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The Future of Merger Control in Europe

"You are permitted in time of great danger to walk with the devil until you have crossed the bridge."

BULGARIAN PROVERB

International Bar Association
Section on Business Law

The US regime has traditionally given little recognition to the idea that some collaboration can be good for competition. Charles T Compton considers the tentative, and uncertain, steps that have been taken in this direction.

Changing US View of Joint Ventures

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Allowing competitors to cooperate

US courts and antitrust agencies in recent years have increasingly recognised the enormous value to innovation in granting competitors some limited permission 'to walk with the devil'. There remains, however, little precision in the law governing joint ventures in the United States. The very term 'joint ventures' encompasses such a wide variety of collaborative efforts that any attempt at rule-making or coherent analytical structure has been problematic. The resulting doubts as to antitrust exposure have, in turn, inhibited pro-competitive collaboration – the 'good we oft might win'.

The numerous sources of 'law' relating to joint ventures have added to the confusion, for practitioner and businessperson alike. One has been invited to consider not only decades of US Supreme Court and other judicial decisions, but also various (and changing) enforcement guidelines issued by the US Department of Justice (DOJ) and the Federal Trade Commission (FTC), business review letters, speeches and articles emanating from antitrust regulators and actual enforcement efforts by the federal government – not to mention often divergent views promulgated by state enforcement agencies.[1]

Even as US antitrust agencies struggle to establish or update rules and rationales useful to this vast range of business collaborations, the business need for clarity and predictability has become all the more pressing. The pace of technological change and global competition has accelerated, challenging many of the economic underpinnings and assumptions employed in traditional joint venture analysis. Competitors – particularly in technology-based industries – have launched a virtual *tsunami* of collaborative activities in recent years, ranging from joint research to standard setting to cooperation in the production, distribution, and marketing of products and services.

"You are permitted in time of great danger to walk with the devil until you have crossed the bridge." Bulgarian Proverb

Rule-of-Reason analysis has become the norm in assessing most collaborations, with *per se* treatment largely reserved for naked cartels. Ironically, this liberalising trend has lessened predictability. There remain, for example, differing views on the weight to be given certain efficiencies when balanced against competitive restraints; and Rule-of-Reason balancing is in itself an ambiguous enterprise, raising the doubts that deter even attempts at collaborative innovation.

The uncertain antitrust risks still surrounding joint ventures, coupled with the accelerating impact of changing technology on global competition, has led to a series of high-level reviews and hearings in the United States. Led by FTC Chairman Robert Pitofsky, these ongoing hearings have precipitated a new round of scholarship and fresh thinking about antitrust, and about joint ventures in particular. We may anticipate, during 1998, either new federal guidelines applicable to collaborative activity or, at the least, a report or series of position statements. These will be intended to assist the business community in minimising antitrust exposure when forming joint ventures or strategic alliances. The FTC's anticipated pronouncements should usefully inform not only the US business community, but also the on-going dialogue on JVs within the European Union.

Increasing resort to joint ventures invokes a multiplicity of US statutes and enforcement guidelines

Competitor collaboration is increasing

Joint ventures ('JVs') as used here includes 'any collaborative effort among firms, short of a merger, with respect to R&D, production, distribution, and/or the marketing of products and services'.[2] Legitimate JVs generally involve some integration of resources, management, and risk. They may range in structure from a loose contractual arrangement to a fully-integrated entity falling just short of a merger.

Collaborations of all sorts are increasingly common – especially in technology industries, as competitors race to invent, develop and market new products, secure the often massive funding needed for R&D, spread often considerable risks in the enterprise and establish technical standards essential for growth of the market, ease of use, and follow-on development.[3] As recently stated by FTC Chairman Pitofsky: 'global innovation-based competition is driving firms toward ever more complex collaborative agreements which sometimes raise new competition issues'.[4]

A frequent synonym for joint venture today is 'strategic alliance', comprising two or more partners engaged in cross-licences or other technology swaps, joint R&D, and/or the sharing of complementary assets (such as those involved in manufacturing and distribution) for a jointly developed product.[5] A recent example is the series of agreements announced between Apple Computer Co and Microsoft Corporation on 7 August 1997.[6]

Applicable laws and guidelines

The primary US antitrust statutes applicable to joint ventures include Section 7 of the Clayton Act (15 USC § 18), which prohibits acquisitions, mergers, and joint ventures that substantially lessen competition or tend to create a monopoly; Section 1 of the Sherman Act (15 USC § 1), which prohibits multi-party 'contracts, combinations, or conspiracies' that unreasonably restrain trade; Section 2 of the Sherman Act, prohibiting monopolisation, attempted monopolisation, and conspiracy to monopolise a market for a particular service or product; and Section 5 of the Federal Trade Commission Act (15 USC § 46), which prohibits 'unfair methods of competition' and 'unfair or deceptive acts or practices'.

There are, of course, decades of judicial precedents reflecting the evolution of antitrust law in evaluating the competitive consequences of joint ventures. In addition, the antitrust practitioner must look to a growing body of interpretive materials issued by the US antitrust enforcement agencies: the FTC and the Antitrust Division of the DOJ. Recent years have seen a proliferation of guidelines intended to restate and clarify antitrust law and enforcement policy applicable to various activities, including certain types of joint ventures. These guidelines include:

- the Department of Justice and Federal Trade Commission Horizontal Merger Guidelines (1992) ('1992 Merger Guidelines');
- the Revision to the Horizontal Merger Guidelines (on Efficiencies) issued 8 April 1997;
- the Antitrust Guidelines for the Licensing of Intellectual Property, issued by the US Department of Justice and the FTC on 6 April 1995 (the '1995 IP Guidelines');
- the 1995 Department of Justice – Federal Trade Commission Antitrust Enforcement Guidelines for International Operations ('1995 International Guidelines');[7] and
- the 1996 Department of Justice and Federal Trade Commission Statements of Antitrust Enforcement Policy in Health Care ('1996 Health Care Guidelines').

