ 1959 BKART A REP. 17.

²⁰ *Ibid.*

under single control be reported to the BKartA. The specific transactions covered are mergers, acquisitions of stock or assets, management contracts, and any kind of acquisition in another enterprise by which the acquiring company obtains twenty-five percent or more of the voting capital of the other enterprise.²¹ However, the language of this section lends itself to the construction that section 23 is applicable only to an acquisition of the requisite equity interest in an already existing enterprise. Consonant with this interpretation, the formation of a new joint venture is not an arrangement with "another enterprise."

Even if section 23 were given a broad construction to include the formation of a joint venture which fulfills the market share requirement by a partner owning at least twenty-five percent of the voting capital, this section would not appear to impose a very serious burden on the joint venture. Even though this section requires registration, only eight enterprises reported consolidations on their own initiative,²² thus apparently largely ignoring the registration procedure. Perhaps this is because under this clause the BKartA has inadequate power to follow up registration with effective action. The BKartA cannot prohibit the acquisition; at most, it can require the companies involved to explain their position when there is a danger that a market-dominating enterprise is likely to result.²³ The BKartA has recognized its own limitation in stressing that the Cartel Law is inadequate in counteracting the consolidation of economic power in Germany.²⁴ If the lack of enforcement here is at least a partial explanation for low registration figures, it may, therefore, provide a clue that the rate of registration may increase with effectiveness of enforcement.

Thus, the German Cartel Law presents no serious obstacle to the establishment of joint ventures. Similarly, French antitrust legislation²⁵ does not explicitly attempt to regulate the formation of joint ventures. In fact, the most relevant provision exempts from the general prohibition of practices hindering competition any concerted action, convention, or combination whose effect is to extend the market for its products or "ensure further economic progress by means of rationalisation and specialisation."²⁶

²¹ CARTEL LAW § 23, 1 OEEC GUIDE D1.0, at 14.

²² 1959 BKART A REP. 46.

²³ CARTEL LAW § 24, 1 OEEC GUIDE D1.0, at 14.

²⁴ Günther, *Two and One-Half Years of German Antitrust Policy*, in 1 INTERNATIONAL CONFERENCE ON RESTRAINTS OF COMPETITION, CARTEL AND MONOPOLY IN MODERN LAW [hereinafter cited as INT'L CONFERENCE] 95, 108 (1961). For an analysis of mergers and comparative law on oligopoly, see Schwartz, *Parallel Action in Oligopoly Markets*, in 2 *id.* at 433.

²⁵ Article 59 bis Price Ord. No. 45-1483, June 30, 1945, as amended, 2 OEEC GUIDE F1.0, at 2.

²⁶ Article 59 ter, § 2, Price Ord. No. 45-1483, June 30, 1945, as amended, 2 OEEC GUIDE F1.0, at 3.

Likewise, the antitrust laws of the remaining member countries of the EEC do not explicitly deal with joint ventures. Belgian law is broadly directed against enterprises exercising a "preponderant influence on the market for goods or capital," whether alone or in combination.²⁷ The Netherlands Economic Competition Act authorizes government intervention against an abuse of economic power by one or a combination of enterprises with a dominant market position.²⁸ The Italian Draft Bill,²⁹ while prohibiting dominant market power achieved as a result of "understandings," specifies that mergers of associations and concentration of shares are not "understandings" within the meaning of the law.³⁰ The Italian Bill, therefore, specifically may be construed to exclude the agreement creating the joint venture from its purview. In Luxembourg, in the absence of any special national legislation regulating restrictive trade practices, the Treaty of Rome is expected to be the law with respect to practices involving community matters. In short, it is apparent that national legislation of the EEC countries does not purport to regulate, at least expressly, the creation of the joint venture.

III. THE JOINT VENTURE UNDER THE TREATY OF ROME

The antitrust provisions of the Treaty of Rome do not proscribe any particular form of corporate structure. Article 85 outlaws all agreements by enterprises, decisions by associations, and all concerted practices which are apt to affect inter-Common Market commerce and which have as their object, or result, *inter alia*, in the distortion of competition within the Common Market.³¹ Article 86 complements 85 by proscribing abuse of a dominant position by one or more enterprises.³² Concentration and merger, however, cannot be prevented; only abusive exploitation of a dominant market position is prohibited under this article.³³

²⁷ Law on the Protection Against Abuse of Economic Power of June 22, 1960, [1960] MONITEUR BELGE 4674, 5210. See generally *Del Marmol & Fontaine, Protection Against the Abuse of Economic Power in Belgium*, 109 U. PA. L. REV. 922 (1961).

²⁸ [1956] Nederlandse Staatscourant No. 401; [1958] Nederlandse Staatscourant Nos. 412-43, arts. 24-27.

²⁹ [1960] Foro Jt. IV, 30—Testo definitivo del disegno di legge per la tutela della libertà di concorrenza.

³⁰ [1960] Foro Jt. IV, 30, art. 2.

³¹ 298 U.N.T.S. at 47, 51 AM. J. INT'L L. at 895, CCH COMMON MARKET REP. ¶ 2001.

³² 298 U.N.T.S. at 48, 51 AM. J. INT'L L. at 896, CCH COMMON MARKET REP. ¶ 2101.

³³ Article 66, §1 of the Treaty Establishing the European Coal and Steel Community (ECSC), April 18, 1951, provides, in contrast, a means of controlling the method of creating concentrations. For a comparison of the provisions of the EEC and ECSC Treaties, see Kronstein, *The Significance of the Provisions Concerning Competition Within the Total Perspective of the ECSC Treaty and the EEC Treaty*, in 1 INT'L CONFERENCE 131.

The absence of provisions in the Treaty of Rome expressly applicable to particular business structures, such as joint ventures, is characteristic of modern European restrictive trade practices legislation. No specific form of business undertaking is, a priori, judged either pernicious or harmless. Commercial enterprises are first allowed to come into existence; then, irrespective of their form, they are pragmatically evaluated and, if necessary, controlled in terms of their actual behavior.

IV. THE AGREEMENTS ESTABLISHING THE VENTURE

A. Article 85 of the Treaty of Rome

While there is no provision in the Treaty of Rome dealing with the joint venture explicitly, the genesis of possible antitrust concern may originate from the very basic organic documents creating the joint enterprise.³⁴ This serious problem arises because such documents may be "agreements" within the meaning and purview of article 85. Article 85 of the Treaty prohibits "all agreements between enterprises, all decisions by associations of enterprises, and all concerted practices which are apt to affect trade between Member States and which have as their object or effect the prevention, restriction, or distortion of competition within the Common Market."³⁵ Certain practices, including price fixing; production, distribution, technical development or investment controls; market or supply division; tie-in agreements, and the imposition of different conditions for various transactions involving similar goods that adversely affect competitors of the favored party, are expressly prohibited.³⁶ Such agreements are stated to be null and void by article 85, section 2. However, any agreement, decision, or practice which:

contributes to the improvement of the production or distribution of commodities or to the promotion of technological or economic progress, while reserving an equitable share of the resulting profit to the consumers and which does not

- (a) impose on the enterprises involved any restrictions not indispensable for the attainment of these objectives, or

³⁴ The joint venture in the Common Market may take one of two corporate forms approximating the American corporation—the stock company and the limited liability company. Both entities insulate the shareholders from liability for company debts. One difference between the two is the suitability of their shares for trading. This study is confined to these two corporate types, since the joint venture is generally cast into either one of these two forms. See generally Conard, *supra* note 3.

