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to the

FEDERAL TRADE COMMISSION

HEARINGS ON

THE JOINT VENTURE PROJECT

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Mr. Chairman, Members of the Commission, it is a pleasure to appear before you today in response to your invitation. I will address a number of the issues raised in your Notice of Opportunity for Comment, in the context of a brief analysis of the treatment of joint ventures under the European Community's competition policies.

I will begin with a brief overview of treatment of joint ventures under European competition law, and then will address several points I believe are worthy of your consideration.

I. BACKGROUND

The European Commission has a permissive attitude toward joint ventures. The vast majority of ventures are cleared rapidly. A few are approved after restructuring or subject to conditions. Very few are prohibited.

Over ninety-five per cent of joint ventures that fall within the competition rules of the European Community (EC) are governed by the provisions of Article 85 of the Treaty of Rome. Article 85 is roughly analogous to Section 1 of the Sherman Act. It prohibits joint venture-type agreements "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." Agreements caught under this general prohibition are void unless they qualify for an exemption under a "block" or "group" exemption which applies to agreements falling within specified parameters, or are granted an individual exemption under Article 85 (3). Article 85(3) exempts agreements that: "contribute 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 do not: (a) impose on the ventures concerned restrictions which are not

indispensable to the attainment of these objectives; and (b) afford such venturers the possibility of eliminating competition in respect of a substantial part of the products in question.

A few joint ventures involving very large companies are regulated by the EC's Merger Regulation.[1] This Regulation applies to joint ventures performing, on a lasting basis, all the functions of an autonomous economic entity, which do not give rise to impermissible coordination of the competitive behavior of the parents amongst themselves or between them and the joint venture.[2]

Joint ventures regulated under Article 85 are known as "cooperative" joint ventures. Joint ventures governed by the Merger Regulation are known as "concentrative" joint ventures. This distinction is an important jurisdictional issue. Different substantive and procedural rules apply to the different types of joint venture. Since this distinction was created by the Merger Regulation in 1989, the European Commission has made several attempts at clarification. The Commission's most recent statement on the distinction is its 1994 Notice on "The Distinction between Concentrative and Cooperative Joint Ventures."[3]

II. "CONCENTRATIVE" JOINT VENTURES

A. ELEMENTS OF "CONCENTRATIVE" JOINT VENTURES

According to the 1994 Joint Venture Notice, "concentrative" joint ventures have three principal elements:

1. Joint Control

"Joint control" exists where the parent companies must agree on major decisions concerning the venture's activities. There is no "joint control" if one of the parents can decide alone on the venture's commercial activities.[4]

2. <u>"Full-Function" Entity</u>

The venture must act as an independent participant in the relevant market and perform all of the activities or functions performed by other entities operating in the same relevant market. Thus, R&D or production-only joint ventures are not "full-function" ventures. A critical factor in determining whether a joint venture is "full function" is whether the joint venture has sufficient financial and other resources--including staff, assets, and financing--to operate the business on a lasting basis. However, the venture's economic independence will not be contested by the European Commission merely because the parents reserve to themselves the right to make certain decisions that are important to the development of the venture or because, for an initial start-up period of no more than 3 years, the parents are key suppliers or customers of the venture.

3. <u>No Coordination of Competitive Behavior</u>

The venture must not raise a serious risk of coordination of competitive behavior among the parents or between the parents of the joint venture. According to the Commission, a "high probability" of impermissible coordination of competitive behavior exists when two or more parents remain substantially active in the venture's markets. On the other hand, there is no significant risk of coordination if one parent remains active in the market. The Commission has also stated that there may be risks of impermissible coordination when two or more of the parents have significant activity in an adjacent market or where the parents play a role upstream or downstream of the venture.