Various occasions for antitrust review

The US federal court system has long been the primary forum for testing JVs and for articulating

antitrust standards. The federal judge remains the ultimate arbiter. Private antitrust litigation, threatening trebled damages long after the fact, remains the ultimate risk (and deterrent) for business people contemplating a joint venture. Judicial pronouncements come only after years of battle, costing more time and treasure than most companies can afford. As a practical matter, therefore, most near-term antitrust guidance for the business community must now come from government regulators; hence the potpourri of agency guidelines listed above.

There are several occasions for antitrust regulatory review in which federal agency guidelines, as well as the underlying statutes and precedents, are applied with more expedience and utility to businesspeople.

Hart-Scott-Rodino notifications

In the 'traditional' joint venture, a separate corporation is established by the partners to pursue a particular line of business. Such fully integrated JVs may require notification under the provisions of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ('HSR Act').[8]

The HSR process, like a Form CO filing with the European Commission under the Merger Regulation, is mandatory where certain size-of-person and size-of-transaction thresholds are met. The JV, as with mergers, cannot be consummated until statutory waiting periods have expired without enforcement action by the DOJ or FTC. HSR review is applicable only to larger, corporate joint ventures; it nevertheless has much broader compass than the European Commission's Merger Regulation (even with the broadening of that Regulation on 1 March 1998 to cover 'cooperative' as well as 'concentrative' JVs). The HSR thresholds are far lower, and it matters not whether the JV is 'full function', autonomous or results in permanent structural market change. All antitrust issues are reviewed in the course of an HSR investigation; there is no separate Article 85-type review of coordination issues, or of JVs that are not 'full function'.

HSR review does not, unfortunately, offer a completely satisfying answer to business people forming joint ventures. Apart from applying only to a small portion of all JVs, HSR review does not pre-empt enforcement action by individual states, private civil suits, or even later investigation and enforcement action by the federal reviewing agency. Further, there is no publication of the *ratio decidendi* on decisions not to challenge a notified JV or merger.

Voluntary filings

The closest US parallels to voluntary Form A/B filings under Article 85 are submissions pursuant to the National Cooperative Research and Production Act of 1993 ('NCRPA'), discussed below, and requests for business review letters. For some years the DOJ has offered a Business Review Procedure to furnish advisory antitrust opinions on proposed JVs and other transactions.[9] On 1 December 1992, the Department announced a pilot programme to expedite the processing of such requests where joint ventures or exchanges of business information were proposed. If persons seeking business review voluntarily furnish specified information and documents with their submission, the DOJ 'will use its best efforts' to respond within 60-90 days.[10]

Concerns about delay and public disclosure of confidential information have deterred widespread use of the Business Review Procedure (whether 'expedited' or not), particularly where technology JVs are concerned.[11] Nevertheless, indexes, digests and the Business Review Letters themselves are available from 1968-95, furnishing useful antitrust guidance in particular transactions.

Also issuing from the federal regulatory authorities is a stream of speeches and articles which (though carefully couched as the view only of the author) certainly warrant attention as expressions of current antitrust enforcement outlook. Many of these may be found on the world wide web home pages for the DOJ's Antitrust Division and the Federal Trade Commission.[12]

The federal Business Review Procedure, together with voluntary filings under the NCRPA and formal notifications required by the Hart-Scott-Rodino Act, comprise the only real opportunities for US companies and their counsel to seek antitrust comfort beforehand when establishing JVs. By contrast to practice before the European Commission, US regulators shy from early and informal consultation with the parties, and usually decline to consider hypothetical transactions.[13] In a recent speech Joel Klein, Assistant Attorney General for Antitrust, proposed a new notification procedure for the settlement of patent infringement disputes, and perhaps for other IP licensing agreements raising antitrust concerns.[14] New legislation would be required, however – which seems unlikely in the near future.

Legal standards applicable to joint ventures

Overview

Collaborative arrangements offer wonderful occasions of sin for erstwhile competitors. Collusion is, at best, facilitated in a JV. Spillover effects are not unknown. Many JVs in fact contemplate outright reductions in product or innovation competition between the participants. Consequently, horizontal agreements among competitors have always been viewed with suspicion. The mere fact that more than one entity is involved seems invariably to raise the spectre of conspiracy. Indeed, some today complain that the federal antitrust agencies 'routinely grant approval to the multi-billion-dollar mergers of giant companies' even while they 'continue to regard joint ventures with suspicion and treat them as second class corporate citizens'.[15]

The fact remains that both courts and US antitrust agencies have increasingly displayed an appreciation for the salient pro-competitive benefits promised by legitimate JVs: 'Collaborations among rivals can generate significant efficiency gains. By bringing the abilities and resources of several companies together, collaborating firms may attain economies of scale and scope; increase capacity and market access; minimise risk; avoid duplication; transfer, commercialise, or distribute technology efficiently; combine complementary or co-specialised capabilities; or better appropriate the returns of innovation. Such benefits, or efficiencies, can speed the development of new products, lead to better products, reduce the costs of product development, and enhance inter-operability in a particular industry.'[16]

Because joint ventures allow firms to pool resources for a limited time without abandoning their independence, JVs may permit the substantial efficiencies of integration without the disappearance of one or more of the business partners.[17] JVs formed to commercialise new products, accomplish new entry or facilitate the establishment of standards for quality, safety, design and interface compatibility have no difficulty demonstrating efficiencies.[18] Antitrust exposure continues, however, where there is further interaction among competitors that might be characterised as collusive, conspiratorial, or cartel-like.