³⁵ 298 U.N.T.S. at 47, 51 AM. J. INT'L L. at 895, CCH COMMON MARKET REP. ¶ 2001.

³⁶ *Ibid.*

- (b) enable such enterprises to eliminate competition in respect of a substantial portion of the commodities involved . . .

[may be exempted from the prohibition of section 1].³⁷

But this exemption from the prohibition of article 85, section 1, can only be invoked if the agreement or decision has been notified to the EEC Commission which has exclusive jurisdiction for granting exemptions.³⁸ For a ruling of nonapplicability of article 85, section 1, there is limited overlapping jurisdiction; the parties may apply to the EEC Commission or to a national court of the EEC countries.

Therefore, to the extent to which the basic organic document creating the joint venture represents an agreement between the partners coming within the purview of article 85, section 1, it becomes vulnerable under section 2 of article 85.

B. Possible Sources of Anticompetitive Effects in the Organic Documents

The organic documents creating the joint venture will embody contractual obligations between the partners which are designed to fit best the particular circumstances involved in the establishment and the proposed operations of the joint venture. There are quite a number of clauses which may be embodied in such agreements which may give rise to problems under article 85.

A first possible source may be traced to the purpose clause in the organic documents. Such a statement of a joint venture's purposes is required by the national laws of the member countries of the EEC.³⁹ However, it would seem that unless the purpose clause is unduly restrictive, by expressly excluding the joint ventures from carrying out specific economic activities or from engaging in business in specified territorial areas, such clauses would, by themselves, make the prohibition of article 85 inapplicable. Usually, the recital of purposes and objects contemplated for the joint venture is broad enough to negate any implications of restraints of trade.

³⁷ *Ibid.*

³⁸ Regulation 17, arts. 2, 5, [1962] J.O.C.E. 205, 206, as amended, [1962] J.O.C.E. 1656, CCH COMMON MARKET REP. ¶¶ 2411, 2441. See Weiser, *supra* note 7, at 23-32, for a discussion of the negative rulings and grant of exemptions, and an analysis of the mandatorily registrable class and optionally registrable class of agreements.

³⁹ The organic documents represent the basic agreement between the partners. They are equivalent to American articles and by-laws. See, e.g., Germany, Gesetz über Aktiengesellschaften, art. 20; Gesetz betreffend die Gesellschaften mit beschränkter Haftung GmbH, art. 5(4); Belgian Code de Commerce, I-IX, art. 30(1), as amended, Law of January 6, 1958. The statement of purpose is for the benefit of creditors and incorporators.

More serious problems may arise from other provisions in the organic documents. Where the joint venture will be engaged in manufacturing operations, the partners may agree on a plan for the level of production of their venture. They may base this level on market potential for the joint venture's products or on a partner's output of primary or other material. The partners may provide for a stated level of financial investment for certain commercial activities; they may make definite allocations for stated objectives in manufacturing, marketing, development or research operations. Where the organic documents explicitly prohibit exports from certain areas into others, perhaps to protect one of the partner's areas of business, a division of territories in the Common Market may occur. Such an export embargo was present in *United States v. Minnesota Mining & Mfg. Co.*,⁴⁰ in which the joint manufacturing subsidiaries were prohibited from exporting to countries in which the partners manufactured independently. Or, the partners may agree upon the pricing policy of the products or services sold by the joint venture. Whenever such and similar restraining clauses are explicit and go beyond the inherent limitations imposed by the capital structure of the joint venture, they would bring the prohibition of article 85, section 1 into play.

Similar difficulties may arise from the type of shares distributed among the partners and the rights attendant thereto. The corporate structure may approximate that described in *United States v. Aluminum Co. of America*.⁴¹ There, an international corporation was formed abroad by American, German, Swiss, French, and English aluminum producers. The production quota of aluminum of the foreign corporation was limited to quantities proportional to the shares held by the corporate partners in the new enterprise. Sales quotas of excess production were relative to the share holdings, and the sale of purified aluminum to the country of origin of the aluminum ore was also indirectly proportional to the number of shares held by the partners. In effect, the joint venture can thus become a constrained corporate entity, encapsulated from the outset in the restraints embodied in its shares.

In addition, other sections of the organic document may bring the joint venture into conflict with article 85. For example, when one or more of the partners contributes intangible property rights, such as patents, trademarks, know-how, or services, rather than cash, in exchange for shares, the laws of certain of the Common Market countries require a detailed description of the capital structure in the

⁴⁰ 92 F. Supp. 947 (D. Mass. 1950).

⁴¹ 148 F.2d 416 (2d Cir. 1945).

organic document.⁴² The manner of transfer, and the nature and the quantum of industrial property rights transferred to the joint venture may introduce additional restraints on the competitive energies of the enterprise. Moreover, such a grant of industrial property rights to the joint venture may be by assignment or license, and may be subject to restrictions intended to preserve the rights granted. The propriety of the form of grant and any restraints attendant thereto may bring article 85 into play whether these agreements involving industrial property rights are embodied in the organic documents or, as is generally the case, in ancillary agreements.

Thus, the number, character, and seriousness of possible restrictive provisions in the organic documents of joint ventures may vary with the particular needs of the partners to protect their interests with respect to each other, third parties, and the public.

But it soon becomes apparent that the basic organic documents founding the joint venture in the Common Market may involve a degree of vulnerability under article 85, if the required effect on Common Market competition and interstate trade are found. What would appear to be most objectionable in terms of the aims of the Treaty of Rome is placing the joint venture into an economic strait jacket from the time of its creation. Ideally, the venture should be able to develop and take advantage of new economic opportunities of the growing market. Where the organic documents, considered as a whole, would allow the venture to expand in accordance with its own economic capabilities, they should not be the subject of antitrust suspicion.

It would appear to be no adequate answer to argue that the shareholders always have the power to amend the articles in order to remove anticompetitive restrictions from the organic documents. The mere existence of the agreement raises the antitrust issue. Also, any proposed amendment is always subject to being blocked by the other partner whenever he regards such a change as inimical to his interests.

