ANTITRUST ENFORCEMENT GUIDELINES FOR STRATEGIC ALLIANCES

William J. Kolasky, Jr.[*]
Wilmer, Cutler & Pickering
Washington, D.C.

Presented at the Federal Trade Commission's Hearings on Joint Ventures
July 1, 1997

I. Introduction

I would like to thank you for giving me the opportunity to testify today about the antitrust implications of strategic alliances both generally and in the aviation and telecommunications industries in particular. As strategic alliances become increasingly more prevalent and vital to global competitiveness, especially for airlines and telecommunications providers, it is important that the antitrust enforcement agencies adopt a predictable, comprehensible, and reasonable framework that will allow firms to remain competitive and provide improved services to consumers while minimizing anticompetitive risks that accompany certain collaborative arrangements. My hope is that this testimony will aid the Commission in adopting such a framework.

II. Nature and Purpose of Strategic Alliances

The term "strategic alliance" is a widely-used but loosely-defined term that encompasses a wide range of collaborative business activities. Strategic alliances may take any number of forms, including minority equity investments, exclusive supply arrangements, joint research and development, joint production, joint purchasing, and joint marketing through co-promotion, co-branding and other similar arrangements. The Canadian Bureau of Competition, in its November 1995 policy statement on strategic alliances, therefore, defines strategic alliance broadly as including "any form of inter-firm cooperative arrangement beyond contracts completed in the ordinary course of business."[1] However they are defined, what strategic alliances all have in common is their goal: enabling the parties to use their complementary resources effectively to pursue strategic objectives.

In recent years, alliances have become increasingly popular. According to Securities Data Corporation, the number of alliances has increased about 25% per year for the last decade.[2] The 1992 annual survey of electronics industry CEOs produced by Ernst & Young in cooperation with Electronic Business magazine noted that "Some eight out of ten electronics companies now have alliances, and most CEOs are planning or negotiating new ones."[3] Individual companies are often parties to multiple alliances. For example, IBM alone is reported to have more than 10,000 alliances.[4]

The growth of strategic alliances has spawned a large and growing body of literature in management journals[5] but has attracted little attention in either the industrial organizational economics or antitrust law review literature. There have also been few litigated cases to date involving strategic alliances as such, and to our knowledge there are no litigated cases using the term as part of their substantive antitrust analysis. There have, however, been several recent Justice Department investigations involving strategic alliances in the telecommunications and aviation industries, two of which have resulted in consent decrees which I discuss in more detail below.

The management literature explains the growing popularity of strategic alliances as a response to the greater need for cooperation to keep pace with increasingly complex technologies and global markets. Arms-length dealings and open market transactions are often insufficient to serve the needs of firms trying to stay competitive. Several factors in particular have contributed to this greater need for cooperation:

1. Globalization. Competing in a global economy requires a much larger scale and scope of operations. In addition, in many national markets, the presence of well-entrenched local firms, different cost structures, local customs and preferences, and restrictive national laws make it difficult for foreign firms to compete successfully. Strategic alliances provide a way to achieve the scale and scope necessary to compete globally and to overcome the many obstacles to global expansion.

2. Increasing economies of scale and scope. More generally, in more and more industries, the scale and scope of the optimal-sized firm seems to be expanding dramatically due to technological change. Again, strategic alliances provide a means of competing on a much larger scale through a network of firms.

3. Specialization. At the same time as the economies of scale and scope in individual markets increase, there is increased consciousness of the diseconomies of a large firm trying to do everything itself. The current business school mantra is to concentrate on your core competencies. This imperative drives firms to outsource everything else and to form strategic alliances with the firms on whom they then become dependent for strategically important functions.

4. Complexity. Many key technologies have grown so complex that few if any companies can master them all, especially considering the risk involved. This drives firms to look for partners who can provide the expertise they themselves lack.

5. Pace of technological change. R&D alliances are frequently a response to the need to move quickly in rapidly changing markets. Alliances are flexible enough to adapt to changing market conditions, have comparatively low entry and exit costs, and can be abandoned if the market, or the technology, takes a different course.

