

ANTITRUST ANALYSIS OF JOINT VENTURES: AN OVERVIEW

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I. INTRODUCTION

Since last Spring, the Federal Trade Commission has been considering antitrust policy toward competitor collaboration, particularly in the form of joint ventures. Conduct falling within the apparent scope of the FTC's consideration is infinite in variety and diverse in its antitrust treatment. Rather than undertake the daunting task of compiling a complete road map to the antitrust analysis of all such conduct, this article sets out general principles for the analysis of joint ventures, broadly defined¹ as entities that play a role in the marketplace in their own right² and are owned or controlled³ by two or more persons (the joint venture's

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¹ Far narrower definitions have been offered. See, e.g., Joseph F. Brodley, *Joint Ventures and Antitrust Policy*, 95 HARV. L. REV. 1521, 1526 (1982):

[A] joint venture may be defined for antitrust purposes as an integration of operations between two or more separate firms, in which the following conditions are present: (1) the enterprise is under 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.

Moreover, the term "joint venture" appears to have been used in other areas of law and in much antitrust case law to refer to a concept narrower than the broad conceptualization of a joint venture used here.

² That role can be as slight as submitting a single joint bid, supplying a single participant with a minor input, or offering a single bundled product, such as the combined lift ticket in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 589-91 (1985). Although many joint ventures are incorporated, have a place of business, employees, and such, none of that is necessary to satisfy the broad definition used here.

³ All participants in a joint venture commonly have ownership interests, but a joint venture may feature ownership by some participants and contractual rights for others, and the contractual rights may or may not be comparable to ownership rights. It is even possible for no participant in a joint venture to own a share of the venture itself because

"participants") that are neither ordinary investors⁴ nor commonly controlled.⁵ To limit the discussion to competitor collaboration, it is assumed hereafter that joint venture participants would be actual or potential competitors absent the joint venture.

Joint ventures are an important and distinct category for antitrust analysis because of their potential to bring about an efficiency-enhancing integration of economic activity.⁶ Many different forms of economic integration may be effected by joint ventures, and each may enhance efficiency in more than one way. Joint ventures can permit the realization of economies of scale (and scope), for example, by combining or replacing the suboptimally sized manufacturing or distribution operations of joint venture participants, or by jointly developing and promoting a new brand. Joint ventures can combine complementary assets in a way that permits the development of a product that venture participants could not have produced individually, or at least can reduce the costs of such an enterprise by eliminating the need to replicate assets one joint venture participant already has. Joint ventures can pool risks by diversifying cost or revenue sources, as may be the case with a research joint venture or a physician-sponsored health plan.

Joint ventures sometimes avoid problems associated with the use of market mechanisms for exchange. Perhaps most importantly, joint ventures owned by participants can avoid problems commonly arising in long-term supply, licensing, and similar contractual relationships. Such long-term relationships generally lead to investments in assets that are, to some extent at least, specific to that relationship. Such relationships also may eliminate the need by one party to make certain investments

the venture is not a separate legal entity. The foregoing scenarios normally call for the same general analysis and are not distinguished below. Ownership without control (e.g., a minority equity interest in a venture controlled by its independent management) can give rise to a joint venture, but most of the competitive issues associated with joint ventures arise from control.

⁴ This definition excludes public corporations jointly owned by ordinary investors, such as individuals, pension plans, and mutual funds.

⁵ For similar definitions, see 7 PHILLIP E. AREEDA, *ANTITRUST LAW* 348 (1986) ("joint venture" usually refers to a research, production, or marketing enterprise created by several persons other than ordinary investors"); HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY* 185-86 (1994) ("A joint venture is any association of two or more firms for carrying on some activity that each might otherwise perform alone.").

⁶ See *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984) ("[M]ergers, joint ventures, and various vertical agreements hold the promise of increasing a firm's efficiency and enabling it to compete more effectively. Accordingly such combinations are judged under a rule of reason, an inquiry into market power and market structure designed to assess the combination's actual effect."); *NCAA v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 103 (1984) ("a joint selling arrangement may be so efficient that it will increase sellers' aggregate output and thus be procompetitive").

because another party has made them. In either event, there is a risk of opportunistic exploitation of one party by another, and the added control possible in joint ventures may mitigate or eliminate this risk.⁷ Joint ventures also can facilitate transfers of intermediate goods at prices approximating marginal cost, replicating efficient intrafirm transfer pricing.⁸

In certain circumstances, joint ventures can also mitigate free-rider problems. Although this possibility can arise in a variety of situations, it may be most significant for R&D joint ventures. Patents and other intellectual property rights protect only some of the innovative output of an R&D effort, and what is not protected can be utilized by competitors of the innovator without compensation.⁹ The incentive to invest in R&D can be enhanced by including within an R&D joint venture firms that stand to gain from the venture's activities, even if they do not participate.¹⁰

Although joint ventures offer the prospect of furthering the goals of competition by enhancing efficiency, they also can lessen competition among the joint venture's participants through the formation of the venture itself or through collateral restraints. The essence of competition is independent decision making.¹¹ Independent decision making on price or output normally is most important from a competition perspective because competition in the setting of price or output most clearly promotes consumer welfare. Price and output decisions, thus, normally

⁷ See Brodley, *supra* note 1, at 1527-28; Edmund W. Kitch, *The Antitrust Economics of Joint Ventures*, 54 *ANTITRUST L.J.* 957, 964-65 (1986); Howard H. Chang, David S. Evans & Richard Schmalensee, *Some Economic Principles for Guiding Antitrust Policy Toward Joint Ventures*, 1998 *COLUM. BUS. L. REV.* 225, 237-39. This sort of analysis is sometimes termed "transaction cost economics." See OLIVER E. WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM* ch. 4 (1985). It is more often applied to the similar scenario of vertical integration. See, e.g., *id.*; Benjamin Klein et al., *Vertical Integration, Appropriable Rents, and the Contracting Process*, 21 *J.L. & ECON.* 297 (1978).