Moreover, publication of the articles as required by the national laws of the Common Market countries would appear to be an equally inadequate solution. Theoretically, publication should make it possible for the EEC Commission to scrutinize the proposed enterprise early in its career. But many countries permit publication of only a summary of the articles,⁴³ which may not include possibly offensive portions. In any event, the Regulations pursuant to article 85, though providing for notification and examination of agreements, do not

⁴² See, *e.g.*, CHURCH, BUSINESS ASSOCIATIONS UNDER FRENCH LAW (1960).

⁴³ *E.g.*, France. Loi du 24 Juillet 1867, art. 57. There are similar provisions in the German law.

suggest their own nonapplicability as a result of publication of the organic documents of a joint venture.

C. Documents Supplementary to the Articles

Not all of the many provisions which are needed to define the respective rights of the partners in a joint venture need be described in its articles. Many important matters may be left to ancillary agreements. Indeed, this may be a preferred management practice. The control devices deemed necessary for the protection of minority interests, the nature, rights, and distribution of shares, arrangements respecting industrial property rights, and the pattern of management of the joint venture may often be the subject of such secondary documents. Such separate agreement may become effective at the time when the joint venture comes into being and be essential to its operational existence. Many of the arrangements found in the organic documents may rather occur here in the ancillary documents. And to the extent that trade and competition are affected as specified in article 85, such clauses may be subject to its prohibition.

D. The Situation Under the Regulations and the Bosch Decision

The resulting situation under the Treaty and the Regulations is very unsatisfactory. To the extent to which agreements in the organic and ancillary documents establishing the joint venture come within the purview of article 85, section 1, in their effect on trade and competition, they would be prohibited. Under section 2 of article 85, such agreements would be null and void, and thus unenforceable. Accordingly, the very existence of a joint venture may be placed in jeopardy by private parties,⁴⁴ governmental agencies, a dissatisfied partner, or competitors.

Whether the agreement which embodies the prohibited, anti-competitive clause will be considered null and void in its entirety, and, therefore totally unenforceable, or whether only that clause will be held invalid, should depend on how essential that clause is to the entire agreement. Where that clause represents the essence of the agreement, the agreement may fall in its entirety; otherwise, it may be held valid and enforceable, notwithstanding the invalidity of the particular clause. Moreover, problems of jurisdiction may further complicate the matter. The EEC administrative and judicial institutions

⁴⁴ Private party suits attacking the validity of a corporation are recognized in Germany and France. *E.g.*, CARTEL LAW §§ 25, 26, 35, 38, 1 OEEC GUIDE 101.0, at 15, 17-18. Franceschelli, *Le Premier Règlement d'Application des Articles 85 et 86 du Traité de Rome*, 50 REVUE DU MARCHÉ COMMUN 345, 347 (1962), opines that an action for damages between private parties will be entertained in Italy.

only have jurisdiction respecting matters of Community interest. Accordingly, they would normally have jurisdiction to pass upon the validity of the clause embodying the anticompetitive effects.⁴⁵ But, the question of the essentiality of the clause and, hence, the validity of the entire agreement would be passed upon by the appropriate national institution. It is likely, therefore, that the question of the validity of the agreement in the organic and the ancillary documents of the joint venture would likely be decided, in part, by different forums.

The Regulations do not provide an adequate solution to these problems. They subject agreements coming within the purview of article 85, section 1, for which it is desired to claim an exemption under article 85, section 3, to notification. For certain classes of agreements, notification is optional.⁴⁶ Hence, where the exception to notification does not apply, the agreements entered into at the formation of the joint venture become subject to notification to the EEC Commission. The *Bosch* decision has somewhat attenuated this effect of the Regulations by holding that, although article 85 has been in effect since the date of the Treaty of Rome, section 2—the null and void clause—only came into effect, with minor exceptions not applicable here, on March 13, 1962. It held, further, that agreements existing on that date, which come within the purview of section 1 of article 85 and which are outside of the exceptions from notifications of the Regulations, are null and void unless timely notified pursuant to the Regulations.⁴⁷

Accordingly, under this holding, agreements which established joint ventures prior to March 13, 1962 should be valid at least until that date. For the period subsequent thereto and for agreements which established joint ventures in the EEC after March 13, 1962, the parties are confronted with the serious dilemma of notifying their agreements within the time schedule or facing the possible adverse consequences attendant to invalidity or penalties imposed by the Com-

⁴⁵ The Treaty cannot give rise to private rights. The validity of agreements which are not null and void according to the rules of the EEC is derived not from any provisions of the Treaty, but from the provisions of municipal law concerning the freedom to contract. See Ballardore Pallieri, *Il Mercato comune europeo e la legislazione italiana antimonopolistica*, 13 DIRITTO INTERNAZIONALE 407 (1959); Franceschelli, *The Restrictions on Competition That Can Be Exempt From the Prohibition of Article 85, sec. 1*, in 1 INT'L CONFERENCE 297, 306. For a discussion of the relationship between national and EEC law, see generally Clément, *The Particular Problem of Delimiting Competence To Act Between the Commission of the EEC and the Individual National Cartel Authorities*, in 1 *id.* at 395; Steindorf, *The Provisions Against Restraints of Competition in the European Community Treaties and the National Law*, in 1 *id.* at 191.

⁴⁶ See Weiser, *supra* note 7; Regulation 17, arts. 4, 5(2), [1962] J.O.C.E. 206, CCH COMMON MARKET REP. ¶¶ 2431, 2441.

⁴⁷ *Kleding-Verkoopbedrijf de Geus en Uitdenbogerd v. Robert Bosch GmbH*, Court of Justice of the European Communities, April 6, 1962, 8 Recueil de la Jurisprudence de la Cour No. 13/61, [1962] J.O.C.E. 1081, CCH COMMON MARKET REP. ¶ 8003.

mission if a violation of section 1 of article 85 or of the Regulations were found.

To require the notification of agreements necessary to the formation of the joint venture is believed to be unsound. This result would be tantamount to attempting to supervise the establishment of a commercial enterprise *ab initio*. There is no basis in the history of the Treaty of Rome supporting the principle that competition can best be nurtured and fostered by controlling the establishment or form of new corporate enterprises from the outset. On the contrary, the Treaty itself expressly recognizes the Right of Establishment⁴⁸ which seems to guarantee the validity of corporate business forms—whether joint or not—unfettered by any requirement of prior registration with an administrative agency.

