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Are We Compatible?: Current European Community Law on the Compatibility of Joint Ventures with the Common Market and Possibilities for Future Development

Alyssa A. Grikscheit

Increasingly, companies wishing to create joint ventures must determine whether competition law will hinder their ventures, or even prevent them from happening. Given the extraterritoriality and impact of modern competition laws, American and European Community (EC)[†] competition law will likely affect the terms of creation of all but the most insignificant ventures, no matter what their national origins are.¹ Problems may arise from the attempt to satisfy both of these regulatory regimes.² Venturers seeking to comply with EC law, however, face an even greater task — that of determining which of two systems of evaluation might apply to their venture and

[†] This Note continues to refer to the EC, despite that entity's recent tendency to refer to itself as the European Union (EU). The November 1, 1993 entry into force of the Maastricht Treaty on European Union created the EU, but it is unclear whether the EU supersedes the EC in all respects. See, e.g., *European Union . . . er Community has an Identity Problem*, AGENCE FRANCE PRESSE, Nov. 10, 1993 (Financial Section), available in LEXIS, NEXIS Library, AFP File. Accordingly, this Note retains the traditional terminology.

1. Both the American and the European Community competition laws may apply extraterritorially to a venture of any "nationality" if the venture sufficiently impacts American or European jurisdictions. With the January 1, 1994 entry into force of the Agreement on the European Economic Area and the likelihood that Austria, Finland, Norway, and Sweden will become members of the EC in 1995, the number of cases in which EC competition law is applicable will likely increase. See AGREEMENT ON THE EUROPEAN ECONOMIC AREA [EEA AGREEMENT] arts. 53-54 (on file with author). Nevertheless, non-EC firms continue to set up joint ventures with EC firms at a rapid rate. In its Twenty-First Report on Competition Policy, the Commission — the quasi-executive power in the Community heading up competition enforcement — found that "for the past two years at least, joint ventures set up between foreign firms are far more important than purely national joint ventures (ratio 2:1), and third-country firms are almost as frequent as partners as Community firms." Commission of the European Communities, XXIst Report on Competition Policy 423 (1991) [hereinafter XXIst Report]. This increase may be due in part to fears of the creation of a "fortress Europe," that is, a Europe that treats European firms equally, but disadvantages third-country firms. For a more detailed account of the Commission's role, see *infra* note 159.

2. Parent companies may have to obtain clearances from both the Justice Department in the United States and the Commission in the European Community. One commentator notes that "the adoption of the Merger Control Regulation . . . created the potential for conflict and confusion with concentrations of a Community dimension being scrutinised twice: once on each side of the Atlantic." Alan J. Riley, *Nailing the Jellyfish: The Illegality of the EC/US Government Competition Agreement*, 3 EUR. COMPETITION L. REV. 101 (1992). On September 23, 1991, the Commission signed an agreement with the United States to coordinate antitrust enforcement on both sides of the Atlantic. Competition Laws Co-operation Agreement, Sept. 23, 1991, U.S.-EC, 4 C.M.L.R. 823 (1991). France has brought an action of annulment against the Commission in the European Court of Justice, however, on the grounds that the agreement is ultra vires. Case 327/91, *France v. Commission* (pending) (report of initiation at 1992 O.J. (C 28) 4). If the Court of Justice upholds the agreement, it will lessen the difficulty of planning joint ventures to assure compliance with both U.S. and EC law.

satisfying the proper conditions for a determination of "compatib[ility] with the Common Market."³ The Commission of the European Communities (Commission) only exempts from the requirements of EC competition law those ventures that it finds compatible with the Common Market.⁴

Article 85 of the Treaty of Rome sets out one system of evaluation.⁵ The Treaty of Rome is the foundation of all EC "economic" law, which includes competition law, the analogue to U.S. antitrust law. Article 85 now regulates *cooperative* joint ventures, or ventures between firms that do not involve a loss of independent action on the part of the parent companies.⁶ Cooperative ventures are typically formed for a relatively circumscribed purpose, such as the research

3. One of the systems of evaluation expressly refers to *compatibility* with the Common Market, while the other does not. The second system does refer to *incompatibility* with the Common Market, however. Compare Council Regulation 4064/89 of 21 December 1989 on the Control of Concentrations Between Undertakings, 1989 O.J. (L 395) 1, corrected version at 1990 O.J. (L 257) 14, art. 2 [hereinafter Regulation 4064/89] with TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY] art. 85(1). Accordingly, commentators have discussed what this Note terms *compatibility* under many different names. Joseph P. Griffin refers to "substantive legality." Joseph P. Griffin, *Joint Ventures: European Regulations Reviewed*, NATL. L.J., Oct. 19, 1992, at 31, 34. Frank L. Fine refers instead to "appraisal criteria" and divides his inquiry into three areas: "test of dominance," "test of 'significant impediment' to competition," and "factors considered." Frank L. Fine, *The Appraisal Criteria of the EC Merger Control Regulation*, 4 EUR. COMPETITION L. REV. 148, 148-51 (1991).

4. The chief institutions of the European Community are the Commission, the Council of Ministers, the European Parliament, and the European Court of Justice. The most important of these from a competition law perspective are the Commission and the Council of Ministers, which are roughly equivalent to the American executive and legislative branches of government, respectively. Under the Treaty of Rome, the Commission drafts regulations concerning competition for consideration by the Council of Ministers. EEC TREATY art. 155. If the Council passes the regulations, the Commission must implement them by drafting "guidelines" and making "decisions" akin to those of U.S. administrative agencies. See EEC TREATY art. 155. The Commission, therefore, has tremendous power to formulate and implement competition policy. This power is by no means absolute, however, for the Council must enact legislation before the Commission may implement it. See EEC TREATY arts. 149, 155.

5. EEC TREATY art. 85. The Treaty provides in relevant part:

The following shall be prohibited as *incompatible with the common market*: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and *which have as their object or effect the prevention, restriction or distortion of competition within the common market.*

EEC TREATY art. 85(1) (emphasis added). This Note will not address joint ventures such as coal, steel, or transport ventures, which fall under separate specific regulations. The TREATY ESTABLISHING THE EUROPEAN COAL AND STEEL COMMUNITY [ECSC TREATY] arts. 65-66 governs competition in the coal and steel industries. Rules of competition for the transport sector are set out in Council Regulation 1017/68 Applying Rules of Competition to Transport by Rail, Road and Inland Waterway, 1968 O.J. (L 175) 1; Council Regulation 4056/86 Laying Down Rules for the Application of Articles 85 and 86 to Maritime Transport, 1986 O.J. (L 378) 4; and Council Regulation 3975/87 Laying Down the Procedure for the Application of the Rules on Competition to Air Transport, 1987 O.J. (L 374) 1. Claus-Dieter Ehlermann, Director-General of the Competition Directorate (DG IV), notes that the Commission might soon combine the three regulations on land, sea, and air transport into a single regulation. Claus-Dieter Ehlermann, *The Contribution of EC Competition Policy to the Single Market*, 29 COMMON MKT. L. REV. 257, 264 (1992).

6. See *infra* Part I.

and development of a certain product or the establishment of a distribution system for all of the parent companies' products.

The other system of evaluation governs joint ventures that are not cooperative. In December 1989, the Council of the European Communities adopted Regulation 4064/89 (Merger Regulation).⁷ The Merger Regulation establishes criteria for determining the permissibility of mergers. It also applies, however, to *concentrative* joint ventures, or ventures that cause a structural change in the market by creating a new autonomous economic entity.⁸

Although each of the two compatibility standards is problematic,⁹ the greatest difficulties arise from the differences between the two standards.¹⁰ The existence of two substantively different standards may confuse would-be venturers. Faced with the uncertainty about which standard the Commission is likely to apply, the would-be venturers may even distort their behavior by making an otherwise cooperative venture concentrative, or deciding not to form a procompetitive venture.¹¹ Finally, evaluation of joint ventures by two different sectors of the Competition Directorate of the Commission¹² may lead to an even greater difference between the standards over time, unless the Commission makes an effort to harmonize them.¹³ Given the time pressures involved in setting up joint ventures, the two standards are likely to diverge further without intervention, for venturers may not be able to appeal Commission decisions and obtain concomitant judicial review of the standards applied.¹⁴

The Commission and commentators note that the potential for reform in the procedural arena is quite great.¹⁵ The current literature

7. Regulation 4064/89, *supra* note 3.

8. *See infra* Part II.

9. *See infra* sections III.A.1, III.A.2.

10. *See infra* section III.A.3.

11. *See infra* notes 158-69 and accompanying text.

12. A Merger Task Force evaluates cases under the Merger Regulation but does not consider cases under Article 85.

13. *See infra* section III.C.

14. *See* William Sibree, *EEC Merger Control and Joint Ventures*, 17 EUR. L. REV. 91, 91-92 (1992) ("The long term worry is that the Commission is unlikely in practice to be subject to any effective judicial control Appeal to the Court of First Instance, with a likely time lag of at least 12 months, is not a realistic possibility in most cases."); *cf.* Bernd Langeheine, *Judicial Review in the Field of Merger Control*, 1992 J. BUS. L. 121 (discussing the potential importance of judicial review under the Merger Regulation). Appeal is especially unlikely when the Commission pressures parties to propose and adhere to compromise conditions in return for a determination of compatibility. *See* Eamonn Doran, *Reflections on the ICI/Du Pont EC Merger Regulation Case*, 14 EUR. COMPETITION L. REV. 70, 72 (1993) ("The beauty about such compromises for the Commission is that the parties go away reasonably happy having got most of their deal and are therefore unlikely to appeal to the European Court").

15. *See* Commission Press Release, IP (92) 1111, Dec. 23, 1992 (on file with author); Commission, Draft Guidelines for the Appraisal of Cooperative Joint Ventures, *reprinted* in 4 C.M.L.R. ANTITRUST REP. 504 (1992) [hereinafter Draft Guidelines]; *Competition: Sir Leon Urges Speedier Procedures for Vetting Joint Ventures*, EUR. REP. No. 1772, June 1, 1992; *New*

discusses the difficulties would-be venturers have in determining if their proposed venture is concentrative or cooperative¹⁶ and the procedural differences between notifications under the two standards.¹⁷

This Note argues, however, that the substantive differences between the two standards are even more problematic than the procedural ones. Reducing the substantive differences between the two compatibility standards, short of creating a single standard that is unresponsive to the tensions between concentrative and cooperative situations, will have a beneficial impact. Similar standards of compatibility, coupled with procedural efficiency, will mollify venturers' concerns about the unpredictability of the Commission's inquiry and encourage them to establish procompetitive joint ventures. Moreover, appropriate standards and adequate safeguards will ensure that the Commission does not unduly sacrifice its enforcement powers in the name of certainty.¹⁸

Part I of this Note examines the history, legal basis, and interpretation of the Article 85 compatibility standard and its application to cooperative joint ventures. Part II analyzes the same issues with respect to the Merger Regulation standard for concentrative joint ventures. These Parts focus on the Commission's evaluation of compatibility with the Common Market under each standard, using the relevant Commission Notices¹⁹ and decisions to illuminate how each of the

Challenge Faced by Competition Authority, 708 Common Mkt. Rep. (CCH) 1 (June 11, 1992). For examples of treatment by commentators, see *infra* note 17.

16. See, e.g., Anthony McClellan, *Mergers and Joint Ventures with a Community Dimension and Other Acquisitions*, 1992 J. BUS. L. 136; John H. Riggs & Anthony Giustini, *Joint Ventures Under EEC Competition Law*, 46 BUS. LAW. 849 (1991); Otto Sandrock & Elke van Arnheim, *New Merger Control Rules in the EEC*, 25 INTL. LAW. 859 (1991); Horst Satsky, *The Merger Regulation of the European Economic Community*, 38 AM. J. COMP. L. 923 (1990); Terence P. Stewart & Delphine A. Abellard, *Merger Control in the European Community: The EC Regulation "On the Control of Concentrations Between Undertakings" and Implementing Guidelines*, 11 NW. J. INTL. L. & BUS. 293 (1990).

17. Under the notification system of the EC, would-be venturers must, on their own, engage in analysis similar to that of the Commission to see if their proposed venture is consistent with EC competition law. If there is any doubt about the venture's compatibility with the Common Market, the parent companies must "notify" the venture to the Commission, and request an exemption, "negative clearance," or an informal "comfort letter." If firms fail to notify their venture, they run the risk of fines, or even nullification of the venture. Regulation 4064/89, *supra* note 3, art. 4; Council Regulation 17/62 Implementing EEC Treaty Articles 85 and 86, 1962 O.J. (L 13) 204, as amended by Council Regulation 59/62, 1962 O.J. (L 58) 1655; Council Regulation 118/63, 1963 O.J. (L 162) 2696; Council Regulation 2822/71, 1971 O.J. (L 285) 49; and as modified for new members by the Acts of Accession) [hereinafter Regulation 17]. Note that the Acts of Accession, passed upon the entry of new members into the EC, tend to modify some of the requirements of Regulation 17 for these new members during a specified transition period. See Patrick Thieffry et al., *The Notification of Mergers Under the New EEC Merger Control Regulation*, 25 INTL. LAW. 615 (1991); see also Scott L. Holden, *Notify and Justify: The Exemption Process for Mergers and Joint Ventures in the EEC*, 5 J.L. & COM. 395, 395-99 (1985).

18. An obvious tension exists between the desire of venturers for certainty and that of the Commission for enforcement. Clearer principles of evaluation, however, could promote certainty without arbitrarily removing ventures from the scope of the Commission's inquiry.

19. Notices are nonbinding statements of Commission policy.

compatibility standards functions in practice. Finally, Part III suggests how the Commission should revise and clarify the two compatibility standards to promote joint ventures that increase competition without sacrificing enforcement. This Note concludes that the Commission should harmonize the two compatibility standards for cooperative and concentrative joint ventures, but should not merge them into a single standard.

I. THE ARTICLE 85 COMPATIBILITY STANDARD

Before comparing and analyzing the two standards of compatibility in Part III in order to recommend specific reforms, Parts I and II of this Note set out each of the standards in detail. Part I examines the history, basis, and interpretation of the compatibility standard under Article 85. Section I.A documents the Commission's early attempts to control joint ventures through the use of Article 85. Section I.B discusses the basis for the Commission's control under Article 85 by analyzing Article 85 itself. Finally, section I.C explores the Commission's interpretation of the Article 85 compatibility standard through a textual analysis of its Notices and decisions. Together with the examination of the Merger Regulation compatibility standard in Part II, this Part provides the necessary basis for the comparison of the two standards and the proposal for reform in Part III.

A. *Early Attempts To Control Mergers and Joint Ventures*

Neither Article 85, nor any other provision of the Treaty of Rome, explicitly refers to merger or joint venture control. Article 85(1) of the Treaty of Rome outlaws "agreements . . . decisions . . . and concerted practices . . . which have as their object or effect the prevention, restriction or distortion of competition within the common market" ²⁰ Article 85(3), however, exempts certain agreements, decisions, and concerted practices from the purview of Article 85(1). ²¹

Sir Leon Brittan, the Competition Commissioner from 1989 to 1993, recently explained the reasons for the omission of any mention of mergers or joint ventures in the Treaty:

[T]he merger issue was not high on anyone's agenda in Europe in the mid-1950s. National competition policy, where it existed, was not overly concerned with mergers and the EEC's founding Treaty reflected that

20. EEC TREATY art. 85. The other major competition article in the Treaty is EEC TREATY art. 86. Article 86 sanctions the abuse of a dominant position and is generally only applicable to single firms acting as monopolies. See, e.g., Case 6/72, *Europemballage Corp. v. Commission*, 1973 E.C.R. 215 [*Continental Can*] (upholding the Commission's narrow reading of Article 86). Because the Court of Justice held that Article 86 applies only to concentrations currently in a dominant position, this Note will not discuss Article 86 in detail. For a comparison between the Article 86 notion of dominant position and the notion of dominant position under the Merger Regulation, see *infra* note 178 and accompanying text.

21. See *infra* section I.C.5.

situation. . . . Whatever the authors of the Treaty and the six Member States thought they were doing about mergers in 1957, they left a large gap which the momentum of events in the following decades first highlighted and then began to fill.²²

As Competition Commissioner, Brittan greatly influenced the filling of this gap. In December 1989, under Brittan's guidance, the Commission drafted and the Council adopted the Merger Regulation, and Brittan led the initial process of interpreting the Merger Regulation through Notices and decisions.

As early as 1964, the Commission recognized the existence of the merger and joint venture gap in the Treaty and appointed experts to study the problem. In a 1966 Memorandum, the experts recommended that the Commission not examine certain concentrations²³ under Article 85; instead they suggested that the Commission submit to the Council a regulation geared specifically toward concentration enforcement.²⁴ The experts suggested treating joint ventures as concentrations falling outside the scope of Article 85 enforcement, so long as they were not accompanied by additional unnecessary restrictions or anticompetitive practices.²⁵ The Council failed to adopt the regulations that the Commission submitted to it in the ensuing years.²⁶ In the absence of a regulation on concentration control, however, the Commission could not follow the Memorandum's approach without sacrificing its control over joint ventures and other concentrations. Accordingly, during the 1970s, the Commission decided to investigate joint ventures under Article 85 in order to exercise *some* enforcement power.²⁷

A landmark Court of Justice decision in 1987, however, greatly

22. LEON BRITTAN, COMPETITION POLICY AND MERGER CONTROL IN THE SINGLE EUROPEAN MARKET 24 (1991).

23. All mergers are concentrations because they concentrate the resources of two or more firms into one. Some joint ventures — those that involve a structural change in the market — are also concentrations.

24. See Eur. Econ. Community, EEC Studies: The Problem of Industrial Concentration in the Common Market (1966), reprinted in FRANK L. FINE, MERGERS AND JOINT VENTURES IN EUROPE: THE LAW AND POLICY OF THE EEC 147, 163 (annex G) [hereinafter 1966 Memorandum]. For an overview of the history of EC control over joint ventures, see Anand S. Pathak, *The EC Commission's Approach to Joint Ventures: A Policy of Contradictions*, 5 EUR. COMPETITION L. REV. 171, 173-76 (1991).

25. See 1966 Memorandum, *supra* note 24, at 166; see also Pathak, *supra* note 24, at 174. But see John T. Lang, *Joint Ventures Under the EEC Treaty Rules on Competition - II*, 13 IRISH JURIST 132, 135 (1978) (arguing that the authors of the Memorandum did not intend to exclude joint ventures from the ambit of Article 85).

26. See *infra* notes 141-44 and accompanying text.

27. See, e.g., Case IV/26 917 — Henkel/Colgate, Commission Decision of 23 December 1971, reprinted in CM/M/I COMPETITION L. W. EUR. & U.S.A. 476e (1983); Case IV/26 612 — MAN/SAVIEM, Commission Decision of 17 January 1972, 1972 J.O. (L 31) 29; Case IV/28 796 — Beecham/Parke-Davis, Commission Decision of 17 January 1979, 1979 O.J. (L 70) 11. Some would date the Commission's change of policy from its Sixth Report on Competition Policy (1976), reprinted in CM/M/VII COMPETITION L. W. EUR. & U.S.A. 363 (1981). Pathak, *supra* note 24, at 174-75, contains a discussion of the implications of this report.

reduced the Commission's ability to apply Article 85 to joint ventures.²⁸ In *Philip Morris*,²⁹ the European Court of Justice investigated whether the acquisition of a minority shareholding in a competitor constituted an infringement of Article 85(1). In the course of answering this question, however, the court determined that Article 85(1) only governs situations in which both parent companies remain independent, such as the acquisition of a minority shareholding or the creation of a joint venture.³⁰ After *Philip Morris*, the Commission could no longer treat mergers as falling under Article 85(1) and could only use that provision to control some joint ventures.³¹

B. *The Legal Basis for Commission Control Under Article 85*

Since the entry into force of the Merger Regulation, the Commission has applied Article 85 only to cooperative joint ventures, that is, to all ventures that do not qualify as concentrative under the Merger Regulation.³² The Commission applies Article 85 not only to networks of joint ventures and "fully-fledged joint ventures," but also to ventures that perform limited functions and are not independent market participants.³³ In its recent Draft Guidelines, the Commission noted the possible range of cooperative joint ventures: "[T]heir purpose may be R&D, the purchase of basic or intermediate products, investment, production or sales planning, the fixing of prices, the sharing of markets, or joint selling."³⁴ The final guidelines, embodied in the Commission's 1993 Notice, list the possible kinds of cooperative joint ventures in even greater detail.³⁵

28. Joined Cases 142 & 156/84, *British Am. Tobacco Co., R.J. Reynolds v. Commission*, 1987 E.C.R. 4487 [*Philip Morris*]. The European Court of Justice can review any Commission decision at the request of an interested party. Commentators note that after *Philip Morris*, Article 85 "applies only to the conduct of independent undertakings when their independence remains unaffected by the restrictive practice agreed upon between them." Sandrock & van Arnhem, *supra* note 16, at 861.

29. *Philip Morris*, 1987 E.C.R. at 4575.

30. 1987 E.C.R. at 4578-79.

31. Article 85 now only applies to cooperative joint ventures, which are typically those in which the parent companies form a joint venture for a limited purpose and remain independent. See *infra* sections I.B, I.C.

32. See Commission Notice Concerning the Assessment of Cooperative Joint Ventures Pursuant to Article 85 of the EEC Treaty, 1993 O.J. (C 43) 2, 3 [hereinafter 1993 Notice] ("This Notice applies to all JVs which do not fall within the scope of application of Article 3 of Council Regulation (EEC) 4064/89 . . .").

33. Draft Guidelines, *supra* note 15, at 514-17. The 1993 Notice provides a list of categories of joint ventures to which Article 85(1) does not apply. These categories include joint ventures that are a matter of "internal organization" and those that fall under the 1968 Notice as having limited management cooperation, technical arrangement, or informational purposes. See 1993 Notice, *supra* note 32, at 4.

34. Draft Guidelines, *supra* note 15, at 508.

35. The 1993 Notice begins with the very general statement that "Joint Ventures . . . embody a special, institutionally fixed form of cooperation between undertakings" and then lists all the "fields of business activity" in which joint ventures might function:

The Commission will only evaluate cooperative ventures under Article 85(1) if the ventures meet certain size thresholds. The Commission adopted its current thresholds in a 1986 Notice and indicated its continued approval of the thresholds in its 1993 Notice.³⁶ The thresholds for cooperative joint ventures covered by Article 85(1) are quite low in comparison with those under the Merger Regulation.³⁷ In order for Article 85(1) to apply to a joint venture, goods or services covered by the agreement and other substitute goods or services produced by the parents must comprise more than five percent of the relevant market. The aggregate annual worldwide turnover of the parents must also exceed 200 million Ecu.³⁸

If a joint venture meets the relevant thresholds, the Commission examines whether it is compatible with the Common Market. Neither Article 85 nor its implementing regulations set out the requirements of the compatibility standard in detail.³⁹ The 1993 Notice, however, compiles the most important issues in the current compatibility analysis.⁴⁰ According to the Notice, the Commission should evaluate competition between the parent companies of a joint venture and then determine the venture's effect on third parties. If the joint venture is full function, that is, an autonomous economic entity, the Commission also should evaluate competition between each parent company and the joint venture.⁴¹ In the course of its analysis, the Commission considers a number of additional factors:

- the market shares of the parent companies and the JV, the structure of the relevant market and the degree of concentration in the sector concerned,
- the economic and financial strength of the parent companies, and

[T]he procuring and processing of data, the organization of working systems and procedures, taxation and business consultancy, the planning and financing of investment, the implementation of research and development plans, the acquisition and granting of licenses for the use of intellectual property rights, the supply of raw materials or semi-finished products, the manufacture of goods, the provision of services, advertising, distribution and customer service.

1993 Notice, *supra* note 32, at 2. Nevertheless, the simple description in the Draft Guidelines remains helpful, although less authoritative than the final version.