Under US law, the threshold question is whether the term 'joint venture' is simply a label, intended to disguise a naked cartel. Outright collusive arrangements, of course, present no more analytical difficulty in the United States than in the European Union. Agreements between horizontal competitors to collaborate with respect to price, market allocation, customer allocation, etc, are deemed *per se* illegal with no need for elaborate assessment of competitive purposes or effects. Cartels by definition have no plausible efficiency and no apparent functional integration of existing resources or creation of new productive capacity. They will not be spared *per se* treatment by mere characterisation as 'joint ventures'.[19]

Putting aside outright cartels, more difficult questions are presented: does the formation of the JV itself substantially lessen competition in violation of Section 7 of the Clayton Act? Even if legitimate, is the JV structured such that unlawful collusion is facilitated (or even expressly permitted) in competitive arenas outside the scope of the specific collaboration? Does the joint venture create a product, facility, network or standard, access to which is essential for competition in a particular market? And, finally, does the JV involve collateral restraints imposed on a party to the JV, on the JV itself, or upon third parties, which unnecessarily restrains and harms competition? In addressing these issues, it may be helpful to focus on several broad categories of collaborative activity among competitors: fully integrated JVs analysed as mergers; collaborations involving R&D or intellectual property; and purchasing, marketing and other JVs.

Joint ventures viewed as mergers

Whether or not HSR notification is required, the antitrust agencies can always initiate *sua sponte* review of JVs for violations of the Clayton or Sherman Acts. The issue under Section 7 of the Clayton Act is whether the merger or joint venture will 'substantially lessen' competition in the relevant market. As long ago as 1964, the US Supreme Court noted that: 'Overall, the same considerations apply to joint ventures as to mergers, for in each instance we are but expounding a national policy annunciated by the Congress to preserve and promote a free competitive economy'.[20]

In analysing fully integrated JVs, the practitioner's primary touchstone is the 1992 Horizontal Merger Guidelines, jointly issued by the DOJ and FTC. The Guidelines require market definition, calculations of market concentration before and after JV formation, review of structural

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market characteristics encouraging or inhibiting supra-competitive pricing, the likelihood of new entry, and cognisable efficiencies arising from the transaction. The antitrust agencies are also concerned with potential 'spillover' effects in adjacent markets. For example, competing joint venture parents, armed with one another's sensitive competitive information and flush with a spirit of cooperation, may be tempted to collude with respect to prices or customers in non-JV arenas. Most commentators would agree that the enforcement agencies should not block a JV based merely on the potential for such spillover effects, but rather wait and act if and when they occur.[21] Actual collusion, of course, exposes the JV parents to *per se* liability under the Sherman Act.

In applying merger analysis to fully integrated JVs, the agencies and courts look beyond actual competition and ask whether there will be a substantial lessening of potential competition.[22] JVs between firms having a vertical relationship have also recently been found violative of Section 7 of the Clayton Act, where down-stream rivals to the JV might have been deprived of access to critical inputs. In *United States v MCI Communications Corp*, 1994-2 Trade Cas (CCH) & 70, 730 (DDC 1994), the DOJ challenged a proposed JV between MCI and British Telecommunications plc. The Department found that there would likely be a substantial lessening of competition in the US market for global telecommunications services because BT would have the ability and incentive to disfavour competitors with respect to the interconnections necessary to provide similar service.[23]

As seems appropriate, joint ventures are viewed by US antitrust authorities less strictly than are mergers. Unlike mergers, JVs leave two independent companies standing and potentially competing in other markets. Moreover, restrictions on the scope and duration of JVs, by contrast to mergers, would normally limit any anti-competitive effects.[24] Finally, more latitude may be appropriate because 'running a joint venture is fundamentally different from running a single firm'.[25]

Joint ventures involving R&D or intellectual property

National Cooperative Research and Production Act ('NCRPA') 1993

The significance of NCRPA lies both in its affording an opportunity for regulatory review before the formation of a worrisome JV and also in its indirect expression of antitrust guideposts. NCRPA was intended to liberalise the antitrust scrutiny of joint ventures within its scope. This legislation extended the National Cooperative Research Act of 1984 beyond pure research and development to include production joint ventures. NCRPA provides that collaborations within its scope will be judged under the Rule of Reason, 'taking into account all relevant factors affecting competition, . . .'[26]

Under NCRPA, collaborators may file a notification with the federal antitrust agencies no later than 90 days after executing a written JV agreement. 30 days after filing the notification, or upon its publication in the Federal Register (whichever is sooner), the protections of the NCRPA apply. In addition to Rule-of-Reason treatment, these include limiting antitrust exposure to actual, rather than trebled, damages in any private antitrust suit and the possibility of recovering attorneys' fees in successfully defending a frivolous or unreasonable antitrust claim.[27]

By excluding certain activities from its definition of a protected 'joint venture', the statute illuminates the conduct which most seriously concerns US antitrust regulators. Section 2(b) of the Act defines a qualifying joint venture as *not* encompassing the following activities:

- exchanging with a competitor information relating to costs, sales, profitability, prices, marketing or distribution, unless such information is 'reasonably required to carry out the purpose of such venture';
- entering into any agreement or engaging in conduct that restricts or requires the sale, licensing or sharing of inventions, developments, products, processes, or services not developed through or produced by such venture;
- restricting or requiring participation by any person who is a party to such a venture in other research and development activities beyond that necessary to prevent misappropriation of proprietary information;
- engaging in market allocation;
- restricting production or entering into agreements with a competitor involving production of products or services outside the scope of the JV; and
- entering into other restrictions on the competitive conduct of participants in the joint venture which are not reasonably required to carry out the purpose of the JV.