6. Network effects. In technology-driven markets, network effects make it critical that a firm capture the first mover advantage so that its technology becomes the industry standard. Alliances between new technology firms and established manufacturers

are often used as a way to get off the starting block more quickly in order to capture these network effects.

All of these forces combine to drive companies in the direction of relying on other firms to perform functions that are critical to their success or failure. This, in turn, confronts them with all the problems Oliver Williamson identified in his ground-breaking work on transactions costs -- notably, bounded rationality and opportunism.[6] Firms are naturally reluctant to make investments specific to arms-length transactions with another firm because the other firm may become opportunistic and try to capture all of the gains from that investment.[7] The combination of opportunism and bounded rationality makes arms-length contracting inefficient. In much the same way that the creation of firms helps reduce transactions costs among individuals, strategic alliances can reduce transactions costs among firms by aligning firms' interests to reduce the chance of opportunism and by eliminating the need to constantly negotiate new transactions in response to complex and changing business conditions. Many strategic alliances accomplish this through exclusivity and reciprocity agreements, and some alliances further cement the relationship through joint ownership of productive assets or through equity investments in each other. As the management literature makes clear, parties to strategic alliances rely more on the alignment of economic incentives through these mechanisms, rather than on the legal enforceability of their contracts, to assure success.

III. Strategic Alliances in the Aviation and Telecommunications Industries

Some of the largest-scale strategic alliances are found in the aviation and telecommunications industries, where they are being used to overcome antiquated nation-state obstacles to the creation of global competitors. Among the barriers to competing in foreign countries are limitations on foreign ownership, the presence of well-established local firms, different cost structures, and varying local customs and preferences. At the same time, customers are demanding integrated services that cross international lines.

A. Airlines

Since foreign ownership of domestic airlines is still limited by most countries, alliances between airlines of different countries are necessary to develop more efficient international networks of flights. The greatest benefits to consumers come from alliances between airlines with end-to-end routes as opposed to overlapping routes. Typically, these alliances are largely contractual and involve code sharing, coordination of routes and scheduling, integration of marketing and advertising, joint product development, coordinated frequent flyer programs, and other integration that will help increase network efficiency. In some cases, they may also involve minority equity investments. Consumers stand to benefit from these alliances through reduced layover times, simplified reservations and ticketing, and expanded and more consistent service.

Three recent examples of strategic alliances in the aviation industry serve to highlight the antitrust issues likely to arise. The 1993 strategic alliance between Northwest Airlines and KLM Royal Dutch Airlines involved two airlines that competed against each other on only two routes.[8] The alliance brought together a major domestic carrier and the principal carrier in the Netherlands,

allowing the airlines to provide more efficient service to transatlantic passengers whose destinations require using both carriers.[9] The recently approved alliance between United and Lufthansa presented a similar situation, but with carriers that had more extensive route coverage in their respective markets.[10] Because the potential for substantial efficiency gains from the alliances outweighed the smaller risks of anticompetitive effects, the Department of Transportation granted antitrust immunity to both alliances.[11] By contrast, the proposed strategic alliance between British Airways and American Airlines involves two airlines that directly compete against each other on numerous routes. This alliance presents more significant anti-trust concerns, which are currently under review both by the U.S. Department of Transportation and the European Commission.[12]

B. Telecommunications

In telecommunications, as in aviation, alliances are necessary to provide seamless global telecommunications service where local markets were historically closed to competition and are still dominated by well-entrenched national telephone companies.[13] Changes in technology and the increasing need to transfer computer data have also stimulated demand for high-quality, global telecommunications services. Alliances between service providers in different countries can help ensure consistent and reliable international communications services that extend to previously inaccessible markets. Domestically, alliances between telecommunications service providers and other high-technology firms can stimulate the creation of full service, multimedia networks with expanded capabilities. However, high barriers to entry in telecommunications markets increase anticompetitive risks, particularly where one of the partners in an alliance has a dominant position in its local market.