36. See *id.* at 4; Commission Notice on Agreements of Minor Importance Which Do Not Fall Under Article 85(1) of the Treaty Establishing the European Economic Community, 1986 O.J. (C 231) 2, 2-3 [hereinafter Notice-Minor Importance].

37. See *infra* notes 173-76 and accompanying text.

38. 1993 Notice, *supra* note 32, at 4; Notice-Minor Importance, *supra* note 36, at 2-3. An Ecu is a European currency unit. Two hundred million Ecu equaled about 236 million dollars on October 14, 1993. See Ecu, 1993 O.J. (C 277) 1. Article 85(1) also does not apply to joint ventures that are "neutral to competition," such as ventures that "are concerned solely with technical and organizational arrangements." 1993 Notice, *supra* note 32, at 4. Such ventures, however, are quite rare.

39. See EEC TREATY art. 85; Regulation 17 *supra* note 17.

40. 1993 Notice, *supra* note 32, at 2.

41. *Id.* at 4.

any commercial or technical edge which they may have in comparison to their competitors,

- the market proximity of the activities carried out by the JV,
- whether the fields of activity of the parent companies and the JV are identical or interdependent,
- the scale and significance of the JV's activities in relation to those of its parents,
- the extent to which the arrangements between the firms concerned are restrictive,
- the extent to which market access by third parties is restricted.⁴²

The Commission does not weigh each of these factors equally, however. Market share, for instance, is much more important than many of the other factors.⁴³ To provide an understanding of how these factors relate to each other and to the entire evaluation of the effects on actual and potential competition between the parents, between the joint venture and the parents, and with third parties, the following section examines the relevant Commission decisions.

C. *The Commission's Interpretation of the Article 85 Compatibility Standard*

The Commission's decisions flesh out in greater detail its interpretation of "compatibility with the Common Market" under Article 85. Typically, the compatibility inquiry under Article 85 proceeds in two stages. First, the Commission examines the joint venture to see if it violates Article 85(1) of the Treaty. Article 85(1) characterizes as incompatible with the Common Market "all agreements between undertakings . . . which may affect trade between Member States and which have as their object or effect the prevention, restriction, or distortion of competition within the common market."⁴⁴ The Commission commonly finds that joint ventures constitute "agreement[s] between undertakings," and that they not only affect trade but also lessen or distort competition, and are therefore incompatible with the Common Market.⁴⁵

Second, assuming the venture violates Article 85(1), the Commission determines whether the venture deserves an exemption under Article 85(3). Article 85(3) exempts from the requirements of Article 85(1):

42. *Id.* at 6.

43. See *infra* notes 93-95 and accompanying text.

44. EEC TREATY art. 85(1).

45. See, e.g., Case IV/33 016 — *Ansay*, Commission Decision of 19 December 1990, 1991 O.J. (L 152) 54, 58; Case IV/32 006 — *Alcatel Espace/ANT Nachrichtentechnik*, Commission Decision of 12 January 1990, 1990 O.J. (L 32) 19, 23-24; Case IV/27 093 — *De Laval/Stork*, Commission Decision of 25 July 1977, 1977 O.J. (L 215) 11, 14-16. Fine notes that "[t]he result is a sluice gate effect by which JVs not falling into the *de minimis* category will almost inevitably infringe Article 85(1) and become subject to the rule of reason formula of Article 85(3)." FINE, *supra* note 24, at 70.

— any agreement or category of agreements between undertakings;
....

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.⁴⁶

The Commission interprets Article 85(3) quite liberally and eventually grants exemptions to most ventures caught by Article 85(1).⁴⁷ The Commission is particularly generous in interpreting the phrase “improving the production or distribution of goods or to promoting technical or economic progress,” finding that “mere contribution” to these goals is sufficient to warrant an exemption, and that the contribution need not be “substantial.”⁴⁸ In order to be eligible for exemption, however, the parties must have notified the joint venture agreement to the Commission and requested an exemption.⁴⁹

The Commission’s two-step inquiry requires the notification of many ventures because they fall under Article 85(1), despite the fact that they easily meet the conditions for Article 85(3) exemption. One commentator argues that the Commission’s deliberate policy of forcing notifications under Article 85(1), even in cases in which an exemption is obviously desirable, “may be counterproductive and might actually hinder enforcement,”⁵⁰ because it spreads the Commission’s energies too thin. Another commentator notes that requiring so many notifications “can only become more cumbersome as the volume of JVs increases, leading to inconsistent or irrational results.”⁵¹

This Note addresses the Commission’s current mode of analysis under Article 85 in order to determine whether these and other criticisms are well founded. The Commission’s 1993 Notice clarifies that its Article 85(1) joint venture inquiry focuses on: (1) actual or poten-

46. EEC TREATY art. 85(3).

47. See, e.g., *Cekacan*, 1990 O.J. (L 299) at 69; *Alcatel Espace/ANT Nachrichtentechnik*, 1990 O.J. (L 32) at 24-25; *De Laval/Stork*, 1977 O.J. (L 215) at 17-19.

48. See Case IV/32 363 — *KSB/Goulds/Lowara/ITT*, Commission Decision of 12 December 1990, 1991 O.J. (L 19) 25, 33.

49. Article 4 of Regulation 17/62, Article 85’s chief implementing regulation, provides that “[u]ntil [agreements, decisions, or concerted practices] have been notified, no decision in application of Article 85(3) may be taken.” Regulation 17, *supra* note 17. If the parent companies mistakenly notify their joint venture under the Merger Regulation, instead of Article 85, the notification will nonetheless be considered adequate for purposes of Article 85(3).

50. 2 BARRY E. HAWK, UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE 308-09 (1990). Hawk characterizes the Commission’s inquiry as “schizophrenic”; he argues that the flexibility of the Commission’s current approach is only “[a]t first glance . . . a good thing,” and is far outweighed by the need for certainty. *Id.* at 308.

51. FINE, *supra* note 24, at 89.

tial competition between the parent companies; (2) actual or potential competition between each parent and the joint venture; and (3) potential effects on third parties.⁵² In the following sections, this Note analyzes the relevance of these considerations in turn, before examining other factors the Commission may take into account. After establishing what constitutes incompatibility with the Common Market under Article 85(1), this Note then considers the grounds for exemption under Article 85(3).

1. *Actual or Potential Competition Between the Parents*

In its Article 85(1) analysis, the Commission first examines whether the creation of the joint venture will affect actual or potential competition between its parent companies. If a venture's parent companies are actual or potential competitors, and if the parents transfer all their competencies in a certain area to the venture, the venture might reduce competition by achieving alone what the parents otherwise could only have achieved separately. The 1993 Notice explains that the creation of a cooperative joint venture will affect competition only to the extent that its parent companies are actual or potential competitors.⁵³ If a venture's parent companies are active in completely different markets, it is unlikely that their cooperation will give them an unfair competitive advantage. Actual or potential competition is one of the fundamental areas of Article 85 analysis, one which the Commission has considered since long before the 1993 Notice.⁵⁴

A 1977 case concerning the creation of a joint venture for the manufacture of turbines, compressors, and other heavy equipment exemplifies the Commission's concern with the issue of actual or potential competition. In *De Laval/Stork*,⁵⁵ the Commission found that "the two parties were actually or at the very least potentially in competition with each other on the relevant markets"⁵⁶ because both parents were previously active in the joint venture's submarkets.⁵⁷ Curiously, rather than insisting that the parents compete with the new joint venture so that the industry would achieve the net addition of a competi-

52. 1993 Notice, *supra* note 32, at 2, 4-5.

53. *Id.* at 5.

54. See, e.g., Case IV/28 796 — Beecham/Parke-Davis, Commission Decision of 17 January 1979, 1979 O.J. (L 70) 11, 15; Case IV/26 917 — Henkel/Colgate, Commission Decision of 23 December 1971, reprinted in CM/M/I COMPETITION L. W. EUR. & U.S.A. 476e (1992). Actual or potential competition is central to the American Antitrust analysis as well. See Robert Pitofsky, *A Framework for Antitrust Analysis of Joint Ventures*, 54 ANTITRUST L.J. 893, 897 (1986) ("The Supreme Court made clear twenty years ago . . . that the principal anticompetitive concern with respect to the formation of a joint venture is that it might result in a lessening of potential competition." (citing *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158 (1964))).

55. Case IV/27 093 — De Laval/Stork, Commission Decision of 25 July 1977, 1977 O.J. (L 215) 11.

56. 1977 O.J. (L 215) at 15.

57. 1977 O.J. (L 215) at 14.

tor, the Commission required both parents to withdraw from the market, resulting in a net *reduction* by one in the number of competitors in the industry.⁵⁸ The Commission further insisted that "[t]he withdrawal would have had to have been completely irreversible so that [the parents] could no longer be regarded as actual or potential competitors."⁵⁹ The Commission continues to require market exit by the parents, although lately it has relaxed this requirement to permit joint ventures when only one parent exited the market.⁶⁰

Scholars have criticized the Commission's notion of actual or potential competition, claiming that it is overbroad and causes the Commission to require market exit more often than necessary.⁶¹ For instance, the Commission sometimes finds actual or potential competition between the parents of a venture and a resultant violation of Article 85(1), but then grants an Article 85(3) exemption because the parents could not reasonably have borne the financial and other risks on their own.⁶² Competition cannot really be "potential," however, if the parties lack adequate resources to compete.⁶³ In the discussion paper to its Draft Guidelines, the Commission recognized this problem and proposed "putting greater emphasis, when dealing with potential competition, on the '*realistic economic approach*' first adopted in 1983, so as to give a reasonable field of application to the ban in Article 85(1)."⁶⁴ Unfortunately, the Commission did not reiterate this pledge in the final version of the guidelines.⁶⁵

In practice, the Commission has already pursued a realistic economic approach in a few recent, progressive decisions.⁶⁶ In *Elopak/Metal Box-Odin*,⁶⁷ a case involving a joint venture to create a new

58. 1977 O.J. (L 215) at 16.

59. 1977 O.J. (L 215) at 16; *see also* Case IV/M188 — *Herba/IRR*, Commission Decision of 28 April 1992 (on file with author). In *Herba*, the Commission was also concerned about the possibility of coordination of competitive behavior between the parents and a subsidiary. *Herba/IRR* at 2.

60. In *Apollinaris/Schweppes*, Commission Decision of 24 June 1991, *reprinted in* CM/M/XIII COMPETITION L. W. EUR. & U.S.A. 195 (1992), only Cadbury-Schweppes planned to exit the market, leaving some of the other parent's divisions to compete with the joint venture. Commission Press Release, IP (91) 862, Sept. 27, 1991, at 1 (on file with author).

61. *See, e.g.*, Pathak, *supra* note 24, at 177.

62. *See, e.g.*, Case IV/32 363 — *KSB/Goulds/Lowara/ITT*, Commission Decision of 12 December 1990, 1991 O.J. (L 19) 25, 34. After finding "potential competition" under its Article 85(1) analysis, the Commission declared that "the financial risk was too great. Thus, without the extension of the cooperation, the chrome nickel steel pump would not have reached the market." 1990 O.J. (L 19) at 34.

63. *See, e.g.*, Pathak, *supra* note 24, at 177 (criticizing "a very broad and unrealistic definition of potential competition").

64. Draft Guidelines, *supra* note 15, at 505 (bold omitted).

65. *See* 1993 Notice, *supra* note 32, at 2.

66. Case IV/32 688 — *Konsortium ECR 900*, Commission Decision of 27 July 1990, 1990 O.J. (L 228) 31; *see also* Case IV/32 009 — *Elopak/Metal Box-Odin*, Commission Decision of 13 July 1990, 1990 O.J. (L 209) 15.

67. 1990 O.J. (L 209) at 15.

paperboard carton, the Commission decided that the venture was compatible with the Common Market. The novelty of this decision stems not from its outcome, however, but from the fact that the Commission did not exempt the joint venture under Article 85(3). Rather, it found that the conditions for applying Article 85(1) were not met because the parents were not actual or potential competitors.⁶⁸ The Commission noted that "[n]either party could in the short term enter the market alone as such entry would require a knowledge of the other party's technology which could not be developed without significant and time-consuming investment."⁶⁹ Commentators observed:

This is a perfectly reasonable finding. But a reader accustomed to the approach displayed in the Commission's previous case-law may feel a little jolt. . . . Dozens of decisions have used this kind of reasoning in the past, but always as justification for granting an exemption under Article 85(3), as opposed to negative clearance under Article 85(1). It seems that the Commission, at least in this case, was willing to take a more tolerant view.⁷⁰

The Commission's approach in *Elopak/Metal Box-Odin* seems especially radical when compared with another case in the packaging sector. In *Cekacan*,⁷¹ when faced with a similar paperboard packaging venture in the same year, the Commission found: "[T]he parties cannot be considered as direct competitors None the less, they must be considered as potential competitors in the use of methods similar to *Cekacan* methods and producing and selling laminates."⁷² Yet, at the same time, the Commission specifically found that the parents each possessed patents and know-how that the other did not and that the packaging was a "completely new product."⁷³

The *Cekacan* style of reasoning — interpreting "potential competition" broadly and then exempting the venture under Article 85(3) — usually prevails over the "realistic economic approach" espoused in *Elopak/Metal Box-Odin*.⁷⁴ Typically, if the parents of a venture are not actual competitors, the Commission will classify them as potential competitors if their product markets are related in any way, even if the label is inapposite from a practical standpoint. Despite its new "realistic economic approach," the Commission tends to cast the net of po-

68. 1990 O.J. (L 209) at 18-22.

69. 1990 O.J. (L 209) at 19.

70. Ian S. Forrester & Christopher Norall, *Competition Law*, 10 Y.B. EUR. L. 407, 421-22 (1990).

71. Case IV/32 681 — *Cekacan*, Commission Decision of 15 October 1990, 1990 O.J. (L 299) 64.

72. 1990 O.J. (L 299) at 68.

73. 1990 O.J. (L 299) at 65.

74. See, e.g., Case IV/32 737 — *Eirpage*, Commission Decision of 18 October 1991, 1991 O.J. (L 306) 22 (finding potential competition and then permitting exemption under Article 85(3)).

tential competition widely, waiting until its Article 85(3) analysis to sort through its catch and release the undeserving.

2. *Actual or Potential Competition Between a Parent and the Joint Venture*

If the joint venture under examination is a full-function venture — one that is economically independent of its parents — the Commission also analyzes the competition between the venture and one or more of its parents. The 1993 Notice provides:

The relationship between the parents and the JV takes a specific significance when the JV is a full-function JV and is in competition with, or is a supplier or a customer of, at least one of the parents. . . . The restriction of competition . . . typically manifests itself in the division of geographical markets, product markets (especially through specialization) or customers. . . . If they remain active competitors, they will usually be tempted to reduce the intensity of competition by coordinating their business policy.⁷⁵

Therefore, when faced with a full-function venture, the Commission analyzes the competitive relationship between the parents and the venture they created.

Despite the Commission's insistence in policy statements that it seeks to determine the extent of competition between an autonomous joint venture and one or more of its parents, the Commission's decisions, as a practical matter, generally focus on the justifiability of parental restrictions on the venture instead.⁷⁶ In *Finaf/Procter & Gamble*,⁷⁷ for example, the Commission noted approvingly the parents' amendment of their joint venture agreement so as "not to restrict the freedom of their joint ventures in Italy, Spain and Portugal to pursue autonomous business policies within the Community."⁷⁸ In *Eirpage*,⁷⁹ the joint venture sought to establish a nationwide paging service in Ireland; one of the parents, however, manufactured pagers and other equipment needed to access the service. Accordingly, before approving the joint venture, the Commission required assurances from the parties that the joint venture would not prefer the parent's equipment over that of competing manufacturers.⁸⁰ Finally, in *Du Pont/*

75. 1993 Notice, *supra* note 32, at 5-6.

76. See Case IV/33 697 — *Finaf/Procter & Gamble*, Commission Decision of 7 January 1992, 1992 O.J. (C 3) 2, 5; *Eirpage*, 1991 O.J. (L 306) at 26-27; Commission Press Release (DuPont/Merck), IP (91) 381, May 6, 1991, at 1 (on file with author). In these three cases, respectively, the Commission required special assurances that the parents not hinder the freedom of the joint venture to compete, that the parents not be given favorable terms of sale by the joint venture, and that the parents and the venture not exchange sensitive information.

77. Case IV/33 697 — *Finaf/Procter & Gamble*, Commission Decision of 7 January 1992, 1992 O.J. (C 3) 2.

78. 1992 O.J. (C 3) at 5.

79. 1991 O.J. (L 306) at 22.

80. 1991 O.J. (L 306) at 26.

Merck,⁸¹ the Commission required limits on the exchange of sensitive information between the venture and the parents, as one parent was an actual, and the other a potential, competitor.⁸² These cases demonstrate the Commission's willingness to permit the creation of a joint venture only on condition that the joint venture agreement contains safeguards to ensure that autonomous joint ventures remain autonomous.

In practice, then, the Commission is more likely to examine the justifiability of parental restrictions on the joint venture's freedom of action than it is to try to characterize the relationship between the parent and the venture in order to draw conclusions about the venture's likely effects on competition. Although the Commission's policy statements stress the competitive relationships between the parents and the venture, its decisions focus on the actual extent of autonomy of the venture.

3. *Effects on Third Parties*

The Commission's evaluation of a cooperative joint venture under Article 85(1) also looks to the proposed venture's potential effects on third parties. Although not determinative, harm to third parties may be evidence of an Article 85(1) violation. In its 1993 Notice, the Commission acknowledged that "[t]he restrictive effect on third parties depends on the JV's activities in relation to those of its parents and on the combined market power of the undertakings concerned."⁸³ The Commission's inquiry into actual or potential competition may indicate potential effects on third parties, but, at this point in the inquiry, the Commission addresses effects on third parties by examining the joint venture and parents' role in the relevant market or markets as a whole. The activities of the joint venture in relation to its parents are important to third parties because, as seen in the previous section, without assurances from the companies concerned, joint ventures may favor their parents in commercial transactions and vice versa, thereby hurting other competitors.⁸⁴ The combined economic strength of the parents and the venture affects third parties as well. A strong agree-

81. Commission Press Release (Du Pont/Merck), *supra* note 76.

82. *See id.* at 2.

83. 1993 Notice, *supra* note 32, at 6.

84. *See, e.g., Eirpage*, 1991 O.J. (L 306) at 25-27 (noting that, without special assurances, Telecom, the parent that was a licensing authority, could grant the joint venture licenses on special terms, and the venture could in turn buy pagers at a discount from Motorola, the other parent). This consideration of third-party effects is reminiscent of the essential facilities doctrine in American antitrust law, whereby firms may not cooperate to exclude "essential facilities" from their other competitors. *See, e.g., Associated Press v. United States*, 326 U.S. 1 (1945); *United States v. Terminal R.R. Assn.*, 224 U.S. 383 (1911); *see also* OECD, COMPETITION POLICY AND JOINT VENTURES 95 (1986) ("[I]t should be examined whether the venture adversely affects competition by excluding enterprises not party to the arrangement from access to an essential facility or input.").

gate financial position, for example, may impede competition in a market characterized by small- and medium-sized competitors.⁸⁵

In all cases, the Commission allows third parties to submit observations about the proposed joint venture, and it often takes such observations quite seriously in rendering a decision. In a case involving the manufacturing of a certain piece of an industrial pump,⁸⁶ for example, the Commission noted: "The competitors fear that when the parties to the cooperation agreement have succeeded in driving out cast-iron pumps, they will exploit the monopoly thus acquired by raising prices, to the detriment of consumers. . . . The detailed arguments of the competitors are taken into account herein below."⁸⁷ The Commission concluded that the venture restricted competition by denying third parties access to the process technology involved in the new stainless steel pumps, although it eventually exempted the venture on other grounds.⁸⁸

The Commission also found harm to third parties in *Screensport/EBU Members*,⁸⁹ a case initiated upon the complaint of a third party. *Screensport* concerned the privileged position of the Eurosport channel, a joint venture, over Screensport and other potential transnational commercial satellite television sports channels.⁹⁰ The Commission specifically found that the joint venture agreement in question would deprive other competitors from televising sports events because of Eurosport's priority access to programming.⁹¹

The Commission often considers harm to third parties to be evidence of an Article 85(1) violation. It is particularly likely to find a violation when some or all of the adversely affected third parties submit comments to the Commission detailing the extent of their probable harm. Harm to third parties typically results when a parent favors the joint venture over the venture's competitors, or the venture inappropriately amasses financial strength in an industry characterized by small competitors.

85. The Commission has been concerned about this for some time. As early as its 1968 Notice, it considered the "global position" of the cooperating firms. Communication Relative aux Accords, Décisions et Pratiques Concertées Concernant la Coopération Entre Entreprises, 1968 J.O. (C 75) 3, corrected at 1968 J.O. (C 84) 14 [hereinafter Communication].

86. Case IV/32 363 — KSB/Goulds/Lowara/ITT, Commission Decision of 12 December 1990, 1991 O.J. (L 19) 25, 31.

87. 1991 O.J. (L 19) at 30.

88. The Commission found that, although the venture violated Article 85(1), it would likely result in improved production and technical progress. 1991 O.J. (L 19) at 33.

89. Case IV/32 524 — Screensport/EBU Members, Commission Decision of 19 February 1991, 1991 O.J. (L 63) 32.

90. 1991 O.J. (L 63) at 41 ("When comparing the position of Eurosport with that of Screensport and other potential transnational commercial satellite television sports channels, the terms of the joint venture clearly confer a privileged position on the former over the latter.").

91. 1991 O.J. (L 63) at 42.

4. Other Factors

In the course of its analysis, the Commission will consider a variety of factors to determine the *extent* of a joint venture's restrictive effects on competition under Article 85(1).⁹² These factors include the market share of the venture and its parents, the structure of the market, the strength of the parent companies, and the relationship of the venture's market to that of its parents.⁹³

Chief in importance are the market share and size of the companies involved. In its 1977 decision in *De Laval/Stork*, the Commission found: "The *size of the two companies*, each of which is a multinational with an extensive turnover, and their position on the relevant markets, where, without being the largest firms, they nevertheless have *sizeable market shares*, indicate that the restrictions of competition within the common market are appreciable."⁹⁴ The Commission continues to find market share and size of the parents to be important, sometimes even dispositive, when determining whether a particular venture contravenes Article 85(1).⁹⁵

The structure of the market may also affect the Commission's decision in some cases. In *Alcatel Espace/ANT Nachrichtentechnik*,⁹⁶ the Commission found that the wide range of products sold by competitors militated against a finding of incompatibility,⁹⁷ and in *KSB/Goulds/Lowara/ITT*, the Commission considered the necessity of attaining a high volume of production in order for the project to be economically feasible to be a factor in the joint venture's favor.⁹⁸

The Commission did not include the likelihood of developing a new product or service based on the investment and other risks in the industry as a relevant factor in its 1993 Notice. Nonetheless, the

92. See Draft Guidelines, *supra* note 15, at 511.

93. See *supra* note 42 and accompanying text.

94. Case IV/27 093 — *DeLaval/Stork*, Commission Decision of 25 July 1977, 1977 O.J. (L 215) 11, 16 (emphasis added).

95. See, e.g., Case IV/32 363 — *KSB/Goulds/Lowara/ITT*, Commission Decision of 12 December 1990, 1991 O.J. (L 19) 25, 27 (noting the significance of the fact that KSB is the "largest pump manufacturer not only in Europe, but also in the world" as well as its "strong position" in many individual markets); Case IV/33 016 — *Ansac*, Commission Decision of 19 December 1990, 1991 O.J. (L 152) 54, 58 (stressing "[t]he overall size of the United States producers" and the fact that all U.S. producers contributed to the joint venture); Case IV/32 737 — *Eirpage*, Commission Decision of 18 October 1991, 1991 O.J. (L 306) 22, 29 (finding that the joint venture will restrict competition insofar as it "will initially be the only provider of interconnected wide-area paging services in Ireland").