1995 IP Guidelines

Intellectual property cross-licensing agreements increasingly comprise the centrepiece of strategic alliances and JVs formed for R&D and the production of new products. In a further effort to encourage innovation collaboration, the DOJ and FTC recently issued their joint 1995 IP Guidelines.[28] These guidelines are notable for several pronouncements:

- licensing arrangements are generally pro-competitive and should be encouraged by the antitrust laws (§ 2.3);
- IP licences should normally be tested by the Rule of Reason (§ 3.4);
- the US antitrust agencies will not presume market power from the mere existence of an intellectual property right, such as a patent or a trademark (§ 2.2); and
- the agencies will assess competitive harm, not just in traditional markets for goods and services, but also in 'innovation markets' (§ 3.2).

It is noteworthy that the 1995 IP Guidelines establish 'safe harbours' for certain licensing scenarios. The agencies will not challenge a restraint in an IP licensing arrangement if it is not obviously anti-competitive and if there are four or more independently controlled technologies that may be substitutable for those controlled by the parties.[29] Additionally, the agencies will not challenge a restraint in a licensing agreement affecting competition in an 'innovation market' if the restraint is not obviously anti-competitive and if there exist four or more other independently controlled entities with the ability and incentive to engage in substitutable R&D.[30]

Whether or not JVs involving licensing restraints qualify for a safe harbour, the 1995 IP Guidelines emphasise that 'it is likely that the great majority of licences falling outside the safety zone are lawful and pro-competitive' (§ 4.3). Rule-of-Reason treatment will be appropriate if the restraint in question 'can be expected to contribute to an efficiency-enhancing integration of economic activity' (§ 3.5). In applying Role-of-Reason analysis, these guidelines are consistent with NCRPA (15 USC § 4302) and the 1996 Health Care Guidelines, discussed below.

Purchasing, buying and other joint ventures

If there has been a consensus that R&D ventures warrant only gentle antitrust oversight, the US view has traditionally been more hostile to partially integrated JVs formed for other purposes. Marketing JVs, in particular, have been said to 'raise the greatest anti-competitive risk of all because they limit competition in the critical areas of pricing and output, which have long been the primary concern of the Sherman Act'.[31] In *United States v Topco Associates Inc*, the Supreme Court condemned as *per se* illegal territorial divisions among small grocery chains that had combined to purchase and market private label products.[32] As recently as 1982, in *Arizona v Maricopa County Medical Society*, the Court rejected a maximum pricing agreement among physicians offering a new service as *per se* illegal – albeit after limited Rule-of-Reason review.[33] *Topco* has been undercut by other decisions, and its reasoning described as 'crude'.[34] But both *Topco* and *Maricopa* stand, and the risks in purchasing and marketing JVs remain real.[35]

The most recent description of the US government's analytical approach to JVs is found in the newly revised Health Care Guidelines, issued jointly by the DOJ and FTC on 28 August 1996.[36] These 1996 Health Care Guidelines show a distinct disdain for *Topco/Maricopa* by US federal regulators, and a notable shift toward appreciating efficiencies in joint buying or selling arrangements. The new Guidelines expressly endorse Rule-of-Reason assessment even for physician network JVs with pricing agreements that would otherwise be *per se* illegal – as long as the physicians' integration is 'likely to produce signification efficiencies' and the pricing restraint is 'reasonably necessary to realise those efficiencies'.[37]

While focused on the health care industry, it is clear that the 1996 Health Care Guidelines are equally valid expressions of antitrust enforcement policy for any joint venture.[38] The principles are said to have been consistently applied by the Department of Justice in its business review letters approving joint purchasing arrangements in markets other than health care.[39]

The 1996 Health Care Guidelines, like the IP Licensing Guidelines a year earlier, establish various 'safe harbours' for physician care networks, joint purchasing arrangements, and other joint activities. They also emphasise that even alliances outside the safe harbours may well be pro-competitive by lowering health care costs or expanding available care. Antitrust analysis is not even necessary if 'it is clear initially that any joint venture presents little likelihood of competitive harm'.[40] Otherwise, the 1996 Health Care

Guidelines suggest the following analytical steps:

(1) define the relevant market (always the most troublesome issue);

(2) evaluate the competitive effects of the venture – ie, assess whether it could raise prices or impede the entry or operation of competitors;

(3) evaluate the impact of pro-competitive efficiencies; and

(4) evaluate collateral agreements – ie, restrictions unlikely to contribute to the JV's legitimate purposes.[41]

The 1996 Health Care Guidelines are consistent with modern US judicial applications of the Rule of Reason to joint ventures. Courts have concentrated on the extent of the venture's pro-competitive efficiencies (largely a function of their level of real integration); whether any restraints imposed are reasonably related to the success of the JV; and whether they are narrowly tailored to achieve the pro-competitive efficiencies.[42] Where a JV results in integrative efficiencies, such as the creation of a new product, the US Supreme Court has shown a willingness even for ancillary price restraints to be analysed under the Rule of Reason, rather than imposing *per se* rules.[43]