This point is well illustrated by the consent decrees the Justice Department negotiated before clearing the British Telecom/MCI Communications and the Sprint/France Telecom/DB Telekom telecommunications alliances.[14] Both involved the creation of a new jointly-owned entity to provide international enhanced telecommunications services and minority equity investments by the European partner(s) in the American carrier. (By contrast, the third major U.S. long distance carrier, AT&T, has relied primarily on looser, contractual alliances to provide these services.) In both cases, the Department feared that the vertical affiliations between a U.S. long distance provider and the dominant telecommunications provider in another country would be likely to lessen competition substantially in the U.S. market for seamless global telecommunications services. The foreign carrier would gain the incentive and ability to favor the partnership and to disfavor other competitors in the interconnections necessary to provide global service. The Department also alleged that the alliance would give the U.S. company, through the foreign carrier, access to competitively sensitive business information about its rivals that would increase the risk of price collusion.

Both challenges were resolved with similar consent decrees. First, the decrees imposed transparency requirements that required the joint ventures and the foreign carriers to disclose the terms of their interconnection agreements. Second, the decrees required that the foreign carriers provide other U.S. long distance companies nondiscriminatory access to their systems. Third, the decrees included confidentiality requirements prohibiting the foreign carriers from disclosing to their partners specified types of information about U.S. competitors.

While these restrictions were appropriate in these cases, involving highly concentrated markets in which the European alliance partners arguably had bottleneck monopoly positions in their local markets, it would be dangerous to generalize beyond the particular circumstances of those cases. Telecommunication markets are extremely dynamic and the major European countries, as well as the United States, are making rapid progress in opening local telecommunication markets to competition from both wire and wireless services.

IV. Framework for Assessing the Legality of Strategic Alliances

A. Generally

As the telecommunications and aviation alliances just discussed illustrate, strategic alliances, in many respects, are simply old wine in new bottles. Chairman Pitofsky and others have long used the term "joint venture" broadly to embrace any collaborative agreement between actual or potential competitors that lies between a cartel and a merger.[15] So defined, the terms "joint venture" and "strategic alliance" become virtually synonymous. Business executives and corporate lawyers, however, think of joint ventures more narrowly; they generally view joint ventures as limited to agreements that create a new and separate business entity under the joint control of independent parent firms. Some states have adopted this narrower definition of the term "joint venture" in their corporation laws,[16] and even some antitrust commentators and courts have followed this narrower usage.[17]

Even under the broader definition of "joint venture," another potential difference between strategic alliances and joint ventures should be noted. As Chairman Pitofsky's definition indicates, antitrust lawyers have traditionally used the term "joint venture" to describe horizontal arrangements among actual or potential competitors. One survey found, by contrast, that nearly one-half of all strategic alliances are vertical.[18] For example, firms that require a critical input often enter into exclusive supply arrangements with a supplier to ensure supply stability, which they then characterize as a strategic alliance. These primarily vertical strategic alliances generally should not raise any serious antitrust concerns. Courts have long recognized that exclusive supply arrangements can provide significant procompetitive benefits including supply assurance, protection against price increases and long-term planning.[19] Exclusivity also serves to protect the parties from free-riding, the risk of which otherwise would be a disincentive to the parties' each investing their own resources in developing a market for the product or service that is the subject of the alliance. Like vertical mergers and vertical supply arrangements generally, purely vertical strategic alliances should provoke enforcement attention only in very narrow circumstances.

Those strategic alliances that involve actual or potential competitors can be analyzed using the same framework that the courts and the Commission have developed for joint ventures and horizontal agreements generally. The first step is to determine whether an alliance is facially anticompetitive. If the "strategic alliance" label is a sham and the arrangement has no purpose other than to restrict output or fix prices, then it may properly be treated as per se unlawful. If, as is generally the case, the alliance is not facially anticompetitive, it should be evaluated under the rule of reason.