B. STANDARD OF LEGALITY

Under the Merger Regulation, the test of legality is whether the "concentrative" joint venture "creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the Community market or in a substantial part of it."[5] A "dominant position" is defined as a position of market power which enables the entity to act independently of its competitors, customers and consumers and usually exists only when market shares exceed 40 per cent.[6] The Merger Regulation contains a presumption that a venture could not impede effective competition if the aggregate market share of the parties does not exceed 25 per cent.[7]

C. JOINT VENTURES PROHIBITED UNDER MERGER REGULATION

1. MSG Media Service[8]

Bertelsmann, the world's second largest media group; Kirch Group, one of Germany's largest private television companies; and Deutsche Telekom, the state telephone monopoly planned to create a joint venture company, Media Service GmbH (MSG), to provide infrastructure, marketing and other services for commercial pay TV. After a five month investigation, the Commission concluded, in November 1994, that the venture would create a dominant position in three separate markets: (1) pay TV services; (2) technical services for pay TV, such as the supply of decoders, and access control systems; and (3) cable network services.

The Commission prohibited the transaction because it believed that the parents of MSG were so strong that it could prevent new entrants into the German market. According to the Commission:

"Telekom owns most of the cable network in Germany and controls its development. . . It also controls the return channels necessary for interactive services, and has direct access to more than 4m cabled households; Bertelsmann and Kirch already have Premiere and own incomparable programme resources; moreover, Bertelsmann is a major operator of book clubs.

No competitor has such advantages nor could reasonably enter the MSG market."

The Commission rejected proposals by the partners to develop a system whereby competitors could have used the decoders, and an undertaking not to discriminate against other pay-TV operators when it came to renting contracts for decoders, and use of commercial information. According to the Commission: "These undertakings are in fact a mere declaration of intent not to abuse a dominant position on the market for administrative and technical services to the detriment of competitors."

MSG also undertook to develop the digital cable network to ensure that there was no shortage of transmission capacity. This too was rejected by the Commission, as too difficult to check and already linked to the regulatory obligations imposed on Telekom.

According to the Commissioner in charge of Competition Policy, the decision is important because it shows that the Commission will use the Merger Regulation "in order to prevent the protection of future markets from competition. . . .Television without frontiers can only be accomplished if program suppliers from other Member States are not faced with prohibitive entry barriers in national markets."

2. Nordic Satellite Distribution[9]

Three firms proposed to create an equally owned joint venture, Nordic Satellite Distribution ("NSD"), that would broadcast programs by satellite to the Nordic countries. The

partners were (a) the largest cable TV operator in Norway with about 30 per cent of the connections; (b) the largest cable TV operator in Denmark with about 50 per cent of the connections; and (c) a large Swedish conglomerate. The Commission concluded that the joint venture would create or strengthen a dominant position in three markets: (1) the provision of satellite TV transponder capacity to the Nordic region; (2) the Danish market for operation of cable TV networks; and (3) the market for distribution of satellite pay TV and other encrypted TV channels to direct-to-home householders.

According to the Commission, the vertically integrated nature of the venture meant that market positions downstream (cable and pay TV) reinforced market positions upstream (satellite transponders, supply of programs) and vice versa. The parties would achieve such strong positions that they would be able to foreclose the Nordic satellite TV market. Because the relevant markets are about to be liberalized and new technologies are being developed, the Commission did not want future market structures to be foreclosed.

3. Holland Media Group[10]

Three firms, RTL, Veronica, and Endemol proposed to create a joint venture, Holland Media Group, that would become the largest TV broadcaster in Holland with about 40 per cent of the TV audience. Ordinarily, the Commission would not have had jurisdiction over the venture because the parties concerned did not have the requisite turnover. However, pursuant to Article 22 of the Merger Regulation the Dutch Government requested that the Commission examine the case.

The Commission concluded that the venture would lead to the creation of a dominant position (60 per cent) of the market for TV advertising in Holland and to a strengthening of Endemol's existing dominant position of the market for Dutch TV production. In July 1996 the

Commission approved a modified form of the venture under which Endemol withdrew from the venture and RTL5 was converted from a general interest channel into a news-only channel.