⁸ The underlying economics is familiar in the context of vertical integration that eliminates "double marginalization" or "successive monopoly" and thereby lowers the final product price. See Fritz Machlup & Martha Tabor, *Bilateral Monopoly, Successive Monopoly, and Vertical Integration*, 27 *ECONOMICA* (N.S.) 101 (1960); Joseph J. Spengler, *Vertical Integration and Antitrust Policy*, 68 *J. POL. ECON.* 547 (1960). The basic insight dates to the 1838 classic AUGUSTIN COURNOT, *RESEARCHES INTO THE MATHEMATICAL PRINCIPLES OF THE THEORY OF WEALTH* 105 (Nathaniel T. Bacon trans., Augustus M. Kelley 1971).

⁹ See Richard C. Levin et al., *Appropriating the Returns from Industrial Research and Development*, 5 *BROOKINGS PAPERS ON ECONOMIC ACTIVITY* 783 (1987); Chang et al., *supra* note 7, at 238.

¹⁰ See, e.g., Gene M. Grossman & Carl Shapiro, *Research Joint Ventures: An Antitrust Analysis*, 2 *J.L. ECON. & ORG.* 315, 316-17, 321 (1986).

¹¹ See, e.g., *Copperweld*, 467 U.S. at 768-69 ("Concerted activity is inherently fraught with anticompetitive risk. It deprives the marketplace of the independent centers of decision making that competition assumes and demands.")

are the competitive strategies of greatest concern in antitrust.¹² Competition with respect to other competitive strategies, however, also can be very important in promoting consumer welfare, particularly over the longer term. Such strategies include the development of new products and processes, and various nonprice attributes of products. But not every decision made by firms is important to competition, and in some circumstances cooperation, rather than competition, may promote consumer welfare. For example, cooperation on technical standards can benefit consumers, even though it eliminates competition with respect to certain product attributes. Thus, antitrust analysis of joint ventures depends a great deal on how the venture affects the independent decision making of its participants and which competitive strategies are affected.

II. A STRUCTURE FOR THE APPLICATION OF SECTION 1 OF THE SHERMAN ACT TO COMPETITOR JOINT VENTURES

A. BASIC MODES OF ANALYSIS FOR JOINT VENTURES AND COLLATERAL RESTRAINTS

A joint venture is both an economic actor in its own right and a collaboration of its participants.¹³ As such, it can be treated as a single entity under the antitrust laws or as a group of competitors. Which of these is the proper characterization for any particular joint venture conduct is important because the "Sherman Act contains a 'basic distinction between concerted and independent action.'"¹⁴ The conduct of a single entity—governed only by Section 2 of the Act—"is unlawful only when it threatens actual monopolization."¹⁵ "Concerted activity subject to § 1 is judged more sternly than unilateral activity under § 2."¹⁶

The conduct of the participants in forming a joint venture plainly is not unilateral conduct, nor is a collateral restraint on the actions of joint venture participants outside the venture. But in certain respects, a joint venture, once formed, necessarily acts as a single economic entity. When

¹² See, e.g., *National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1977) ("Price is the 'central nervous system of the economy.'"); see also *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1, 23 (1979) ("competitive pricing as the free market's means of allocating resources" is "the 'central nervous system of the economy.'"); *NCAA v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 107-08 (1984) ("Restrictions on price and output are the paradigmatic examples of restraints of trade that the Sherman Act was intended to prohibit.")

¹³ The analysis here is very similar to that proposed by AREEDA, *supra* note 5, ¶ 1478.

¹⁴ *Copperweld*, 467 U.S. at 767 (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984)).

¹⁵ 467 U.S. at 767.

¹⁶ *Id.* at 768.

a joint venture itself participates in the marketplace, its ordinary actions as a market participant are those of a single entity.¹⁷ Hence, a joint venture acts as a single entity when it purchases inputs from third parties or sets a price or output for sales to third parties of a product not sold to participants.¹⁸ For many purposes, the NFL is group of competing team owners acting collectively,¹⁹ but it acts as a single entity in designating an official league ball or establishing the play-off system for determining a league champion.

When a joint venture is not acting as a single economic entity, its actions are necessarily the product of an agreement among competitors. This subjects those actions to Section 1 of the Sherman Act. Nevertheless, some joint venture restraints should be analyzed in isolation, while others should be analyzed as a package, posing the question: is the venture itself unlawful? The distinction between the two types of restraints has

¹⁷ See *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 356 (1982) ("In . . . joint ventures, the partnership is regarded as a single firm competing with the other sellers in the market."); *NFL v. North Am. Soccer League*, 459 U.S. 1074, 1077 (1982) (Rehnquist, J., dissenting from denial of cert.) ("the league competes as a unit against other forms of entertainment"); *Chicago Prof'l Sports Ltd. v. NBA*, 95 F.3d 593, 599-60 (7th Cir. 1996) ("the NBA is best understood as one firm when selling broadcast rights to a network in competition with a thousand other producers of entertainment, but is best understood as a joint venture when curtailing competition for players who have few other market opportunities"); AREEDA, *supra* note 5, at 355 ("In general, once a venture is judged to have been lawful at its inception and currently, its decisions should be regarded as those of a single entity rather than the parent's daily conspiracy on every purchase-sale-hiring-license choice."). See also *City of Mt. Pleasant v. Associated Elec. Coop.*, 838 F.2d 268 (8th Cir. 1988) (Associated Electric Cooperative, consisting of forty-three separate distribution cooperatives and six generation and transmission cooperatives, constituted a single entity because the member cooperatives were not competitors).

¹⁸ Treating joint ventures as single entities for limited purposes allows meritorious group-boycott and price-fixing claims, which could erroneously be decided under the per se rule, to be rejected as a matter of law. When a manufacturing joint venture purchases a particular raw material from one supplier rather than another, there is not a group boycott. And it is not price fixing for a joint venture to set the price of a product it produces, at least when its participants individually could not have produced that product. As the Supreme Court explained: "Joint ventures and other cooperative arrangements are not usually unlawful, at least not as price-fixing schemes, where the agreement on price is necessary to market the product at all." *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1, 23 (1979). Note that the Court was not referring to the necessity of the joint venture in marketing the product, but rather to the necessity of an "agreement on price." See also *id.* at 21 ("a necessary consequence of an aggregate license is that its price must be established"). Such an "agreement on price" does not eliminate independent decision making among competitors, and thus is not even akin to price fixing.