The rule of reason looks at the anticompetitive effects of the alliance and balances those effects against the procompetitive and efficiency justifications. Under the rule of reason as traditionally applied by the courts, the agency has the initial burden of proving that the agreement has or is likely to lessen competition.[20] The agency can satisfy this burden by showing either proof of anticompetitive effects such as a reduction in output or by establishing that the alliance will create or facilitate the exercise of market power.[21] If the agency meets this initial burden, then the burden shifts to the parties to prove that the alliance has procompetitive benefits. If the parties establish that the alliance has procompetitive benefits, then the burden shifts back to the agency to show that the alliance is not reasonably necessary to achieve the procompetitive benefits.[22]

Even if the alliance as a whole withstands scrutiny, courts may also examine individual restraints embedded in the alliance. In doing so, courts apply the ancillary restraint doctrine that originated with Judge Taft's decision in *Addyston Pipe*.[23] Under this doctrine, a restraint will be upheld if it "is reasonable necessary . . . to the legitimate ends of the existing partnership."[24] If an individual restraint does not withstand scrutiny, the court may approve the alliance subject to removal or modification of the unlawful restraint.

A speech last year by Acting Assistant Attorney General Joel Klein to the ABA's Antitrust Section has raised questions about the proper order of inquiry for those agreements which are not per se invalid.[25] Although I am sure he did not intend it, the approach urged by the Acting AAG could be misread to create a "guilty until proven innocent" presumption by suggesting that in every case the Department will require challenged parties to show that their alliances will result in bona fide procompetitive benefits. Under this approach, if the challenged party cannot show that the arrangement is reasonably necessary to achieve the stated procompetitive objectives, the agreement will be struck down even before looking at whether it poses any measurable anticompetitive risks.

Read in this way, the Acting AAG's approach is inconsistent with established case law, including the Commission's 1996 decision in *California Dental Association.*[26] The Supreme Court's decisions in *NCAA* and *Indiana Federation* provide good examples. In both cases, the Court looked at the proffered procompetitive justifications for the alleged restraints only after first concluding that they directly restrained output and/or raised price.[27] In applying *NCAA* and *Indiana Federation*, the Second, Third, Ninth, Eleventh, and District of Columbia Circuits have all made this allocation of the burden of proof explicit by requiring plaintiffs to prove that an alleged restraint has or is likely to have real anticompetitive effects before examining the proffered procompetitive justifications.[28]

There are several sound reasons for proceeding in the order the courts do. First, as Judge Easterbrook and others have argued in advocating the use of market power screens, the antitrust laws exist only to protect competition.[29] Unless a strategic alliance lessens competition in a manner likely to have substantially adverse consumer welfare effects, there is no reason for the government to intervene, especially given the potentially chilling effects that such intervention (whether actual or threatened) may have on the very thing being protected -- competition. As Judge Bork explained in *Rothery*, "if the contracting parties by eliminating competition among themselves

are not attempting to restrict industry output, then their agreement must be designed to make the conduct of their business more effective. No third possibility suggests itself."[30]

A second reason, which does not require that one be an adherent to the Chicago School or take a narrow view of antitrust's role, is that the inquiry into the actual effect on competition and the structure of the market serves to inform the inquiry into the alleged justifications for the conduct. *NCAA* illustrates this point nicely. In it, the Supreme Court repeatedly returned to the finding that the restraint at issue had reduced output and raised price in rejecting the efficiency justifications proffered for that restraint. As the Court explained, "If the NCAA's television plan produced procompetitive efficiencies, the plan would increase output and reduce the price of televised games. The District Court's contrary findings accordingly undermine petitioner's position."[31]

A final reason derives from the first question asked prior to engaging in rule of reason analysis. The question that determines whether an agreement is per se unlawful or is instead subject to the rule of reason is whether the agreement is, in the Acting AAG's words, "unadorned" or, in the more customary antitrust jargon, "naked." This inquiry requires determining whether there is any plausible procompetitive rationale for the conduct at issue. If not, and if the conduct directly limits competition between the parties, it is per se unlawful. After finding that the restraint has a plausible procompetitive justification and proceeding to analysis under the rule of reason, it is far more logical for the next inquiry to be the actual or likely effect of the alleged restraint on price and output, rather than a more detailed inquiry into the very issue just examined without having even looked at the actual or likely effect on competition.