96. Case IV/32 006 — *Alcatel Espace/ANT Nachrichtentechnik*, Commission Decision of 12 January 1990, 1990 O.J. (L 32) 19.

97. The parties' market share, however defined, is not high, and there are many other large manufacturers both within the Community and elsewhere in the world who are active or potential competitors in the common market. Some of these have a *larger range of products* and far larger sales than the parties. Thus the agreement, on its own, could not allow the parties to eliminate competition in the common market for these products. 1990 O.J. (L 32) at 25 (emphasis added).

98. *KSB/Goulds/Lowara/ITT*, 1990 O.J. (L 19) at 29.

Commission appears to consider the likelihood of development and risk in certain cases. In the highly unusual decision of *Elopak/Metal Box-Odin*,⁹⁹ the Commission approved a venture in part because neither party was likely to develop the new paperboard-based package on its own in the face of the attendant risks involved.¹⁰⁰ Likewise, in another case, the Commission considered the unlikelihood of development of a pan-European mobile phone system in the absence of a consortium as well as the financial risks involved in such development.¹⁰¹

The Commission has not indicated whether it will continue to consider likelihood of development and risk as factors under Article 85(1) after its 1993 Notice. Although these factors arguably relate to the "economic and financial strength of the parent companies" and the "scale and significance of the JV's activities," they do not precisely correspond to any of the factors listed in the Commission's 1993 Notice.¹⁰² Perhaps the Commission implicitly intended to repudiate the additional factors it elaborated in its 1990 cases. However, because the Notice only provides that the listed factors are the "most important,"¹⁰³ likelihood of development and risk may still be viable factors under Article 85(1).

5. *Grounds for Individual Exemption Under Article 85(3)*

In those cases in which the Commission finds a restriction of competition under Article 85(1) and to which a group exemption does not apply,¹⁰⁴ the only remaining way to ensure that a venture is compati-

99. See *supra* notes 67-70 and accompanying text.

100. Case IV/32 009 — *Elopak/Metal Box-Odin*, Commission Decision of 13 July 1990, 1990 O.J. (L 209) 15, 18.

101. Case IV/32 688 — *Konsortium ECR 900*, Commission Decision of 27 July 1990, 1990 O.J. (L 228) 31, 33. The Commission also considered the tightness of deadlines in the invitations to tender, the great financial expenditure and staff needed to meet these deadlines, the narrow demand, and the fact that national telecommunications administrations had expressly invited consortia and bidding syndicates to bid for the project.

102. See 1993 Notice, *supra* note 32, at 6.

103. See *id.* at 6 ("The scale of a JV's effects on competition depends on a number of factors, the most important of which are . . .") (emphasis added).

104. There are two different kinds of Article 85(3) exemptions: (1) group, or block, exemptions; and (2) individual exemptions. Most cases falling under Article 85(1), if they warrant an exemption at all, warrant an Article 85(3) individual exemption. Some joint ventures may fit the criteria laid out in regulations establishing group exemptions for research and development or specialization agreements, or for patent licensing and know-how licensing agreements. See Commission Regulation 417/85 of 19 December 1984 on the Application of Article 85(3) of the Treaty to Categories of Specialisation Agreements, 1985 O.J. (L 53) 1; Commission Regulation 418/85 of 19 December 1984 on the Application of Article 85(3) of the Treaty to Categories of Research and Development Agreements, 1985 O.J. (L 53) 5; Commission Regulation 2349/84 of 19 December 1984 on the Application of Article 85(3) of the Treaty to Certain Categories of Patent Licensing Agreements, 1984 O.J. (L 219) 15, corrected at 1985 O.J. (L 113) 34; Commission Regulation 556/89 of 30 November 1988 on the Application of Article 85(3) of the Treaty to Certain Categories of Know-How Licensing Agreements, 1989 O.J. (L 61) 1. The Commission interprets the criteria for the group exemptions extremely strictly, however, and generally decides that ventures do not meet all of the requirements for group exemption. See,

ble with the Common Market is to obtain an individual exemption. Under Article 85(3), the Commission may grant a venture an individual exemption from the requirements of Article 85(1) for a short period of time, usually ten years or less, if the joint venture "contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit."¹⁰⁵ Thus, under Article 85(3), the Commission considers whether procompetitive efficiencies outweigh the anticompetitive risks of the venture.¹⁰⁶ In addition to this general test, Article 85(3) imposes two other requirements on a joint venture seeking an exemption. First, the parties must have notified their joint venture to the Commission and requested an exemption.¹⁰⁷ Second, the joint venture must not include unnecessary restrictions or eliminate competition for a substantial number of products.¹⁰⁸

One author isolates three elements that, when satisfied, substantially increase the likelihood that the Commission will approve a joint venture:

Clearly, it is important to be able to make a convincing case that the product which is the subject of the agreement is *absolutely new*. Even if the parties are present in the same general area, it may be possible, by dividing that area into *clearly defined sub-markets with high technical and financial entry barriers*, to argue plausibly that the parties are neither actual nor even potential competitors. Finally, the *co-operation must substantially facilitate the development of the product*; better still, it may be possible to argue that its development by any of the parties alone

e.g., Case IV/32 262 — KSB/Goulds/Lowara/ITT, Commission Decision of 12 December 1990, 1991 O.J. (L 19) 25, 33 ("[T]here are doubts as to the applicability of Regulation (EEC) No 418/85 which indicate that it would be appropriate to assess the cooperation between the participants as an individual case, assessing the cooperation against the requirements of Article 85(3) directly."); see also Case IV/32 006 — Alcatel Espace/ANT Nachrichtentechnik, Commission Decision of 12 January 1990, 1990 O.J. (L 32) 19, 24. Recently, the Commission widened the exemptions slightly to cover some distribution ventures and more production ventures. Commission Regulation 151/93 Amending Commission Regulations 417/85, 418/85, 2349/84, and 556/89 on the Application of Article 85(3) of the Treaty to Certain Categories of Specialization Agreements, Research and Development Agreements, Patent Licensing Agreements and Know-How Licensing Agreements, 1993 O.J. (L 21) 8 [hereinafter Regulation 151]. Despite this change, however, the group exemptions are still "ill-equipped for application to JVs." FINE, *supra* note 24, at 85.

105. EEC TREATY art. 85(3).

106. This process is much like that of the United States as elaborated in U.S. Dept. of Justice, *Antitrust Enforcement Guidelines for International Operations*, 4 Trade Reg. Rep. (CCH) ¶ 13,109, at 20,602 (1989) ("If the joint venture would likely have significant anticompetitive effects . . . then the Department [of Justice] proceeds to determine whether, considered cumulatively, those anticompetitive effects are outweighed by procompetitive efficiency benefits that the parties claim would be achieved by the joint venture and its restrictions.") (emphasis added); see also Joseph P. Griffin & Michael R. Calabrese, *US Antitrust Policies on Transnational Joint Ventures*, 17 INTL. BUS. L. 319, 320 (July-Aug. 1989) (interpreting the Department of Justice's Guidelines).

107. Regulation 17, *supra* note 17.

108. EEC TREATY art. 85(3)(a), (b).

is impossible. . . .¹⁰⁹

Would-be venturers should add a fourth factor to this list: the Commission's special tolerance toward full-function joint ventures, which perform as autonomous economic entities in the market.¹¹⁰

Of these four factors, the two most significant for the Article 85(3) analysis are the novelty of the proposed product or service and the impracticability of development by a single party.¹¹¹ Indeed, in its 1993 Notice, the Commission itself acknowledged that it would favorably consider "new or improved products and processes" in its Article 85(3) evaluations.¹¹² In this regard, the 1993 Notice followed previous Commission decisions.¹¹³ Usually, a new, highly desirable product will satisfy the Article 85(3) criteria of "improving the production . . . of goods or . . . promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit."¹¹⁴ An improved distribution network for an "old" product may even suffice to satisfy these criteria.¹¹⁵

Sometimes, however, the Commission will be skeptical of a new product or service unless the parties can show that its benefits will reach the consumer. In *Ansac*,¹¹⁶ the Commission refused to grant an Article 85(3) exemption to a U.S. joint sales association that proposed to export natural soda ash to Europe.¹¹⁷ The association planned to

109. Forrester & Norrall, *supra* note 70, at 427-28 (emphasis added).

110. See XX1st Report, *supra* note 1, at 95 ("If, however, cooperative joint ventures perform on a lasting basis all the functions of an autonomous economic entity, the Commission considers that they generally help to increase competition."); see also Commission Press Release (Apolinaris/Schweppes), IP (91) 862, Sept. 27, 1991, at 1 ("This case confirms the Commission's positive attitude towards joint ventures which perform as autonomous economic entities ('full function joint ventures') irrespective of their concentrative or cooperative nature.") (on file with author). Claus-Dieter Ehlermann of the Competition Directorate alleges: "We are currently examining whether the existing block exemptions for specialization and research and development agreements can be extended to apply to cooperative joint ventures operating as fully fledged undertakings." Ehlermann, *supra* note 5, at 267.

111. The emphasis on these two factors results from the fact that actual and potential competition tend to fall under Article 85(1) analysis. See *supra* sections I.C.1, I.C.2.

112. 1993 Notice, *supra* note 32, at 11.

113. In granting an Article 85(3) exemption in *Cekacan*, the Commission determined that the new "Cekacan packaging has certain advantages over traditional methods and meets both the preferences of a section of consumers and a market requirement." Case IV/32 681 — *Cekacan*, Commission Decision of 15 October 1990, 1990 O.J. (L 299) 64, 69.

114. EEC TREATY art. 85(3).

115. See Commission Press Release (Apolinaris/Schweppes), *supra* note 110, at 1 ("[T]he Commission has concluded that important economic advantages result from the creation of the partnership. In particular, the distribution . . . will be substantially improved, enabling the parties to provide better and more intensive services."); Case IV/33 031 — *Fiat/Hitachi*, Commission Decision of 12 December 1992, 1993 O.J. (L 20) 10 (approving a joint venture for the development, manufacture, and sale of hydraulic excavators in part because Fiat/Hitachi's distribution systems were "separate and largely complimentary").

116. Case IV/33 016 — *Ansac*, Commission Decision of 19 December 1990, 1991 O.J. (L 152) 54.

117. 1991 O.J. (L 152) at 60. It might be argued that natural soda ash is not a "new prod-

use its profits to offset possible future antidumping duties, which its members had faced before.¹¹⁸ The Commission decided that this meant that Ansac did not intend to pass on the benefits of the venture to consumers in the form of lower prices, and it therefore denied Ansac an exemption.¹¹⁹ The Commission did, however, grant an exemption in *Alcatel Espace/ANT Nachrichtentechnik*,¹²⁰ which concerned a joint venture for the research and development of electronic equipment for satellites and space vehicles. In *Alcatel Espace*, the Commission concluded that prices could not rise appreciably because of the strength of other competitors in the field; therefore, the benefits of the venture would be passed on to consumers.¹²¹

The Commission does not always measure consumer benefit in terms of price. In the pump sector, for instance, the Commission has found that quality improvements, energy conservation, and increases in environmental safety benefit consumers.¹²² In contrast, however, it found a newly dedicated sports channel to be insufficiently beneficial, especially because it would likely displace other alternatives, and leave the consumer without an "informed choice" between different types of sports programming.¹²³

The other major factor that the Commission considers is whether the joint venture will achieve efficiencies that the parents could not achieve acting alone or could achieve only with great difficulty. The precise terms of this consideration vary greatly from case to case, adding to the confusion inherent in the current standard of compatibility for cooperative ventures. In *Eirpage*,¹²⁴ for example, the Commission allowed a joint venture for the purpose of creating a nationwide paging system because "[n]either party acting on its own could have offered the service as *rapidly and effectively* as [the parents'] cooperation has enabled them to do."¹²⁵ In that case, the Commission was particularly impressed with the range of alternatives

uct" because it had been sold in Europe prior to the *Ansac* decision. Because it is not found naturally in Europe, however, it will be considered a "new product" for the sake of the argument.

118. 1991 O.J. (L 152) at 59.

119. 1991 O.J. (L 152) at 59.

120. Case IV/32 006 — *Alcatel Espace/ANT Nachrichtentechnik*, Commission Decision of 12 January 1990, 1990 O.J. (L 32) 19.

121. 1990 O.J. (L 32) at 24 ("Given the number and importance of other competitors in this field it is most unlikely that the reduction of competition between these two competitors will allow them to increase their prices in any significant way."). The Commission also mentioned "foreseeable," presumably positive, effects on prices in Case IV/32 681 — *Cekacan*, Commission Decision of 15 October 1990, 1990 O.J. (L 299) 64, 69.

122. Case IV/32 363 — *KSB/Goulds/Lowara/ITT*, Commission Decision of 12 December 1990, 1991 O.J. (L 19) 25, 34.

123. Case IV/32 524 — *Screensport/EBU Members*, Commission Decision of 19 February 1991, 1991 O.J. (L 63) 32, 43.

124. Case IV/32 737 — *Eirpage*, Commission Decision of 18 October 1991, 1991 O.J. (L 306) 22.

125. 1991 O.J. (L 306) at 30 (emphasis added).

offered to consumers in over ninety percent of Ireland, rather than just in the major cities. Accordingly, the Commission was rather lenient.¹²⁶ The Commission was stricter in *KSB/Goulds/Lowara/ITT*, allowing a venture in the pump sector only because it found that the relevant product would not reach the market *at all* without a high degree of cooperation.¹²⁷

The Commission has disallowed a number of ventures on the basis of the more stringent *KSB/Goulds/Lowara/ITT* standard. For instance, in *Ansac*,¹²⁸ the Commission refused to permit U.S. producers to form a joint venture for the purpose of importing natural soda ash into the EC because the U.S. producers were capable of importing it into the Common Market individually: "Their past sales activities show that they have, on their own initiative, been capable of overcoming storage and transport problems and assuring regular supplies to their customers. They are therefore capable of acting independently within the common market."¹²⁹ The U.S. companies clearly met the *Eirpage* test because they could have imported soda ash more easily with the joint venture. The Commission, however, judged them under the higher *KSB/Goulds/Lowara/ITT* standard. Likewise, in *Screensport/EBU Members*,¹³⁰ the Commission refused to accept the argument that a transnational sports channel could come into existence only through a joint venture and therefore judged the venture on the basis of the stricter standard.¹³¹

Despite a few progressive decisions, such as *Elopak/Metal Box-Odin*¹³² and *Konsortium ECR 900*,¹³³ the Commission will usually decide that a cooperative venture violates Article 85(1), only to grant it an individual exemption under Article 85(3), rather than simply finding it permissible under Article 85(1). The Commission is relatively more permissive of research and development agreements¹³⁴ and

126. Another lenient case is *De Laval/Stork*, in which the Commission permitted a joint venture simply because "[t]he attainment of [the relevant] economic objectives, which benefit the consumer, is made *easier and quicker* by the cooperation." Case IV/27 093 — *De Laval/Stork*, Commission Decision of 25 July 1977, 1977 O.J. (L 215) 11, 17 (emphasis added). This is a low level of necessity indeed. See also Case IV/32 006 — *Alcatel Espace/ANT Nachrichtentechnik*, Commission Decision of 12 January 1990, 1990 O.J. (L 32) 19, 24 (permitting an exemption in part because the joint venture could achieve results more rapidly and efficiently).

127. 1991 O.J. (L 19) at 34.

128. Case IV/33 016 — *Ansac*, Commission Decision of 19 December 1990, 1991 O.J. (L 152) 54.

129. 1991 O.J. (L 152) at 58.

130. Case IV/32 524 — *Screensport/EBU Members*, Commission Decision of 19 February 1991, 1991 O.J. (L 63) 32.

131. 1991 O.J. (L 63) at 44.

132. See *supra* notes 66-69 and accompanying text.

133. See *supra* note 101 and accompanying text.

134. See Commission Press Release, IP (91) 975, Nov. 12, 1991, at 1 (on file with author) on the clearance of a joint venture for the research and development of optical fibers.

joint distribution agreements,¹³⁵ becoming more skeptical as the scope of cooperation increases. At a certain point, however, the Commission's treatment becomes more favorable again: the Commission may bless full-function joint ventures, which function autonomously in the market, because it considers them to be close to the Merger Regulation end of the joint venture spectrum, without actually qualifying for the more beneficial Merger Regulation treatment.¹³⁶ Joint ventures that do not fall in any of these categories will not likely benefit from Commission approval unless the parent companies can show that they are introducing a new product of genuine benefit to consumers that could not have been produced otherwise or could have been produced in another way only with difficulty.

Although the Commission analyzes the vast majority of joint ventures under Article 85(1) and 85(3), the Merger Regulation is important both for the compatibility inquiry it establishes for joint ventures that meet its conditions and for the incentives it gives would-be venturers to meet its conditions in order for their ventures to receive more favorable treatment than they would receive under Article 85. An examination of the history, legal basis, and interpretation of the Merger Regulation standard is therefore crucial to understanding the differences between the Commission's compatibility standards, predicting the behavior of would-be venturers, and evaluating possibilities for future development.

II. THE MERGER REGULATION COMPATIBILITY STANDARD

To provide a foundation for the comparison of the Article 85 and the Merger Regulation standards of compatibility in Part III, this Part examines the history, legal basis, and interpretation of the Merger Regulation compatibility standard. Section II.A briefly discusses the events leading up to the Council's adoption of the Merger Regulation. Section II.B discusses the basis for the Commission's control under the Merger Regulation, clarifying the distinction between concentrative and cooperative joint ventures and exploring the text of the Merger Regulation itself. Finally, section II.C examines the Commission's interpretation of the Merger Regulation compatibility standard. This Part's discussion provides the basis for an analysis in Part III of the inconsistencies between the Article 85 standard and the Merger Regulation standard and for an examination of the possibilities for reform.

135. See Commission Press Release, IP (91) 784, Aug. 5, 1991, at 1 (rev.) (on file with author) (discussing the Commission's decision to uphold an agreement reducing competition between two computer reservations systems for travel arrangements on the basis that overall European and worldwide distribution would improve).

136. See Commission Press Release (Appollinaris/Schweppes), *supra* note 110, at 1; *supra* note 110 and accompanying text.

A. The Council's Adoption of the Merger Regulation

The Treaty of Rome does not contain an explicit merger provision.¹³⁷ To remedy the resulting gap in the Commission's enforcement powers, the Council adopted the Merger Regulation in 1989, thereby firmly establishing Community control over mergers and concentrative joint ventures.¹³⁸ Like Article 85, the Merger Regulation requires joint ventures to satisfy a standard of compatibility.¹³⁹ The standard of compatibility found in the Merger Regulation, however, is quite different than the Article 85 standard discussed in Part I.

Section I.A discussed the Commission's appointment of experts to study the merger problem and the resultant 1966 Memorandum recommending that the Commission not treat certain concentrations under Article 85.¹⁴⁰ In accordance with the experts' recommendations, the Commission presented a draft merger control regulation to the Council in 1973.¹⁴¹ Because the Council could not agree on specific criteria of market dominance — a crucial element of concentration¹⁴² — the proposal ultimately failed. Revised proposals in 1981, 1984, and 1986 also fell short.¹⁴³ Shortly thereafter, the Commission introduced a new draft regulation, beset by an extraordinary number of exemptions, which the Council never adopted.¹⁴⁴

In the absence of a merger regulation, the Commission tried to evaluate all mergers and joint ventures under Article 85.¹⁴⁵ But the Court of Justice's *Philip Morris* decision in 1987 prevented the Commission from applying Article 85 to mergers or concentrative joint ventures because they involve structural change. This decision thereby created a large gap in the Commission's enforcement pow-

137. See *supra* note 22 and accompanying text.

138. Regulation 4064/89, *supra* note 3; see also *infra* note 147 and accompanying text.

139. See Regulation 4064/89, *supra* note 3, art. 2, 1990 O.J. (L 257) 14, 16-17.

140. See *supra* section I.A.

141. Commission Proposal for a Regulation of the Council of Concentrations Between Undertakings, 1973 O.J. (C 92) 1.

142. See Regulation 4064/89, *supra* note 3, art. 2(1)(a)-(b). The Commission currently defines "dominant position" for the purposes of Article 86 analysis as the ability to prevent "effective competition by acquiring the power to behave to an appreciable extent independently of competitors and ultimately of consumers." XXIst Report, *supra* note 1, at 362 (Annex III). The relevance of Article 86 is discussed more thoroughly in note 20.

143. See Amended Proposal for a Council Regulation on the Control of Concentrations Between Undertakings (Merger Control Regulation), 1982 O.J. (C 36) 3; Amendment to the Proposal for a Council Regulation on the Control of Concentrations Between Undertakings, 1984 O.J. (C 51) 8; Amended Proposal for a Council Regulation on the Control of Concentrations, 1986 O.J. (C 324) 5. See generally Sandrock & van Arnheim, *supra* note 16, at 862 (discussing the many draft merger regulations the Commission submitted to the Council).

144. Amended Proposal for a Council Regulation (EEC) on the Control of Concentrations Between Undertakings, 1988 O.J. (C 130) 4. See Sandrock & van Arnheim, *supra* note 16, at 863 for a discussion of the negotiations on this draft.

145. See *supra* note 27 and accompanying text.

ers.¹⁴⁶ Under increasing pressure from the Commission, the Council reached a compromise and adopted Regulation 4064/89 on the Control of Concentrations Between Undertakings (Merger Regulation) on December 21, 1989.¹⁴⁷ It entered into force on September 21, 1990.

B. *The Legal Basis for Commission Control Under the Merger Regulation*

In order to analyze joint venture control under the Merger Regulation, this section first examines the distinction between cooperative joint ventures governed by Article 85 and concentrative joint ventures analyzed under the Merger Regulation. Section II.B.2. then turns to a textual analysis of the Merger Regulation compatibility standard, as preparation for an in-depth analysis of the Commission's interpretation of the standard in section II.C.

1. *Concentrative or Cooperative?*

Since the adoption of the Merger Regulation, Article 85 governs only cooperative ventures, while the Merger Regulation controls concentrative ventures. The Commission first defined a concentrative joint venture in 1990 in its Notice interpreting the Merger Regulation.¹⁴⁸ The Notice defined *concentrative* joint ventures, for the purposes of the Merger Regulation, as "undertakings that are *jointly controlled* by several other undertakings, the parent companies."¹⁴⁹ Recently, the Commission defined *cooperative* joint ventures negatively, as joint ventures that do not fit the criteria for concentrative joint ventures.¹⁵⁰ In an earlier, more precise definition, the Commission characterized cooperative joint ventures, for the purposes of Article 85 analysis, as "forms of association . . . which enable one or more firms to *influence* appreciably the activities of one or more other firms."¹⁵¹ In general, then, the class of concentrative joint ventures analyzed under the Merger Regulation is much narrower than the class of cooperative joint ventures evaluated under Article 85.

146. See *supra* notes 28-32 and accompanying text.

147. Regulation 4064/89, *supra* note 3. Ironically, the Commission has applied the "Merger Regulation" to more joint ventures than mergers. See Commission of the European Communities, XXIIst Report on Competition Policy, *supra* note 1, at 84 (finding that, of the 63 notifications received in 1991 under the Merger Regulation, 23 regarded joint ventures, while only three concerned mergers).

148. Commission Notice Regarding the Concentrative and Cooperative Operations Under Council Regulation No. 4064/89 EEC on the Control of Concentrations Between Undertakings, 1990 O.J. (C 203) 10 [hereinafter Notice — Concentrative/Cooperative].

149. *Id.* at 10 (emphasis added).

150. 1993 Notice, *supra* note 32, at 3 ("This Notice applies to all JVs which do not fall within the scope of application of Article 3 of Council Regulation (EEC) 4064/89 . . .").

151. Draft Guidelines, *supra* note 15, at 507 (emphasis added).

Whereas the Merger Regulation requires the parent companies to exercise "joint control," Article 85 only requires mere "influence."