¹⁹ Numerous cases have held that the NFL does not act as a single entity in imposing restraints on labor markets, franchise location, or franchise ownership. See, e.g., *Sullivan v. NFL*, 34 F.3d 1091, 1099 (1st Cir. 1994) (restraint on franchise ownership); *Los Angeles Mem'l Coliseum Comm. v. NFL*, 726 F.2d 1381, 1387-90 (9th Cir. 1984) (franchise location restraints); *McNeil v. NFL*, 790 F. Supp. 871, 878-80 (D. Minn. 1992) (labor market restraint).

been usefully framed in terms of "ancillarity."²⁰ An ancillary restraint is one that is reasonably necessary²¹ to the accomplishment of a venture's efficiency-enhancing purposes.²² The agreement forming the joint venture and all ancillary restraints should be analyzed together under the rubric of the legality of the joint venture itself.²³ Nonancillary restraints

²⁰ This concept was introduced into antitrust law by then-Judge Taft's opinion in *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899). Summarizing the common law, Judge Taft held that "no conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the full enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party." 85 F. at 282. The implication of ancillarity has changed considerably since 1898, but the meaning of the term has not.

²¹ "The antitrust laws impose a standard of reasonableness, not a standard of absolute necessity." *NFL v. North Am. Soccer League*, 459 U.S. 1074, 1079 (1982) (Rehnquist, J., dissenting from denial of cert.). This is the standard used in the 1996 Statements of Antitrust Enforcement in Health Care issued jointly by the U.S. Department of Justice and the Federal Trade Commission. For hospital joint ventures involving expensive equipment or services and physician network joint ventures, collateral agreements are analyzed separately if they are not "reasonably necessary to achieve the efficiencies sought by the joint venture." § 2B, Step Four; § 3A, Step Four; § 8B2, Step Four; *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,153. Without explicitly invoking the concept of ancillarity, many cases use the "reasonably necessary" formulation in explaining the relevant inquiry when a restraint with anticompetitive effects also has legitimate objectives. See *Law v. NCAA*, 134 F.3d 1010, 1019 (10th Cir. 1998) (inquiring whether the challenged conduct is "reasonably necessary to achieve the legitimate objectives" and whether "those objectives can be achieved in a substantially less restrictive manner"); *petition for cert. filed*, 66 U.S.L.W. 3800 (U.S. June 23, 1998) (No. 97-2004); *Orson, Inc. v. Miramax Film Corp.*, 79 F.3d 1358, 1367-68 (3d Cir. 1996) (inquiring whether the restraint is "reasonably necessary to achieve the stated objective"); *United States v. Brown Univ.*, 5 F.3d 658, 669 (3d Cir. 1993) (same); *Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d 1566, 1581 (11th Cir. 1991) (inquiring whether the restraint is "reasonably necessary to the accomplishment of the legitimate goals and narrowly tailored to that end"); *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1375 (5th Cir. 1980) (same). See also *ARZEDA*, *supra* note 5, at 397 ("Once the plaintiff satisfies his burden of persuasion on the existence of a significant restraint, he will prevail unless the defendants introduce evidence sufficient to allow the tribunal to find that their conduct promotes a legitimate objective. The plaintiff may rebut by introducing evidence that the objective is illegitimate or the restraint is not reasonably necessary to achieve it.")

²² See *SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958, 970 (10th Cir. 1994) (a restraint is ancillary to a joint venture if it "is reasonably related to [a venture's] operation and no broader than necessary to effectuate the [venture's] business"); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986) ("To be ancillary . . . an agreement eliminating competition must be subordinate and collateral to a separate, legitimate transaction. The ancillary restraint is subordinate and collateral in the sense that it serves to make the main transaction more effective in accomplishing its purpose. Of course, the restraint imposed must be related to the efficiency sought to be achieved. If it is so broad that part of the restraint suppresses competition without creating efficiency, the restraint is, to that extent, not ancillary."); *Polk Bros., Inc. v. Forest City Enters., Inc.*, 776 F.2d 185, 189 (7th Cir. 1985) ("A restraint is ancillary when it may contribute to the success of a cooperative venture that promises greater productivity and output.")

²³ The 1995 Antitrust Guidelines for the Licensing of Intellectual Property issued jointly by the U.S. Department of Justice and the Federal Trade Commission take a similar approach:

should be analyzed separately. Nonancillary restraints are not necessarily unlawful, but any competitive benefits of a joint venture are irrelevant to the analysis of its nonancillary restraints, so those restraints may fall within the scope of the *per se* rule.

A collateral restraint may be reasonably necessary to the achievement of the efficiency-enhancing purposes of a joint venture in a variety of ways. A collateral restraint may make the venture itself operate more efficiently, as might a requirement that joint venture participants buy exclusively from a manufacturing joint venture, in order to facilitate the realization of economies of scale. A collateral restraint may prevent a participant in a joint venture from appropriating an undue share of the venture's benefits, as might exclusive distribution territories for a brand created and promoted by a joint venture. A collateral restraint may prevent nonparticipants from appropriating joint venture benefits for which they have not shared the costs, as might restrictions on resale of a joint venture's output to nonparticipants. A collateral restraint may also prevent unintended competitive consequences that might make the venture uneconomic. For example, by supplying participants with certain products, a joint venture could induce some participants to sell complementary products that only some participants had previously sold, and this effect could be forestalled by exclusive distribution territories for participants' products not supplied by the joint venture.²⁴

As a general rule, restraints on competition between the venture and the participants are likely to be ancillary, and restraints on competition

If the Agencies conclude that the restraint has, or is likely to have, an anticompetitive effect, they will consider whether it is reasonably necessary to achieve procompetitive efficiencies. If the restraint is reasonably necessary, the Agencies will balance the procompetitive efficiencies and the anticompetitive effects to determine the probable net effect on competition in each relevant market.

§ 4.2, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,132.