4. Saint Gobain/Wacker[11]

The Commission opposed the creation of a joint venture among French and German producers of silicon carbide and an investment company owned by the Dutch Government. The venture would have combined the two most important producers of silicon and carbide in the European Economic Area (EEA). The venture would have had more than 60 per cent of two of the relevant product markets. The three remaining competitors had shares of less than 10 per cent each. Moreover, the parties to the venture are the technological leaders and the only companies capable of providing the entire range of silicon carbide grades for abrasives and refractories. Potential competitors from Eastern Europe and China did not appear to have sufficient capacity to provide the entire range of grades of silicon carbide required by European users. Moreover, it did not appear that the potential competitors could develop their production and provide sufficient competition in a two- or three-year time period. The Commission took into account the financial difficulties encountered by the German company, but concluded that these difficulties would not inevitably lead to bankruptcy in the near future. Moreover, even if the Company did completely or partially cease business, the Commission concluded that the competitive situation would be better for EEA customers, than if the venture was authorized.

The Commission rejected proposals by the parties to withdraw their support for antidumping measures affecting imports of relevant products from Eastern Europe and China. The Commission did not believe that the elimination of the antidumping duties would make a significant contribution to resolving the competition problems created by the venture.

D. JOINT VENTURES MODIFIED UNDER THE MERGER REGULATION

Shell/Montecatini[12]

Under the original proposal, Montedison would transfer to a joint venture, now known as "Montell" (previously known as "Sophia"), all of its interests in its polyolefin businesses. The most important of these businesses was its polypropylene technology and production businesses. Montedison is the leading licensor of polypropylene process technology, known as the "Spheripol" process. Montedison would retain the right to license the Spheripol technology in the United States.

Shell would contribute to the Montell joint venture most of its worldwide polyolefin licensing and technology business. Shell would not contribute to the Montell venture its existing joint venture polypropylene production facilities in Europe. Shell also would not contribute to Montell its share of a joint venture with Union Carbide. The Shell-Union Carbide joint venture, known as the Cooperative Undertaking Agreement or "CUA," produced polypropylene in the United States and licensed a polypropylene manufacturing process, known as the "Unipol" process. Shell produced the catalyst for the Unipol process, while Union Carbide licensed the Unipol technology.

The Commission determined that polypropylene was a product market because there was little substitution to other materials. It concluded that Europe was an appropriate geographic market because it was too costly to import polypropylene into Europe.

Even after the consummation of the joint venture, there would be ten polypropylene producers in Europe. Montell would control only a fraction of the market. The Commission noted, however, that Montedison and Shell had the ability to influence a much larger portion of the market due to joint ventures in which they were participants. The Commission expressed a

concern that through these links, Montedison and Shell "may be able to influence the competitive behaviour of their joint venture partners." The Commission expressed a particular concern about the venture between Montedison and Petrofina, Montefina. While the parents independently market their production from the Montefina plant, there was a concern that Shell/Montedison would shift production of specialty products out of the plant, relegating the plant to commodity production.

The Commission concluded that it had serious concerns about the creation of a dominant position in polypropylene production. As far as Montefina was concerned, the Commission noted that the parents had to agree upon all important decisions. Moreover, Montedison personnel would have access to Petrofina's technological improvements, which might be a disincentive to Petrofina using its Fina polypropylene technology. The Commission noted that while the combined market share of Montell would not be very high, there would be a considerable gap between Montell's share and the share of the next largest polypropylene producer. The Commission also supported its conclusion based on the network of joint ventures and Montell's leading position in polypropylene technology.

Montedison agreed to withdraw from the Montefina joint venture. This severed one of the joint venture links that concerned the Commission.

Both Montedison and Shell have interests in polypropylene process technology. Montedison was the largest licensor of polypropylene process technology in the world. The Montedison process is known as Spheripol. Shell participated in a joint venture with Union Carbide that licensed Unipol, a competing process technology. Union Carbide actually licensed the process. Shell sold the catalyst used in the process. The Spheripol and Unipol processes

accounted for 50-70 per cent of plant capacity under license. The other licensors, BASF, Mitsui, Amoco and Sumitomo had much smaller market shares.

The Commission viewed the product market as the licensing of polypropylene process technology. The geographic market was worldwide. The Commission viewed Spheripol and Unipol as the two main technology packages. The proposed arrangement linked Shell to these two main licensing technologies through two joint ventures. Through Montell, it would be the half owner of the Spheripol technology and through the CUA it would provide the catalyst for the Unipol technology.