Many scholars have debated the meaning and scope of these conditions, which this Note only summarily discusses.¹⁵² A "jointly controlled" undertaking must satisfy two additional conditions — one positive and one negative — in order to fall into the concentrative joint venture category. The positive condition is that the joint venture "perform[] on a lasting basis all the functions of an autonomous economic entity."¹⁵³ The joint venture must therefore be an independent actor in the market: "The key issue, which has to be fleshed out in detail, is whether a transaction brings about a lasting change in market structure or merely a temporary change in companies' behaviour."¹⁵⁴ The negative condition is the "absence of coordination of competitive behavior," both between the parents and between the new joint venture and the parents.¹⁵⁵ Generally, the risk of coordination is greater when the joint venture will compete in the same markets as the parents or in upstream or downstream markets.¹⁵⁶

If the joint venture is concentrative, the Merger Regulation applies, and it supplants the rules in Article 85 altogether.¹⁵⁷ The two systems for evaluating joint ventures, moreover, are mutually exclusive. Therefore, if a joint venture fails to satisfy either of the two conditions required for a venture to qualify as concentrative, the Commission will deem it a cooperative venture and subject it to the more demanding Article 85 analysis.

Precisely because the Article 85 inquiry is more demanding, it is "no surprise that companies try to avoid" Article 85 analysis and attempt to fit their ventures under the Merger Regulation.¹⁵⁸ The Commission itself recognizes that it evaluates joint ventures under the

152. For a more in-depth discussion of the conditions for classification as concentrative versus cooperative, see Frank L. Fine, *EEC Antitrust Aspects of Production Joint Ventures*, 26 INTL. LAW. 89, 101 (1992); Christopher Jones, *The Scope of Application of the Merger Control Regulation*, 14 FORDHAM INTL. L.J. 359, 369-72 (1990-1991); R. Kovar, *The EEC Merger Control Regulation*, 10 Y.B. EUR. L. 71, 83 (1990); Riggs & Giustini, *supra* note 16, at 877; Stewart & Abellard, *supra* note 16, at 320.

153. Notice — Concentrative/Cooperative, *supra* note 148, at 11.

154. BRITTAN, *supra* note 22, at 37-38.

155. Notice — Concentrative/Cooperative, *supra* note 148, at 12.

156. *Id.* "Upstream" markets are those that supply the joint venture with inputs, while "downstream" markets are those that the venture supplies.

157. Regulation 4064/89, *supra* note 3, art. 22(2). In 1990, the Commission adopted two Notices intended to clarify which joint ventures would be treated as concentrative and which would be considered cooperative. Notice — Concentrative/Cooperative, *supra* note 148; Commission Notice Regarding Restrictions Ancillary to Concentrations, 1990 O.J. (C 203) 5 [hereinafter Notice — Ancillary]. Neither Notice attempts to interpret the substantive compatibility criteria for joint ventures in Article 2 of the Merger Regulation.

158. Dr. Lennart Ritter, Competition Directorate, Commission of the European Communities, Address at the American Bar Association Section of International Law and Practice Annual Spring Meeting (Apr. 30, 1993) (cassette tape on file with author).

Merger Regulation with a more "positive attitude" than under Article 85 and that, in some circumstances, this difference is unwarranted.¹⁵⁹ Unless the Commission invariably grants Article 85(3) exemptions, then, its approach has the paradoxical effect of discouraging cooperative ventures for a specific purpose, which *might* have structural consequences in the relevant market, while encouraging more drastic concentrative ventures, which *necessarily* involve structural change through the creation of a separate "autonomous economic entity." The Commission's approach may therefore distort the behavior of would-be venturers, by encouraging them either to concentrate more than is economically desirable or to give up and avoid the risks of cooperation altogether.¹⁶⁰

The Merger Regulation and Article 85 not only apply different standards of compatibility, but the *consequences* of finding compatibility or incompatibility under the two standards also differ, further distorting behavior.¹⁶¹ First, the Commission clears joint ventures under the Merger Regulation for an *unlimited* time. Under Article 85, it clears such ventures for several years only, and the parent companies must submit to another investigation to extend the clearance.¹⁶² Second, the Commission continues to monitor many cooperative ventures even after clearing them. Parents of a concentrative venture, although they may have to satisfy certain conditions in order to have their ventures declared compatible, are not subjected to such ongoing monitoring.¹⁶³ Third, the competition laws of the individual Member States usually do not apply to concentrative joint ventures.¹⁶⁴ Cooperative joint ventures, on the other hand, frequently will have to comply with the competition laws of one or more Member States in addition to those of the European Community. Fourth, the Commission must determine within five months of notification whether a concentrative

159. See, e.g., *id.*; Commission Press Release, *supra* note 15, at 1.

160. See *infra* section III.A.3.

161. Many of the following consequences are noted in Griffin, *supra* note 3, at 34.

162. See Pathak *supra* note 24, at 180; see also Draft Guidelines, *supra* note 15, at 504-05 (discussion paper).

163. See, e.g., Case IV/32 363 — KSB/Goulds/Lowara/ITT, Commission Decision of 12 December 1990, 1991 O.J. (L 19) 25, 35-36; Case IV/M012 — Varta/Bosch, Commission Decision of 31 July 1991, 1991 O.J. (L 320) 26, 34.

164. Regulation 4064/89, *supra* note 3, art. 21(2). Under Article 9 of the Merger Regulation, however, the Commission may decide to refer the matter to the authorities of an individual Member State if the matter is better treated at the national level. *Id.*, art. 9. Under Article 12, the Commission may request that the national authorities initiate an investigation. *Id.*, art. 12. For a country-by-country synopsis of the current competition law in many of the Member States, see JOINT VENTURES IN EUROPE (Edward Kling & Julian Ellison eds., 1991) (summarizing the law in France, Germany, Italy, the Netherlands, Spain, Switzerland, and the United Kingdom). See also MERGER CONTROL IN THE EEC (Kluwer Law & Taxn. Pub. 1988) for a country-by-country analysis of the competition laws of every Member State. In 1992, the Commission issued a Draft Notice on the Application of Articles 85 and 86 of the EEC Treaty by National Courts, reprinted in 4 C.M.L.R. 524 (1992), in order to ensure uniform application of EC competition law by the Member States.

joint venture is compatible, while decisions under Article 85 take an average of two years.¹⁶⁵ Finally, the sanctions are different under the two procedures.¹⁶⁶ The Commission may impose higher fines under the Merger Regulation than under Article 85.¹⁶⁷ In addition, a finding of incompatibility under Article 85 renders "[a]ny agreements . . . automatically void"¹⁶⁸ whereas, under the Merger Regulation, the Commission may exercise broad remedial powers, including separation of assets or the cessation of joint control, without explicitly nullifying the parties' agreements.¹⁶⁹

The Commission has done little to harmonize and rationalize the two existing compatibility standards.¹⁷⁰ A concentrative joint venture is generally subjected to a lower level of scrutiny than a cooperative

165. Under the Merger Regulation, the time limit is even shorter under certain circumstances. For instance, the Commission normally has only one month to make a decision under Article 6(1) to the effect that the Merger Regulation as a whole does not apply to the venture. Regulation 4064/89, *supra* note 3, art. 10(1); see also Commission Regulation 2367/90 of 25 July 1990 on the Notifications, Time Limits and Hearings Provided for in Council Regulation (EEC) No. 4064/89 on the Control of Concentrations Between Undertakings, 1990 O.J. (L 219) 5. The Commission has expressed its intent to shorten the procedures under Article 85, at least for "structural" cases, but admits that its resolutions are "not legally binding." Commission Press Release, *supra* note 15, at 1; see also Draft Guidelines, *supra* note 15, at 505 (discussion paper).

166. Note that third parties can sue under either procedure, but rarely do so. See Wilma S.M. Lloyd-Schut, *Construction Joint Ventures: EEC Competition Aspects*, 9 INT'L CONSTR. L. REV. 3, 4 (1992). EC competition law, unlike U.S. antitrust law, does not award private plaintiffs treble damages. Because the cost of bringing a competition law suit is quite high, few private plaintiffs take the risk of suing. See MÁRIO M. MENDES, *ANTITRUST IN A WORLD OF INTERRELATED ECONOMIES: THE INTERPLAY BETWEEN ANTITRUST AND TRADE POLICIES IN THE US AND THE EEC* 59-77 (1991).

167. Under Regulation 4064/89, *supra* note 3, the Commission may impose fines of 1000 to 50,000 Ecu for failure to notify or for provision of incorrect information. For failure to comply with the Commission's decision or its attendant obligations, the Commission may impose fines of up to 10% of a company's turnover, or gross receipts. *Id.*, art. 14. Under Article 85, the Commission may impose fines of 100 to 5000 Ecu for incorrect or misleading information; the 10% of turnover fine is reserved for actual violations of Article 85(1). Regulation 17, *supra* note 17, art. 15; see *supra* note 17 for the subsequent amendments to Council Regulation 17/62; see also Form A/B reprinted in FINE, *supra* note 24, at 138 (Annex F) ("[O]nly a notification in order to obtain exemption affords immunity from fines . . .").

168. EEC TREATY art. 85(2).

169. See Regulation 4064/89, *supra* note 3, art. 8(4); see also T. ANTONY DOWNES & JULIAN ELLISON, *THE LEGAL CONTROL OF MERGERS IN THE EUROPEAN COMMUNITIES* 86 (1991) (arguing that Commission has wide powers of divestiture); 1966 Memorandum, *supra* note 24:

The absolute nullity provided for in Article 85(2) would not be a desirable legal consequence of prohibited concentrations in so far as it might, through the disappearance of the individual firms involved, go beyond the restoration of the *status quo*. The right instrument to cope with undesirable concentrations would be legal machinery to enforce deconcentration. *Id.* at 165.

170. The Commission issued a regulation that amends several existing regulations to expand the scope of Article 85(3). Commission Regulation 151, *supra* note 104. Although this regulation widens existing group exemptions, it does not solve the problems of the Article 85 inquiry. The Commission already finds too many joint ventures "illegal" under Article 85(1) and then pardons them under Article 85(3). Expanding the scope of Article 85(3) will not help clarify the Article 85(1) standard or harmonize it with the compatibility standard under the Merger Regulation. See also *infra* notes 277-81 and accompanying text.

venture.¹⁷¹ As a result, the current legal regime discourages legitimate joint ventures, or at best forces them to fit the concentrative mold in order to receive permissive treatment.¹⁷² The procedural and substantive differences between the two standards of compatibility, then, can have highly important consequences. Part III will explore the differences between the process of evaluation under each of the compatibility standards, as well as the import of the differences for would-be venturers.

2. *The Text of the Merger Regulation*

To trigger the Merger Regulation, the parent companies of a joint venture must pass certain thresholds for EC and worldwide sales¹⁷³ and must not achieve more than two-thirds of their total turnover within one member state.¹⁷⁴ The thresholds are currently quite high: 250 million Ecu for EC sales and 5 billion Ecu for worldwide sales.¹⁷⁵ The Commission may ask the Council to revise these thresholds downwards in 1996.¹⁷⁶

171. See *supra* notes 158-59.

172. The Commission has found a number of joint ventures notified under the Merger Regulation to be cooperative rather than concentrative. See, e.g., Case IV/M093 — Apollinaris/Schweppes, Commission Decision of 24 June 1991, *reprinted in* CM/M/XIII COMPETITION L. W. EUR. & U.S.A. 195 (1992) (finding a notified operation not a concentration under the meaning of Article 3 of the Merger Regulation); Case IV/M088 — Elf/Enterprise, Commission Decision of 24 July 1991, *reprinted in* CM/M/XIII COMPETITION L. W. EUR. & U.S.A. 247 (1992) (same). Companies may try to disguise cooperative ventures as concentrative ventures because of the advantages of the inquiry under the Merger Regulation. The extent of the problem is unclear. What is clear, however, is that procedural reform will not suffice to change this sort of behavior. Cf. Griffin, *supra* note 3, at 35 (arguing that an "emphasis on timely analysis . . . should encourage venturers to organize their projects on the basis of sound business principles rather than legal pigeonholes").

173. When the thresholds are met, non-EC companies planning to create joint ventures or other concentrations must notify them under the Merger Regulation. The very first joint venture the Commission considered under the Merger Regulation, Mitsubishi/UCAR, concerned non-EC parent companies. Case IV/M024, Commission Decision of 4 January 1991, *reprinted in* CM/M/XIII COMPETITION L. W. EUR. & U.S.A. 37 (1992); see also Case IV/M121 — Ingersoll-Rand/Dresser, Commission Decision of 18 December 1991, *reprinted in* CM/M/XIII COMPETITION L. W. EUR. & U.S.A. 455 (1993) (on file with author); Commission Press Release, IP (92) 23, Jan. 17, 1992, at 1 (on file with author).

174. Article 1 of the Merger Regulation lists the threshold provisions. Regulation 4064/89, *supra* note 3, art. 1. For the purposes of the Regulation's thresholds, turnover is calculated by adding "the amounts derived by the undertakings concerned in the preceding financial year from the sale of products and the provision of services," after the deduction of direct taxes and not including sales between the venturers. Regulation 4064/89, *supra* note 3, art. 5; see Trevor Soames, *The "Community Dimension" in the EEC Merger Regulation: The Calculation of the Turnover Criteria*, 11 EUR. COMPETITION L. REV. 213 (1990); see also Jones, *supra* note 152, at 362-63; Riggs & Giustini, *supra* note 16, at 869-70.

175. As of October 14, 1993, these threshold amounts were equivalent to about 449 million and 5.9 billion dollars respectively. See *Ecu*, 1993 O.J. (C 277) 1.

176. Article 1(3) of the Merger Regulation provides that: "The thresholds . . . will be reviewed before the end of the fourth year following that of the adoption of this regulation [December 21, 1993] by the council acting by a qualified majority on a proposal from the commission." Regulation 4064/89, *supra* note 3, at 17. The Commission believes that the thresholds should be one billion and one hundred million Ecu respectively. Amended Proposal for a Council Regula-

Although the Merger Regulation expressly refers to a determination of compatibility with the Common Market,¹⁷⁷ this determination is quite different than that under Article 85. Sir Leon Brittan, the former Competition Commissioner, claims that "[t]he substantive test of the Regulation is based on the notion of dominant position"¹⁷⁸ The language of the Merger Regulation itself supports Brittan's interpretation. Article 2(2) of the Merger Regulation indicates that "[a] concentration which does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part or it shall be declared compatible with the common market."¹⁷⁹ In making its determination, moreover, the Commission must take into account a number of factors:

- (a) the need to maintain and develop effective competition within the common market in view of, among other things, the structure of all the markets concerned and the actual or potential competition from undertakings located either within or outwith the Community;
- (b) the market position of the undertakings concerned, and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.¹⁸⁰

As section II.C discusses, some of these factors are more important than others.¹⁸¹ Part III compares the factors evaluated under each

tion (EEC) on the Control of Concentrations Between Undertakings, 1989 O.J. (C 22) 14, 16. The Commission reviewed the thresholds in 1993, as planned, but in the face of German, British, and French opposition to change, Karl van Miert, the current Competition Commissioner, decided to keep the standards as they are and revisit the issue in another three years' time. See *Keeping the Powder Dry*, *ECONOMIST*, July 31, 1993, at 58.

177. Regulation 4064/89, *supra* note 3, art. 2(1).

178. Leon Brittan, *The Law and Policy of Merger Control in the EEC*, 15 *EUR. L. REV.* 351, 352 (1990). Despite the fact that Brittan referred to the "significant impediment" language as a "gloss on the dominant position idea," *id.*, Fine purports to find two tests in Article 2(3): a test of dominance, and a test of "significant impediment" to competition. Fine, *supra* note 152, at 149; see also BRITTAN, *supra* note 22, at 36 (arguing that a "pure dominant position test" was not intended and that "we are at the beginning of a new legal development"); Kovar, *supra* note 152, at 90 ("[N]either the creation nor even the strengthening of a dominant position within the meaning of Article 86 of the Treaty would bring about the prohibition *per se* of a concentration operation."). For an explanation of the differences between the Merger Regulation test and the Article 86 test, see DOWNES & ELLISON, *supra* note 169, at 84-86. Fine suggests that Article 86 itself may apply to joint ventures if the venture does not simply create, but actually abuses, a dominant position, but he admits this situation is extremely rare. See FINE, *supra* note 24, at 90.

179. Regulation 4064/89, *supra* note 3, art. 2(2).

180. *Id.*, art. 2(1).

181. Brittan recognized the difficulty of evaluating the relative importance of these factors and their interaction with the dominant position test early on: "The interplay between these various factors and between them and the dominant position test itself has already given rise to comment." Brittan, *supra* note 178, at 352.

standard, finding that the Commission normally considers more factors in greater depth under an Article 85 analysis than under a Merger Regulation analysis, thereby causing the resulting standards of compatibility to be quite different in application.¹⁸²

C. *The Commission's Interpretation of the Merger Regulation Compatibility Standard*

In the three years since enforcement under the Merger Regulation began, the Commission has generated many published and unpublished decisions, as well as Notices and press releases. Unfortunately, the Commission has never issued an official statement explaining its interpretation of Article 2. Shortly after the Council adopted the Merger Regulation, the Commission issued two informational Notices intended to clarify the scope of the Merger Regulation. Neither Notice addressed the compatibility question, however.¹⁸³ While a truly coherent picture of Merger Regulation enforcement has not yet emerged, the extant decisions and other informational material give a general indication of the Commission's theory of compatibility under the Merger Regulation.

To understand how the Commission interprets the notion of compatibility with the Common Market under the Merger Regulation, this Note analyzes the relevant Commission decisions from the time of the implementation of the Merger Regulation to the present. Although most of these decisions are unpublished¹⁸⁴ and lack the precedential

182. See *infra* Part III. The greater rigor of the Article 85 analysis may be due in part to its age relative to that of the Merger Regulation. The Article 85 standard has been in evolution since the early days of the Community, while the Merger Regulation standard is only a few years old.

183. The first Commission Notice explicitly defines joint ventures for the purposes of the Merger Regulation, as "undertakings that are jointly controlled by several other undertakings, the parent companies." Notice — Concentrative/Cooperative, *supra* note 148, at 10. This Notice, however, deals primarily with distinguishing concentrative and cooperative ventures rather than addressing the standards of compatibility employed to evaluate them: "The purpose of this notice is to define as clearly as possible, in the interests of legal certainty, concentrative and cooperative situations." *Id.* at 10. The difficulty of distinguishing concentrative from cooperative joint ventures has become a fertile source of academic commentary. See, e.g., Riggs & Giustini, *supra* note 16, at 852-908. The second Notice clarifies the applicability of the Merger Regulation to ancillary restrictions, but also fails to explain the compatibility standard. Notice — Ancillary, *supra* note 157. The Notice addresses criteria of evaluation, but it does so only for restrictions that are ancillary to a joint venture or merger agreement. *Id.* at 5-6. In general, ancillary or collateral restraints are those "that do not pertain to the actual formation and fundamental operation of the joint venture itself." See Salem M. Katsh, *Collateral Restraints in Joint Ventures*, 54 ANTITRUST L.J. 1003 (1986).

184. Although "unpublished," these decisions are not completely unavailable. In an effort to strike a balance between protecting business secrets and providing information to interested parties, "[t]hird parties showing a sufficient interest" can obtain a copy of an unpublished decision by submitting a written request to the Commission. See, e.g., 1990 O.J. (C 281) 2. In addition, many of these decisions are unofficially published in CM/M/XIII COMPETITION L. W. EUR. & U.S.A. (1992) and other sources.

value of American court opinions,¹⁸⁵ they reveal the factors most important to the Commission and illustrate how the Commission typically evaluates them. Although this Note focuses on joint ventures, it will also examine merger and acquisitions cases. An examination of these cases enriches the discussion because the Commission's compatibility analysis under the Merger Regulation tends not to distinguish joint ventures from such other concentrations.¹⁸⁶

Two 1991 cases, *Alcatel/Telettra*¹⁸⁷ and *Magneti Marelli/CEAc*,¹⁸⁸ provide a convenient framework for analyzing the Commission's interpretation of "compatibility with the Common Market" under the Merger Regulation. *Alcatel/Telettra* concerned an acquisition and *Magneti Marelli* a joint venture. Together, the acquisition and venture formed part of a framework agreement between Fiat SpA and Alcatel Alsthom Compagnie Générale d'Électricité in the battery, telecommunications, and railway equipment sectors.¹⁸⁹ In both cases, the Commission divided its compatibility inquiry into three major areas: relevant product markets, geographic markets, and horizontal and vertical impact.¹⁹⁰

1. Product Markets

Before the Commission can evaluate the impact of a concentration, and thereby determine if it is compatible with the Common Market, it must delineate the product market or markets in which the venture is likely to affect competition.¹⁹¹ The Commission tends to define product markets narrowly for the purpose of compatibility analysis under

185. To date, there are no decisions of the European Court of Justice that concern the compatibility with the Common Market of a joint venture under the Merger Regulation, even though all decisions of the Commission are appealable to the Court of Justice.

186. Often, the Commission does not indicate whether it would characterize a concentration as an acquisition or a joint venture. Except when there is an issue as to whether the joint venture falls under the Merger Regulation at all, the Commission tends not to distinguish joint ventures from other concentrations.

187. Case IV/M042 — *Alcatel/Telettra*, Commission Decision of 12 April 1991, 1991 O.J. (L 122) 48.

188. Case IV/M043 — *Magneti/Marelli/CEAc*, Commission Decision of 29 May 1991, 1991 O.J. (L 222) 38.

189. *Alcatel/Telettra*, 1991 O.J. (L 122) 48; *Magneti Marelli/CEAc*, 1991 O.J. (L 222) 38.

190. See 1991 O.J. (L 122) at 52-54; 1991 O.J. (L 222) at 39-40; see also Case IV/M070 — *OTTO/Grattan*, Commission Decision of 21 March 1991, reprinted in CM/M/XIII COMPETITION L. W. EUR. & U.S.A. 99, 102-04 (1991); Case IV/M081 — *VIAG/Continental Can*, Commission Decision of June 1991, reprinted in CM/M/XIII COMPETITION L. W. EUR. & U.S.A., 157, 159-62 (1991).

191. Form CO, which companies use to notify joint ventures to the Commission under the Merger Regulation, offers the following guidance: "A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use." Form CO, excerpted in Derek Ridyard, *An Economic Perspective on the EC Merger Regulation*, 11 EUR. COMPETITION L. REP. 247, 253 (Annex) (1990).

the Merger Regulation.¹⁹² For instance, in *Magneti Marelli*, instead of defining the product market as the lead battery market, the Commission subdivided that market: "[T]he concentration affects . . . four separate product markets: the traction battery market, the stationary battery market, the original equipment (OE) market for starter batteries and the replacement market for starter batteries."¹⁹³ In general, the Commission finds separate product markets when different products "only compete to a limited extent which is not sufficient to ensure effective competition between these different products in the short term."¹⁹⁴ In other words, the Commission defines separate product markets whenever products are not close substitutes.¹⁹⁵

The Commission's evaluation tends to focus on "overlap" in a "technical and marketing" sense, rather than in the American economic one.¹⁹⁶ Former Competition Commissioner Brittan's view reflects the EC's skepticism of the American economic approach to substitutability: "Our American friends have tried to apply concentration indices and to consider reactions to hypothetical price increases at certain levels, but I am not persuaded that this has always been successful."¹⁹⁷ In the same book, however, after expressing uncertainty about the appropriate approach for the Commission to take, he seemed to acknowledge the virtue of economic evaluation: "The one point I wish to stress now is that our approach is an economic, rather than legal one."¹⁹⁸ Consequently, economic ideas filter into

192. See, e.g., Mario Siragusa & Romano Subiotto, *The EEC Merger Control Regulation: The Commission's Evolving Case Law*, 28 COMMON MKT. L. REV. 877, 905 (1991).