²⁴ That a joint venture would not have formed or would not have been profitable but for one or more restraints is evidence that they are ancillary but is far from dispositive of the issue. There remains the question of why the restraint affects the profitability or attractiveness of the joint venture. Price fixing unrelated to a joint venture but contained in the agreement forming the venture could make a joint venture profitable and attractive when it otherwise would not be, but the price fixing would not be ancillary if its impact were merely to raise profits by raising prices. To be ancillary, the price fixing would somehow have to further the accomplishment of the joint venture's efficiency-enhancing purposes.

Similarly, the fact that a joint venture likely would not be dissolved if a collateral restraint was enjoined does not establish that the restraint is non-ancillary. Enjoining the restraint could substantially reduce the efficiencies generated by a joint venture but still not reduce them to the point that the marginal costs of continuing the venture exceeded the marginal benefits. This is true in part, and only in part, because much of the cost associated with a venture may have been sunk.

among joint venture participants outside the venture are not.²⁵ But ancillarity cannot be judged in a vacuum. Precisely how a restraint furthers the procompetitive purposes of the venture and why obvious less restrictive means would not adequately accomplish the same ends must be evaluated in the factual context of each joint venture. Consider three examples in which a joint selling venture eliminates price competition among participants outside the venture:

First, suppose that the joint venture's participants sell differentiated consumer products, and the venture serves only to take telephone orders and ship goods from a shared warehouse. The benefits of sharing warehousing and telemarketing functions do not appear to depend on collective pricing, so the restraint is almost surely nonancillary.²⁶ Second, suppose that the joint venture's participants sell a liquid industrial commodity stored by the joint venture in a common tank for pick up by customers. Since a single homogeneous product is dispensed from a single tap, charging multiple prices may be difficult to sustain; hence, joint price determination may be ancillary to the joint venture.²⁷ Third, suppose that the joint venture negotiates prices with customers, and prices fluctuate frequently as information on supply and demand conditions changes. In this case, the joint venture's participants probably must cede control over pricing to the venture in order to take advantage of

any benefits of pooling their sales functions; hence, the joint pricing probably is ancillary.²⁸

Another example serves to clarify the overall conclusions of this section as to basic modes of analysis for joint ventures and their collateral restraints. Suppose a group of regional food distributors establishes a joint venture to supply some of what they distribute. The venture creates a new brand of spices; it packages and ships them to the individual venture participants for distribution to supermarkets. The brand is nationally promoted by the venture and competes with several other brands. The venture acts as a single entity in selecting its suppliers of containers and raw food products, and in deciding how much national advertising to do and of what type.²⁹ In other respects, the conduct of the venture is the concerted conduct of its participants. A variety of collateral restraints could be properly regarded as ancillary to the formation of the joint venture. For example, requirements that participants purchase certain products exclusively from the venture may be reasonably necessary to ensure that the venture achieves scale economies, and exclusive distribution territories for the venture's products may be reasonably necessary to prevent free riding either on the national promotional activities³⁰ or the local promotional activities of individual participants. Still other restraints likely would not be ancillary and might even be per se illegal—for example, restraints on prices charged to retailers by the participants and exclusive distribution territories for products not produced by the venture.³¹

²⁵ See, e.g., *Blackburn v. Sweeny*, 53 F.3d 825 (7th Cir. 1995) (per se rule applied to restraint on territories in which advertising was permissible, which was found not to be ancillary to an agreement to dissolve a law partnership); *General Leaseways, Inc. v. National Truck Leasing Ass'n*, 744 F.2d 588, 595 (7th Cir. 1984) (per se rule applied when there was no "organic connection between the restraint and the cooperative needs of the enterprise").

²⁶ In *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969), the Supreme Court effectively found that "price fixing" and "profit pooling" were non-ancillary to the joint venture, although the Court did not phrase its analysis in such terms. In 1940 the owners of the two daily newspapers in Tucson, Arizona, formed what is now commonly referred to as a joint operating agreement, under which the advertising, circulation, and production departments of the papers were merged but editorial and news operations were not. The joint venture company controlled the pricing of circulation and advertising of both papers, and profits were distributed according to an agreed ratio. *Id.* at 134. On a motion for summary judgment, the district court held these restraints per se illegal, and the Supreme Court affirmed. *Id.* at 134-35. However, the district court had found that the merger of "circulation, advertising, and production departments has resulted in substantial cost savings." 280 F. Supp. 978, 982 (D. Ariz. 1968). Consequently, the decree entered by the district court and affirmed by the Supreme Court did not dissolve the joint venture, but merely ordered that the price fixing, profit pooling, and common ownership cease. *Id.* at 993-94. In 1970 Congress effectively reversed the decision by enacting the Newspaper Preservation Act, Pub. L. No. 91-353, 84 Stat. 466, codified at 15 U.S.C. §§ 1801-04.

²⁷ HOVENKAMP, *supra* note 5, at 188, concludes that the price restraint in a similar hypothetical is ancillary.

²⁸ Cf. *National Bancard Corp. v. Visa USA, Inc.*, 779 F.2d 592, 601, 605 (11th Cir. 1986) (refusing to apply per se rule to joint price setting of interchange fees for the Visa system because "individual price negotiations are impractical, would produce instability and higher fees, and could result in the demise of the product offered").

²⁹ Without finding the conduct to be that of a single economic entity, similar conduct was found not violative of the Sherman Act in *Sewell Plastics, Inc. v. Coca-Cola Co.*, 720 F. Supp. 1186 (W.D.N.C. 1988) (summary judgment), 720 F. Supp. 1196 (W.D.N.C. 1989) (merits), *aff'd in relevant part without published opinion*, 912 F.2d 463 (4th Cir. 1990). Thirty-three Coca-Cola bottlers formed a cooperative to supply most of their plastic bottle requirements. The nation's largest supplier of plastic bottles challenged the arrangement, alleging a variety of antitrust claims. See 720 F. Supp. at 1198-99. Largely because the bottlers had exclusive territories, the district court first held that the arrangement was not the sort of conduct properly deemed a per se unlawful group boycott. *Id.* at 1192-93. The court then rejected several rule of reason claims on the grounds that the venture had not been shown to possess market power or to have had an adverse impact on competition. *Id.* at 1218-20.