Taking the courts' approach of first looking at the likely effect on competition in a rule of reason case does not doom the agencies and the courts to doing a full-blown rule of reason analysis in every case. As the late Phillip Areeda observed, and as both *NCAA* and *Indiana Federation* illustrate, there are many cases in which the adverse effect on competition will be obvious and the analysis can be done "in the twinkling of an eye."[32] Conversely, there will be cases, like *Rothery*, where the absence of an anticompetitive effect will likewise be obvious. Indeed, the use of market power screens to create safe harbors in the joint Health Care and Intellectual Property guidelines reflects the agencies' acceptance of this reality. Likewise, there will be cases where the validity of the proffered procompetitive justifications can be determined quite easily, *NCAA* being a perfect example.

It is important to remember that there is a significant interplay between the likely anticompetitive effects and the degree of scrutiny to which any proffered efficiency justifications should be subjected. If the agencies subject all agreements to the same degree of scrutiny regardless of the anticompetitive effects, there is too great a danger that fear of antitrust prosecution will chill procompetitive collaborations among competitors. This very concern led Congress to enact the National Cooperative Research and Production Act, assuring full-blown rule of reason treatment of research and production joint ventures. For this reason, where there is no realistic danger to competition, proffered procompetitive justifications should, as Judge Aldrich wrote of judicial review under the Tunney Act, be examined "with a reducing glass rather than a microscope."[33]

For numerous reasons, the Acting AAG's approach is particularly inappropriate when applied to strategic alliances. As the Canadian government has recognized, "strategic alliances should generally lead to positive innovation and efficiency gains without accompanying negative effects on competition."[34] Only where parties to an alliance collectively have market power or where the alliance may facilitate collusion among the parties outside the alliance itself will alliances begin to pose anticompetitive risks.[35] That being the case, the agencies should not require the parties to prove procompetitive benefits with certainty unless there are demonstrable anticompetitive dangers.

B. The Need for Antitrust Guidelines

Clear antitrust guidelines for strategic alliances would be helpful to guide firms seeking business relationships that will allow them to become or remain competitive in the new global economy. The health care guidelines and the intellectual property guidelines discuss many of the same issues useful in analyzing strategic alliances, but their focus is too narrow to provide general guidelines for strategic alliances and joint ventures. In developing general joint venture and strategic alliance guidelines, the agencies should use the 1988 International Operations guidelines as a model.[36] Those guidelines set forth a coherent and sensible framework for evaluating joint ventures under the antitrust laws.

In developing guidelines, the Commission should continue making use of safe harbor provisions similar to those adopted in the merger, health care, and intellectual property guidelines, and those included in the EC block exemptions for specialization agreements and research and development joint ventures.[37] Safe harbors presume that agreements between firms whose collective market share falls below a certain threshold level will not pose significant anticompetitive risks. Judge Easterbrook stated the rationale behind safe harbors best when he observed that, "Firms that lack power cannot injure competition no matter how hard they try."[38] A market share safe harbor provision will save costly litigation expenses and allow small firms to collaborate and become more competitive, without fear of antitrust liability.

Given the degree of overlap between the terms, any guidelines should cover strategic alliances, as well as joint ventures. There should be separate sections on full-function joint ventures, minority equity investments, research and development alliances, production joint ventures and specialization agreements, joint purchasing, joint marketing (including co-branding and co-promotion), and exclusive supply arrangements. Licensing arrangements are already well-covered in the Intellectual Property Guidelines and probably need not be addressed separately in any joint venture guidelines.