193. *Magneti Marelli/CEAc*, 1991 O.J. (L 222) at 39. This detailed division into separate product markets is by no means rare. See, e.g., Case IV/M092 — RVI/VBC/Heuliez, Commission Decision of 3 June 1991, reprinted in CM/M/XIII COMPETITION L. W. EUR. & U.S.A. 155 (1992) (defining separate markets for city buses and tour buses); Case IV/M081 — VIAG/Continental Can, Commission Decision of June 1991, reprinted in CM/M/XIII COMPETITION L. W. EUR. & U.S.A. 159, 161 (1992) (defining separate markets for glass, plastic, and aluminum beverage containers).

194. *VIAG/Continental Can*, CM/M/XIII COMPETITION L. W. EUR. & U.S.A. at 161 (1992).

195. See Siragusa & Subiotto, *supra* note 192, at 905 ("[T]he Commission will normally arrive at a relatively narrow relevant product market definition based on its assessment of demand substitutability as conditioned by a product's characteristics, price and intended use.").

196. See, e.g., Case IV/M149 — Lucas/Eaton, Commission Decision of 9 December 1991, reprinted in CM/M/XIII COMPETITION L. W. EUR. & U.S.A. 426, 430 (1993) (finding little overlap between the heavy duty braking systems produced by the joint venture and the products of the parent companies); Case IV/M086 — Thomson/Pilkington, Commission Decision of 23 October 1991, reprinted in CM/M/XIII COMPETITION L. W. EUR. & U.S.A. 373, 378-81 (1993) (finding a joint venture in optronics compatible with the Common Market when one parent specialized in submarine periscopes while the other produced missile systems); cf. *United States v. Aluminum Co. of America*, 148 F.2d 416, 424-26 (2d Cir. 1945) (pursuing a more economic approach); 2 PHILLIP AREEDA & DONALD F. TURNER, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* ¶ 519-21 (1978); PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* ¶ 520'-21' (Supp. 1993) (same).

197. BRITTAN, *supra* note 22, at 37.

198. *Id.*

Commission analyses of product markets, but the Commission employs general economic principles more frequently than detailed examinations of cross-elasticity of demand, as courts do in the United States.¹⁹⁹ Occasionally, however, the Commission does engage in a more complicated economic inquiry. In *Tetra Pak/Alfa-Laval*,²⁰⁰ an acquisitions case, the Commission investigated substitutability extensively, including sending out questionnaires to consumers and competitors in order to establish the demand elasticity between categories of packaging machines.²⁰¹

Although the Commission's approach to substitutability varies along a wide spectrum stretching from noneconomic to full economic reasoning, it generally confines its analysis to the product markets in which the joint venture will compete.²⁰² This approach runs contrary to the Commission's first Notice, in which it vowed to consider effects in "upstream, downstream, or neighbouring markets."²⁰³ Currently, the Commission only rarely considers "possible spill-over effects" between the markets in which the joint venture competes and other markets.²⁰⁴ The Commission generally deems a venture compatible if it establishes a "new" market, regardless of its effects on associated markets.²⁰⁵ This practice has a beneficial effect; it promotes joint ventures for new products. When the substitutability inquiry is based on "marketing" rather than economics, however, this practice may also lead to

199. See Case IV/M126 — *Accor/Wagons-Lits*, Commission Decision of 28 April 1992, 1992 O.J. (L 204) 1, 4; *Lucas/Eaton*, CM/M/XIII COMPETITION L. W. EUR. & U.S.A. at 430; *Thomson/Pilkington*, CM/M/XIII Competition L. W. Eur. & U.S.A. at 380; Commission Press Release, IP (91) 942, Oct. 25, 1991 ("[T]he products . . . are to a large extent complementary and the degree of overlap is very limited . . .") (on file with author); see also Siragusa & Subiotto, *supra* note 192, at 906; cf. AREEDA & TURNER, *supra* note 196, ¶ 519-21.

200. Case IV/M068 — *Tetra Pak/Alfa-Laval*, Commission Decision of 19 July 1991, 1991 O.J. (L 290) 35.

201. 1991 O.J. (L 290) at 37. Similarly, in *Nestlé/Perrier*, the Commission engaged in a quite detailed economic inquiry, even if its decision suggests that the parties' submissions were responsible for prompting the Commission's economic conclusions. See Case IV/M190 — *Nestlé/Perrier*, Commission Decision of 22 July 1992, 1992 O.J. (L 356) 1, 2-7, 15.

202. See, e.g., *Accor/Wagons-Lits*, 1992 O.J. (L 204) at 3 (examining the effects of a joint venture in the market for contract group catering, without analyzing the effects in the related market for direct group catering, because direct group catering did "not represent an alternative" to contract group catering); Case IV/M012 — *Varta/Bosch*, Commission Decision of 31 July 1991, 1991 O.J. (L 320) 26, 27-28, 31 (analyzing the effects of a joint venture in starter batteries only in the product markets in which the venture would be active).

203. Notice — *Concentrative/Cooperative*, *supra* note 148, at 13.

204. See *Lucas/Eaton*, CM/M/XIII COMPETITION L. W. EUR. & U.S.A. at 430. More frequently, the Commission considers spillover between two of the markets in which the joint venture is active. See, e.g., Case IV/M062 — *Eridania/ISI*, Commission Decision of 30 July 1991, reprinted in CM/M/XIII COMPETITION L. W. EUR. & U.S.A., 257, 260 (1992) (analyzing the spillover between the industrial and consumer sugar markets).

205. This approach corresponds with the "new product" idea in American antitrust law. See *Broadcast Music, Inc. v. Columbia Broadcasting Sys.*, 441 U.S. 1, 21-22 (1979); Richard W. Pogue, *Antitrust Considerations in Forming a Joint Venture*, 54 ANTITRUST L.J. 925, 928-29 (1986).

the approval of joint ventures in which the only progressive idea is a new product description.²⁰⁶

Despite encountering difficulties in isolating narrow geographic markets and analyzing the joint venture's impact within them, the Commission is fairly consistent in its approach. The Commission generally succeeds in isolating specific product markets and in conducting a separate analysis for each of these distinct product markets. It does not insist on narrow product market definitions, however, when the narrow markets would be arbitrary and when only a few products of the coventurers overlap.²⁰⁷ The Commission also applies its definitions consistently within industries, despite its frequent difficulty in formulating them. For example, it repeatedly uses the same or similar product market definitions in the truck and bus sector,²⁰⁸ the catalogue sector,²⁰⁹ and the petroleum products sector.²¹⁰

The Commission defines overly narrow product markets based on a substitutability inquiry that only rarely includes full-blown economic analysis. Moreover, it ordinarily confines its attention to the markets in which a particular joint venture competes, rather than considering related markets as well. Once it defines product markets, however, the

206. See Siragusa & Subiotto, *supra* note 192, at 906 (The Commission's approach "appears to have resulted in narrow product market definitions which do not always reflect commercial reality.").

207. In *Sanofi/Sterling*, which concerned a joint venture for the manufacture, sale, and distribution of prescription drugs, the Commission found: "[A]ny workable market definition in the pharmaceutical sector will involve a certain amount of arbitrariness, because . . . substitutability among medicines may not only depend on the intrinsic characteristics of the drug itself, but also their intended use, taking into account the patient's overall condition." Case IV/M072 — *Sanofi/Sterling*, Commission Decision of 10 June 1991, *reprinted in* CM/M/XIII COMPETITION L. W. EUR. & U.S.A. 171, 175 (1992). After deciding that well over 20 product markets were involved in the joint venture, the Commission isolated five in which the coventurers overlapped and singled these markets out for further analysis. CM/M/XIII COMPETITION L. W. EUR. & U.S.A. at 176. The Commission also found that ATC classifications, the classifications of medicines recommended by the World Health Organization, properly delimited medicines in need of further inquiry, but that the third and sometimes the fourth level of specificity should be used for classification purposes. CM/M/XIII COMPETITION L. W. EUR. & U.S.A. at 176; see also Case IV/M112 — *EDS/SD-Scicon*, Commission Decision of 17 July 1991, *reprinted in* CM/M/XIII COMPETITION L. W. EUR. & U.S.A. 225, 227 (1992) ("Market definition within the IT services sector is particularly difficult.").

208. See Case IV/M092 — *RVI/VBC/Heuliez*, Commission Decision of 3 June 1991, *reprinted in* CM/M/XIII COMPETITION L. W. EUR. & U.S.A. 153 (1992); Case IV/M004 — *Renault/Volvo*, Commission Decision of 7 November 1990, *reprinted in* CM/M/XIII COMPETITION L. W. EUR. & U.S.A. 1, 5-7 (1992).

209. See Case IV/M080 — *La Redoute/Empire*, Commission Decision of 25 April 1991, *reprinted in* CM/M/XIII COMPETITION L. W. EUR. & U.S.A. 119, 122-23 (1992); Case IV/M070 — *OTTO/Grattan*, Commission Decision of 21 March 1991, *reprinted in* CM/M/XIII COMPETITION L. W. EUR. & U.S.A. 99, 102-03 (1992).

210. See Case IV/M111 — *BP/Petromed*, Commission Decision of 29 July 1991, *reprinted in* CM/M/XIII COMPETITION L. W. EUR. & U.S.A. 251 (1992); Case IV/M098 — *ELF/BC/CEPSA*, Commission Decision of 18 June 1991, *reprinted in* CM/M/XII COMPETITION L. W. EUR. & U.S.A. 185, 188 (1992); Case IV/M063 — *ELF/Ertol*, Commission Decision of 29 April 1991, *reprinted in* CM/M/XIII COMPETITION L. W. EUR. & U.S.A. 125, 128 (1992).

Commission consistently applies its definitions to other joint ventures in the same sector.

2. *Geographic Markets*

The Commission must also define the relevant geographic markets in order to ascertain whether the formation of a joint venture negatively impacts the geographic markets in which its parent companies compete.²¹¹ Once again, *Alcatel/Telettra*²¹² and *Magneti Marelli*²¹³ serve as useful starting points for an analysis of the Commission's definition of geographic markets. In both *Alcatel/Telettra* and *Magneti Marelli*, the Commission found the relevant geographic markets to be national ones.²¹⁴ The Commission based its determinations on economic, not political, considerations. In other words, for the purpose of determining geographic markets, "[g]eography . . . is not political, it is economic."²¹⁵ Accordingly, in *Alcatel/Telettra*, after finding that public telecommunications equipment markets vary from Member State to Member State, the Commission decided that Spain was the relevant geographic market for the compatibility inquiry.²¹⁶ The Commission selected Spain because it determined that the concentration would significantly affect only the Spanish market.²¹⁷ In *Magneti Marelli*, the Commission also found that the possible economic effects of the joint venture established national markets — France and Italy — as the relevant geographic markets.²¹⁸

The Commission does not always define national markets as the relevant geographic market, however. The most comprehensive definition of a geographic market appears in *Cargill/Unilever* and makes no reference to national borders:

The relevant geographic market can be defined as the area where the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because conditions of competition are appreciably different in those areas.²¹⁹

211. For a general overview of the factors the Commission believes are relevant to the determination of the geographic market, see XX1st Report, *supra* note 1, at 360-61 (Annex III).

212. Case IV/M042 — *Alcatel/Telettra*, Commission Decision of 12 April 1991, 1991 O.J. (L 122) 48.

213. Case IV/M043 — *Magneti Marelli/CEAc*, Commission Decision of 29 May 1991, 1991 O.J. (L 222) 38.

214. See *Alcatel/Telettra*, 1991 O.J. (L 122) at 52; *Magneti Marelli*, 1991 O.J. (L 222) at 39.

215. BRITTAN, *supra* note 22, at 34.

216. *Alcatel/Telettra*, 1991 O.J. (L 122) at 50, 52.

217. 1991 O.J. (L 122) at 52.

218. *Magneti Marelli*, 1991 O.J. (L 222) at 39.

219. Case IV/M026 — *Cargill/Unilever*, Commission Decision of 20 December 1990, reprinted in CM/M/XIII COMPETITION L. W. EUR. & U.S.A. 31, 34 (1992). Somewhat ironically, after expounding this definition, the Commission found it could leave the question of

This definition establishes three requirements for a geographic market definition. The "supply and demand of products or services" requirement indicates that a relevant geographic market includes only that territory in which one or more of the parent companies was active before setting up the joint venture. Together, the "homogeneity" and "appreciable difference" requirements ensure that a geographic market is defined which is neither too narrow nor too broad. When the conditions of competition vary widely, the Commission will prefer a narrower definition; when the conditions remain homogeneous, the Commission will adopt a broader definition. In accordance with these criteria, the Commission has interpreted "geographic market" to mean anything from a local or regional market, such as the Northeast of England,²²⁰ to the entire European Community,²²¹ or the whole world.²²²

For practical reasons, the Commission is more likely to find that the relevant geographic market is a national or community market than that it is a local or worldwide one. Because market information is often available only on a national or community scale, the Commission sometimes has no choice but to confine its analysis to national or community markets.²²³

geographic market open because the venture was compatible with the Common Market whether the geographic market was national or local. CM/M/XIII COMPETITION L. W. EUR. & U.S.A. at 34. The Cargill/Unilever definition mimics, almost word for word, the guideline set out by the Commission in Form CO, *excerpted in* Ridyard, *supra* note 191, at 253 (Annex).

220. *Cargill/Unilever*, CM/M/XIII COMPETITION L. W. EUR. & U.S.A. at 35 (1992). While both parents were active in the agricultural merchandising sector, Cargill operated only in the northeast of England, so the Commission reasoned that the market share of the joint venture would only increase in that region.

221. Case IV/M050 — AT&T/NCR, Commission Decision of 18 January 1991, *reprinted in* CM/M/XIII COMPETITION L. W. EUR. & U.S.A. 51 (1992). The products concerned included personal computers and automatic teller machines, which were provided by the same companies in each national market. There is also "a substantial cross-border trade in these products, and there does not appear to be any unusually strong preference among the end users for nationally manufactured products." CM/M/XIII COMPETITION L. W. EUR. & U.S.A. at 53.

222. Case IV/M017 — Aérospatiale/MBB, Commission Decision of 25 February 1991, *reprinted in* CM/M/XIII COMPETITION L. W. EUR. & U.S.A. 87, 92 (1992). The Commission defined the helicopter market as a world market because the costs of adaptation of the product to a particular country were minuscule compared to the value of the helicopter itself. CM/M/XIII COMPETITION L. W. EUR. & U.S.A. at 92. Elsewhere, however, Sir Leon Brittan has rejected the notion of a relevant world market: "[O]ur only concern is for competition *within* the Community and I reject the argument that a competitive world market may justify a dominant position in the Community." BRITTAN, *supra* note 22, at 34-35.

223. In *VIAG/Continental Can*, for example, the Commission wanted to define the relevant geographic market as a regional market consisting of four countries and part of a fifth. Given the unavailability of market share figures for this region, however, the Commission's impact analysis relied on national figures, rendering the inquiry an essentially national one. Case IV/M081 — *VIAG/Continental Can*, Commission Decision of 6 June 1991, *reprinted in* CM/M/XIII COMPETITION L. W. EUR. & U.S.A. 157, 162 n.1 (1992). Community and national markets also seem to be the default geographic markets in uncertain cases. *See, e.g.,* Case IV/M112 — *EDS/SD-Scicon*, Commission Decision of 17 July 1991, *reprinted in* CM/M/XII COMPETITION L. W. EUR. & U.S.A. 225 (1992). After examining Community market shares, the Commission noted that EDS believed the markets were national. The Commission therefore extended its reasoning

The relevant geographic market depends in part on the degree of European integration in the industry concerned. For instance, successful penetration of the market by U.S. or other non-EC firms probably indicates intra-EC penetration and therefore a Community market.²²⁴ The degree of integration often depends on the extent of EC, as opposed to national, regulation. When there is greater integration, technical barriers to trade in the form of different national regulations are less pervasive.²²⁵ When there is less integration, or continued fragmentation, the Commission will likely define the relevant markets as national ones. Accordingly, the Commission in *Alcatel/Telettra* found that "up to now the telecommunications markets in the Community have been largely fragmented in national markets."²²⁶ These national markets resulted in part from the persistence of national telecommunications authorities and national standards.²²⁷ The same can be said of pharmaceutical markets.²²⁸ Fragmentation into national markets may also persist because of language and cultural differences or marketing and distribution systems that vary from one Member State to the next.²²⁹

The Commission may also consider the nature of the product or service in question in determining the appropriate geographic market. For example, in *VIAG/Continental Can* the Commission found that metal and plastic closures are easily transportable and have a high

to the national level, finding the acquisition compatible under *either* market definition. CM/M/XII COMPETITION L. W. EUR. & U.S.A. at 228.

224. See Case IV/M121 — Ingersoll-Rand/Dresser, Commission Decision of 18 December 1991, *reprinted in* CM/M/XIII COMPETITION L. W. EUR. & U.S.A. 455, 459 ("The geographic reference market is the European Community. All major manufacturers on the industrial pump market [including the U.S. parent companies] are active in all Member States. Many have production facilities within the Community, and there is considerable reciprocal penetration between individual Member States.").

225. See Siragusa & Subiotto, *supra* note 192, at 910 (noting that different national regulations tend to indicate national geographic markets).

226. Case IV/M042 — Alcatel/Telettra, Commission Decision of 12 April 1991, 1991 O.J. (L 122) 48, 52.

227. 1991 O.J. (L 122) at 52.

228. See Case IV/M072 — Sanofi/Sterling, Commission Decision of 10 June 1991, *reprinted in* CM/M/XIII COMPETITION L. W. EUR. & U.S.A. 171 (1992):

Because the pharmaceutical industry operates within a very tight legal framework, pharmaceutical markets remain essentially national. . . . Notwithstanding the considerable harmonization achieved so far in the Community with regard to pharmaceutical registration procedures, the evaluation of a drug and the decision to authorize its marketing remains at present with the competent authorities of the Member States.

CM/M/XIII COMPETITION L. W. EUR. & U.S.A. at 176.

229. See Commission of the European Communities, XXist Report on Competition Policy, *supra* note 1, at 361 (Annex III). In *KNP/BT/VRG*, a case involving the merger of manufacturers and distributors of printing presses, paper, and packaging materials, the Commission found national markets in part because it found customers preferred "to buy locally because of their dependency on the distributors to service their machines." Case IV/M291 — KNP/BT/VRG, Commission Decision of 4 May 1993, 1993 O.J. (L 217) 35, 37.

packaging density.²³⁰ Accordingly, the Commission determined that the market for closures is the Community.²³¹ In contrast, competition between supermarkets exists on a purely local level, as consumers will only travel so far to shop for groceries.²³² Thus, the supermarket market in *Promodes/Dirsa* consisted of local areas only.²³³

The Commission also considers the supply and demand for the product in question in making its geographic market determination.²³⁴ The amount of crossborder trade and the degree to which consumers prefer national products over imported ones influence the extent to which a given firm may dominate the industry. In *AT&T/NCR*, the Commission found that substantial crossborder trade and a lack of special preference for national ATM machines militated in favor of a Community market.²³⁵ The supply and demand for a product also depends on the identity and characteristics of the typical consumer. Accordingly, the "market to be taken into account is more likely to be narrow if the consumers affected are individuals"²³⁶ because individuals ordinarily do not have significant buying power and tend to shop locally. In contrast, a corporate consumer with disproportionate buying power, such as the monopsonistic buyer in *Alcatel/Telettra*, will ensure that the venture supplying the buyer has less control than its market share would indicate.²³⁷ Likewise, when "the demand side consists only of technically experienced industrial companies which buy internationally,"²³⁸ a Community market definition is appropriate.

Finally, market immaturity may be a reason to choose national geographic markets in rare cases.²³⁹ In most cases, the market is suffi-

230. Case IV/M081 — *VIAG/Continental Can*, Commission Decision of 6 June 1991, reprinted in CM/M/XIII COMPETITION L. W. EUR. & U.S.A. 157, 164 (1992).

231. *VIAG/Continental Can*, CM/M/XIII COMPETITION L. W. EUR. & U.S.A. at 164.

232. Case IV/M027 — *Promodes/Dirsa*, Commission Decision of 17 December 1990, reprinted in CM/M/XIII COMPETITION L. W. EUR. & U.S.A. 25, 28 (1992) (noting that consumers choose between stores in a certain zone because their choices are limited by transportation considerations).

233. *Promodes/Dirsa*, CM/M/XIII COMPETITION L. W. EUR. & U.S.A. at 28.

234. See Siragusa & Subiotto, *supra* note 192, at 913-15 (discussing the relevance of supply and demand in defining the scope of the geographic market).

235. Case IV/M050 — *AT&T/NCR*, Commission Decision of 18 January 1991, reprinted in CM/M/XIII COMPETITION L. W. EUR. & U.S.A. 49, 53 (1992).

236. Siragusa & Subiotto, *supra* note 192, at 913.

237. See Case IV/M042 — *Alcatel/Telettra*, Commission Decision of 12 April 1991, 1991 O.J. (L 122) 48.

238. Case IV/M024 — *Mitsubishi/UCAR*, Commission Decision of 4 January 1991, reprinted in CM/M/XIII COMPETITION L. W. EUR. & U.S.A. 37, 40 (1992) (involving a joint venture in the graphite and carbon electrode markets in which purchasers are highly sophisticated, encouraging intensive competition in quality and price between producers from different countries).

239. See Siragusa & Subiotto, *supra* note 192, at 915 (discussing *OTTO/Grattan* and *La Redoute/Empire*).

ciently well developed that the Commission can simply consider the level of development of the market at the impact stage of its analysis.²⁴⁰ In *OTTO/Grattan* and *La Redoute/Empire*, however, the Commission found the mail order catalogue business in most countries insufficiently developed to constitute a single geographic market for the entire Community.²⁴¹ Since mail order catalogues were relatively new in many countries, and it was far from clear what consumers in the new markets wanted from such catalogues, there was little if any competition in the sector at the Community level. Market immaturity in these cases led to the Commission's choice of national geographic markets.

The geographic market, then, comprises the territory in which one or both parent companies of the venture have historically been active, and within which the market conditions are homogeneous but also distinct from other such territories. The scope of the geographic market also depends on the degree of integration in the sector concerned, the nature of the relevant product or service, and the structure of supply and demand as manifested by the extent of crossborder trade, consumer preferences, and the identity of the consumer.

3. *Horizontal and Vertical Impact*

Once the Commission has determined the relevant product and geographic markets, it considers the impact of the creation of the joint venture in these markets in order to assess the venture's compatibility with the Common Market under the Merger Regulation. If the proposed venture will create or strengthen a dominant position in the relevant markets, the Commission will find it incompatible with the Common Market. The Commission considers both the horizontal impact of a proposed joint venture — the effects on its competitors — and the vertical impact of such a venture — the effects on its suppliers and customers — in making its determination of compatibility.

The Commission's decision in *Alcatel/Telettra* illustrates the Commission's consideration of both the horizontal and vertical impact of a proposed joint venture.²⁴² In *Alcatel/Telettra*, after defining Spain as the relevant geographic market, the Commission discussed the impact of the concentration in Spain, paying special attention to the market shares of Alcatel and Telettra before and after the concen-

240. See, e.g., Case IV/M043 — *Magneti Marelli/CEAc*, Commission Decision of 29 May 1991, 1991 O.J. (L 222) 38, 40; see also *infra* notes 265-68 and accompanying text.

241. Case IV/M070 — *OTTO/Grattan*, Commission Decision of 21 March 1991, reprinted in CM/M/XIII COMPETITION L. W. EUR. & U.S.A. 101, 102-03 (1992); Case IV/M080 — *La Redoute/Empire*, Commission Decision of 25 April 1991, reprinted in CM/M/XIII COMPETITION L. W. EUR. & U.S.A. 119, 122-23 (1992).