³⁰ Free riding could be said to occur whenever the sales share of a participant exceeded its share of contributions for the national promotional activities.

³¹ A restraint preventing one joint venture participant from selling "non-joint-venture products anywhere but in Japan" was found not to be "reasonably necessary" to the purpose of the joint venture in *Yamaha Motor Co. v. FTC*, 657 F.2d 971, 981 (8th Cir. 1981).

This last example intentionally resembles *United States v. Topco Associates*,³² which serves to illustrate another important point. About two dozen small supermarket chains formed Topco to supply themselves with private label products (store brands) like those which their large competitors (e.g., A&P and Kroger) were so profitably selling. Topco procured products for its members, which sold them very profitably under Topco's private labels.³³ The distribution of the Topco brands was subject to complicated territorial licenses featuring some exclusive territories.³⁴ Topco argued that its members could not successfully compete against private label products without the joint venture and that the territorial restraints were necessary for the joint venture.³⁵ The district court essentially agreed.³⁶ Without rejecting this factual conclusion, the Supreme Court held that these restraints were per se violations of Section 1 of the Sherman Act.³⁷

³² 405 U.S. 596 (1972).

³³ *Id.* at 598-600 & nn.3-4.

³⁴ *Id.* at 601-03.

³⁵ *Id.* at 605.

³⁶ *Id.* at 605-06; 319 F. Supp. 1031, 1037, 1042-43 (N.D. Ill. 1970).

³⁷ 405 U.S. at 608-12. On remand, less restrictive alternatives were permitted, provided that their effect was not to create de facto exclusive territories. *United States v. Topco Assocs.*, 1973-1 Trade Cas. (CCH) ¶ 74,391 (N.D. Ill. 1973) (final judgment), 1973-1 Trade Cas. (CCH) ¶ 74,486 (N.D. Ill.) (opinion), *aff'd without opinion*, 414 U.S. 801 (1973).

United States v. Sealy, Inc., 388 U.S. 350 (1967), is in a similar vein. Sealy was owned by some thirty licensees, which sold Sealy trademarked bedding products in exclusive territories. *Id.* at 351-53. The licensees employed resale price maintenance, which the district court held to be per se illegal. *Id.* at 355. The district court did not find the territorial restraints unlawful, and the government appealed that decision to the Supreme Court. *Id.* at 351-52. The Court reversed, holding the "territorial limitations [to be] part of 'an aggregation of trade restraints' including unlawful price fixing." *Id.* at 357 (quoting *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 598 (1951)).

A synopsis of the two decades of litigation that followed the Supreme Court's decision is provided by *Ohio-Sealy Mattress Manufacturing Co. v. Kaplan*, 745 F.2d 441, 443-47 (7th Cir. 1984). Shortly after the Supreme Court handed down its decision, Sealy replaced exclusive territories with areas of primary responsibility and significant financial disincentives for selling outside them. In 1971 one of the Sealy licensees brought suit for damages and injunctive relief. The plaintiff was awarded damages, but the trial court imposed no injunctive relief. The court of appeals remanded the case with instructions to consider injunctive relief. *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 585 F.2d 821, 823-31, 843-45 (7th Cir. 1978). In 1981 the district court enjoined the practices mentioned above, and the court of appeals affirmed. *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 669 F.2d 490, 495-96 (7th Cir. 1982). Additional suits were filed in 1976 and 1979. See 745 F.2d at 446. The litigation apparently concluded in 1986.

A study co-authored by plaintiff's expert concluded that the injunctive relief ordered in 1981 reduced prices and that the restraints were thus anticompetitive. Willard F. Mueller & Frederick E. Geithman, *An Empirical Test of the Free Rider and Market Power Hypotheses*, 73 REV. ECON. & STAT. 301 (1991). A second study, however, argued that the first was flawed. It found that the relief ordered in 1981 increased Sealy's profits and therefore concluded

Beginning with Chief Justice Burger's dissent, it has often been argued that the territorial restraints were ancillary and should not have been subject to the per se rule.³⁸ The argument was that the Topco members were responsible for promotion of the Topco brands, so nonexclusive distribution inherently created free-rider problems.³⁹ This observation is correct,⁴⁰ but there is a more general critique of the Court's reasoning. The only competition restrained was that in the sale of newly introduced private label products,⁴¹ and that competition apparently would not have existed absent the joint venture. Per se treatment is not appropriate for a restraint on competition created by a joint venture,⁴² so such a restraint should always be treated as ancillary, i.e., not analyzed separately from the joint venture itself.⁴³

that the restraints were simply mistakes. E. Woodrow Eckard, Jr., *An Empirical Test of the Free Rider and Market Power Hypotheses: A Comment*, 76 REV. ECON. & STAT. 586 (1994).

³⁸ See 405 U.S. at 613 (arguing that the territorial restraints were "minimal ancillary restraints that are fully reasonable in view of the principal purpose" of the joint venture); see also ROBERT H. BORK, *THE ANTITRUST PARADOX* 274-79 (1978); HOVENKAMP, *supra* note 5, at 190-91 (1994); RICHARD A. POSNER & FRANK H. EASTERBROOK, *ANTITRUST* 248-49 (2d ed. 1981).

Although Topco has been severely criticized for applying the per se rule to restraints that should have been considered ancillary, Topco's per se condemnation of a joint venture's plausibly ancillary territorial restraints was followed in *Bascom Food Products v. Reese Finer Foods*, 715 F. Supp. 616 (D.N.J. 1989). Reese private labeled, but did not manufacture or package, over 500 food products distributed by twenty shareholders and about ten other distributors in what were generally exclusive territories. *Id.* at 619-22. Bascom alleged that Reese committed per se antitrust violations by refusing to allow Bascom to become a Reese distributor and by refusing to allow Reese distributors to sell to wholesalers as well as retailers. Bascom also alleged that some of the Reese products had no good substitutes. The district court found that the exclusive territories were per se illegal under Topco, *id.* at 630-31, and that the refusal to deal "appears to constitute the type of boycott to be treated under *per se* analysis." *Id.* at 634. The court thus granted the preliminary relief sought. Without invoking the term "ancillary," the court held that Reese had not demonstrated that "various Reese Foods products would not be sold other than pursuant to the distribution restrictions." *Id.* at 632.