The guidelines should also address under what circumstances a joint venture or strategic alliance will be treated as a single entity for purposes of *Copperweld*.[39] With respect to this very difficult issue, I would urge the agencies to consider the approach taken by the late Phillip Areeda, who argued that a well-considered decision approving the creation of a joint venture necessarily expresses approval of all that is inherent and reasonably necessary to it.[40] Under this approach, the venture's operations, including buying and selling, that do not directly involve competition among the parents should be governed by section 2 standards, with section 1 being

reserved for the formation of the venture and any restraints on the members' conduct outside the venture.[41] An alternative approach worthy of consideration is that taken by the Seventh Circuit in a recent opinion by Judge Easterbrook in *Chicago Professional Sports Ltd. Partnership v. NBA.*[42] There, the Seventh Circuit adopted a "functional" test under which the application of section 1 depends on whether the conduct at issue "deprive[d] the marketplace of the independent centers of decisionmaking that competition assumes."[43] Under this approach, a joint venture might act as a single entity for some purposes but not others.

V. Conclusion

As the discussion indicates, developing comprehensive guidelines for joint ventures and strategic alliances is a critical, but daunting task. It is important that the agencies continue to involve the private bar and business community, both of which have extensive experience in these areas. There hearings are a useful first step, and I thank you for being given an opportunity to participate.

ENDNOTES

[*] Mr. Kolasky is a partner and head of the Antitrust and Consumer Protection practice group at Wilmer, Cutler & Pickering. Some of the clients represented by Wilmer, Cutler & Pickering have an interest in several of the strategic alliances discussed in this testimony. David Kreeger, a summer associate at the firm, assisted in preparing this statement. This statement is based in part on a paper prepared for a panel discussion on strategic alliances at The Conference Board's 1997 Antitrust Conference on Antitrust Issues in Today's Economy (March 6, 1997).

1. Director of Investigation and Research, Strategic Alliances Under the Competition Act, November 1995 (http:/info.ic.gc.ca). I thank David Balto for first calling this policy statement to my attention.

2. *Business 2000 III: Partnerships for Success*, Inc., Dec. 1, 1995, at 133.

3. Charles T.C. Compton, *Cooperation, Collaboration, and Coalition: a Perspective on the Types and Purposes of Technology Joint Ventures*, 61 Antitrust L. J. 861, 863 (1993).

4. *Business 2000 III: Partnerships for Success*, Inc., Dec. 1, 1995, at 133.

5. For examples of recent literature describing strategic alliances, see The Conference Board, Strategic Alliances: Gaining a Competitive Advantage (1996) (conference report); Alan S. Gutterman, Corporate Counsel's Guide to Strategic Alliances (1995); John Hession, Developing, Structuring and Negotiating Successful Strategic Alliances (1994) (Testa, Hurwitz & Thibeault); R. Ahern, *The Role of Strategic Alliances in the International Organization of Industry*, 25 Int'l J. Urban and Regional Res. 1229 (1993); Jeffery Atik, *Technology and Distribution as Organizational Elements Within International Strategic Alliances*, U. Pa. J. Int'l Bus. L. 273 (1993); David Lei and John W. Slocum, Jr., *Global Strategy, Competence Building and Strategic Alliances*, 35 Cal. Mgmt. Rev. 81 (1992); Jordan D. Lewis, Partnerships for Profit: Structuring and Managing Strategic Alliances (1990); Brian Borys and David B. Jemison, *Hybrid Arrangements as Strategic Alliances: Theoretical Issues in Organizational Combinations*, 14 Acad. of Mgmt. Rev. 234 (1989).

For examples of literature discussing joint ventures broadly-defined, see Peter J. Buckley and Mark Casson, *A Theory of Cooperation in International Business*, Mgmt. Int'l Rev., Special Issue 1988, at 19; Bruce Kogut, *A Study of the Life Cycle of Joint Ventures*, Mgmt. Int'l Rev., Special Issue 1988, at 39; Bruce Kogut, *Joint Ventures: Theoretical and Empirical Perspectives*, 9 Strategic Mgmt. J. 319 (1988).