242. See Case IV/M042 — *Alcatel/Telettra*, Commission Decision of 12 April 1991, 1991 O.J. (L 122) 48.

tration.²⁴³ Despite the high market shares of the parent companies, the Commission decided that the buying power of the monopsonistic Spanish telecommunications operator, Telefonica, combined with the possibility of new entrants, would prevent the new venture from exercising undue market power in Spain.²⁴⁴ Telefonica, however, owned 30.8% of the shares of Telettra, creating vertical connections between Telefonica on the one hand and Telettra and the new joint venture on the other. The Commission found, "[i]n the context of the present case, the participation of Telefonica in the capital of Alcatel and Telettra, given their strong position on the transmission markets in Spain, is considered to amount to a barrier for other competitors."²⁴⁵ The decision of compatibility, therefore, was conditional; the Commission required Alcatel to acquire the shareholdings held by Telefonica in the two companies concerned in order to obtain a determination of compatibility.²⁴⁶

Magneti Marelli serves as a more prototypical example of the Commission's reasoning because it did not involve a monopsonistic buyer.²⁴⁷ The Commission originally objected to the impact of the concentration in France and Italy but later withdrew its objections as to Italy because of the small increase in market share involved and the presence of significant competitors in the market.²⁴⁸ The Commission determined that four factors accounted for the creation of a dominant position in France and the resulting threat to competition: market share, the market-share gap in relation to the next largest producer, the financial strength of the new joint venture, and the unwillingness of other would-be competitors to compete due to the market's maturity.²⁴⁹ Faced with the Commission's objections, Magneti Marelli's parent company, Fiat, decided to reduce its majority holding in the French battery company CFEC to reduce the overall market share of Magneti Marelli in France. The Commission then held that the joint venture was compatible with the Common Market so long as Fiat reduced its holding in CFEC to ten percent and did not thereafter increase it.²⁵⁰

243. See 1991 O.J. (L 122) at 52-54.

244. See 1991 O.J. (L 122) at 53.

245. 1991 O.J. (L 122) at 54.

246. See 1991 O.J. (L 122) at 54-55.

247. See Case IV/M086 — Thomson/Pilkington, Commission Decision of 23 October 1991, reprinted in CM/M/XIII COMPETITION L. W. EUR. & U.S.A. 373 (1993). There was also a monopsonistic, or single, buyer in Thomson/Pilkington. In that case, the Commission noted that this imperfection is common in defense related markets. *Thomson/Pilkington*, CM/M/XIII COMPETITION L. W. EUR. & U.S.A. at 8.

248. Case IV/M043 — Magneti Marelli/CEAc, Commission Decision of 29 May 1991, 1991 O.J. (L 222) 38, 40.

249. 1991 O.J. (L 222) at 40.

250. 1991 O.J. (L 222) at 40-41.

The Commission's reasoning in *Alcatel/Telettra* and *Magneti Marelli* reveals three factors that seem most relevant in deciding whether a concentration creates or strengthens a dominant position under the Merger Regulation: market share, size and importance of existing competitors, and supply-side substitutability or barriers to entry.²⁵¹ Article 2(1) of the Merger Regulation lists many more factors.²⁵² Concerns about market share, existing competitors, and barriers to entry, however, tend to recur in the Commission's decisions.²⁵³

Often, the Commission decides mainly on the basis of market share that a concentration is compatible with the Common Market.²⁵⁴ The Commission probably employs no explicit cutoff below which it dismisses the possibility of market dominance. But in several cases²⁵⁵ in which the Commission found a venture compatible with the Common Market, footnotes indicate that market share was below twenty-five percent.²⁵⁶ In *BP/Petromed*, the Commission determined that the combined market share of the companies involved would "not attain 15% in any of the oil markets affected,"²⁵⁷ and that the shares would exceed ten percent in only two submarkets.²⁵⁸ The existence of a rough market-share threshold is therefore apparent. If the combined market shares of the parents of a venture are less than twenty-five percent of the market as a whole, the Commission will likely deem it compatible with the Common Market.

Even if a venture has a high market share — greater than twenty-

251. The Commission discussed each of these factors individually in Case IV/M068 — *Tetra Pak/Alfa-Laval*, 1991 O.J. (L 290) 35, 38-39.

252. See *supra* text accompanying note 180.

253. See Regulation 4064/89, *supra* note 3, art. 2(1); *infra* notes 254-75 and accompanying text.

254. See, e.g., Case IV/M111 — *BP/Petromed*, Commission Decision of 29 July 1991, reprinted in CM/M/XIII COMPETITION L. W. EUR. & U.S.A. 251, 254 (1992).

255. Actual market share figures are deleted by the Commission before publication because of their confidential business nature.

256. See, e.g., Case No. IV/M073 — *Usinor Sacilor/ASD*, Commission Decision of 29 April 1991, reprinted in CM/M/XIII COMPETITION L. W. EUR. & U.S.A. 133, 134 n.1 (1992). In its first proposal for a merger regulation, the Commission set a specific threshold at 25% of the market share of the relevant market in a member country. Commission Proposal for a Regulation of the Council on the Control of Concentrations Between Undertakings, 1973 O.J. (C 92) 1, 2. In its 1981 proposal, however, the Commission set the threshold at 20% of the EC as a whole. Amended Commission Proposal for a Council Merger Control Regulation, 1982 O.J. (C 36) 3, 4. In a 1984 amendment, the Commission revised the 20% figure to apply to the EC as a whole or a "substantial part thereof." Amendment to the Commission Proposal, 1984 O.J. (C 51) 8, 8. Although the Merger Regulation as actually adopted contains no specific threshold, and the actual threshold may vary according to the circumstances of each case, the Commission seems more permissive when the new venture's market share will be below 25%. In *BP/Petromed*, although the Commission mentioned the market shares of competitors, the bulk of its compatibility inquiry focused on the market shares of BP and Petromed. *BP/Petromed*, CM/M/XIII COMPETITION L. W. EUR. & U.S.A. at 252-54.

257. CM/M/XIII COMPETITION L. W. EUR. & U.S.A. at 253.

258. CM/M/XIII COMPETITION L. W. EUR. & U.S.A. at 253.

five percent — it may be compatible if its competitors are even stronger and larger.²⁵⁹ *ELF/BC/CEPSA*²⁶⁰ best illustrates the Commission's concern with the size and importance of existing competitors.²⁶¹ In that case, three major companies created Cepsa/Ertoil, a joint venture encompassing chemical, hydrocarbon, pharmaceutical, and other related markets. The concentration of Cepsa and Ertoil resulted in a refining capacity — roughly equivalent in the sector to market share — greater than twenty-five percent (32.3%). Two other competitors owned refineries, however, one of which, REPSOL, had a capacity of fifty-eight percent.²⁶² In the product market of gasoline and diesel fuel, REPSOL had an even larger market share, such that the production capacity of REPSOL was more than double that of Cepsa and Ertoil combined.²⁶³ Even though the margin between REPSOL and Cepsa/Ertoil was narrower in some areas, such as asphalt, the presence of a strong actual competitor in all the relevant product markets led the Commission to find that the venture would not create a dominant position. It therefore found the arrangement compatible with the Common Market.²⁶⁴

The Commission's concern with size and importance of competi-

259. See, e.g., *Merger Control: Rhone Poulenc/SNIA Nylon Deal Approved One Year After ICI/Du Pont*, European Inf. Serv., Sept. 21, 1993, available in LEXIS, Nexis Library, Intl File:

The Commission said that although the new enterprise would hold a large chunk of the EC market, it would be below 50% and the presence of dynamic competitors, such as Du Pont, the world's number one producer of nylon fibres, and others, would mean there was no danger of the new enterprise dominating the market on its own.

Id.

260. Case IV/M098 — *ELF/BC/CEPSA*, Commission Decision of 18 June 1991, reprinted in CM/M/XIII COMPETITION L. W. EUR. & U.S.A. 187 (1992).

261. See also Case IV/M012 — *Varta/Bosch*, Commission Decision of 31 July 1991, 1991 O.J. (L 320) 26, 30 ("The lead of the order of (> 25%) over the next largest competitors would be considerable. The other competitors are small and medium-sized battery specialists.").

262. *ELF/BC/CEPSA*, CM/M/XIII COMPETITION L. W. EUR. & U.S.A. at 190.

263. CM/M/XIII COMPETITION L. W. EUR. & U.S.A. at 190: "Par ailleurs, la capacité de production et la production de REPSOL représente plus du double de celle de Cepsa/Ertoil. De ce fait, il n'y a pas lieu de considérer que le projet de concentration aboutira à la création d'une position dominante dans ces marchés." ("Besides, REPSOL's production and capacity for production are almost double that of Cepsa/Ertoil. For that reason, there is no need to consider whether the concentration will lead to the creation of a dominant position in these markets.").

264.

Compte tenu de la présence de Repsol, qui dépasse largement la capacité de production de l'ensemble Cepsa/Ertoil, et détient des parts de marché égales ou supérieures dans tous les marchés affectés, ainsi que de la présence de Petromed qui constitue une source de concurrence appréciable; de la réglementation actuelle du secteur pétrolier en Espagne et du rôle de Repsol dans ce secteur, ainsi que de la concurrence extérieure déjà implantée dans certains des marchés affectés, le projet de concentration ne crée ou ne renforce pas de position dominante susceptible d'entraver de façon significative la concurrence dans aucun de ses marchés affectés.

CM/M/XIII COMPETITION L. W. EUR. & U.S.A. at 192.

("Taking into account Repsol's capacity, which greatly exceeds that of Cepsa and Ertoil together, Repsol's market share which is equal or higher in all the relevant markets; the presence of Petromed, which is an appreciable source of competition; the actual functioning of the oil sector in Spain and the role of Repsol in that sector; as well as the external competition which already exists in certain affected markets, the concentration neither creates nor

tors may come into play in other contexts as well. In sectors characterized by worldwide competition, the Commission often treats strong competition from imports as it would domestic competition.²⁶⁵ Similarly, in sectors that are oligopolistic and involve the production of a homogeneous product, the Commission may find that a restriction of competition is probable given the size and importance of the venture's existing competitors.²⁶⁶

Barriers to entry are the final factor in the Commission's impact analysis under the Merger Regulation. If the parent companies of a venture have a combined market share that is high, and significant barriers to entry exist, the Commission might find the creation or strengthening of a dominant position likely and therefore declare the venture incompatible with the Common Market. In *AG/AMEV*,²⁶⁷ which concerned a merger between Belgian and Dutch insurance companies, the Commission isolated several factors that indicated high barriers to entry in the national insurance markets.²⁶⁸ These factors include: legal requirements calling for substantial capital resources and financial reserves, slow return on investment and high advertising and production costs in the start-up period, and the present inability to offer crossborder services.²⁶⁹

A company's ability to offer crossborder services depends heavily upon the degree of integration within the Community in the relevant service or product sectors. Divergent technical standards and regulations in a particular sector will force the firms in that sector to offer services or products that vary from Member State to Member State according to the requirements of national and local laws. Producers will face the costs of complying with these different laws if they wish to compete in more than one Member State.

Another element that may affect barriers to entry is the maturity of

reinforces a dominant position capable of restricting competition in a significant way in any of the affected markets.")

CM/M/XIII COMPETITION L. W. EUR. & U.S.A. at 192.

265. See, e.g., Case No. IV/M097 — *Péchiney/Usinor-Sacilor*, Decision of 24 June 1991, reprinted in CM/M/XIII COMPETITION L. W. EUR. & U.S.A. 199, 201 (1992) ("Compte tenu de la part importante des importations, de la puissance des acheteurs et de leur concentration, les entreprises concernées ne se trouveront pas en position dominante.") ("Considering the important role of imports, as well as the economic power and concentration of the buyers, the businesses concerned are not in a dominant position.").

266. See Communication, *supra* note 85, at 4, where the Commission stated: "Une restriction de la concurrence peut, notamment, se réaliser dans un marché oligopolistique de produits homogènes." ("Notably, a restriction of competition could occur in an oligopolistic market of homogeneous products.") In *Nestlé/Perrier*, the Commission stressed the fact that "[e]ven without the merger a narrow oligopoly of three suppliers exists between whom price competition is considerably weakened and for whom the degree of market transparency is very high." Case IV/M190 — *Nestlé/Perrier*, Commission Decision of 22 July 1992, 1992 O.J. (L 356) 1, 14.

267. Case IV/M018 — *AG/AMEV*, Commission Decision of 21 November 1990, reprinted in CM/M/XIII COMPETITION L. W. EUR. & U.S.A. 11 (1992).

268. CM/M/XIII COMPETITION L. W. EUR. & U.S.A. at 14.

269. CM/M/XIII COMPETITION L. W. EUR. & U.S.A. at 14.

the market. Developing markets are generally characterized by low entry barriers, while mature or declining markets have higher barriers. In *Magneti Marelli*, the Commission found high barriers to entry, relying on the fact that the relevant battery market was a "mature market on which little production capacity is available."²⁷⁰ In another case, the Commission discovered that overcapacity and declining sales in the farm and earth-moving machinery sectors created barriers to entry.²⁷¹ Conversely, the Commission has found the beverage plastic bottle market to be a "developing market characterized by low entry barriers and an increasing number of suppliers."²⁷²

In general, the Commission pays little attention to "the interests of the intermediate and ultimate consumers, and the development of technical and economic progress,"²⁷³ despite the fact that Article 2(1)(b) of the Merger Regulation lists these factors along with the more readily analyzable economic factors of Article 2(1)(a).²⁷⁴ In particular, the Commission considers technical progress more seriously under the Article 85 analysis than under the Merger Regulation analysis.²⁷⁵

To summarize the impact analysis under the Merger Regulation, the Commission considers both horizontal and, if relevant, vertical impact in determining whether a joint venture creates or strengthens a dominant position and is therefore incompatible with the Common Market. In making its determination, the Commission chiefly relies on three factors: (1) the market share of the parent companies before and after the venture; (2) the size and importance of existing competi-

270. Case IV/M043 — *Magneti Marelli/CEAc*, Commission Decision of 29 May 1991, 1991 O.J. (L 222) 38, 40.

271.

Una caratteristica comune ai tre mercati è il costante declino del volume delle vendite nella CEE negli ultimi dieci anni, una tendenza che con tutta probabilità è destinata a continuare. Attualmente esiste una notevole sovraccapacità sui tre mercati in questione all'interno della Comunità ed è in corso una certa razionalizzazione all'interno dell'industria nel suo complesso.

Case IV/M009 — *Fiat Geotech/Ford New Holland*, Commission Decision of 8 February 1991, reprinted in *CM/M/XIII COMPETITION L. W. EUR. & U.S.A.* 67, 70 (1992).

("A common characteristic in the three markets is the constant decline in volume of sales in the EEC in the last ten years, a trend that with all probability is destined to continue. Actually, a notable overcapacity exists in the three markets in question within the Community, and a certain rationalization is running its course in the industry as a whole.")

CM/M/XIII COMPETITION L. W. EUR. & U.S.A. at 70.

272. Case IV/M081 — *VIAG/Continental Can*, Commission Decision of 6 June 1991, reprinted in *CM/M/XIII COMPETITION L. W. EUR. & U.S.A.* 157, 162 (1992).

273. Reg. 4064/89, *supra* note 3, art. 2(1)(b).

274. Reg. 4064/89, *supra* note 3, art. 2(1).

275. A source of comparison is U.S. Dept. of Justice, *Antitrust Enforcement Guidelines for International Operations*, *supra* note 106, at 20,600-20,605. The Department of Justice's four-step analysis evaluates the joint venture market or markets, other markets, vertical restraints, and offsetting efficiency benefits. The Commission largely omits this last step in its evaluation under the Merger Regulation.

tors; and (3) the existence or lack of entry barriers.²⁷⁶

Clearly, the Commission's Merger Regulation inquiry focusing on product markets, geographic markets, and the impact of the proposed venture is quite different from its two-step Article 85 inquiry, which looks first into actual or potential competition and effects on third parties, and then into possible grounds for exemption. The following section examines the difficulties inherent in each of the two standards, as well as the difficulties arising from having two different standards, before proposing how the standards might be revised and clarified.

III. REVISING AND CLARIFYING THE COMPATIBILITY STANDARDS TO PROMOTE PROCOMPETITIVE JOINT VENTURES

This Part addresses the various difficulties with the Commission's approach to joint ventures. As previously discussed, the Commission applies two different standards of compatibility with the Common Market to joint ventures. Each of these standards is problematic. The greatest difficulties arise, however, from the mere existence of two different standards of compatibility. This Part examines these difficulties in detail, evaluates the Commission's attempts to change the system, and proposes additional possibilities for reform.

As a whole, this Part addresses the reform of the two standards with a view toward rationalizing and harmonizing them. Section III.A compiles the difficulties with the two standards of compatibility and notes the discrepancies between them, drawing on the Commission's decisions as set forth in Parts I and II. Section III.B analyzes the Commission's recognition of the need for reform and its proposed solutions. Finally, section III.C exposes the inadequacy of the proposed reforms and pinpoints the steps necessary to improve the Community's joint venture clearance regime. This Part concludes that harmonization would reduce the probability of confusion, distortion of behavior, and increasing divergence of standards, without needlessly sacrificing the enforcement power of the Commission.

A. *Difficulties with the Two Standards of Compatibility and Discrepancies Between Them*

The detailed examination of the relevant Commission decisions in Parts I and II exposed many difficulties with each of the two compatibility standards. This section summarizes and evaluates these difficulties. Section III.A.1 explores the problems with the Article 85 compatibility standard. Next, section III.A.2 analyzes the problems with the Merger Regulation compatibility standard. Finally, section

276. See *supra* notes 267-72 and accompanying text.

III.A.3 highlights the difficulties arising out of two inconsistent standards of compatibility.

1. *Problems with the Compatibility Inquiry Under Article 85*

The Commission's compatibility analysis under Article 85 evidences three serious difficulties. First, the Commission interprets Article 85(1) too broadly, thereby catching too many ventures only to exempt them by means of its Article 85(3) analysis. Second, the Commission defines "actual or potential competition" too broadly, such that many companies are unjustifiably considered to be actual or potential competitors. Finally, the Commission often improperly considers industrial policy concerns when evaluating a venture's competitive effects. The net result of these three difficulties may be fewer procompetitive ventures altogether or ventures distorted by their creators' attempts to squeeze them into the terms of the Merger Regulation to evade evaluation under Article 85.

Currently, many parent companies must notify clearly compatible ventures to the Commission, only to have them approved after a considerable expenditure of time and money. The Commission should interpret Article 85(1) more restrictively so that it applies to fewer ventures. In 1990, Barry Hawk suggested four possible solutions to the Article 85 interpretation problem: shift more of the Article 85(3) analysis to Article 85(1), expand the existing block exemptions, accelerate procedures, and issue guidelines.²⁷⁷ Although the Commission has implemented or is poised to implement the last three suggestions,²⁷⁸ the first is the most important.²⁷⁹ Moreover, although Hawk advocates merely reallocating the current inquiry between Article 85(1) and 85(3) by expanding the *analysis* under Article 85(1), the Commission must also reduce the *scope* of applicability of Article 85(1). The Commission insists on a notification whenever a venture falls under Article 85(1) even if the venture clearly merits an Article 85(3) exemption: "The typical pattern of Commission decision [is] first to damn the agreement with an elaborate analysis under Article 85(1), and then redeem them with an equally elaborate analysis under Article 85(3)."²⁸⁰ This approach may overmonitor businesses engag-

277. HAWK, *supra* note 50, at 309.

278. Commission Regulation 151/93 amended the existing block exemptions for specialization agreements, research and development agreements, patent licensing agreements, and know-how licensing agreements. Regulation 151, *supra* note 104. In a press release in late December 1992, the Commission resolved to speed up its consideration of cooperative joint ventures. Commission Press Release, *supra* note 15, at 2. Finally, the Commission issued guidelines for the evaluation of cooperative ventures in a 1993 Notice. 1993 Notice, *supra* note 32, at 2.

279. Hawk may agree. He focuses on this possible reform in Barry E. Hawk, *Joint Ventures Under EC Law*, 1992 FORDHAM CORP. L. INST. 557, 596-97. He goes so far as to address precisely how the Commission should allocate the inquiry between Article 85(1) and 85(3). HAWK, *supra* note 50, at 596-97.

280. Forrester & Norall, *supra* note 70, at 419.

ing in commendable joint ventures. In this context, two commentators have complained about the Commission's historic "refusal to take the risk of trusting businessmen and their lawyers — the consumers of Community law — to make sensible decisions about whether agreements were or were not pro-competitive viewed in their entirety."²⁸¹

Difficulties also arise from the Commission's treatment of actual or potential competition. The Commission's notion of potential competition is unjustifiably broad, and, upon finding actual or potential competition, it consistently requires market exit on the part of the parents no matter what the actual competitive circumstances.²⁸² Although the Commission appropriately seeks to deter joint ventures that are really disguised cartels, its approach often goes too far, insisting on the net loss of a competitor when both parents withdraw, or at best mere stasis when only one withdraws.²⁸³ Although the presence of both parents in the market may indicate illicit sharing of business information, or possibly collusion, the Commission may adequately guard against this contingency simply by requiring assurances from or imposing conditions on the parent companies.²⁸⁴ Even when assurances prove insufficient to guarantee the firms' future good conduct, it is unlikely that eliminating one firm will engender less rather than more interfirm coordination. The Commission may currently find a restriction of competition when the joint venture competes with a parent *and* when it does not.²⁸⁵

A final difficulty with the Commission's analysis under Article 85 is the influence of industrial policy concerns on its evaluation of a venture's compatibility with the Common Market.²⁸⁶ Viewed broadly, the entire project of European integration is an industrial policy goal,

281. *Id.* at 409.

282. *See supra* notes 60-65 and accompanying text.

283. *See supra* notes 55-60 and accompanying text; *see also* Joseph F. Brodley, *Joint Ventures and Antitrust Policy*, 95 HARV. L. REV. 1523 (1982). Brodley notes, "[t]he joint venture as a new economic actor provides an actual addition to competition that must be weighed against anticompetitive effects that are only probabilistic. Moreover, joint venture entry is immediate, whereas the hypothesized potential entry by parent firms may occur only after some delay." *Id.* at 1532. Brodley also finds that "[p]otential competition can be an effective standard for joint venture analysis only when combined with an analysis of collusion and market exclusion risks in a single analytical approach that emphasizes incentive correcting rather than prohibitory remedies." *Id.* at 1538 (emphasis added).

284. Faced with Commission opposition, some companies may even be able to alter their agreements by subjecting themselves to conditions of their own choosing, thereby gaining Commission approval. In *Finaf/Procter & Gamble*, the Commission eventually permitted a joint venture in the sanitary protection products sector to continue after informing the parents of the objectionable portions of their agreement and receiving adequate assurances from the companies concerned. Case IV/33 697 — *Finaf/Procter & Gamble*, Commission Decision of 7 January 1992, 1992 O.J. (C 3) 2, 4.

285. *See supra* section II.B.

286. *See FINE, supra* note 24, at 73 ("As long ago as 1977, the Commission has been granting individual exemptions to production JVs which increase the ability of EEC industry to compete against manufacturers from highly developed countries such as the United States and Japan.").

which European competition policy must help promote.²⁸⁷ Viewed more narrowly, however, industrial policy reflects national interests that may run counter to the goal of integration as well as to competition policy goals. The Commission should not allow these national interests to sabotage an otherwise coherent Community competition policy.²⁸⁸ The Commission should clarify this stance, especially as some Article 85 Commission decisions suggest that the Commission is considering industrial policy when making its compatibility determinations.²⁸⁹ In two recent cases, the Commission demonstrated its willingness to approve joint ventures that hurt intracommunity competition in order to promote European competition with U.S. and Japanese firms. For instance, the Commission recently approved a joint venture between a Dutch company and two French companies to develop liquid crystal displays.²⁹⁰ The new venture will be the only one of its kind in Europe; its sole competitor will be a Japan-U.S. joint venture.²⁹¹ The decision represents the first in which the Commission has used the "technical or economic progress" provision of Article 85(3) to approve the creation of a European monopoly. Similarly, in *Alcatel Espace/ANT Nachrichtentechnik*, the Commission found compatible a joint venture between two European firms active in the satellite industry, basing its decision in part on the high NASA and U.S. Department of Defense budgets for satellites.²⁹² The Commission therefore effectively opened the back door to industrial policy considerations in this case by finding a joint venture faced with strong non-EC competitors in non-EC markets compatible, despite the sixteen EC competitors who could be harmed by it at home.²⁹³

287. In a recent speech, Karl van Miert, the Competition Commissioner, noted:

Competition policy has so long been a central Community policy, that it is often forgotten that it is not an end in itself but rather one of the instruments toward the fundamental goals laid out in the Treaty — namely the establishment of a common market, the approximation of economic policy, the promotion of harmonious development and economic expansion, the increase of living standards and the bringing about of closer relationships between Member States.