³⁹ See 405 U.S. at 623-24 (Burger, C.J., dissenting); BORK, *supra* note 38, at 276.

⁴⁰ The district court found that "the cost of developing consumer acceptance for the Topco private brands was born by each member in its own territory." 319 F. Supp. at 1042. Consequently, some degree of free riding was inevitable without exclusive territories or some other restraint that imposed charges to defray promotional costs.

⁴¹ Chief Justice Burger emphasized this point (see 405 U.S. at 613) but did not take the argument a step further.

⁴² The 1995 Antitrust Guidelines for the Licensing of Intellectual Property, *supra* note 23, make a similar point. In § 4.1.2, they explain why a certain licensing arrangement does not present antitrust concerns by stating that it "does not diminish competition that would occur in its absence."

⁴³ Of course, competition in private label products would not have been created by the joint venture if, absent the joint venture, the individual Topco members likely would have introduced private label products on their own.

B. JOINT VENTURES ANALYZED AS CARTELS OR MERGERS

A broad definition of joint venture is convenient because a similarly broad range of arrangements are termed joint ventures by their participants, and it is useful to consider the proper antitrust analysis of all such arrangements. A broad definition, however, implies that very different antitrust analyses are applicable to different sorts of joint ventures.⁴⁴

The broad definition of a joint venture above embraces conduct unaccompanied by a potentially efficiency-enhancing integration of economic activity among participants. If two competitors formed a venture that did nothing but set their prices, the arrangement would be nothing more than a price-fixing cartel, and it would be treated as such under the antitrust laws.⁴⁵ A cartel involves a complete, or nearly complete, loss of independent decision making with respect to the most important competitive strategies. Cartels centrally determine prices, outputs, or the allocation of customers for otherwise competing firms. They are per se illegal under the antitrust laws because they offer no significant prospect of consumer benefit. Perhaps the most important feature that distinguishes cartels from other joint ventures is the absence of a potentially efficiency-enhancing economic integration among the participants.⁴⁶

In two notable joint venture cases, the Supreme Court applied the per se rule only after finding that the requisite economic integration

⁴⁴ Cf. HOVENKAMP, *supra* note 5, at 186 ("to characterize something as a 'joint venture' is to say nothing about its effect on competition or its legality under the antitrust laws"); Robert Pitofsky, *A Framework for Antitrust Analysis of Joint Ventures*, 74 *Geo. L.J.* 1605, 1606 (1986) ("attaching the label 'joint venture' . . . tells one virtually nothing useful about the likely legality of an arrangement under the antitrust laws").

⁴⁵ See *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 597-98 (1951) ("Nor do we find any support in reason or authority for the proposition that agreements between legally separate persons and companies to suppress competition among themselves and others can be justified by labeling the project a 'joint venture.' Perhaps every agreement and combination to restrain trade could be so labeled."). Prohibiting the sort of conduct described in the text was the central purpose of the Sherman Act. The trust from which antitrust takes its name was precisely the sort of arrangement described. See, e.g., 21 *CONG. REC.* 2457, 2460 (1890) (remarks of Senator Sherman describing the trusts and the evils they bring about).

⁴⁶ See ABA SECTION OF ANTITRUST LAW, *ANTITRUST LAW DEVELOPMENTS* 398 (4th ed. 1997) ("an arrangement qualifies for rule of reason treatment as a joint venture only when it involves some potential for an efficiency-generating integration of the parties' resources"); 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, 7 (1991) ("Joint ventures are distinguished from . . . cartels . . . by the extent to which they integrate the resources of the partners. A cartel constitutes a naked agreement among competitors unaccompanied by any integration of resources."); Neil E. Roberts, *Cartels and Joint Ventures*, 57 *ANTITRUST L.J.* 849, 853 (1989) (a joint venture is not a cartel if "it does integrate assets or abilities of the parties so as to create efficiencies and new or more effective competition for the benefit of consumers"). The absence of economic integration means that the per se rule

was absent. The finding was explicit in *Arizona v. Maricopa County Medical Society*,⁴⁷ where the Court held that agreements among 70 percent of area medical practitioners to adhere to maximum fee schedules promulgated by the Maricopa Foundation for Medical Care were per se violations of Section 1 of the Sherman Act. The Court took pains to explain that the Foundation was not a "joint venture," did not "pool . . . capital and share the risks of loss as well as the opportunities for profit," and did not permit the practitioners "to sell any different product."⁴⁸ In other words, the Foundation lacked a potentially efficiency-enhancing integration of economic activity that would have merited rule of reason treatment.⁴⁹ The finding was implicit in *Topco*, where the Court emphasized: "Each of the member chains operates independently; there is no pooling of earnings, profits, capital, management, or advertising resources. . . . The association does not itself own any manufacturing, processing, or warehousing facilities, and items that it procures for members are usually shipped directly from the packer or manufacturer to the members."⁵⁰ The apparent point of this factual recitation is that *Topco* did not entail the sort of economic integration that would have warranted more lenient treatment.

Any genuine economic integration⁵¹ that plausibly could confer non-trivial social benefits suffices to take a joint venture outside the purview of the per se rules applied to cartel activity.⁵² The requisite economic integration is present in a joint venture whenever the participants' joint undertaking of one or more facets of product development, production,

might apply but not that it *does* apply. Agreements among competitors not involving any economic integration may be competitively benign or even procompetitive.

⁴⁷ 457 U.S. 332 (1982).

⁴⁸ *Id.* at 356-57.

⁴⁹ Also notable is that the dissenting Justices disagreed about this characterization. *Id.* at 364-65.

⁵⁰ 405 U.S. at 598.