The Commission concluded that other currently available licensing technologies do not significantly constrain the parties' competitive behaviour. Moreover, new entry is not likely to undermine quickly a significant exercise of market power. Nor could the size and sophistication of licensees thwart the exercise of market power by a dominant technology provider. Because the Commission believed there was significant demand in Europe for new licensing packages, the venture posed a competitive problem. In the words of the Commission, the venture "would lead to the creation of a dominant position as a result of which effective competition would be significantly impeded in the market for PP [polypropylene] technology."

To remedy the problem, the parties agreed to modify the Montell venture. The partners agreed to transfer the Spheripol technology to a new subsidiary of Montedison, "Technipol." This company was to be a separate, full-functioning company capable of conducting the polypropylene technology business. Montedison would contribute to the company the existing Spheripol technology, existing licensing contracts, the revenues for any licenses, sufficient resources to support R & D efforts, and the R & D staff. The commitment required Montell to manufacture catalysts for Technipol on terms and conditions that are customary in the industry.

In 1996 the Commission[13] eliminated the conditions it had required for approval after the parties had agreed to other conditions with the FTC[14] which the Commission deemed adequate to eliminate the problems.

III. "COOPERATIVE" JOINT VENTURES

Pursuant to the Merger Regulation, all joint ventures which are not "concentrative" are "cooperative" and fall within the scope of Article 85 of the Treaty of Rome. Article 85, like Section 1 of the Sherman Act, applies to a very large number of joint ventures. However, a few joint ventures are not caught by Article 85(1) because they do not have as their object or effect the prevention, restriction or distortion of competition.[15] Other joint ventures do not have an "appreciable" effect on competition between Member States and therefore are not covered because of the Commission's Notice on "Agreements of Minor Importance."[16]

A. STANDARD OF LEGALITY

If the venture is caught by Article 85(1), the Commission's analysis of the venture focuses on the:

> "Relationship between the enterprises concerned and on the effects of their cooperation on third parties. The first task is to check whether the creation or operation of the JV is likely to prevent, restrict or distort competition between the parents. Secondly, it is necessary to examine whether the operation in question is likely to affect appreciably the competitive position of third parties, especially with regard to supply and sales possibilities."[17]

Such analyses involve defining the relevant product and geographic markets and applying the Commission's previous decisions to the particular facts.

A venture which is determined to be prohibited under Article 85(1) may nevertheless be permitted if it qualifies for an exemption under Article 85(3). Under the Commission's procedures, unless the venture falls within the parameters of a "block" exemption, an exemption can only be granted if the venturers have notified the agreement to the Commission and have obtained a formal decision granting an exemption. Very frequently companies notify the Commission and obtain a "comfort letter"[18] from the Commission which does not have the status of a formal exemption but is roughly equivalent to an FTC Advisory Opinion or an Antitrust Division Business Review Letter.

If a joint venture falls within the prohibitions of Article 85(1) and a formal exemption is sought, the Commission must, pursuant to Article 85(3), examine:

- whether the venture contributes to improving the production or distribution of goods or to promoting technical or economic progress,
- whether consumers are allowed a fair share of the resulting benefit,
- whether the parents or the offspring are subject to restrictions which are not indispensable for the attainment of these objectives, and
- whether the cooperation in the venture affords the entities involved the possibility of eliminating competition in respect of a substantial part of the products or services involved. [19]

An exemption can be granted only if the answer to the first two questions is in the affirmative, and the answer to the second two questions is negative. The European Commission has stated that the development of new or improved products and processes and measures

opening up new markets, leading to sales expansion into new territories or to the enlargement of a supply of new products, will generally be assessed favorably. The European Commission also has stated that it will view unfavorably ventures that have as their main purpose the coordination of actual or potential competition between the participating entities.

> "The pros and cons of a JV will be weighed against each other on an overall economic balance, by means of which the type and extent of the respective advantages and risk can be assessed. If the parents are economically and financially powerful and have, over and above that a high market share, their exemptions applications will need a vigorous examination."[20]

The Commission's 1993 Notice on the "Assessment of Cooperative Joint Ventures pursuant to Article 85"[21] offers guidance as to how the Commission would evaluate various common types of joint ventures.