Most challenges to joint ventures in the United States have in fact involved collateral restraints on the activities of the JV or its parents – the issue being whether they have sufficient nexus to the efficiency-producing benefits of the JV arrangement.[44] Where the JV has market power or significant share, of course, the Rule-of-Reason analysis of these restraints tilts in favour of antitrust challenge – both because anti-competitive conduct is more likely and also because the JV or its parents will be less constrained by significant independent competition.[45]

A final and particularly troublesome issue for JVs is that of access by rivals to membership in a JV, or to the JV's competitively significant facilities – typically raised in the context of network JVs, such as those being formed in the banking, telecommunications, utility and airline industries. Network JVs in the US have generally enjoyed the same Rule-of-Reason analysis applied to other competitor collaborations.[46] Denial of access or expulsion of members for good business reasons – such as combating 'free riders' – should normally survive challenge.[47]

Where the JV has market power, however, or where access is essential to effective competition, restrictions may both be unreasonable under Section 1 of the Sherman Act and also amount to attempts to monopolise in violation of Section 2. Indeed, some courts would apply the *per se* rule if the JV has market power or exclusive access to facilities necessary to compete.[48]

Clamour for clarification on joint ventures continues

FTC's 1996 Global Competition Report

On 3 June 1996, following several months of hearings, the FTC staff released a report entitled 'Anticipating the 21st Century: Competition Policy in the New High-Tech, Global Marketplace' ('FTC Global Competition Report'). Chapter Ten summarised the dialogue on joint ventures, and the FTC's ultimate conclusion: '[W]e believe that the time has come for a significant effort to rationalise, simplify, and articulate in one document the antitrust standards that federal antitrust enforcers will apply in assessing collaborations among competitors.'[49]

In reaching this conclusion, the FTC staff acknowledged that:

- continued business uncertainty about the antitrust analysis of joint ventures might be having a 'chilling effect on inter-rival collaborations';[50]
- the agencies might have an unnecessarily narrow view of the types of efficiencies that might justify certain joint ventures;[51]
- the NCRPA has had 'limited effects at best' in facilitating pro-competitive JVs, falling well short of original expectations;[52]
- despite the 1995 IP Guidelines and the 1996 Health Care Guidelines, 'the requests for more antitrust guidance still have not abated'.[53]

Among the suggestions made by commentators and scholars during the FTC Global Competition Hearings were that: (i) antitrust analysis should move away from 'characterisation' and 'integration' to look primarily at competitive effects, efficiency justifications, and what effect the JV is likely to have on output and prices;[54] (2) JVs should be analysed in the same way as mergers;[55] (3) 'safe harbour' standards should be adopted more generally for JVs;[56] (4) the antitrust agencies should be wary about using a *per se* standard when they review JVs, 'especially those that facilitate entry into international markets;'[57] (5) more information needs to be disseminated about antitrust enforcement decisions, including cases not brought;[58] and (6) standard-setting activities should receive more protection.[59] One witness suggested, to lessen the

before the American Intellectual Property Law Association, San Antonio, Texas, 2 May 1997 (text available on the DOJ's website).

[15] Press Release by economists David Evans (NERA) and Richard L Schmalersee (Professor, MIT) in response to FTC's Joint Venture Project, electronically published 27 June 1995 (PR Newswire).

[16] FTC Report, *Anticipating the 21st Century: Competition and the New High-Tech Global Marketplace*, 3 June 1996, Ch 10, *Joint Ventures*, p 2 ('FTC Global Competition Hearings').

[17] *See* Robert Pitofsky, *A Framework for Antitrust Analysis of Joint Ventures*, 54 Antitrust LJ 893-894 (1985).

[18] *See, eg*, James J Anton and Dennis A Yao, *Standard-setting Consortia, Antitrust, and High-Technology Industries*, 64Antitrust LJ, 247, 248-49 (1995); Jack E Brown, *Technology Joint Ventures Standards or Define Interfaces*, 61 Antitrust LJ 921 (1993).

[19] *Eg, Timken Roller Bearing Co v United States*, 341 US 593, 598 (1951) (agreement having the purpose of suppressing competition cannot be justified by labelling the project a 'joint venture'); National Soc'y of Prof'l Eng'rs v United States, 435 US 679, 687-92 (1978) (applying *per se* rule to professional society's price restrictive canon).

[20] *United States v Penn-Olin Chem Co*, 378 US 158, 170 (1964). *See United States v Ivaco Inc*, 704 F Supp 1409, 1414 (WD Mich 1989) (enjoining fully integrated JV involving high market share).

[21] Robert Pitofsky, *A Framework for Antitrust Analysis of joint Ventures*, 54 Antitrust LJ at 893, 900 (1985): "The correct answer should be that joint venture support for collusive arrangements, whether direct or indirect, must be proven and cannot be assumed.'

[22] *See United States v Penn-Olin Chemical Corp, supra* n 20 at 173-74. (The District Court should have considered that one of the parties would have remained a significant potential competitor and constrained pricing by lingering 'at the edge of the market, continually threatening to enter.') In *Yamaha Motor Co v FTC*, 657 F.2d 971 (8th Cir 1981), *cert denied*, 456 US 915 (1982), the court affirmed an FTC determination that a joint venture between a Japanese and US manufacturer of outboard motors violated Section 7 of the Clayton Act because, *inter alia*, it would have eliminated potential competition in the US market by Yamaha. *See* 94 FTC 1174, 1273 -74 (1979). Rule-of-Reason analysis did not save the parties' competitive restrictions.