⁵¹ Competitors may feign integration, but the per se rule cannot be avoided by mere cosmetic integration with no real efficiency-enhancing potential. On the other hand, if there is a nontrivial potentially efficiency-enhancing economic integration among the participants, a joint venture ought not to be subject to second guessing about its motives. There are better ways in which to uncover the anticompetitive effects of a joint venture. Even if documents suggest that a joint venture was formed as an excuse for imposing collateral restraints, it should be assessed under the rule of reason if there is a nontrivial potentially efficiency-enhancing economic integration among the participants. As discussed in the next section, the rule of reason analysis should be highly truncated when certain collateral restraints are imposed.

⁵² The 1995 Antitrust Guidelines for the Licensing of Intellectual Property, *supra* note 23, take a similar approach in § 3.4: "To determine whether a particular restraint in a licensing arrangement is given per se or rule of reason treatment, the Agencies assess whether the restraint in question can be expected to contribute to an efficiency-enhancing integration of economic activity."

distribution, or marketing plausibly reduces cost⁵³ to a nontrivial extent, or plausibly allows the joint venture to offer a product both valued by consumers and that the individual venture participants could not have individually offered.⁵⁴ A business *function*, however, must be performed jointly; jointly making a business *decision* does not suffice. Thus, the requisite economic integration may be present with a sales joint venture that does market research, makes calls on potential customers, or maintains showrooms, but not with one that merely sets prices.⁵⁵

In determining whether the *per se* rule may apply, the issue is not whether the venture actually achieves any social benefits. A joint venture yielding no social benefits may merit rule of reason treatment, while a joint venture achieving significant social benefits could be *per se* illegal. The *per se* rule should not be applied if an integration is reasonably calculated to achieve social benefits, even if it fails to do so;⁵⁶ a research and development joint venture should not become *per se* illegal merely by virtue of its failure to produce any useful new products or processes. Moreover, the *per se* rule may apply to a venture that achieves social benefits with no integration of economic activity. A joint venture that merely allocates customers might significantly reduce transportation costs but would not entail any integration, and so would be *per se* illegal.

The requisite integration may exist even though some joint venture participants make no nonmonetary contributions to the venture.⁵⁷ If a firm distributes a rival's product, thus eliminating the need for the rival to maintain a distribution system, the requisite integration is present even though the rival contributes nothing to the venture but a monthly payment for services rendered. Moreover, the requisite integration may

⁵³ Cost is used here in its economic sense—"real resource usage." A joint venture that reduces the price paid for inputs without achieving any reduction in resource usage is merely exercising market power.

⁵⁴ This treatment of economic integration has advantages over narrower constructions advocated by some commentators and that may be implicit in some case law. It avoids both arbitrary distinctions that cannot be justified on the basis of economic analysis and fact-intensive judgments on matters of degree, which require completing much of a rule of reason analysis just to determine whether such an analysis is appropriate. Cf. Ernest Cellhorn & W. Todd Miller, *Competitor Collaboration Guidelines—A Recommendation*, 42 ANTITRUST BULL. 851, 854-55 (1997) (criticizing narrower integration tests). This expansive treatment of integration does not drastically alter the antitrust treatment of borderline conduct. As is explained in the next section, a truncated rule of reason analysis is employed in many situations.

⁵⁵ A similar distinction is drawn and well explained by William F. Baxter, *Preface*, 15 J. REPRINTS ANTITRUST L. & ECON. i, v-viii (1985). Apart from cartels, the requisite economic integration may be absent with information exchange and standard setting.

⁵⁶ Brodley's integration requirement, quoted *supra* note 1, appears to require more.

⁵⁷ Brodley's integration requirement, quoted *supra* note 1, mandates contributions but does not specifically indicate that they cannot be monetary.

not exist despite substantial sharing of financial risks among joint venture participants.⁵⁸ If several competitors agree merely to pool all revenues and divide them according to preset shares, the arrangement is a cartel with no potentially efficiency-enhancing economic integration.⁵⁹

A joint venture formed by actual or potential competitors should be analyzed solely as a horizontal merger or acquisition if:⁶⁰ (1) the formation of the venture, including any ancillary restraints, eliminates all actual and potential competition among participants throughout the vertical supply chain in which the venture operates; (2) participants do not compete with the venture once formed; and (3) the venture does not terminate within a few years by its own terms.⁶¹ If two corporations form a third in which they each own half of the stock and to which they each transfer all of their assets, the transaction creates a joint venture within the meaning of that term here, but it is analytically equivalent to one in which either corporation acquired all of the stock or assets of the other, and it would be analyzed as a merger.⁶² Many transactions reasonably termed joint ventures by their participants have been treated as

⁵⁸ In *Maricopa County* the absence of pooling of risks was a factor emphasized by the Supreme Court in concluding that the requisite integration was absent. See text accompanying note 48 *supra*. Until revised in 1996 (see *supra* note 21), federal enforcement policy was understood by some to hold that risk sharing was inherently part of the requisite economic integration in health care joint ventures. See John J. Miles, *Joint Venture Analysis and Provider-Controlled Health Care Networks*, 66 ANTITRUST L.J. 127, 139 & n.47 (1997), commenting on U.S. Department of Justice and Federal Trade Commission, Statements of Enforcement Policy and Analytical Principles Relating to Health Care and Antitrust (1994), reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,152.

⁵⁹ See *Citizen Publ'g Co. v. United States*, 394 U.S. 131, 135 (1969); *Northern Sec. Co. v. United States*, 193 U.S. 197, 328 (1904).

⁶⁰ These criteria do not consider whether participants compete with each other in markets unrelated to those in which the joint venture operates. A joint venture can provide a conduit for anticompetitive communication regarding such markets, but a joint venture does not make such communication inevitable or even reasonably likely, and there surely are other conduits for such communication.

⁶¹ Mergers are sometimes said to differ from joint ventures in that mergers are permanent, while joint ventures are not. See, e.g., Thomas A. Piraino, Jr., *A Proposed Antitrust Analysis of Telecommunications Joint Ventures*, 1997 Wisc. L. REV. 639, 660. However, the case law does not require that a transaction be permanent to be treated as a merger under § 7 of the Clayton Act. See *United States v. Archer-Daniels-Midland Co.*, 584 F. Supp. 1134 (S.D. Iowa 1984) (13-year lease with options for extension and purchase held to be a merger within the meaning of § 7). Moreover, joint ventures subject to termination may last long enough to be essentially permanent for purposes of antitrust analysis.