It would, therefore, appear highly commendable for the Council of the EEC to clarify the status of such formative agreements. Some of them would, undoubtedly, justify a ruling confirming that they do not come within the purview of section 1 of article 85; others could qualify for an exemption under section 3 of article 85; at a minimum, others would warrant an exception from the notification provisions. Such rulings could be made applicable for a certain limited period. Also, such different rulings would recognize distinctions inherent in such agreements, such as the number of partners, their respective nationality, their respective competitive situation, and the nature of the commercial activity of the joint venture. A legal justification for giving such a favorable treatment to the agreements creating the joint venture could be found in the establishment of the joint venture itself. If one is willing to recognize that a joint venture is, *ipso facto*, an economic entity which tends to make, from an overall point of view, a contribution to the economic and technological progress of the EEC, its creation would provide the basic legal and laudable purpose to which such agreements are ancillary and hence, also be permissible and valid. Subsequently, the economic effects of such agreements can be evaluated during the operations of the joint venture along with its other contracts for their effect on competition in the EEC.

V. THE OPERATIONS OF THE VENTURE

After a joint venture has been established, its business operations can be expected to be subject to antitrust scrutiny essentially on the same terms as other forms of corporate organization. These operations may arise out of agreements between the joint venture and

⁴⁸ Arts. 52-58, 298 U.N.T.S. at 37-40, 51 AM. J. INT'L L. at 886-88, CCH COMMON MARKET REP. ¶¶ 1301-81.

another enterprise or the joint venture and one of the founding partners, but only, in the latter case, to the extent to which the joint venture then qualifies as an "enterprise" distinct from its parent.⁴⁹

A first relevant factor in any such evaluation is the commercial purpose pursuant to which the operation is carried out.⁵⁰ It would always seem to be advantageous for a joint venture to promote the aims of the Treaty of Rome, as stated in its Preamble and Principles. Increasing incompatibility would make it more difficult to justify the venture's existence. However, the Common Market is a dynamic, evolving phenomenon; its aims may have varying importance at any one time. What appears presently as a laudable economic objective for purposes of one segment of the Common Market may, in the future, be viewed as inimical to another sector. A more sophisticated examination of the compatibility of the purpose and practices of a joint venture with the Treaty, therefore, should account for the future economic growth of the Community.

The fact that a joint venture intends, as its business purpose, to overcome difficulties in finding suitable outlets for its excess production in the United States rather than to help Europe, does not mean, however, that the venture is incompatible with the philosophy of the EEC. A recent case showed that the business reasons pertaining to conditions outside of the Common Market were of secondary importance in evaluating the propriety of the formation of a joint United States-Belgian factory. The fact that the enterprise would alleviate labor and economic difficulties within the Community⁵¹ became a primary business purpose on the basis of which Common Market officials could justify the joint venture.

An operating joint venture is, by its very nature, more inclined to certain types of business conduct than are other corporate enterprises. Fundamentally, two possible anticompetitive tendencies inhere in jointness: the competitive vigor of the joint venture may be hampered by one or more of its parents; and the joint venture itself

⁴⁹ A very important concept under the EEC antitrust laws is that of the term "enterprise." An agreement only comes within the scope of Article 85, section 1, when it is between at least "two enterprises." This question will be quite complex in the case of the joint venture. One question is whether the agreements between the parent holding more than 50% equity interest in the joint venture and the joint venture are agreements between two distinct enterprises. A different answer may obtain respecting the agreements between a parent holding a minority interest in the joint venture and the joint venture. Also, is the agreement between a joint venture, which has, for example, two corporate parents, and another corporation, an agreement between two enterprises or between more than two? On the definition of "enterprises," see Weiser, *supra* note 7, at 28-29. Behr, *The Concept of Enterprise Under the European Economic Community*, 26 LAW & CONTEMP. PROB. 454, 462 (1961).

⁵⁰ See BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD 200 (1958).

⁵¹ Written question no. 91 of M. Armengaud to the Commission of the EEC, Case of Reynolds Metal Co. and Société Générale de Belgique, [1962] J.O.C.E 893.

may exert an anticompetitive influence on the commercial activities of the partners vis-à-vis each other.⁵² To illustrate the first tendency, which will be the focus of the subsequent discussion, if the jointly owned company will be a potential competitor of one or more of the partners, its competitive ability might be curtailed by restricting its markets, customers, or products to those not dealt with by the parent. The joint venture might also be prevented from offering disruptive prices of quality.⁵³ When these practices affect inter-member trade and intra-Common Market competition, they would come under the prohibition of article 85.

A. Market Division or Customer Allocation

One of the basic aims of the Common Market is to abolish custom and tariff barriers to trade, created by non-economic territorial boundaries. A division of the Common Market by joint venturers along existing political lines, therefore, would be most objectionable. Such restraints would defeat or neutralize the positive effects on free trade fostered by the creation of the Market. The Commission of the EEC is "convinced that in the first place, those infringements of articles 85 and 86 should be taken up which threatened to undo the abolition of barriers to trade within the Common Market."⁵⁴

Division of the Common Market is more likely to occur when one or more of the partners to a joint venture already operates in a member state and when he is a potential or actual competitor of the joint venture. Market division is probably least likely when there is no actual or potential competition between the joint venturers, and, perhaps, if one or more of the parents are located outside of the Common Market. Also, exclusive allocation of the entire Common Market territory to the joint venture is least likely to be objectionable under EEC laws, especially if the partners intend to include other countries as they are admitted to membership in the EEC.

B. Marketing and Production

Because joint distribution and marketing arrangements may result in territorial division, they have been carefully scrutinized by antitrust agencies in the Common Market and particularly in Germany. The experience of the BKartA under German law may, therefore, shed some light on the legality of such arrangements under the Treaty of

⁵² See BREWSTER, *op. cit. supra* note 50, at 202.

⁵³ *Ibid.*

⁵⁴ Von der Groeben, *The Cartel Legislation of the European Economic Community in the Light of Two Years Experience*, in 1 INT'L CONFERENCE 63, 67.

Rome.⁵⁵ After balancing advantages and disadvantages, the BKartA held that certain joint distributing and marketing ventures were permissible because they promoted economic progress. The arrangements under consideration were substantially free of unnecessary restraints and negative restrictions on exports. In addition, the ventures introduced a new element—a contribution was being offered by the joint venture that had not previously been made available by the parents. This contribution varied from case to case—a new variety of product, a faster service, a more dependable supply—but in each instance it was not merely a duplication of the old. It was not necessary for these new features, however, to be predicated on or protected by patents, trademarks, and the like. Moreover, the arrangements generally involved an aspect of specialization; the partners thereby eliminated some inefficient feature of their own organization.⁵⁶

Statements of the EEC Commission tentatively suggest that similar criteria may be used in applying the antitrust laws to joint ventures engaged in marketing or distribution. The Commission has reported favorably on “coordinating the manufacturing programme of several enterprises so that each enterprise limits the range of articles produced.”⁵⁷ It has further stated that:

One of the chief effects of the Common Market will be to stimulate production and trade within the Community, each of the six countries being encouraged to specialize in the fields in which it enjoys comparative advantages

There is accordingly reason to believe that each member country will be led to develop certain specialties within each of the branches of its industrial production and to drop others without abandoning any of the major sectors which form an established part of its industry.⁵⁸

Accordingly, the presence of the discussed features should be looked upon favorably by the EEC.