[23] *See* Competitive Impact Statement, 59 Fed Reg 33,009, 33,014-24 (27 June 1994). The Consent Order required MCI to publish rates, terms and conditions under which it gains access to the BT network and other non-public information. 1994-2 Trade Cas (CCH) ¶ 70, 730 at 73,008-013 (DDC 1994).

[24] *See* Charles F Rule, *The Administration's Views on Joint Ventures*, 54 Antitrust LJ 1121, 1127-28 (1985); Joseph Kattan, *Antitrust Analysis of Technology Joint Ventures: Allocative Efficiency and the Rewards of Innovation*, 61 Antitrust LJ 937, 947 (1993). Kattan cites the FTC's Consent Order in the General Motors-Toyota JV as an example of a transaction that would have been challenged had the two companies merged. *Id* at 948-49. In that JV, between the world's first and third largest automobile manufacturers, the FTC addressed 'spillover' concerns of collusion outside the JV and possible inhibition on GM's incentives to expand its output of small cars. The Commission initially imposed limits on information exchange and on the JV's output (200,000 automobiles per year). In 1993, the FTC re-examined its Consent Order and concluded that changes in the market then warranted removal of all previous limitations on the JV's conduct. 5 CCH Trade Reg Rep ¶ 23, 491 (29 October 1993).

[25] David S Evans, *Antitrust Policy Towards Joint Veniures*, testimony presented at the FTC's Hearings on Joint Venture Project, 24 June 1997. Evans, a Senior Vice-President of NERA, points out that JVs have at least four problems differentiating them from single firms: (1) their members may have conflicting objectives; (2) some members may attempt to 'free ride' on the efforts of others; (3) a JV must harness its members to generate positive externalities; and (4) a JV must coordinate the actions of its independent members.

[26] 15 USC § 4302 (1994).

[27] Failure to file under the Act, of course, does not preclude Rule-of-Reason treatment for an R&D or production JV. *Id.*

[28] Reprinted in 1994 Trade Reg Rep (CCH) ¶ 13,132.

[29] 1995 IP Guidelines § 4.3.

[30] *Id.*

[31] T A Piraino, *Beyond Per Se, Rule of Reason or Merger Analysis: A New Antitrust Standard for Joint Ventures*, 76 Minn L Rev 1, 52 (1991).

[32] 405 US 596 (1972).

[33] 457 US 332 (1982).

[34] *Eg, Rothery Storage Van Co v Atlas Van Lines*, 792 F.2d 210, 226 (DC Cir 1986), *cert denied*, 479 US 1033 (1987). *See* Richard W Pouge, *Antitrust Considerations in Forming a Joint Venture*, 54 Antitrust LJ 925, 937 (1985).

[35] *Eg, Palmer v BRG of Georgia Inc*, 498 US 46 (1990) *(per curiam)*. Rule-of-Reason analysis, of course, is no safe harbour. *See generally National Collegiate Athletic Ass'n v Board of Regents*, 468 US 85, 101 (1984) (*per se* treatment inappropriate for college athletic association's limitations on live TV football broadcasts; horizontal restraints still invalidated after a truncated or 'quick look' application of Rule of Reason).

[36] These replace the 1994 Joint Health Care Principles, which had in turn revised the antitrust agencies' 1993 statements. According to the DOJ/FTC press release accompanying the latest guidelines, their frequent revisions 'demonstrate that antitrust analysis and enforcement are flexible and resilient to accommodate these changing markets'.

[37] 1996 Health Care Guidelines, Statement 8, p 56.

[38] 'The agencies emphasise that it is not their intent to treat such networks either more strictly or more leniently than joint ventures in other industries . . . 1996 Health Care Guidelines, *Introduction*.

[39] *See* business review letters cited by ABA Section of Antitrust Law, Antitrust Law Developments at 409-10 and n 93 (4th ed 1997). As the ABA text also points out, 'the approach to joint ventures set forth in the *Health Care Statements* is very similar to that articulated in the Department's now-superseded *1988 International Guidelines* . . . *Id.* at 399 n 3.

[40] 1996 Health Care Guidelines, n 6.

[41] 1996 Health Care Guidelines, Statement 2, pp 11-13.

[42] *Eg Rothery Storage & Van Co v Atlas Van Lines*, 792 F.2d 210, 224 (DC Cir 1986), *cert denied*, 497 US 1033 (1987).

[43] In *Broadcast Music Inc v CBS*, 441 US 1 (1979), for example, the Supreme Court considered licensing mechanisms whereby composers and artists granted non-exclusive rights to their works to ASCAP and BMI. ASCAP and BMI then offered blanket licences to consumers, thereby eliminating direct competition between the composers and artists. The Supreme Court applied the Rule of Reason and upheld the

risk of private litigation, 'adoption of the EU model, under which the competition authorities have sole jurisdiction to decide the legality of any registered joint venture'.[60]

FTC's 1997 Joint Venture Project

Seven months after its Global Competition Report, the FTC announced the 'Joint Venture Project', intended to 'clarify and update antitrust policies regarding joint ventures and other forms of competitor collaborations'.[61] Public hearings began on 2 June 1997, and continued through the year.[62] In its 'Comment and Hearings on the Joint Venture Project', the FTC explained that it was 'interested in better understanding the current use of competitor collaborations', as well as better understanding the impact those arrangements have on competition. The FTC is seeking input on which aspects of US antitrust law regarding joint ventures require clarification, the extent to which the NCRPA and existing agency guidelines have or have not been helpful, and where any inadequacies might 'be remedied through changes in or additions to the current guidelines . . .'[63]