B. RECENT CASES

1. British Telecom/MCI (Concert)[22]

BT and MCI proposed to create a joint venture to provide advanced business telecommunications services to multinational companies. Under the proposed agreement, BT would acquire a 20 per cent stake in MCI, and a new joint venture company (Concert) would be created. The Commission granted an exemption under Article 85(3) because the new venture would offer new services more quickly, cheaply, and with more advanced technology, than either of its parents would have been able to provide under their existing technologies. The large companies who would be the venture's customers would benefit through the offering of new services and lower prices. On the other hand, the joint venture would not eliminate competition in the relevant market, because several of the large multinationals are in, or are planning to enter,

the same market. Finally, the creation of the new company was "indispensable" to the success of the venture, because it would substantially shorten the time required for the relevant services to be brought to market. The Commission granted an exemption for seven years. The venture was the subject of a 1994 consent decree.[23] The merger of BT and MCI is now pending before competition authorities in Europe and the United States.[24]

2. ATLAS

Deutsche Telekom and France Telecom notified the Commission of their intention to create a cooperative joint venture, ATLAS, to provide domestic data communication services to companies in France and Germany. The Commission objected because the parent firms had very high market shares (75 per cent) and would not compete in the relevant markets. The elimination of competition in national markets is aggravated by the fact that the parent companies enjoy monopolies for the provision of infrastructure, the necessary building blocks for service providers competing with ATLAS. In the absence of alternative infrastructure allowing competing service providers to build up their own networks at competitive prices, competition would suffer a set-back precisely at the time that action taken by the Commission to liberalize all telecommunications services except basic voice services should begin to bear its fruits for the benefit of users.[25] The Commission agreed to approve the venture after the French and German Governments accelerated the liberalization of their communications markets.[26]

3. PHOENIX (Global One)[27]

Deutsche Telekom and France Telecom proposed to purchase 20 per cent of Sprint, the third-largest U.S. long distance operator, and to create a global telecommunications venture, PHOENIX, using the ATLAS venture between Deutsche Telekom and France Telecom. PHOENIX, later renamed Global One, would compete with the British Telecom/MCI joint

venture previously exempted by the Commission.[28] PHOENIX had also been the subject of a U.S. consent decree.[29] The Commission approved the venture in July 1996.[30]

4. ATT/Unisource (Uniworld)[31]

AT&T proposed a venture with Unisource, N.V., a joint venture of the Dutch, Spanish, Swedish and Swiss national carriers, to provide advanced telecommunications services and high-speed data transmission to European businesses. This venture, to be called "Uniworld," would compete with the Global One[32] and Concert (BT/MCI)[33] ventures previously approved by the Commission. As conditions for approving the venture, the Commission demanded that AT&T permit competing European firms to have access to AT&T's network for transatlantic calls. The Commission also sought assurances from U.S. authorities that AT&T would be required to open its network for transatlantic calls originating in the United States to competitors. Moreover, the Commission sought assurances from the four European governments that they would meet the EU's timetable for liberalizing their telecommunications markets.

5. UIP Pay-TV

In 1991, three large producers of motion pictures created a joint venture which, among other things, licensed and sold films produced by the three parent companies to Pay-TV broadcasters. The joint venture agreement prohibited the parents from entering into agreements with other distributors for the distribution of their films. The agreement also contained a provision that the venture would use its best efforts to maximize gross receipts from the films. In March 1997, the Commission ordered the dissolution of this aspect of the joint venture, on the grounds that it was not eligible for exemption under Article 85(3). The Commission believed that the exclusivity portion of the agreement could not be justified as providing a benefit to customers. Moreover, the best efforts provision appeared to limit competition among films

produced by the parent companies. According to the Commission, the only appropriate solution was to dissolve this aspect of the joint venture.[34]

6. Online Ventures

The Commission has announced that it is investigating several joint ventures in the market for on-line services. The ventures are Europe Online,[35] America Online/Bertelsmann/Deutsche Telekom, and Microsoft Network.[36] The Commission's stated objective is to "prevent the establishment of anticompetitive situations which slow down the development of on-line services and of the "information society"."[37]

IV. "FULL FUNCTION" "COOPERATIVE" JOINT VENTURES

After several years of operation under the Merger Regulation, the European Commission concluded that a significant number of "full-function" ventures were falling outside the scope of the Merger Regulation because they involved the risk of coordination of economic behavior. As a consequence, some full-function ventures were examined under the Merger Regulation and some under Article 85. In 1996 the Commission proposed to deal with this situation by treating all "full-function" "cooperative" joint ventures under the Merger Regulation, even if jurisdiction did not technically exist under the Merger Regulation.[38] These changes probably will be implemented in early 1998.