C. Price Fixing

Two possible sources of restrictive practices may be found. The first involves the price which the joint venture charges its share-

⁵⁵ See generally Decision of Federal Cartel Office, Aug. 23, 1960 (“Terrazzo”), in WuW/E BKARTA 241 (11 WuW 805 (1960)). This case raised typical issues that arise under article 85.

⁵⁶ For a discussion of the standards which the BKartA applies in granting an exemption from the prohibition, see 1958 BKARTA REP. 46-47.

⁵⁷ COMMISSION OF THE EEC, FOURTH GENERAL REPORT ON THE ACTIVITIES OF THE COMMUNITY § 71, at 85 (1961).

⁵⁸ *Id.* § 71, at 85-86.

holders who purchase its product in amounts exceeding their quota as measured by their contribution to the joint venture's capital.⁵⁹ These sales most often occur if the parent does not itself make the item which the joint venture produces. If, because of quality or other factors, the joint venture's product is more attractive to the parent than equivalent items obtainable from other Common Market sources of supply, there would be little need to justify the pricing policy. Where, however, the venture's product is less attractive than competitive products available from other Common Market sources, the pricing policy may be questionable.

A second source of possible restrictive effects may involve the price charged for the product to outsiders. This problem is peculiar to the joint venture only to the extent to which it occurs pursuant to an agreement between the parents determining that price. But in that respect, it is but one aspect of the issue of agreements between the joint partners relating to the management of the joint venture.

D. Management of the Joint Venture

The competitive initiative of a joint venture may be dulled if the partners directly control its governing boards. As directors, they may restrict output, production, research, product development, sales, expansion, and many other phases of business activity. Some of these restraints may be inchoate in the organic documents of the joint venture; to that extent, they have been considered above. To the extent that they are not so included, however, they may be viewed as agreements, decisions, or concerted practices within article 85.

The magnitude of this anticompetitive factor would seem to be a function of both the independence of the governing board from its parents, and the competitive relationship of the joint venture to its parents. The greater the board's independence, the less likelihood there is of concern. On the other hand, the less competition there is between the venture and its corporate shareholders, the more should management of the joint venture be independent. This would suggest that partners who do not compete with the joint venture, therefore, can more actively contribute to the venture's management than can those partners who compete with it. This also suggests that the director of the parent company who is selected on the basis of his past proficiency for management in a field in which the parent company and the joint venture compete, may need additional insulation from the parent. Arrangements can be worked out in the corporate structure

⁵⁹ See BREWSTER, *op. cit. supra* note 50, at 204.

of the joint venture for the most suitable insulation of such a corporate executive.

E. The Role of Industrial Property

Industrial property rights, as represented by patents, trademarks, and know-how, are likely to play a very significant role in the formation and management of a joint venture. If soundly managed, these rights can be a most valuable asset of the new corporate enterprise.

In the evaluation of a joint venture under the policies of the Treaty of Rome, the ownership of protected industrial property immediately should cast the venture in a favorable light. It evidences a likelihood of valuable contribution to science and technology by way of a new and useful product, apparatus, or method of production. Industrial property rights are well-recognized in the Common Market⁶⁰ and will be given even stronger protection when the European Patent Convention comes into effect, creating a single patent covering the whole of the EEC.⁶¹

To protect industrial property rights, certain restraints are commonly attached to their management and exploitation. Reasonable restrictions that do not exceed the legitimate area of monopoly usually are not objectionable under national antitrust laws.⁶² Moreover, it is significant that the Regulations have recognized the permissibility of some form of restraints by excepting from notification

agreements between two enterprises, having as their sole effect to impose on the purchaser or the user of industrial property rights—particularly patents, utility models, designs or trademarks—or on the beneficiary of contracts involving the acquisition or use of manufacturing processes or knowledge relating to the utilization and the application of industrial techniques, limitations in the exercise of these rights.⁶³

⁶⁰ Ladas, *Industrial Property*, in 1 *AMERICAN ENTERPRISE IN THE EUROPEAN COMMON MARKET—A LEGAL PROFILE* 235 (Stein & Nicholson ed. 1960). For the international antitrust problems, see Timberg, *International Patent and Trademark Licenses and Interchanges: The United States Approach*, in 2 *INT'L CONFERENCE* 751.

⁶¹ See Weiser & Behrman, *The Convention for European Industrial Property Rights*, 5 *PAT., T.M. & COPYRIGHT J. OF RESEARCH & EDUC.* 233, 241, 243 (1961); Froschmaier, *Patents, Trade Marks, and Licenses Within the Community*, *INT'L & COMP. L.Q.* 50 (Supp. No. 4, 1962).

⁶² Under German Law, restrictions imposed by the licensor are valid if within the scope of the patent privilege. *CARTEL LAW* § 20, 1 *OEEC GUIDE D1.0*, at 12. Decisions of Federal Cartel Office, May 6, 1960, in *WuW/E BKARTA* 251 (11 *WuW* 815 (1960)); June 20, 1960, in *WuW/E BKARTA* 254 (11 *WuW* 818, 1960); Fourth Quarter 1960 ("Betriebsgeheimnis"), in *WuW/E BKARTA* 317 (3 *WuW* 217 (1961)). See also Decision of Federal Cartel Office, Feb. 19, 1959 ("Gewindschneidemaschinen"), in *WuW/E BKARTA* 25 (4 *WuW* 305 (1959)).

⁶³ Regulation 17, art. 4(2)(ii)(b), [1962] *J.O.C.E.* 206, *CCH COMMON MARKET REP.* ¶ 2431.

The Court of Justice has given further recognition to the value of industrial property rights by stating that agreements which are excepted from notification by the Regulations are valid. This is in contrast to its statement that agreements that are not so excepted are invalid unless timely notified with the Commission.⁶⁴ Also, Common Market industries have recognized, and the Commission has noted with apparent approval, the "revival of interest in a development of foreign patent rights which can be profitable on the larger market though they would not have been profitable on the separate national markets."⁶⁵

VI. PRESENT TRENDS IN THE EEC

The Community's business pattern over the past four years confirms the conclusion that the joint venture is currently a favorite form of commercial undertaking, particularly suited to meet the challenge of increased competition in the EEC. Business circles have responded to the reduction of custom barriers, abolition of quotas, and increased market demand and competition by expanding interstate business cooperation. The reports of the EEC Commission and business journals disclose very substantial activity during the last year in the acquisition of financial interests in other companies and in the formation of joint ventures.⁶⁶ Increased economic cooperation is found in manufacturing, purchasing, and distribution.