6. *See* O.E. Williamson, The Economic Institutions of Capitalism (Free Press, 1985). *See also* Erin Anderson and Hubert Gatignon, *Modes of Foreign Entry: A Transaction Cost Analysis and Propositions*, J. Int'l Bus. Studies, Fall 1986, at 1; and Hans B. Thorelli, *Networks: Between Markets and Hierarchies*, 7 Strategic Mgmt. J. 37 (1986).

For a discussion of the costs and benefits of cooperative arrangements compared to direct investment, see Farok J. Contractor and Peter Lorange, *Competition vs. Cooperation: A Benefit/Cost Framework for Choosing Between Fully-Owned Investments and Cooperative Relationships*, Mgmt. Int'l Rev., Special Issue 1988, at 5.

7. *See* Ronald J. Gilson and Mark J. Roe, *Understanding the Japanese Keiretsu: Overlaps Between Corporate Governance and Industrial Organization*, 102 Yale L. J. 871 (1993).

8. *Joint Application of Northwest Airlines and KLM Royal Dutch Airlines*, 1993 WL 12266 at *8 (D.O.T.) (Final Order).

9. *Joint Application of Northwest Airlines and KLM Royal Dutch Airlines*, 1992 WL 352834 at *1 (D.O.T.) (Order to Show Cause).

10. *See Joint Application of United Air Lines, Inc. and Deutsche Lufthansa, A.G.*, at 33 (D.O.T. February 1996).

11. *See Joint Application of Northwest Airlines and KLM Royal Dutch Airlines*, 1993 WL 12266 (D.O.T.) (Final Order); *Joint Application of United Air Lines, Inc. and Deutsche Lufthansa, A.G.*, 1996 WL 268067 (D.O.T.) (Final Order).

12. For a history of the American Airlines/British Airways alliance, see *Joint Application of American Airlines, Inc. and British Airways PLC*, 1997 WL 129026 (D.O.T.) (Order).

13. For a background discussion of strategic alliances in the telecommunications industry, see William T. Lake, John H. Harwood II and Craig Masback, *The Emerging Strategic Alliances in International Telecommunications* (sponsored statement, Wilmer, Cutler & Pickering); and William T. Lake, John H. Harwood II and Sarah E. Whitesell, *Global Alliances for Global Networks*, Int'l Corp. L., June 1994, at 14.

14. *United States v. MCI Communications Corp.,* 1994-2 Trade Cas. (CCH) ¶ 70,730 (D.D.C.) 1994); *United States v. Sprint Corp.,* 1996-1 Trade Cas. (CCH) ¶ 71,300 (D.D.C. 1996).

15. *See* Robert Pitofsky, *A Framework for Antitrust Analysis of Joint Ventures*, 54 Antitrust L. J. 893 (1985); Charles F. Rule, *The Administration's Views on Joint Ventures*, 54 Antitrust L.J. 1121 (1985); Herbert Hovenkamp, *Exclusive Joint Ventures and Antitrust Policy*, 1995 Colum. Bus. L. Rev. 1; and Thomas A. Piraino, Jr., *Beyond Per Se, Rule of Reason, or Merger Analysis: A New Antitrust Standard for Joint Ventures*, 76 Minn. L. Rev. 1 (1991).

16. *See, e.g., Inter-City Tire & Auto Ctr. v. Uniroyal,* 701 F. Supp. 1120 (D.N.J. 1988).

17. An influential article by Professor Joseph Bradley, for example, defines joint ventures as,

> "an integration of operations between two or more separate firms, in which the following conditions are present: (1) the enterprise is under the joint control of the parent firms, which are not under related control; (2) each parent makes a substantial contribution to

the joint enterprise; (3) the enterprise exists as a business entity separate from its parents; and (4) the joint venture creates significant new enterprise capability in terms of new productive capacity, new technology, a new product, or entry into a new market."

Joseph F. Brodley, *Joint Ventures and Antitrust Policy*, 95 Harv. L. Rev. 1521, 1526 (1982). This definition has subsequently been embraced by several courts. *E.g.*, *Instructional Sys. Dev. Corp. v. Aetna Cas. & Sur. Co.*, 817 F.2d 639, 643 n.2 (10th Cir. 1987); *COMPACT v. Metropolitan Gov't*, 594 F. Supp. 1567, 1574 (M.D. Tenn. 1984).