Van Miert Speech on Competition Policy, REUTER EUR. COMMUNITY REP., May 11, 1993.

288. See, e.g., *Keep Competing*, FIN. TIMES (London), Jan. 15, 1993, at 13:

In anti-trust issues, Mr.[.] Van Miert says, competition should not be the only criterion: industrial, social, and other factors also apply. Indeed they do, but they are not the business of the competition commissioner. . . . If the result is to be a productive compromise, it is above all necessary that the competition commissioner should fight his corner.

Id. at 13.

289. See, e.g., Case IV/32 006 — *Alcatel Espace/ANT Nachrichtentechnik*, Commission Decision of 12 January 1990, 1990 O.J. (L 32) 19.

290. *EC Approves the Creation of Monopoly LCD Maker*, INDEPENDENT (London), May 1, 1993, at 17.

291. *Id.*

292. *Alcatel Espace/ANT Nachrichtentechnik*, 1990 O.J. (L 32) at 22. These budgets ensure a large market for American manufacturers, enabling them to spend more on research and development than their European counterparts. 1990 O.J. (L 32) at 22.

293. See 1990 O.J. (L 32) at 22.

2. Problems with the Compatibility Standard Under the Merger Regulation

The chief difficulties with the compatibility standard under the Merger Regulation stem from the regulation's turnover threshold, its scope of application, the three substantive areas of the Commission's analysis, and the influence of industrial policy concerns. The first of these difficulties is that the turnover threshold, which triggers the application of the Merger Regulation, bears no logical connection to the factors that determine whether a venture is compatible with the Common Market.²⁹⁴ If a joint venture is formed by two parents with high EC and worldwide turnover, as well as extensive business in one member state, the venture will likely be caught by the regulation, no matter how benign its actual effect on competition. The disjunction between the trigger for analysis and the standard for analysis threatens to become a problem of even greater magnitude if and when the Council decides to lower the thresholds for the Merger Regulation's application.²⁹⁵

Despite the Merger Regulation's high thresholds, its scope of application is still too broad. Although the thresholds partly serve a screening function to weed out *de minimis* cases,²⁹⁶ they do not exclude enough cases from consideration. The Commission sometimes applies the Merger Regulation to *de minimis* cases as well as to cases that are arguably unrelated to the smooth functioning of the Common Market.²⁹⁷ For example, *BNP/Dresdner Bank*²⁹⁸ and *BNP/Dresdner Bank — Czechoslovakia*²⁹⁹ involved attempts by two banks to set up joint ventures to help finance transactions in Hungary and Czechoslo-

294. Compare Reg. 4064/89 *supra* note 3, art. 1 (listing the turnover criteria) with Reg. 4064/89, *supra* note 3, art. 2 (setting out the standard of compatibility).

295. See *supra* note 176 and accompanying text.

296. The Commission generally tries to avoid capturing *de minimis* cases in its competition evaluations. See, e.g., Notice — Minor Importance, *supra* note 36, at 2.

297. See, e.g., Sibree, *supra* note 14, at 91. Sibree notes, "it is becoming a matter of increasing concern that . . . the expectation that the Merger Regulation should lead to control over only substantial transactions in Community terms was misfounded." *Id.* The thresholds may also exclude some ventures that ought to be regulated at Community level. In particular, the requirement that the venture not achieve more than two-thirds of its turnover within a single Member State is absurd in light of the unification of Germany: "The biggest companies in Germany like Siemens, like Bosch, like Mercedes and BMW usually have more than two-thirds of their turnover in Germany. . . . If they would make a merger or would merge, this would not fall within the competence of Brussels." Dr. Bernhard Beck, Corporate Counsel, Robert Bosch GmbH, Address at the American Bar Association Section of International Law and Practice Annual Spring Meeting (Apr. 30, 1993) (cassette tape on file with author).

298. Case IV/M021 — BNP/Dresdner Bank, Commission Decision of 4 February 1991, reprinted in CM/M/XIII COMPETITION L. W. EUR. & U.S.A. 57 (1992).

299. Case No. IV/M124 — BNP/Dresdner Bank-Czechoslovakia, Commission Decision of 26 August 1991, reprinted in CM/M/XIII COMPETITION L. W. EUR. & U.S.A. 285 (1992) (on file with author); see also Commission Press Release, IP (91) 802, Aug. 27, 1991 (on file with author).

vakia.³⁰⁰ In each case, the Commission required notification and set up a review procedure, only to conclude that the ventures did not "have any significant impact on the Community market and can therefore be declared compatible."³⁰¹ Requiring notifications in cases that only minimally affect the Community wastes valuable resources.³⁰²

Difficulties also stem from the Commission's reasoning in each of the three substantive areas of compatibility analysis under the Merger Regulation: product market, geographic market, and impact.³⁰³ In its product market inquiry, the Commission tends to rely on product market definitions that do not accord with commercial reality.³⁰⁴ Moreover, it analyzes a venture's effects in upstream, downstream, and neighboring markets only irregularly, and its substitutability inquiry remains questionable from an economic point of view.³⁰⁵

The Commission's geographic market analysis, while more coherent overall than its product market analysis, generally views integration quite statically. If the process of harmonizing the relevant national laws, regulations, and technical standards is ongoing at the European level in relation to the industry at issue, the Commission will likely decide that a Community market has not yet been attained and will declare that the market is a national one.³⁰⁶ Although the Commission's approach may often accord with the slow process of integration, a more dynamic approach could *encourage* integration, at least on the part of the relevant firms.

The Commission's horizontal and vertical impact inquiry reflects the concerns most relevant to compatibility because it is at the impact stage of the analysis that the Commission finally decides whether a venture creates or strengthens a dominant position, thereby rendering it incompatible with the Common Market. The Commission's decisions reveal that it applies the Merger Regulation impact factors in a more consistent way than it applies those under Article 85.³⁰⁷ The Commission, however, should explain the weight to be given to these factors, in a Notice if possible, because the evolving caselaw has ren-

300. *BNP/Dresdner Bank*, CM/M/XIII COMPETITION L. W. EUR. & U.S.A. at 58; *BNP/Dresdner Bank-Czechoslovakia*, CM/M/XIII COMPETITION L. W. EUR. & U.S.A. at 287.

301. Commission Press Release, IP (91) 802, *supra* note 299, at 1.

302. Arguably, the Commission had a political motive in these two cases. It may have been trying to portray itself as a staunch defender of free competition in an era in which the inflow of Western bank operations into Eastern Europe could be seen as exploitative by the East. Nevertheless, in taking these cases to the decision stage, the Commission overtly acted in a manner contrary to its published policy, potentially undermining its credibility in the long run.

303. See *supra* section II.C.

304. See *Siragusa & Subiotto*, *supra* note 192, at 906.

305. See *supra* notes 199-204 and accompanying text.

306. See *supra* note 223 and accompanying text.

307. See *supra* notes 243-75 and accompanying text. This consistency may be one more reason that venturers prefer falling under the Merger Regulation to falling under Article 85.

dered some factors more important than others.³⁰⁸ A Notice explaining the relative importance of the factors in the Commission's analysis would promote certainty and encourage joint venturing.³⁰⁹ Some flexibility might be sacrificed; Notices, despite their nonbinding effect, tend to be construed as "the law." But the benefits of certainty in this area far outweigh any drawbacks of the rigidity that would result from codification.³¹⁰

Finally, industrial policy or social goals may unpredictably influence the Commission's Merger Regulation decisions just as they do in the Commission's Article 85 analysis.³¹¹ Brittan professed to scorn "old-fashioned industrial policy where politicians and bureaucrats sat in their offices playing with industrial structures much as children do with their Lego sets."³¹² Nevertheless, the Commission sometimes accommodates industrial policy concerns in a more subtle and sophisticated way.³¹³ The Commission may successfully promote favored industrial policy goals simply by relaxing its application of the Merger Regulation in key cases.³¹⁴ In *Aérospatiale/MBB*, for example, the

308. The fact that certain factors are more important than it would otherwise appear, combined with the difficulty of access to the relevant Commission decisions, necessitates a policy statement that summarizes the important tenets of the caselaw to date. See *supra* notes 249-52 and accompanying text.

309. Downes and Ellison note that certainty remains a serious problem in the joint venture area: "One of the most difficult tasks facing the Commission . . . will be to establish a clear and fair practice in relation to joint ventures, so that businesses planning new enterprises may know where they stand." DOWNES & ELLISON, *supra* note 178, at 161.

310. Sibree notes that, although the Commission and Council intended the Merger Regulation to provide the advantages of one-stop shopping, "the clarity and simplicity which we were to expect does not exist in the case of joint ventures . . ." Sibree, *supra* note 14, at 91 (emphasis added). Similarly, Hawk decries the Commission's current approach, despite its flexibility, claiming that it is counterproductive and may hinder enforcement. HAWK, *supra* note 50, at 308-09.

311. See XXist Report, *supra* note 1, at 42 ("Industrial policy concerns the effective and coherent implementation of all those polic[i]es which impinge on the structural adjustment of industry with a view to promoting competitiveness."). Ridyard notes that "the Commission may use its discretion in defining market dominance to encourage the development of 'European Champions' with the ability to match the industrial giants of the US and Japan." Ridyard, *supra* note 191, at 252; see also Case IV/M017 — *Aérospatiale/MBB*, Commission Decision of 25 February 1991, reprinted in CM/M/XIII COMPETITION L. W. EUR. & U.S.A. 89 (1992) (approving a suspect joint venture for the production of helicopters); Siragusa & Subiotto, *supra* note 192, at 929 ("[T]he definition of the relevant product and geographic markets or . . . the assessment of compatibility, is likely to vary from case to case, possibly depending on political pressures from Member States."); Heinrich Hölzler, *Merger Control*, in EUROPEAN COMPETITION POLICY 9, 30 (Peter Montagnon ed., 1990) ("Only by making it hard for public interest to be taken into account will the Community develop an approach to mergers capable of achieving the basic objective — that of ensuring that the gains from the single market are maximized through the free play of market forces.").

312. BRITTAN, *supra* note 22, at 32.

313. Claus-Dieter Ehlermann, Director-General for Competition under van Miert, refers to the perceived problem of the Commission's "susceptibility to lobbying." Claus-Dieter Ehlermann, *EC Merger Control — No Soft Touch*, FIN. TIMES (London), July 9, 1993, at 21.

314. Paul C. Curnin, Note, *United States Antitrust Law and Industrial Policy: International Joint Ventures After GM-Toyota*, 9 FORDHAM INTL. L.J. 257, 287-88 (1985-1986) (noting that,

Commission approved a joint venture in the helicopter sector that faced U.S. competition, despite the venture's adverse effects on other EC competitors.³¹⁵ Presumably, the Commission took into account arguments that the joint venture would permit more effective competition against American rivals and discounted the cost to consumers of a more concentrated market.

Only eight months later, however, the Commission refused to let such industrial policy considerations prevail. In *Aérospatiale-Alenia/de Havilland*, the Commission declared a concentration *incompatible* with the Common Market for the first time.³¹⁶ There, the Commission found that a joint venture in the regional turboprop aircraft market would constrict EC competition.³¹⁷ This decision engendered a dispute between those who believed the Commission acted on a sound economic basis and those who wanted to see industrial policy concerns play a more active role.³¹⁸ Interestingly enough, the new Competition Commissioner, Karel van Miert, was one of the decision's critics.³¹⁹ Paul Quiles, the French Transport Minister, also criticized the decision: "It seems to be imperative the Commission should not content itself with looking at competition [criteria]. It is not enough."³²⁰ Most non-French scholars, however, have supported the Commission's denial of approval of the *de Havilland* joint venture, viewing the decision as evidence that the Commission will not succumb to industry lobbyists and that "competition is the central yardstick according to which it will interpret the Merger Regulation."³²¹

If *de Havilland* is any indication, the Commission is less prone to acknowledge industrial policy considerations under its Merger

"[i]nstead of the active governmental intervention envisioned by most critics of industrial policy, relaxation of the enforcement of the antitrust laws is a passive form of intervention").

315. *Aérospatiale/MBB*, CM/M/XIII COMPETITION L. W. EUR. & U.S.A. at 93.

316. Case IV/M053 — *Aérospatiale-Alenia/de Havilland*, Commission Decision of 2 October 1991, 1991 O.J. (L 334) 42. This past year, however, the Commission used the market definitions elucidated in *de Havilland* to clear a Deutsche Aerospace AG (DASA) takeover of Dutch Fokker NV. See *EC Uses De Havilland Ruling to Pass Fokker Takeover*, REUTER EUR. COMMUNITY REP., May 12, 1993. Two of the parties to the *de Havilland* case, Alenia and Aérospatiale, are involved with DASA in other ventures. *Id.*

317. 1991 O.J. (L 334) at 60.

318. The minority opinion of the Advisory Committee on Concentrations in the *de Havilland* decision stated, "[a] minority does not accept the Commission description and analysis of the market. . . . Further, this minority considers that the Commission is not so much protecting competition but rather protecting the competitors of the parties to this proposed concentration." Opinion 91/C 341/07 of 5 December 1991, 1991 O.J. (C 314) 7.

319. See, e.g., *EC Uses De Havilland Case To Pass DASA/Fokker Takeover*, *supra* note 316. Van Miert reportedly even characterizes competition policy as "just one strand, albeit a central one, of industrial policy." *Competition Policy: Half-Year Summary of Commissioner Van Miert's Decisions*, TECH EUROPE, July 8, 1993, § 84.

320. Andrew Hill et al., *Brussels' Merger Policy Attacked*, FIN. TIMES (London), Oct. 8, 1991, at 22.

321. Leonard Hawkes, *The EC Merger Control Regulation: Not an Industrial Policy Instrument: The De Havilland Decision*, 1 EUR. COMPETITION L. REV. 34, 37 (1992).

Regulation analysis than under its Article 85 analysis. However, given Commissioner van Miert's sympathies, industrial policy considerations may command even greater respect in the future under both systems of analysis. The influence of industrial policy is therefore likely to remain a problem, alongside difficulties with the Merger Regulation's thresholds, scope of applicability, and substantive standards.

3. *The Difficulties Resulting from Two Disparate Standards of Compatibility*

Three problems arise from the existence of two different substantive standards of compatibility for cooperative and concentrative joint ventures: the differences between the standards cause confusion, distort behavior, and threaten to become more serious over time. First, differences between the standards are confusing for venturers who wish to comply with the law but must do so in a climate of tremendous uncertainty. Second, faced with uncertainty, would-be venturers may distort their behavior, either by deciding not to risk venturing in the first place, or by creating concentrative ventures when cooperative ventures would be economically preferable, in order to take advantage of the more favorable Merger Regulation regime. Finally, given the short time periods necessary to conclude joint ventures, and the resultant unlikelihood of judicial review, the current differences between the standards threaten to become even greater over time.

Confusion results from the fact that it is hard to predict which of the two standards the Commission will apply to a particular venture, combined with the fact that the Commission's inquiry varies significantly from one standard to the other. In particular, the disparate treatment of effects on third parties and associated markets and of technical and economic progress may cause substantial confusion.³²² The Commission considers the interests of third parties extensively under Article 85, but not under the Merger Regulation.³²³ No economic or policy reason justifies treating third parties differently in a concentrative rather than a cooperative situation.³²⁴ Conversely, the Commission considers the effects on neighboring, upstream, or downstream markets only sporadically under the Merger Regulation, de-

322. The remarks of a corporate counsel to a company that regularly forms joint ventures illustrate the danger of confusion:

[There is] a lot of legal uncertainty. And I myself am doubting whether the Notices we have . . . are so helpful. There is still a lot of interpretation possible. . . . I am always in a sort of conflict with the management to say, "I can't give you a definite answer, this is possible, or this is not possible."

Beck, *supra* note 297.

323. See *supra* notes 83-91 and accompanying text.

324. See Barry E. Hawk, *Joint Ventures Under EC Law*, in 1991 FORDHAM CORP. L. INST., EC AND U.S. COMPETITION LAW AND POLICY 557 (Barry E. Hawk ed., 1992) (arguing that analysis under either procedure should focus on actual or potential competition, spillover effects, and effects on third parties.).

spite a policy statement to the contrary.³²⁵ The Commission considers these associated market effects even less frequently under Article 85.³²⁶ Effects on associated markets should be a more important part of the Commission's inquiry under both standards, in order to illuminate the whole range of effects the joint venture will likely produce. Effects on associated markets are especially important given the Commission's tendency toward narrow product market definitions.

More confusing still is the disparate treatment of technical and economic progress under the two standards. The Commission gives little weight to such progress in the Merger Regulation inquiry but often permits progress to play a crucial role in rescuing ventures under Article 85(3) from an Article 85(1) finding of incompatibility. Brittan explained the reasons for giving little weight to progress in a Merger Regulation evaluation: "[T]echnical and economic progress . . . will certainly form part of the Commission's analysis However, this does not mean that such progress is a legitimate defence for a merger [or other concentration] which creates a dominant position."³²⁷ This statement is astonishing given the inclusion of "technical and economic progress" alongside other "determinative" factors in Article 2(1) of the Merger Regulation.³²⁸ However, one author notes that, in accordance with the history of the negotiations leading up to the Merger Regulation, the first part of Article 2(1)(b) deals with "classic economic analysis of competition," which is given greater weight, while the second part is "rather less clear as the scope of the matters which are to be taken into account is widened to include more general matters."³²⁹ The Commission, therefore, tries to ensure that progress is substantial before it gives such progress any weight in its Merger Regulation analysis, especially because industrial policy considerations may be disguised as progress.³³⁰

Arguably, the Commission treats technical and economic progress differently under the two compatibility standards because of the greater likelihood that ventures falling under the Merger Regulation will involve "structural change." Some commentators believe that such change renders the creation of a dominant position more harmful than it would be otherwise; hence, benefits falling under the Merger Regulation's rubric of "general matters" should not easily outweigh the harms made apparent in the course of "classic economic analy-

325. See *supra* notes 202-06 and accompanying text.

326. See *supra* notes 83-91 and accompanying text.

327. BRITTAN, *supra* note 22, at 35.

328. See Regulation 4064/89, *supra* note 3, art. 2(1)(b).

329. Hawkes, *supra* note 321, at 36.

330. In *Accor/Wagons-Lits*, for example, the Commission found little promise of progress, and said that even if progress were attainable, there were other means to attain it. Case IV/M126 — *Accor/Wagons-Lits*, Commission Decision of 28 April 1992, 1992 O.J. (L 204) 1, 9 (finding technical or economic progress in the catering sector unlikely).

sis.”³³¹ Many of the joint ventures decided under Article 85 also involve structural change, however.³³² For full-function and some other Article 85 joint ventures, structural change is likely.³³³

In fact, the degree of structural change in the relevant markets provides a better basis for gauging the appropriate weight of technical and economic progress than the concentrative-cooperative distinction. Progress may justify a joint venture that involves little structural change, such as a joint research and development agreement, but remain insufficient to warrant the approval of a more elaborate joint venture. The Commission's current use of the technical and economic progress criteria is therefore proper at either end of the joint venture spectrum, but inappropriate in the middle. Progress should not exempt a “fully fledged joint venture” that does not satisfy the Merger Regulation's thresholds, when it fails to aid a similar venture that barely satisfies the Regulation's thresholds.

In addition to the differences between the standards that confuse would-be venturers, some differences *distort* venturers' behavior.³³⁴ The Commission's greater overall tolerance for concentrative ventures may lead would-be venturers to force what otherwise would be cooperative ventures into the concentrative mold.³³⁵ Venturers will create concentrations when cooperations are more economically desirable because of the unlimited clearance, avoidance of national competition laws, and rapid procedures of the Merger Regulation.³³⁶ Yet, they

331. See, e.g., Hawkes, *supra* note 321, at 36. This structural argument dates at least from the 1966 Memorandum. See 1966 Memorandum, *supra* note 24, at 166 (Annex G).

332. See Pathak, *supra* note 24, at 174. Hawk believes most ventures are on a continuum somewhere between mergers and cartels. Drawing a line between structural and behavioral criteria, such as the concentrative-cooperative distinction, inevitably results in arbitrariness: “A risk to be avoided is overly rigid classifications or definitions that result in a blindered application of different ‘structural’ and ‘behavioral’ legal rules.” Hawk, *supra* note 324, at 559; see also Jean-Marc Le Bolzer, *The New EEC Merger Control Policy After the Adoption of Regulation 4064/89*, 14 WORLD COMPETITION 3, 36 (1990).

333. See *supra* notes 134-36 and accompanying text.

334. One industry representative notes:

As a corporate lawyer, if the management is asking, “What should we do if we have a strategic plan to cooperate with another company?,” I have always to say please follow the stricter, the closer, the more concentrative path, and the best thing is [if] you buy the company. If you buy it totally, then you have the influence and you have the possibility of getting this quick clearance under Merger Control.

Beck, *supra* note 297.

335. See *supra* notes 158-72 and accompanying text. Extreme distortion will result if would-be venturers decide not to create a procompetitive venture. See Brodley, *supra* note 283, at 1529 (“In development of a refined and focused antitrust policy for joint ventures, care should be taken to avoid biasing the choice of organizational form away from joint ventures and toward other less efficient contractual alternatives.”).

336. See *supra* notes 161-69 and accompanying text. Frank L. Fine argues that “the Commission's approach may have the unintended effect of distorting business decisions and the development of a coherent body of anti-trust law on business co-operation,” but he finds distortion to stem from the Commission's failure to take a comprehensive approach to nonconcentrative operations. See Frank L. Fine, *The Commission's Draft Guidelines for Joint Ventures: On the Road to Transparency?*, 13 EUR. COMPETITION L. REV. 51, 54 (1992).

cannot be certain that they will be successful. Because of the great lack of certainty in the current regime, venturers may distort their behavior without actually benefiting from the more relaxed Merger Regulation standards. This possibility could inhibit outright the formation of many otherwise procompetitive ventures.

Finally, the differences between the two compatibility standards *threaten to become greater and more divisive over time*. If the Commission does not intentionally harmonize the differences between the two standards, they will likely grow further apart, thereby creating even greater uncertainty.³³⁷ The two standards are applied by different parts of the Commission's Competition Directorate, and therefore are unlikely to grow together merely for the sake of administrative convenience.³³⁸ Judicial review has so far been nonexistent and remains improbable given the short time frame involved in setting up a joint venture.³³⁹ Timely harmonization could therefore not only minimize confusion and distortion, but also reduce the threat of future divergence and the accompanying uncertainty.

B. *The Commission's Proposals for Reform*

The Commission has, to some extent, recognized the need for reform in the joint venture arena. Its proposals have been by and large inadequate, however, resulting "not from a failure of intelligence, but from a narrowness of vision."³⁴⁰ This narrowness of vision manifests itself primarily in a desire to reform the procedures, rather than the substance, of the joint venture inquiry.

Brittan recognized that the regime under the Merger Regulation does not always function well. He admitted that "[t]he Commission . . . must further refine its analytical and investigative skills, and attempt to make its decision-making process as transparent and predictable as possible."³⁴¹ To this end, he considered the need for an independent merger authority.³⁴² He decided, however, that "so far, the Commission has been able to resist all pressures and has pursued a

337. Similarly, the "dominant position" doctrine of Article 85 has evolved into a different doctrine under the Merger Regulation. See *supra* notes 142, 178 and accompanying text.