The EEC Commission has recognized that much of the current reorganization of industrial structures—including joint ventures—is consonant both with the objectives of the Treaty and the need for adaptation to a new and enlarged economic area.⁶⁷ This appreciation

⁶⁴ *Kleding-Verkoopbedrijf de Geus en Uitdenbogerd v. Robert Bosch GmbH*, Court of Justice of the European Communities, April 6, 1962, 8 *Recueil de la Jurisprudence de la Cour* No. 13/61, [1962] J.O.C.E. 1081, CCH COMMON MARKET REP. ¶8003. The statement of the court in reference to exempt agreements should be taken cautiously. It is dictum in that such an agreement was not before the court. The export prohibition of the *Bosch* case is not within the class of agreements exempt from notification. But the court did pass upon the Regulation, as a whole. Therefore, the statement should be given due consideration.

⁶⁵ COMMISSION OF THE EEC, THIRD GENERAL REPORT ON THE ACTIVITIES OF THE COMMUNITY § 181, at 132 (1960).

⁶⁶ See, e.g., *Wall Street Journal*, June 8, 1962, p. 1, col. 6. This trend was accentuated by "reciprocal holdings among the companies concerned (with development of technical cooperation) or . . . the joint founding of new enterprises" COMMISSION OF THE EEC, FOURTH GENERAL REPORT ON THE ACTIVITIES OF THE COMMUNITY § 72, at 88 (1961). "[An important form] of cooperation is enlargement of the size and financial basis of enterprises or takeover; [and] . . . Penetration of the domestic markets of the partner countries by the creation of local subsidiaries and selling agencies or by agreements between firms for the reciprocal use of internal distribution networks." *Id.* §§ 70(b), (d), at 85.

⁶⁷ *Id.* § 71, at 85.

of the economic contribution of joint ventures should facilitate the issuance of Commission rulings permitting their establishment to continue unfettered by notification requirements of the antitrust laws.

It is significant that joint ventures will not be barred on the basis of the participation of a non-Market partner. Financial aid will even be extended from Community sources. Reynolds Metal Co. & Société Générale de Belgique,⁶⁸ a joint venture including an American partner, and organized to build an aluminum rolling mill, received financial help from Belgium and the European Investment Bank. On the question of the participation by an American partner, the Commission stated:

No Treaty provision permits the Commission to oppose investments into the Common Market by enterprises from outside the Common Market. . . . It appears difficult to make a distinction between non-member parties on the basis of the investor's intent to help Europe or not. . . .⁶⁹

It also overruled the contention that the six member countries were self-sufficient in the field of aluminum manufacturing and "that the financial help was going to affect the normal competition conditions."⁷⁰ However, approval of the joint venture was only given with the proviso that its operations be compatible with the rules of competition of the Community.

VII. SUMMARY

This study suggests that the joint venture offers a suitable corporate organization for doing business in the EEC. However, serious, but not insurmountable, obstacles must be faced. Some aspects of the establishment of the joint venture—such as some of the agreements necessary for its creation—will be subject to the control of administrative agencies, if their validity is to be insured. In the management of the joint venture, compatibility with the laws will be favored by independence of its management and by emphasis on specialization aspects. Practices which approximate traditional political barriers will increase antitrust risks. Industrial property assets, like patents, trademarks, and know-how will represent a very valuable asset for the joint venture. If skillfully and judiciously managed, the joint venture should provide a sound manner of doing business in the EEC.

⁶⁸ [1962] J.O.C.E. 893.

⁶⁹ *Id.* at 894.

⁷⁰ *Ibid.*

VIII. THE IMPACT OF AMERICAN ANTITRUST LAWS UPON JOINT VENTURES ABROAD

American antitrust law, and particularly the law of joint ventures, is of great interest to Common Market administrative agencies in whom is vested the authority to enforce the rules governing freedom of competition.⁷¹ Of course, it is of vital concern to American participants in an EEC joint venture, who are likely to be confronted with antitrust laws on both sides of the Atlantic. The American partner may be subject principally to the Sherman Act, particularly if he controls less than fifty percent of the venture's voting stock and cannot, therefore, claim that it is a subsidiary.⁷²

The law in this field is far from clear, but absent a purpose or effect to restrain trade or to monopolize, "there is nothing per se unlawful in the association or combination of a single American enterprise with a single foreign concern in a jointly owned manufacturing or commercial company to develop a foreign local market."⁷³ On the other hand, "the fact that there is common ownership or control of the contracting corporations does not liberate them [the partners] from the impact of the antitrust laws."⁷⁴ In addition, a joint venture may become unlawful if it unreasonably, directly, and substantially restrains the trade and commerce of the United States.

A great uncertainty, however, still enshrouds the validity of American participation with actual or potential competitors in joint ventures abroad which may have restrictive effects.⁷⁵ Our administrative and judicial decisions generally have not passed upon the

⁷¹ Nearly every issue of WuW comments on American antitrust decisions and rulings. The same is true of *Gewerblicher Rechtsschutz und Urheberrecht Auslands Internationaler Teil*.

⁷² In *United States v. Pan Am. World Airways, Inc.*, 193 F. Supp. 18, 40 (S.D. N.Y. 1961), *appeal pending*, 368 U.S. 964 (1962), Judge Murphy pointed out that if Pan American had been a majority stockholder in Panagra, it might have made a decisive difference in the final holding. Support for this position can be found in ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 90 (1955), in which it was stated that "where minority foreign stockholders are not competitors, but mere investors, a foreign corporation may still be deemed a subsidiary of its American parent." *Id.* at 90. In *United States v. Standard Oil Co.*, 1960 Trade Cas. ¶69849 (S.D.N.Y. 1960), the consent decree defined a subsidiary as a corporation more than 50% of whose stock entitled to vote for the election of directors was owned or directly controlled by the defendant. See also *United States v. E. I. Du Pont de Nemours & Co.*, 118 F. Supp. 41, 219 (D. Del. 1953), *aff'd*, 351 U.S. 377 (1956).

⁷³ *United States v. Imperial Chem. Indus., Ltd.*, 100 F. Supp. 504, 557 (S.D.N.Y. 1951). See also Van Cise, *United States Antitrust Law*, in *FEDERAL BAR ASS'N, INSTITUTE ON LEGAL ASPECTS OF THE EUROPEAN COMMUNITY* 140, 152-54 (1960); ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 90 (1955); BREWSTER, *op. cit. supra* note 50.

⁷⁴ *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 598 (1951).