Since the FTC's Joint Venture Project hearings began, a wide range of scholarly opinion and writing has been submitted.[64] Given the divergence in opinions expressed thus far, it is difficult to predict the outcome of the FTC's hearings. Nevertheless, because the agencies are under enormous pressure to clarify and improve antitrust guidance on collaborative activities, a report, a series of position statements, or a set of new guidelines seems inevitable. The very fact of the FTC's hearings demonstrates that the law in this area carries with it some confusion as it evolves. That evolution is inevitable with increasing recognition of the competitive value in collaborative activity, and the need not to discourage the formation of efficiency-producing joint ventures.

The FTC's Joint Venture Project offers an important opportunity for study and dialogue on joint venture issues, which should be of value to the antitrust bar in the United States. The outcome of these hearings should also serve to inform the debate ongoing within the European Union. With attention properly paid, one might even hope for small additional steps in the direction of procedural convergence, if not substantive harmonisation.[65] Such steps are essential with the globalisation of joint ventures, coupled with overlapping international antitrust enforcement activity.[66]

Notes

* An earlier version of this article was presented at the International Bar Association *Future of Merger Control in Europe* Seminar in Florence, Italy, 26 September 1997.

[1] *See, eg,* National Association of Attorneys General Vertical Restraints Guidelines, adopted 4 December 1985; amended December 1988 and 25 March 1995; published in Antitrust Report (January 1996).

[2] Department of Justice, Antitrust Enforcement Guidelines for International Operations ¶ 3.4 at 20,599 10 November 1988), reprinted in Trade Reg Rep (CCH) ¶ 13,109.10 at 20,599. These 1988 International Guidelines were superseded by US Department of Justice & Federal Trade Commission, Antitrust Guidelines for International Operations (April 1995), reprinted in Trade Reg Rep (CCH) ¶ 13,107 ('1995 International Guidelines').

[3] *See* Charles T (Chris) Compton, *'Cooperation, Collaboration, and Coalition: A Perspective on the Types and Purposes of Technology Joint Ventures'*, 69 Antitrust LJ 861 (1993).

[4] Press release, 'FTC Announces Project to Follow Global and Innovation-based Competition Hearings', 23 January 1997.

[5] *See* Thomas M Jorde and David J Teece, *'Innovation, Cooperation, and Antitrust,'* in *Antitrust, Innovation, and Competitivenss* at 55 (1992).

[6] That alliance included a broad cross-licensing agreement, the purchase by Microsoft of $150 million worth of non-voting Apple stock, Apple's agreement to bundle Microsoft Web Browser on its Mac computers, and other collaboration.

[7] The 1995 International Guidelines do not attempt a substantive restatement of the antitrust laws applicable to transnational JVs. Reference is therefore still made by many US practitioners to the DOJ's 1988 Antitrust Enforcement Guidelines for International Operations.

[8] 15 USC § 18A. *See* 16 CFR § 801.40 (1992) for the regulations governing HSR reportability.

[9] The procedures for requesting DOJ Business Review Letters is set forth in 28 CFR § 50.6 (1994). The FTC has a similar Advisory Opinion procedure, set out at 16 CFR §§ 1.1-1.4 (1994).

[10] DOJ Press Release, 1 December 1992 at 2. Information required from the parties includes: (1) the purposes and objectives of the JV; (2) the extent of their current involvement in the proposed JV's product market; (3) current competitors and market shares; (4) restrictions on the parents' ability to compete with the JV; (5) restrictions on the flow of information from the venture to its owners; (6) requirements for entry into the JV's market; and (7) expected business synergies or efficiencies. *Id* at 3-5.

[11] The majority of JV Business Review Letters published by the DOJ in 1994-95 involved physician network joint ventures and other collaborations in the health care industry. *See* Department of Justice 1994 and 1995 Supplements and Revised Indexes to Digest of Business Reviews, released on 20 February 1995.

[12] *See, eg,* Mary L Azcuenaga, *Integrated Joint Ventures*, 7 August 1995, published at 'www.ftc.gov/WWW/speeches/azcuenaga/aba95Fnl.htm'. The DOJ Antitrust Division's home page may be found at 'www.usdoj.gov/atr/atr.htm'.

[13] This aversion to informal meetings may in part explain the relatively infrequent resort to voluntary filing procedures in the US. *See* Statement of Joseph P Griffin before the Federal Trade Commission Hearings on the Joint Venture Project, pp 10-11, 2 June 1997, electronically published at the FTC's website.

[14] Joel L Klein, *Cross Licensing and the Antitrust Law,* address

joint venture, stating that 'the integration of sales, monitoring, and enforcement against unauthorised copyright use' created a new product that could not otherwise exist. *Id* at 20. Nevertheless, any agreement between competitors on their own pricing or production risks being characterised as *per se* illegal.

[44] Given JV efficiencies such as new or improved products, increased output, lower costs and prices, or entry into new markets, courts further consider 'the nature of the ancillary restraints imposed and the reasonableness of their relationship to the purposes of the venture'. *Eg, Berkey Photo Inc v Eastman Kodak Co*, 603 F.2d 263, 302-03 (2d Cr 1979), *cert denied*, 444 US 1093 (1980). *See generally* Salem M Katsh, *Collateral Restraints in Joint Ventures*, 54 Antitrust LJ 1003 (1985).