338. The Competition Directorate is responsible for enforcing the competition laws. Although Commission decisions are made by the members of the Commission, the Competition Directorate has great de facto power in advising the Commission.

339. See Sibree, *supra* note 14, at 91-92; cf. Langeheine, *supra* note 14, at 121-22 (discussing the potential importance of judicial review under the Merger Regulation); Siragusa & Subiotto, *supra* note 192, at 929 ("[R]ecourse to the Court of Justice seems inevitable.").

340. SUSAN ROSE-ACKERMAN, *RETHINKING THE PROGRESSIVE AGENDA: THE REFORM OF THE AMERICAN REGULATORY STATE* 26 (1992). Rose-Ackerman used this phrase in another context, but it is equally apt here.

341. *Brittan Reflects on First Year of Merger Control*, 694 Common Mkt. Rep. (CCH) 1, 4 (Nov. 14, 1991).

342. *Sir Leon Brittan Considers a European Mergers Authority*, 703 Common Mkt. Rep. (CCH) 1, 1-2 (Apr. 2, 1992).

policy which is loyal both to the Merger Regulation, and to the concept of maintaining effective competition within its jurisdiction — accordingly, the case for change has not, thus far, been made out.”³⁴³ This Note argues in section III.C that, although the Commission has resisted “pressures” better under the Merger Regulation than under Article 85, a case for change has indeed been made.

Faced with the unwillingness of the Member States to lower the thresholds triggering the application of the Merger Regulation, the current Competition Commissioner, Karl van Miert, seems poised to implement some reforms in 1994 to regain Member State trust. These reforms include “increas[ing] transparency” by publishing draft decisions, advisory committee opinions, and parent company “commitments,” as well as permitting greater third-party access and lighter notification requirements for some ventures.³⁴⁴ The Commission may also publish a new Notice, containing details about jurisdiction, calculation of turnover, and the definition of a concentration.³⁴⁵ Unfortunately, the Commission will probably not address the Merger Regulation’s compatibility standard in its new Notice.

With respect to joint ventures under Article 85, the Commission also admits that reform is necessary. Accordingly, it published a set of Draft Guidelines in 1992³⁴⁶ that were incorporated into a Notice in 1993.³⁴⁷ In the discussion paper accompanying the Draft Guidelines, the Commission recognized the need to remedy a situation that was “discriminatory, at least in the case of fully-fledged joint ventures which create substantial capacity (extension of product range, production or market) by means of new investment.”³⁴⁸ To this end, the Commission proposed some tentative solutions: developing a more realistic economic approach to potential competition, adopting a more flexible approach to ancillary clauses, granting almost automatic exemption under Article 85(3) for joint ventures under certain thresholds, widening existing block exemptions, and creating a self-imposed time limit for decision similar to that of the Merger Regulation.³⁴⁹

As the Commission admitted, however, these reforms provide only a “partial solution” to the problem.³⁵⁰ Most of them focus on Article 85(3). Simply widening block exemptions and an “almost automatic” *de minimis* rule do not change the outcome for most marginal or bene-

343. *Id.* at 2.

344. See Commission Press Release, IP (93) 38, July 28, 1993, at 1; *Merger Regulation: Commission To Attempt Fine Tuning Without Touching Thresholds*, TECH EUROPE, Sept. 9, 1993.

345. See Commission Press Release, *supra* note 344, at 1.

346. See Draft Guidelines, *supra* note 15.

347. 1993 Notice, *supra* note 32.

348. Draft Guidelines, *supra* note 15, at 505 (discussion paper).

349. See *id.*

350. *Id.*

ficial joint ventures, however. These ventures still must be notified under and churned through Article 85(1), only to receive an Article 85(3) exemption in the end. This system promotes neither certainty nor parent company confidence, and will continue to discourage procompetitive ventures.³⁵¹

Only two of the proposed substantive reforms will help to decrease the number of procompetitive ventures caught by Article 85(1):³⁵² the proposal on potential competition and the proposal on ancillary restrictions.³⁵³ Currently, the Commission finds many ventures to violate Article 85(1) because the parents are ostensible competitors and then excuses them under Article 85(3) because the parents cannot in fact compete.³⁵⁴ If the Commission succeeds in following its proposed "realistic economic approach," the need for this kind of paradoxical reasoning would all but disappear, fostering much needed coherence.

Likewise, the Commission's new commitment not to apply Article 85(1) to ancillary restrictions, such as noncompete agreements, represents a step in the right direction. These ancillary restrictions are often necessary for the formation and effective functioning of joint ventures; to require the restrictions to pass through the Article 85(1) and 85(3) hoops every time a venture employs them wastes valuable time and resources.

The Commission's proposals, while admirably seeking to remedy procedural and other inadequacies, do not go far enough. Further harmonization is necessary, not just between the procedures governing the Merger Regulation and Article 85 joint ventures, but also between the substantive standards of compatibility with the Common Market, which serve as the crucial test under each system of analysis. Harmonization of these standards, short of merger into a single standard, will reduce the confusion, distortion, and threat of future divergence caused by the two different standards.³⁵⁵

351. Ironically, the Commission said that the purpose of the 1993 Notice was to "improve the legal certainty for undertakings by explaining the legal and economic criteria which will guide the Commission in its future policy towards JVs." Commission Press Release, *supra* note 15, at 1. The Notice, unfortunately, is not sufficiently far-reaching to achieve this purpose.

352. The time limit reform, while a welcome harmonization with the procedural standards of the Merger Regulation, is procedural rather than substantive. It is also voluntary, and therefore not legally binding on the Commission. See Commission Press Release, IP (92) 1111, *supra* note 15, at 2.

353. See 1993 Notice, *supra* note 32, at 4-9, 13-14.

354. See *supra* notes 61-65 and accompanying text.

355. The distinction between concentrations and other arrangements is firmly entrenched in EC competition law, at least since the 1966 Memorandum. See 1966 Memorandum, *supra* note 24, at 155-57. This distinction is not likely to change just because joint ventures happen to fall into both categories. Cf. Pathak, *supra* note 24, at 183 (suggesting the elimination of the entire cooperative joint venture category). A single standard might also of necessity eliminate some ventures from the Commission's scope of enforcement, reducing its overall enforcement powers.

C. *Toward a New System of Joint Venture Control
in the Community*

In both its Article 85 and its Merger Regulation inquiries, the Commission should place the greatest importance on economic, as opposed to industrial policy or social, considerations. It should be aware that industrial policy concerns are best achieved by means other than competition decisions. Because industrial policy concerns surface more often in Article 85 inquiries, the Commission should reform its Article 85 compatibility inquiry to a greater extent than its Merger Regulation inquiry. When the Commission engages in an Article 85 inquiry, it should strive to interpret both Article 85(1) and 85(3) more narrowly, so that fewer joint ventures have to be notified under Article 85(1) only to receive subsequent exemptions under Article 85(3). The process of evaluation under the Merger Regulation need not be reformed so much as clarified. This is not to say that the compatibility standard under Article 85 should be the same as that under the Merger Regulation. A single standard would be neither politically feasible nor easy to enforce.³⁵⁶ Rather, harmonization of the two standards, short of their merger, will promote certainty and address the problems of confusion, distortion of behavior, and divergence of the standards over time.

Economic considerations, as opposed to industrial policy considerations, should prevail under both compatibility standards.³⁵⁷ Joint ventures benefit the Common Market by facilitating risky investments, combining complementary skills, creating economies of scale, adding new competitors, developing new markets, and promoting competition between firms.³⁵⁸ They may sometimes have anticompetitive economic effects, however, such as market or information sharing, increased barriers to entry, elimination of competitors, reduced incentives to compete or enter the market, and concentrated market power.³⁵⁹ An economic analysis of the effects of joint ventures best separates the desirable ventures from those that restrict competition

356. See *supra* note 355.

357. Although some European authors believe that the EC system is premised on an outlook that is sympathetic to industrial policy, see, e.g., MENDES, *supra* note 166, at 265, there are those in the Competition Directorate itself who are in favor of an economic approach. Manfred Caspari notes, "I for one do not see how measures that are damaging to competition could be justified on industrial policy grounds." Manfred Caspari, *Joint Ventures — The Intersection of Antitrust and Industrial Policy in the EEC*, in 1985 FORDHAM CORP. L. INST., EC AND U.S. COMPETITION LAW AND POLICY 449, 464 (Barry E. Hawk ed., 1986).

358. The precise catalogue of procompetitive efficiencies varies from author to author. Compare AREEDA & TURNER, *supra* note 196, ¶ 703c with OECD, *supra* note 84, at 93-94; Brodley, *supra* note 283, at 1528; and Joseph P. Griffin & Michael R. Calabrese, *U.S. Antitrust Considerations of Transnational Joint Ventures*, in INTERNATIONAL JOINT VENTURES 295, 296 (David N. Goldsweig & Roger H. Cummings eds., 1990).

359. See AREEDA & TURNER, *supra* note 196, ¶ 703c; OECD, *supra* note 84, at 94; Brodley, *supra* note 284, at 1530-34; Griffin & Calabrese, *supra* note 358, at 296.

because economic indicators serve as neutral terms by which to characterize a venture in order to weigh its benefits to consumers against its burdens to competitors.

An economic approach also forestalls the industrial policy allegations levied so frequently against the Commission.³⁶⁰ Of course, the Commission cannot eradicate industrial policy, given the role of competition policy in the Community itself. Competition policy is only one of many Community policies with the "specific aim of promoting integration."³⁶¹ In addition, integration was the primary reason for establishing the European Community in the first place. The industrial policy concerns that usually impact competition law, however, are often not so lofty. They include promotion of small- and medium-sized businesses,³⁶² maintenance of national industries,³⁶³ encouragement of technological development,³⁶⁴ and mitigation of the consequences of recession.³⁶⁵ The Member States endorsed these lesser industrial policy concerns in Article 130f of the Treaty of Rome,³⁶⁶ and in the recently ratified Treaty of Maastricht.³⁶⁷ But, although the Community should recognize the connection between competition and

360. Of course an economic approach may not be able to defuse allegations that the approach merely disguises decisions based on industrial policy. See *Getting Away with Merger*, ECONOMIST, June 12, 1993, at 92 (discussing a Centre for Economic Policy Research study finding that the Commission "used economic analysis to justify political decisions, rather than to reach an economically sensible verdict"); see also Hölzler, *supra* note 311, at 29 ("For all its emphasis on competition, the new regulation has too many loopholes and is too lacking in transparency. Sixteen years of debate have failed to resolve one of the most important questions, that of whether competition or public interest should be the main yardstick.").

361. Ehlermann, *supra* note 5, at 261.

362. See Communication, *supra* note 85, at 3.

363. See, e.g., Case IV/M017 — Aérospatiale/MBB, Commission Decision of 25 February 1991, reprinted in CM/M/XIII COMPETITION L. W. EUR. & U.S.A. 89, 89 (1992); Case IV/M009 — Fiat Geotech/Ford New Holland, Commission Decision of 8 February 1991, reprinted in CM/M/XIII COMPETITION L. W. EUR. & U.S.A. 67, 69 (1992).

364. Hawk believes the Commission uses competition policy to promote EC competition in high technology fields: "To a certain extent the Commission's favorable competition stance is part of a broader, albeit ill-defined industrial policy intended to encourage growth and innovation in high technology firms." HAWK, *supra* note 50, at 309-10.

365. See *New EC Report on Competition Policy Points to New Factors and Shift in Focus*, 64 Antitrust & Trade Reg. Rep. (BNA) No. 1618, at 712 (1993) ("In the first annual report issued since Karel van Miert took over . . . the Commission indicated that the slowdown in economic growth and its social consequences . . . must be taken into account when applying EC competition rules.").

366. Article 130f(1) provides that the Community shall "strengthen the scientific and technological basis of European industry and . . . encourage it to become more competitive at [the] international level." EEC TREATY art. 130f(1). Later, the Article provides that the Community shall take into account "the connection between the common research and technological development effort, the establishment of the internal market and the implementation of common policies, particularly as regards competition and trade." EEC TREATY art. 130f(3).

367. TREATY OF MAASTRICHT, tit. II, as signed on February 7, 1992, is entitled "Provisions Amending the Treaty Establishing the European Economic Community With a View To Establishing the European Union." The Maastricht Treaty, which entered into force on November 1, 1993, amends the EEC Treaty to include a Title on "Industry." TREATY OF MAASTRICHT, tit. XIII, art. 130. The Maastricht Treaty provides that "[t]his Title shall not provide a basis for the

industrial policy, it should not let one invade the proper province of the other. Given the *external* threat to competition policy posed by the separate goal of industrial policy, the Commission should not allow competition policy itself to be *internally* shaped according to industrial policy concerns.³⁶⁸

If economic considerations are to dominate compatibility analysis, the Merger Regulation standard needs less alteration than does the Article 85 standard; industrial policy currently affects Article 85 decisions more systematically and pervasively than it affects Merger Regulation decisions.³⁶⁹ Ideally, in an Article 85 determination, the Commission should first consider the requirements of Article 85(1), but less stringently than it currently does, while limiting the secondary Article 85(3) analysis.³⁷⁰ Adjusting the Article 85 inquiry in this way will enable would-be venturers to proceed with greater certainty and encourage more procompetitive ventures. Also, fewer ventures will be caught by Article 85(1) only to be excused under Article 85(3), saving valuable time and resources.

The Merger Regulation process, on the other hand, does not need reform so much as clarification. Given the paucity and unavailability of Commission decisions under the Merger Regulation, the Commission should adopt a Notice on the substantive standard of evaluation, with guidelines explaining which factors the Commission will weigh most heavily.

The Commission should clarify the Merger Regulation standard, while revising the Article 85 standard to better reflect the Merger Regulation's preoccupation with economic analysis to the exclusion of industrial policy considerations.³⁷¹ The compatibility standard under Article 85 need not be identical to the current standard under the Merger Regulation. Instead, the Commission must bring the two standards closer together. Some of the differences between the two procedures may be justified.³⁷² But procompetitive benefits should not

introduction by the Commission of any measure which could lead to a distortion of competition." TREATY OF MAASTRICHT, tit. XIII, art. 130 (3); see also Ehlermann, *supra* note 5, at 261.

368. Mendes argues that, in the EC, "antitrust not only embodies other principles but also has to be coordinated with other concerns of economic policy," while in the United States, the law promotes competition as an end in itself. MENDES, *supra* note 166, at 265. He admits, however, that "perhaps due to the influence of American antitrust, economic considerations have been increasingly used." *Id.* at 266; see also BRITTAN, *supra* note 22, at 37; Caspari, *supra* note 357, at 464.

369. See *supra* section III.A.

370. See *supra* notes 277-81 and accompanying text.

371. See *supra* notes 311-21, 360-68 and accompanying text.

372. For the greater need for monitoring under Article 85, see *infra* text accompanying note 380. Likewise, despite their preemption under Regulation 4064/89, *supra* note 3, national competition laws should not be preempted under Article 85 because of the breadth of the relevant language in that article. For these reasons alone, a single standard would be inappropriate. Cf. Pathak, *supra* note 24, at 183 (suggesting the elimination of the entire cooperative joint venture category).

automatically outweigh an Article 85(1) restriction or distortion of competition. Rather, the Commission should adopt a balancing test so that it may realistically weigh the advantages of the venture against the competitive harm it will likely engender.³⁷³

Political hurdles alone may prevent the standard under Article 85 from mirroring that under the Merger Regulation.³⁷⁴ Some commentators correctly predicted that the Commission's refusal to grant an exemption in the *de Havilland* case would delay the lowering of the Merger Regulation thresholds that the Commission desired in 1993.³⁷⁵ The representatives of national governments that make up the Council of Ministers may continue to refuse to give the Commission more enforcement powers under the Merger Regulation after seeing the Commission promote competition over the virtues of their national industries.³⁷⁶ Because the Commission has not denied exemption for any similar case after *de Havilland*, however, the Council may eventually be willing to step up the Commission's enforcement powers.

A single compatibility standard, moreover, would not necessarily be conducive to enforcement. Rather than being able to exempt some ventures permanently and not others, the Commission would likely find itself monitoring all ventures. After all, cooperative ventures can evolve from a joint distribution arrangement to a near merger; inability to police them over time might lead to the exemption of "sham" joint ventures that would later impede competition in the Common Market. The more detailed process of review and limited-time exemption for cooperative ventures is probably justified. Accordingly, harmonization that reduces the differences between the standards but stops short of a single standard will ensure the Commission adequate

373. This approach is similar to that proposed in U.S. Dept. of Justice, *Antitrust Enforcement Guidelines for International Operations*, *supra* note 106, at 20,602 ("If the joint venture would likely have significant anticompetitive effects, however, then the Department proceeds to determine whether, considered cumulatively, those anticompetitive effects are outweighed by procompetitive efficiency benefits that the parties claim would be achieved by the joint venture and its restrictions.") (emphasis added). The use of a rule of reason approach also lends itself to balancing. See Griffin & Calabrese, *supra* note 106, at 320; Pitofsky, *supra* note 54, at 913 ("A rule of reason analysis means balancing anticompetitive effects against efficiencies and other business justifications, and then examining whether comparable efficiencies could have been achieved in a less restrictive way.").

374. See *supra* note 176.

375. This year, van Miert did in fact announce that further consideration of the lowering of the thresholds will be put off until 1996. See *Keeping the Powder Dry*, *supra* note 176, at 59. For a commentator prediction of this delay, see Hawkes, *supra* note 321:

Although the case demonstrates the fact that EEC merger control is not part of the Community's industrial policy but is competition driven, the repercussions of the case might delay further amendments to the Regulation. . . . In view of the controversies occasioned by the *de Havilland* Decision, the early review of those thresholds which Sir Leon appeared to be hoping for, may prove difficult to achieve.

Id. at 37-38.

376. *Id.*

enforcement powers while reducing the uncertainties faced by procompetitive ventures.

An example may serve to illustrate the kind of harmonization that should occur. Under the Merger Regulation, the Commission often approves joint ventures based only on the predicted benefits to the parties involved. Thus, in *CONAGRA/Idea*, it stated: "The agreement between CONAGRA and IDEA, allows on the one hand CONAGRA to be present in the French meat market and on the other hand provides Idea with a strong partner with up-to-date techniques and expertise in this field."³⁷⁷ In contrast, under Article 85 the Commission requires, at the very least, efficiency benefits; often, however, the Commission will approve a venture only when faced with the inability of a desirable product to reach the market without such cooperation.³⁷⁸ The Commission should establish a more concrete and stringent standard under the Merger Regulation, which simply requires some benefit from or logical reason for the arrangement. An even more rigorous standard than that under the Merger Regulation is perhaps justified under Article 85, such that the application of Article 85(3) may be narrowed in conjunction with the narrowing of Article 85(1). The current Article 85 standard, however, allows industrial policy considerations to influence its scope — the Commission agreed to give beepers to the rural Irish in order to contact loved ones but balked when the issue was infighting between rival pump manufacturers.³⁷⁹ A proper standard, without these industrial policy overtones, would adopt a sliding scale based on the amount of structural change involved, rather than resort to a political evaluation of the desirability of the venture's product or service.

Accordingly, although the mode of analysis under the Merger Regulation is not perfectly translatable to an Article 85 determination, given the Treaty language and priorities of Article 85, the analysis can nevertheless serve as a model for rationalizing the Article 85 process. The present scope of Article 85(1) is too broad; a finding of Article 85(1) violation followed by an Article 85(3) exemption gives the Commission incredible monitoring powers, and even bargaining power, in that it can suggest that it will deny the parties an exemption

377. Case IV/M010 — *C.O.N.A.G.R.A./Idea*, Commission Decision of 30 May 1991, reprinted in CM/M/XIII COMPETITION L. W. EUR. & U.S.A. 149 (1992).

378. See *supra* notes 125-31 and accompanying text.

379. Compare Case IV/32 737 — *Eirpage*, Commission Decision of 18 October 1991, 1991 O.J. (L 306) 22, 30 ("Neither party acting on its own could have offered the service as rapidly and effectively as [the parents'] cooperation has enabled them to do.") with Case IV/32 363 — *KSB/Goulds/Lowara/ITT*, Commission Decision of 12 December 1990, 1991 O.J. (L 19) 25, 29 ("Without this association, none of them would on its own have developed these stainless steel components."). A similar concern occasionally arises in American antitrust law. For instance, in *Chicago Board of Trade*, a Depression-era case, the Court favored an arrangement benefiting the "country dealer" rather than the economy as a whole. *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 240-41 (1918).

unless the parties revise their agreement in certain ways. Narrowing the range of joint ventures to which Article 85(1) applies, however, may actually allow the Commission to provide more effective monitoring of the ventures that still fall under Article 85(1).³⁸⁰ The Merger Regulation process engenders confusions and dysfunctions, but the analysis under the Merger Regulation is at least more structured, logical, and faithful to economic principles than is the analysis under Article 85. An Article 85 analysis that more closely approximates that under the Merger Regulation would enable would-be venturers to assess the probabilities of their venture's compatibility more accurately and would promote certainty and a willingness to invest in high-risk procompetitive ventures.

Harmonization of the two standards, somewhat short of merging them into a single standard, will promote certainty without needlessly sacrificing the Commission's enforcement powers. The current process, by monitoring all agreements that fall under Article 85(1) regardless of their potential for Article 85(3) exemption, wastes resources and needlessly harasses firms undertaking procompetitive ventures. The Commission should therefore limit the application of Article 85(1) and restructure its vague "actual or potential competition" inquiry to accord with discrete economic criteria. In addition, the Commission should clarify the Merger Regulation and publish a Notice on the weight it will likely accord the relevant compatibility factors. Then, although the meaning of "compatibility with the Common Market" may still differ between the Merger Regulation and Article 85, the probability of confusion, distortion of behavior, and ever-divergent standards will be greatly diminished.

CONCLUSION

The extraterritorial application of European competition law means that American companies wishing to engage in joint ventures with European or even other non-European firms must structure their ventures so as to minimize the possibility of a conflict with EC law. At present, this is no easy task. If a venture covers more than joint research and development or distribution, it is often unclear whether the Commission will deem it concentrative, and thus subject to analysis under the Merger Regulation, or cooperative, and therefore subject to Article 85 evaluation. Many procedural hurdles currently exist for the would-be venturer, from calculating turnover to deciding which form to file when notifying the venture to the Commission. Attempting to determine the venture's substantive compatibility with the Common Market, however, poses perhaps the greatest uncertainty.

Joint venturers must know what factors demonstrate compatibility

380. See *supra* note 372 and accompanying text.

with the Common Market in order to structure compliant ventures. An in-depth analysis of the Commission's compatibility standards highlights the need for change and clarification. In the long term, a certain standard based on economic reasoning under Article 85 is preferable to one that incorporates questionable notions of industrial policy. Furthermore, despite the comparative logic of decisions under the Merger Regulation, room still exists for clarification and improvement, especially as to the proper weight of impact criteria and the rationality of product market definitions. Such changes would enable would-be venturers to predict whether and how to construct a joint venture that both fits their needs and complies with the law. As a result, firms could structure their ventures in order to make compliance likely, without distorting their behavior in such a way as to force cooperative ventures into becoming concentrations. Most importantly, greater certainty would minimize the legal risk of an already financially risky joint venture, enabling the parent companies to give the go-ahead to produce new products and services.

A single substantive standard for determining the compatibility of concentrative and cooperative joint ventures would provide the maximum amount of legal certainty, but is neither practical nor desirable given the current state of EC competition law. Rather, the two standards of compatibility must remain, but with clarifications and improvements. A harmonization of the two standards, short of their merger, could enhance certainty, reduce confusion, minimize the distortion of behavior, and defuse the threat of increasingly divergent standards, while allowing the Commission to exercise sufficiently extensive enforcement powers.