V. ISSUES WORTHY OF CONSIDERATION

Although I've omitted many details from the preceding brief summary, I hope it gives some flavor of the European Community's approach. I suggest that the following issues are worthy of consideration in the context of the Joint Venture Project.

A. Focus on anticompetitive effects, not structure

Many of us who have dealt with the European Commission's "concentrative" versus "cooperative" distinction have found it to be an elusive, evolving concept. Its creation is the result of legal constraints and political considerations not relevant in the United States. U.S. enforcers have gained some experience with this type of hair-splitting analysis in the context of the treatment of joint ventures under the Hart-Scott-Rodino Act. That experience and the European Commission's growing frustration with the distinction as indicated by its now almost-annual "clarification" of the distinction, should be sufficient evidence that this approach should not be considered by U.S. enforcers.

B. Transnational ventures are different

The 1995 Antitrust Enforcement Guidelines for International Operations contain the statement that "once jurisdictional requirements, comity, and doctrines of foreign governmental involvement have been considered and satisfied, the same substantive rules apply to all cases."[39] As I have explained elsewhere in detail[40] this statement may be read incorrectly.

Prior editions of the International Antitrust Guidelines and a substantial body of expert opinion consistently have taken the position that the transnational character of a particular transaction may affect the substantive antitrust analysis. For example, market analysis may be different; the business justifications for the restraint may be stronger or weaker; or the U.S. Government's antitrust objectives may be more limited or different than would be the case in a purely domestic transaction. As the Ninth Circuit pointed out, in the Metro Industries case, which was decided after the 1995 International Guidelines were published:

> "Application of the per se rule is not appropriate where the conduct in question occurred in another country . . . . The

> potential illegality of actions occurring outside the United States requires inquiry into the impact on commerce in the United States, regardless of the inherently suspect appearance of the foreign activities. Consequently, where a Sherman Act claim is based on conduct outside the United States, we apply rule or reason analysis to determine whether there is a Sherman Act violation."[41]

The point is that the analytical framework may not change, but the factors relevant to the analysis will be different in a transnational context. For example, efficiency justifications that are appropriate to international markets may not arise in domestic cases.

A related issue in transnational joint ventures is the applicability of trade and industrial policy considerations to the antitrust analysis. The European Community often pays at least as much attention to the issues of promoting market integration among Member States and to the industrial policy considerations, such as meeting challenges from competition outside the Common Market, as to "pure" antitrust analysis. These issues are viewed to be legitimate elements of the competition analysis. In difficult cases, the College of Commissioners, rather than the Commissioner in charge of competition policy, makes the final decision.

The fragmented nature of U.S. Government decision-making in the international trade area is well known and is best exemplified by the current debates over the proper U.S. Government strategy to obtain access to foreign markets. If the U.S. antitrust enforcement agencies continue to be limited to analyzing transnational ventures from the narrow antitrust law perspective, while other U.S. agencies consider the international trade and industrial policy aspects, it is increasingly likely that decisions based on "pure" antitrust analysis will be

overridden in situations where they are perceived to conflict with the U.S. Government's overall international competitiveness.

I am not suggesting a reorganization of the U.S. Government. Rather, I am suggesting that realistic analysis of the competitive aspects of transnational joint ventures must encompass a much broader range of issues than would be the case in a purely domestic transaction.

C. Issue guidelines on transnational joint ventures

Prior editions of the International Antitrust Guidelines contain extensive discussions of transnational joint ventures. Unfortunately, the 1995 International Guidelines delete those discussions and refer those seeking guidance to the U. S. enforcement agencies' statements of antitrust enforcement policy on health care ventures, intellectual property and other areas that offer little guidance to the nonexpert. In contrast, the European Commission's joint venture guidelines contain detailed discussions of the most common types of joint ventures, explanations of the issues considered to be most important, and explanations of the types of arrangements considered to raise the greatest risk.