18. The Conference Board, *Strategic Alliances: Gaining a Competitive Advantage* (1996), at 9 (survey of 2,000 strategic alliances found that only 55 percent were between competitors). For a particularly useful discussion of vertical strategic alliances, see Jordan D. Lewis, The Connected Corporation: How Leading Companies Win Through Customer-Supplier Alliances (1995).

19. *See Standard Oil Co. v. United States*, 337 U.S. 293, 306-07 (1949); *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 334 (1961).

20. *See NCAA v. Board of Regents*, 468 U.S. 85 (1984); *F.T.C. v. Indiana Federation of Dentists*, 476 U.S. 447 (1986).

21. *See Capital Imaging Associates v. Mohawk Valley Medical Associates*, 996 F.2d 537, 546 (2nd Cir. 1993).

22. For a more thorough discussion of the rule of reason approach as it has been applied by the courts, see 1 ABA Section of Antitrust Law, ANTITRUST LAW DEVELOPMENTS (Fourth) 51-71 (1997).

23. *See United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898).

24. *Id*. at 281.

25. *See* Joel I. Klein, *A Stepwise Approach to Antitrust Review of Horizontal Agreements*, Remarks before the A.B.A. Antitrust Section Semi-Annual Fall Policy Program, 1996 WL 655653 (D.O.J.).

26. 5 Trade Reg. Rep. (CCH) ¶ 24,007 (FTC Mar. 25, 1996).

27. *NCAA v. Board of Regents*, 468 U.S. 85 (1984); *F.T.C. v. Indiana Federation of Dentists*, 476 U.S. 447 (1986).

28. *See K.M.B. Warehouse Dists. v. Walker Mfg.* Co., 61 F.3d 123, 127 (2d Cir. 1995); *Capital Imaging Assocs. v. Mohawk Valley Medical Assocs.*, 996 F.2d 537, 543 (2d Cir. 1993); *Orson v. Miramax Film Corp.*, 79 F.3d 1358, 1367-68 (3d Cir. 1996); *United States v. Brown Univ.*, 5 F.3d 658, 668-69 (3d Cir. 1993); *Bhan v. NME Hospitals*, 929 F.2d 1404, 1413 (9th Cir. 1991); *Rothery Storage & Van Co. v. Atlas Van Lines*, 792 F.2d 210 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987); *Graphic Prods. Dists. v. Itek Corp.*, 717 F.2d 1560, 1573 (11th Cir. 1983).

For a discussion of the plaintiff's burden, see also 1 ABA Section of Antitrust Law, ANTITRUST LAW DEVELOPMENTS (Fourth) 55-65 (1997).

29. *See* Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1 (1984).

30. *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 221 (D.C. Cir. 1986).

31. *NCAA v. Board of Regents*, 468 U.S. 85, 114 (1984).

32. *Id.* at 110 (1984) (citation omitted).

33. *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975).

34. STRATEGIC ALLIANCES UNDER THE COMPETITION ACT 1, November 1995 (authored by Director of Investigation and Research).

35. *Id.* at 3.

36. *See* U.S. Dept. of Just., Antitrust Enforcement Guidelines for Int'l Operations (19889), *reprinted in* 4 Trade Reg. Rep.(CCH) ¶ 13,109.

37. *See* EC Regulation 418/85, 1985 OJ L 53/5 (research and development); EC Regulation 417/85, 1985 OJ L 53/5, *as amended by* EC Regulation, 1993 OJ L 21/8 (specialisation agreements).

38. Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 20 (1984).

39. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

40. VII P.E. AREEDA, ANTITRUST LAW ¶ 1478b (1986).

41. *Id.* at ¶ 1478a.

42. 95 F.3d 593 (7th Cir. 1996).

43. *Id.* at 606.