⁷⁵ See Haight, *The Sherman Act, Foreign Operations, and International Law*, in *LEGAL PROBLEMS IN INTERNATIONAL TRADE AND INVESTMENTS* 89, 92-96 (World Community Ass'n of Yale Law School 1962).

legality of individual restrictive practices. Rather, American antitrust cases usually have involved a complex of objectionable practices.⁷⁶ In addition, American antitrust defendants have often occupied a dominant market position. In contrast, joint ventures in the Common Market which include American participants often bring into question the propriety of only a few practices, sometimes just one or two. Also, the American participant often does not occupy a dominant position in the market. Rather, it may be expected that, to an increasing extent, the joint venture in the EEC will involve a small or medium-size American enterprise which cannot satisfactorily take advantage of the opportunities offered by the Common Market without a European partner. This may be particularly true when the American partner's contribution to the joint venture is in new fields of technology within his special competence.

A. The American Cases

Three recent American decisions may help to dispel some of the uncertainty in this field. In *United States v. Pan Am. World Airways, Inc.*,⁷⁷ the district court sustained the validity of Pan American-Grace Airways, Inc. (Panagra), a foreign joint venture in which Pan American and Grace jointly owned fifty percent of the stock. Implicit in the decision is the confirmation by the court that the original combination was lawful. The court held that the "joinder of Grace and Pan American was not the result of conspiracy, but was a lawful combination with legitimate ends."⁷⁸ But the holding expressly distinguished between joint ventures and combinations of existing competitive enterprises, which might be unlawful under the circumstances. "It is apparent that the principle upon which these cases [cited by the Government] were decided applied to combinations of existing companies which were in substantial competition with one another prior to their combinations."⁷⁹

The agreement forming Panagra prohibited the partners from paralleling its services in South America and precluded competition in that area. On that point, the court stated that "the division of territories understanding under which the operations of the two airlines were conducted was not unreasonable under the circumstances and not a *per se* violation" ⁸⁰

⁷⁶ See, e.g., ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 62-90 (1955).

⁷⁷ 193 F. Supp. 18 (S.D.N.Y. 1961), *appeal pending*, 368 U.S. 964 (1962).

⁷⁸ *Id.* at 22.

⁷⁹ *Id.* at 48.

⁸⁰ *Id.* at 22.

An important factor in favor of the joint ventures was that their combination involved a novel feature. The joinder was to foster the "development of a new form of transportation"; their action constituted "the successful inauguration of an international air transportation system in South America . . . in the truest sense a pioneering endeavor."⁸¹ It is significant that both the joint venture itself and its operations were found lawful. It was Pan American that was found to have violated the Sherman Act by preventing the extension of Panagra to the United States.

In two recent consent decrees which throw additional light on these points, Standard Oil of New Jersey⁸² and Gulf Oil⁸³ were enjoined from engaging in joint marketing ventures with their partner, Socony Mobil Oil Co. An important distinction, however, was drawn between joint marketing and other cooperative operations. The decrees directed the defendants to compete with each other, insofar as practicable, in marketing petroleum products in the area formerly served by their joint venture.⁸⁴ But it is significant that joint production, refining, and pipeline operation were excluded from a long list of prohibitions against price fixing, allocation and division of territories, markets, and customers, restrictions on imports and exports, allocations of and limitations on production, and exclusion of distributors and third persons.⁸⁵

It would be important to determine if there are differences in the application of the antitrust laws to different phases of the economy. Business arrangements which involve joint production or joint manufacturing are likely to be more permanent in nature than joint systems of distribution and marketing. Accordingly, restraints on competition that may occur in connection with the former arrangements may be the more objectionable of the two types since they may hamper the very source of industrial development. This may be particularly true in an economy bent on economic growth, like that of the Common Market. On the other hand, the first barriers to commerce that are being removed in the EEC are tariffs and customs. These were

⁸¹ *Id.* at 27. (Emphasis added.)

⁸² *United States v. Standard Oil Co.*, 1960 Trade Cas. ¶ 69849 (S.D.N.Y. 1960) (consent decree) [hereinafter cited as Standard Decree].

⁸³ *United States v. Gulf Oil Corp.*, 1960 Trade Cas. ¶ 69851 (S.D.N.Y. 1960) (consent decree) [hereinafter cited as Gulf Decree].

⁸⁴ Standard Decree § VII(A), at 77341; Gulf Decree § IV, at 77348.

⁸⁵ Standard Decree § V(E), at 77340; Gulf Decree § V(E), at 77349.

A further exception was made for the marketing operations of Esso Standard Société Anonyme Française and its subsidiary in the Common Market. Standard Decree § VII(H), at 77342; Gulf Decree § VII(F), at 77351. The cases are totally silent as to the exact relationship between Esso Française and the two defendants. If, however, Esso Française was the third partner in another joint marketing venture, it may have for some reason provided insulation from the injunctive decree.

traditional restraints on distribution systems.⁸⁶ As a matter of achieving primary objectives first, the initial brunt of the antitrust laws may be felt, therefore, by enterprises engaged in distribution and marketing.

The German cases seem to bear this out. But, otherwise, a trend that distinguishes production from distribution is not yet perceptible in the EEC. In that light, the distinctions made between these two phases of business in the two American consent decrees are noteworthy. It will be important to watch for developments on both sides of the Atlantic to determine if these cases—the German cases on one hand, and the American on the other—reflect the inception of opposite trends in antitrust application.

B. Possible Integration of United States and EEC Antitrust Policy

A recognition and an understanding of the antitrust laws of the Common Market are a condition precedent to any changes in the application of our own antitrust laws to American foreign trade in general, and to American participants in EEC joint ventures in particular, either by legislative action or administrative and judicial decision. The United States Department of Justice has taken a step in this direction by recognizing that

throughout the Free World . . . restrictive business practices, or restraint of trade and monopolization as we would call them, are inconsistent with competition, economic development and technological progress in a free enterprise society. Although enforcement activity in many countries has been rather indifferent, by our standards, the interest in an effort to prevent restrictive business practices has been increasing greatly in recent years in western Europe. There is reason to hope that the Common Market and the CECD will aid and accelerate this development.⁸⁷

The Department has also referred to the Treaty of Rome as "one of the most significant developments in this field of law."⁸⁸ On the other hand, the Federal Trade Commission has called for an evaluation of joint ventures which are the "offspring of two or more giant corporations, each with vast financial resources, which—for one reason or another—want to conduct jointly through an enterprise in a field in

⁸⁶ See generally Del Marmol, *Distribution Methods in Restraint of Competition Used by Market Dominating Enterprises*, in 2 INT'L CONFERENCE 475.

⁸⁷ Address by Lee Loevinger, Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice, to the New York Bar Ass'n, January 25, 1962. See ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 92 (1955), for the relation of antitrust law to United States programs abroad.

⁸⁸ *Ibid.*

which they have a common interest.”⁸⁹ A study has also been proposed of joint ventures which engage in activities overlapping those of their parents and of those joint enterprises which are often used to exploit new technologies in fields in which the partners have only peripheral interests.