The European Commission's guidelines also contain a series of "safe harbors." These vary among the guidelines and among the applicable block exemptions.[42] However, the easiest to apply is found in the Merger Regulation, which contains a presumption that a venture will not impede effective competition if the aggregate market share of the venturers does not exceed 25 per cent. Such a "bright line," set at a relatively low market share threshold, could be very useful in screening out ventures which do not merit serious antitrust review by the enforcement agencies. U.S. guidelines might also include discussions of permissible and impermissible

ancillary restraints similar to the "white" and "black" lists contained in the European block exemptions.

D. Continue Efforts at Convergence and Harmonization

The U.S. enforcement agencies are engaged in a number of useful activities designed to encourage convergence of procedure among enforcers and, perhaps, eventual harmonization of substantive antitrust laws. In the area of transnational joint ventures, these efforts are particularly important. The European Commission's recent revisions of the conditions it imposed on the Shell/Montecatini joint venture, after the FTC imposed different conditions, illustrates the need for continued consultation, cooperation and convergence among enforcement authorities. In the meantime, the reality may be that no settlements are truly final until all enforcement authorities have completed their reviews.

E. Make the advisory opinion procedure more user-friendly

Given the very large number of joint ventures occurring each year in the United States, use of the U.S. enforcement agencies'advisory opinion procedures appears to be extremely limited. In my view, this is primarily because the agencies do not encourage the early "informal guidance" consultations that occur frequently with the European Commission. In Europe, it is common that, at a very early stage of organizing a transaction likely to raise antitrust issues, the parties consult informally with the enforcers to seek their informal guidance. Typically, the enforcers inform the parties what objections they would have to the transaction and often make useful suggestions as to how objectionable aspects of the transaction could be remedied. In large and complicated transactions, there may be several such consultations. Thus, when the formal

notification is made, it usually proceeds rather quickly by U.S. standards because of all the preparatory work. U.S. enforcers' historical aversion to discussing "hypothetical" transactions has discouraged such informal consultations in the United States. One need only compare the number of cases involving informal consultations and the number of "comfort letters" issued by the European Commission to the volume of similar written guidance issued by the U.S. enforcement authorities, to see the magnitude of the difference in utilization of the two processes.

I have not seen any reports concerning usage of the Justice Department's 1992 Pilot Business Review Program for joint ventures. However, I suggest that its use of sixty- to ninety-day response periods is a step in the right direction. U.S. enforcers could make a substantial contribution to resolving uncertainty in the business community by following the European Commission's practice of encouraging early and frequent consultations.

Endnotes

1. The Merger Regulation applies to ventures where (i) the combined aggregate worldwide sales of all of the entities involved is more than five billion ECU (about $5.8 billion) and, (ii) aggregate Community-wide sales of each of at least two of the entities involved is more than 250 million ECU, unless each of the entities involved achieves more than two thirds of its aggregate Community-wide sales within one and the same Member State. Commission Regulation 4064/89, art. 1(2), 1990 O.J. (L257) 13.

2. *Id.*, art. 3(2).

3. 1994 O.J. (C385) 1.

4. Commission Notice on the Notion of a Concentration, 1994 O.J. (C385) 5.

5. Commission Regulation, 4064/89, art. 2(3).

6. *See, e.g.*, Alsatel v. Novasam, [1990] 4 C.M.L.R. 434; Kimberly-Clark/Scott Paper, Case No. IV/M623 (1996), 1996 O.J. (L183) 1.

7. Commission Regulation 4064/89, Recital 15.

8. Case No. IV/M469, 1994 O.J. (L364) 1; European Commission, Press Release, IP/94/1025, Opinion of the Advisory Committee, 1994 O.J. (C379) 35.