[45] Some courts, when reviewing ancillary restraints, have gone so far as to make market power an essential element of a Sherman Act Section 1 violation. *EG, SCFC ILC Inc v Visa USA Inc*, 36 F.3d 958 (10th Cir 1994), *cert denied*, 115 S Ct 2600 (1995); *General Leaseways Inc v National Truck Leasing Ass'n*, 744 F.2d 588 (7th Cir 1984).

[46] *Eg, SCFC ILC v Visa USA Inc*, 36 F.3d at 962-64.

[47] *Id*, at 968-71; *see Northwest Wholesale Stationers v Pacific Stationery & Printing Co*, 472 US 284 (1985).

[48] *See., eg, Wigod v Chicago Mercantile Exchange*, 981 F.2d 1510, 1517 (7th Cir 1992); *Bascom Food Products Corp v Reese Finer Foods Inc*, 715 F.Supp 616 (DNJ 1989). The troublesome issues raised by networks and standards found no clear answers during the FTC's recent Global Competition Hearings, discussed below.

[49] FTC Global Competition Hearings, ch 10, p 17.

[50] *Id* at 7.

[51] *Id* at 8.

[52] *Id* at 14-15.

[53] *Id* at 15 & n 83.

[54] *Id* at 8 & n 38 (Gellhorn).

[55] *Id* at 10 & n 50 (Platt, Rill, Skitol).

[56] *Id* at 10 & n 51 (Dam, Gellhorn, Jorde).

[57] *Id* at 8 & n 39 (Dam).

[58] *Id* at 11 & n 60 (Skitol, Berends).

[59] *Id* at 13 & n 73 (Katz).

[60] *Id* at 12 & n 69 (Katz).

[61] FTC Press Release, 23 January 1997.

[62] FTC Press Release, 22 April 1997.

[63] *Id* at 5.

[64] These materials, including hearing transcripts, are available on the FTC's world wide web home page, 'www.ftc.gov/opp/jointvent'.

[65] As Columbia University Law School Professor Harvey J Goldschmid commented at the opening of the Joint Venture Project Hearings on 2 June 1997: 'Harmonisation also ought to be talked about, if we can harmonise with the European Union, at least to any real degree. It will make life for all concerned much easier.'

[66] On 24 November 1997, US Attorney General Janet Reno announced formation of a blue ribbon panel to chart a proposed role for the Department of Justice in international competition and antitrust enforcement. At the news conference, antitrust chief Joel Klein referred to the US-European divergence in the Boeing-McDonnell Douglas merger; he also noted that 25-33 per cent of the Antitrust Division's current work involved international cases. Associated Press, Panel to Advise on Global Antitrust, 24 November 1997.

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there at the creation as a Deputy Assistant Attorney General, was generally critical of the results in his article 'The Effect of 20 Years of Hart-Scott-Rodino On Merger Practice: A Case Study in the Law of Unintended Consequences Applied to Antitrust Legislation,' concluding: '. . . the merger process as it has developed in the two decades of HSR is far different than what was envisioned in 1976. In fact, HSR as we know it today has many of the features that Congress flatly rejected at that time. It imposes significant costs, not only directly on the parties to reportable transactions but arguably in the form of excessive merger regulation, which must be balanced against whatever benefits it can be shown to produce. Whether, on balance, HSR produces public benefits is, at best, unproven. Perhaps this 20th anniversary is a good time for a thorough re-examination of the way this country regulates merger activity.'

[2] The fact that a merger or acquisition is not challenged by the government within the time frames of the Hart-Scott-Rodino Act does not immunise it from challenge later under the substantive rules of the Sherman, Clayton or FTC Acts. In fact, at least one transaction that was investigated and 'cleared' under the pre-merger notification regime was later challenged and a divestiture required under the FTC Act (Acquisition of pipeline by Arkla Inc).

[3] *See* Axin, Fogg, Stoll and Prager, *Acquisitions under the Hart-Scott-Rodino Antitrust Improvements Act (revised ed)* for details on the rules and interpretations. *See also* ABA Antitrust Section *Pre-merger Notification Practice Manual* (1991).

[4] Malcolm R Pfunder, 'Some Reflections On, and Modest Proposals For Reform Of, the Hart-Scott-Rodino Pre-merger Notification Programme,' 65 Antitrust Law Journal 905 (1997).

[5] See Barry C Harris and David D Smith, 'Survey of Economic Studies' presented at FTC Hearings (April 1996). Dr Harris, an economist who was himself also a Deputy Assistant Attorney General in the Antitrust Division, concludes that 'The principal point to be drawn from this brief review of the theoretical literature of oligopoly behaviour is that the determinants of interfirm behaviour are varied and complex and that a simple change in pre-merger and post-merger concentration levels provides little basis for predicting changes in market conduct and performance. In fact, the overall literature provides little, if any, support for the specific concentration standards employed in the Merger Guidelines. More specifically, the literature does not provide support for the presumptions concerning the exercise in market power in markets with a post-merger HHI above 1800 . . . As in the theoretical literature, the empirical literature provides no basis for the application of specific concentration standards to be used across different markets . . . These studies, moreover, do not show a unique relationship that holds across studies, much less across industries. Consequently, the empirical economic literature provides no basis for the existence of a unique critical concentration level or for a specific critical HHI level of 1800. Indeed, the variation among the empirical results suggests that non-concentration factors are likely to be a more important determinant of a market's competitiveness than is the concentration level.'