With respect to foreign joint ventures, it is being seriously questioned whether their impact on competition can be confined to foreign countries; that “the togetherness of joint ventures has rigidly defined boundaries; that corporations may stand as one in foreign countries or markets, but that within the territorial confines of the United States, they are vigorous rivals in the competitive struggle.”⁹⁰ It is probably significant that these remarks appear directed not so much to the joint venture itself, but to bigness, attained by two enterprises, each of which already has a sizeable share of the market for a commodity, which use the joint venture as a device to pool their business. The joint venture is then viewed as “the old trust technique in modern dress.”

Under this view, then, joint ventures “amongst companies whose share of the market is too small to make any real impact upon the competitive conditions in the industry”⁹¹ should present no serious antitrust problems. The risks should be further minimized if only one, rather than a plurality of the partners, is American.

The Common Market now has antitrust laws which it is pledged to effectuate.⁹² It is therefore advocated that duplication and conflict between United States and EEC law should be prevented.⁹³ Repeal

⁸⁹ Address by Paul Rand Dixon, Chairman, Federal Trade Commission, Detroit, Mich., March 12, 1962.

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

⁹² See Address by Professor Dr. Hallstein, President of the EEC Commission, Georgetown University, Washington D.C., April 12, 1960, in which he stated:

The new antitrust Regulations are of essential importance, considering that the Treaty of Rome is founded on the principle that the course of economic events is best guided by competition. Thus, emphasis in our antitrust philosophy lies in the abolition of those types of cartel whose effects most resemble those of customs duties and quotas, or those that impede the operation of a Common Market. This means international cartels for the fixing of prices or the division of markets, as well as export and import cartels affecting trade between the member states.

The antitrust provisions of the EEC apply to restraints caused in the United States but affecting the Common Market. See Hug, *The Applicability of the Provisions of the European Community Treaties Against Restraints of Competition to Restraints of Competition Caused in Non-Member States But Affecting the Common Market*, in 2 INT'L CONFERENCE 639.

⁹³ See Address by Herbert Brownell, former Attorney General, New York, May 16, 1962; Dewey, *Antitrust Barriers to Foreign Policy Goals*, 33 N.Y.S.B.J., 21 (1961). A special committee on antitrust laws of the Association of the Bar of the City of New York has suggested a clearance procedure by which exceptions to the antitrust laws could be granted in certain situations.

of the Webb-Pomerene Export Trade Act is again being urged.⁹⁴ Abroad, similar arguments are being made against the exemption for export cartels under the German Competition Law.⁹⁵

Any reconciliation between American and EEC antitrust law, however, is fraught with difficulties and challenges.⁹⁶ Notwithstanding many analogies, the laws are different. Enforcement of EEC antitrust law is preceded by a registration procedure which is often followed by negotiations to remove objectionable clauses. The administrative proceeding can then be reviewed by the Court of Justice.⁹⁷ There is no precise counterpart in American law for this pattern of registration and administrative procedure. Moreover, while some trade practices are within the exclusive jurisdiction of the EEC, many related phases of business conduct are subject to the diverse laws of the member states.

It will, however, be most unfortunate if the two sets of law act at cross purposes. The exact areas of conflict may become gradually more clearly discernible with the development of the EEC antitrust laws. To the extent that a party may find it difficult, if not impossible, to comply with one set of laws without measurably increasing his risk of infringing the other, appropriate action should be taken promptly to remove such inconsistencies.

The application of American antitrust laws to our foreign operations calls for a keen understanding of the foreign legal questions and their relationship to the economic and political trends that shape their background. Furthermore, our antitrust laws should not stifle efforts to implement a freer foreign trade policy. There is an urgent need for more effective coordination of our trade policies, especially as they relate to the EEC. In contrast to the rest of the world, the dynamic changes in the EEC demand a more concentrated and specialized attention on the part of the United States.⁹⁸ A sig-

⁹⁴ See BREWSTER, *ANTITRUST AND AMERICAN BUSINESS ABROAD* 454-56 (1958); *Foreign Law Can Change U.S. Business—Antitrust Climate Transformed by Common Market*, *Nation's Business*, Aug. 1962, pp. 42-50.

⁹⁵ See Schapiro, *The German Law Against Restraints of Competition—Comparative and International Aspects* (pts. 1-2), 62 COLUM. L. REV. 1, 201, 254 (1962).

⁹⁶ Restraints on competition influence international economic relations adversely. See Günther, *The Problems Involved in Regulating International Restraints of Competition by Means of Public International Law*, in 2 INT'L CONFERENCE 579.

⁹⁷ Regulation 17, art. 17, [1962] J.O.C.E. 210, CCH COMMON MARKET REP. ¶ 2561. See also LaGrange, *Judicial Review of Decisions of Cartel Authorities*, in 2 INT'L CONFERENCE 909.

⁹⁸ See Kravis, *Common Market—Lesson in Trade Expansion*, *Harv. Bus. Rev.*, March-April 1962, p. 6, for a program based on an unequivocal commitment to a national policy of freer trade to compete without trade barriers without inevitable injury. For an economic analysis of the relationship between the EEC and the General Agreement on Tariffs and Trade and the position of the United States, see ALLEN, *THE EUROPEAN COMMON MARKET AND THE GATT* (1960).

nificant step in this direction may be achieved by the establishment of an advisory board on EEC matters. Such a board would be composed of representatives of government, business, and academic circles. The board should develop flexible and effective procedures for consultations with concerned parties. It would proceed with the study of actual cases of foreign business operations where serious conflicts between antitrust and trade provisions arise. The board would also be concerned with studying the developments in the EEC as they affect American business interests, detecting and minimizing the areas where our American laws work at cross purposes, and finally, with making recommendations to promote measures consistent with the overall national foreign trade policy of the United States.

IX. CONCLUSION

The joint venture in the EEC with American participation is a shining and dynamic example of a business partnership reaching across political frontiers. It is one of many developments of a broad magnitude that are unfolding on the international business scene. The Trade Expansion Act of 1962⁹⁹ is a significant move toward the goal of an Atlantic partnership. These changes are creating new and challenging responsibilities. The responsiveness and maturity with which these challenges will be managed can be a decisive influence on how successfully the economic and the political aims of the United States will be attained.

⁹⁹ 76 Stat. 872, 19 U.S.C.A. §§ 1801-1991 (Supp. 1962). Also to be considered in conjunction with such foreign problems is the Revenue Act of 1962, §§ 5, 7, 9, 12, 14-16, INT. REV. CODE OF 1954, §§ 78, 535, 545, 643, 665-66, 668-69, 861, 901-02, 951-64, 970-72, 1246-49, 6048, 6677.