9. Case No. IV/M490, 1996 O.J. (L53) 20; Opinion of the Advisory Committee, 1996 O.J. (C63) 3; [1995] 5 C.M.L.R. 258.

10. Case No. IV/M553, 1996 O.J. (L134) 32; Opinion of the Advisory Committee, 1996 O.J. (C160) 3; [1995] C.M.L.R. 385.

11. European Commission, Press Release IP/96/1120 (Dec. 5, 1996); [1997] 4 C.M.L.R. 25.

12. Case IV/M 269, 1994 O.J. (L332) 48, Opinion of Advisory Committee, 1994 O.J. (C366) 3.

13. 1996 O.J. (L294) 10; [1996] 4 C.M.L.R. 741.

14. In re Montedison SpA, 5 Trade Reg. Rep (CCH) ¶ 23,749 (FTC 1995).

15. *See, e.g.*, Iridium, 1997 O.J. (L16) 87; International Private Satellite Partners, 1994 O.J. (L354) 75; [1995] 4 C.M.L.R. 306; ODIN, 1990 O.J. (L209) 15; [1991] 4 C.M.L.R. 832.

16. 1986 O.J. (C231) 2, as amended, 1994 O.J. (C368) 12. This Notice exempts agreements from Article 85 if: the goods or services which are the subject of the agreement, together with the participating entities' other goods or services which are considered by users to

be equivalent in view of their characteristics, price and intended use, do not represent more than five per cent of the total market for such goods or services in the area of the common market affected by the agreement and the aggregate annual turnover of the participating undertakings does not exceed 300 million ECU.

17. Notice "Concerning Assessment of Cooperative Joint Ventures Pursuant to Article 85," 1993 O.J. (C43) 2, ¶ 17.

18. *See* VALENTINE KORAH, EC COMPETITION LAW AND PRACTICE, 63-66 (5th ed., 1994).

19. Notice, *supra* note 17, at ¶ 53.

20. *Id.,* at ¶ 57.

21. *See* note 17 *supra*.

22. 1994 O.J. (L223) 36; [1995] 5 C.M.L.R. 285.

23. United States v. MCI Communications Corp., 1994-2 Trade Cas. (CCH) ¶ 70,730 (D.D.C. 1994).

24. BT/MCI II, Case No. IV/M856.

25. European Commission, Press Release IP/38/95 (May 24, 1995).

26. 1996 O.J. (L239) 23; [1996] 5 C.M.L.R. 250.

27. 1995 O.J. (C337) 13; [1996] 4 C.M.L.R. 285.

28. *See* note 22 *supra*.

29. United States v. Sprint Corp., 1996-1 Trade Cas (CCH) ¶ 71,300 (D.D.C. 1995).

30. 1996 O.J. (L239) 57; [1996] 5 C.M.L.R. 250.

31. European Commission, Press Release IP/96/1231 (Dec. 24, 1996); [1997] 4 C.M.L.R. 189; 1997 O.J. (C44) 15; The Financial Times, Apr. 16, 1996, at 1.

32. *See* note 30 *supra*.

33. *See* note 22 *supra.*

34. UIP Pay TV, European Commission, Press Release IP/97/227 (Mar. 17, 1997).

35. [1995] 5 C.M.L.R. 379.

36. [1996] 4 C.M.L.R. 139.

37. *Id*.

38. Commission Press Release 96/628 (July 23, 1996); [1996] 5 C.M.L.R. 271.

39. ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS, at 2 (1995).

40. JOSEPH P. GRIFFIN, U.S. INTERNATIONAL ANTITRUST ENFORCEMENT: A PRACTICAL GUIDE TO THE AGENCIES' 1995 GUIDELINES, 53 BNA CORP. PRACTICE SERIES, at A2 (2d ed. 1996).

41. Metro Industries, Inc. v. Sammi Corp., 82 F.3d 839, 844-45 (9th Cir.) cert. denied, 117 S. Ct. 181 (1996).

42. The Block Exemption on Specialization Agreements, [1993] 4 C.M.L.R. 155, and the Block Exemption on Research and Development Agreements, [1993] 4 C.M.L.R. 163, have been amended in order to exempt structural joint ventures when the market shares of the products that are the object of the specialization or research and development agreement do not exceed 10 per cent, in the case of a full-function joint venture, and 20 per cent, in the case of a production joint venture.