⁶² With each firm having a half interest in the third, the third firm is almost certain to be actively and jointly controlled by the first two firms. When all participants own minority interests, control by participants may be absent, and the definition of joint venture used here does not require control. In the absence of control, however, the proper antitrust analysis is a straightforward variation on merger analysis, accounting for the incentive effects of partial equity interests in competitors. The discussion below assumes that participants control any joint venture not treated as a merger.

mergers under the antitrust laws.⁶³ A joint venture relating to but one of many activities of its participants still may be properly analyzed as a horizontal acquisition with respect to that one activity.

Although it is sometimes said that joint ventures short of merger are less anticompetitive than mergers,⁶⁴ that is not necessarily so, particularly because mergers may lead to more efficiency-enhancing integration.⁶⁵ Moreover, to suggest that the difference is one only of degree misses the critical point that mergers call for a significantly different antitrust analysis than nonmerger joint ventures.⁶⁶ The competitive effects analysis of a merger attempts to predict the effects of changes in the ownership of assets, including all or part of the equity in firms, on prices, outputs, and other determinants of social welfare. Joint ventures not satisfying the three conditions in the preceding paragraph also may raise some significant issues relating to changes in the ownership of assets, but they necessarily raise very different issues relating to the competitive effects of particular proposed or ongoing conduct.

The balance of this article is directed to joint ventures that should not be analyzed solely as mergers but that feature a potentially efficiency-enhancing economic integration among the participants, and hence are not cartels. This class of joint ventures requires an antitrust analysis distinct from that of mergers or cartels.

C. ALTERNATIVE RULE OF REASON ANALYSES FOR JOINT VENTURES

The application of the rule of reason to a joint venture and its ancillary collateral restraints begins with an initial showing on the part of the plaintiff (whether the government or a private party) relating to the competitive effects of the venture. The plaintiff may show that the venture is categorically unreasonable in that it falls within a well-defined category of practices with which the courts have had sufficient experience to determine that they "would always or almost always tend to restrict compe-

⁶³ See, e.g., *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158, 167-72 (1964); *FTC v. Warner Communications Inc.*, 742 F.2d 1156, 1159, 1163-65 (9th Cir. 1984); *United States v. Ivaco, Inc.*, 704 F. Supp. 1409, 1414 (W.D. Mich. 1989).

⁶⁴ See, e.g., *Piraino*, *supra* note 61, at 643 n.26.

⁶⁵ Mutual partial equity interests—A owning a share of B, and B owning a share of A—can arise with a joint venture, and mutual majority interests produce anticompetitive effects greater than common full ownership. See William Nye, *Can a Joint Venture Lessen Competition More Than a Merger?*, 40 *ECON. LETTERS* 487 (1992). In addition, Firm A's acquisition of Firm B's business in market X can lessen competition in only market X (and possibly vertically related markets), while a joint venture between A and B also may restrain competition in market Y, in which A and B also compete. Any restraint on market Y, however, is likely to be non-ancillary.

⁶⁶ See HOVENKAMP, *supra* note 5, at 195-96.

tion and decrease output.⁶⁷ Such practices are deemed illegal per se. However, the only per se illegal joint ventures are those that are merely cartels. Any genuine economic integration that plausibly could confer nontrivial social benefits suffices to take a joint venture outside the purview of the per se rule. Hence, the per se rule does not apply to the class of joint ventures considered below.⁶⁸

Alternatively, a plaintiff can show that a practice is much like one condemned as per se illegal even if it is not properly assigned to a per se category.⁶⁹ Such a practice "requires some competitive justification even in the absence of a detailed market analysis"⁷⁰ and is therefore

⁶⁷ *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988); *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 289-90 (1985); *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1, 19-20 (1979). See also *NCAA v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 103-04 (1984) ("Per se rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct."); *National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978) (agreements are per se illegal only if their "nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality").

⁶⁸ Denials of access to joint ventures should always be subject to a fuller rule of reason analysis. *Northwest Wholesale Stationers* did not foreclose this approach. The Supreme Court held that the per se rule does not apply to the exclusion of a competitor from a joint venture unless it "possesses market power or exclusive access to an element essential to effective competition," 472 U.S. at 296; however, the Court undercut any inference that it was establishing a rule of per se illegality when the venture "possesses market power or exclusive access to an element essential to effective competition" by its comment that exclusion from a joint venture "might justify per se invalidation if it placed a competing firm at a severe competitive disadvantage," *id.* at 295-96 n.6. The leading case applying this precedent also evaluated the denial of access to a joint venture under the rule of reason. *SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958, 963-65 (10th Cir. 1994).

⁶⁹ See, e.g., *Lie v. St. Joseph Hosp.*, 964 F.2d 567, 569 (6th Cir. 1992) (truncated rule of reason analysis applied "when the agreement at issue is very similar to per se violations and might, but for prudential constraints, be analyzed under the per se presumption"); *AREEDA*, *supra* note 5, at 428-29 (truncated rule of reason analysis applicable when a "restraint is of the kind that has been regarded as very serious and usually without recognized redeeming virtue" but the "defendant claims justification of a kind which a 'quick look'—usually at the arguments alone—shows to be legitimate in principle and capable of being proved").

⁷⁰ *NCAA*, 468 U.S. at 110. See also *id.* at 109 ("As a matter of law, the absence of proof of market power does not justify a naked restraint on price or output. To the contrary, when there is an agreement not to compete in terms of price or output, 'no elaborate industry analysis is required to demonstrate the anticompetitive character of such agreement.'") (quoting *National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978)); *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 459 (1986) ("A refusal to compete with respect to the package of services offered to consumers, no less than a refusal to compete with respect to the price term of an agreement, impairs the ability of the market to advance social welfare by ensuring the provision of desired goods and services to consumers at a price approximating the marginal cost of providing them. Absent some countervailing procompetitive virtue—such as, for example, the creation of efficiencies in the operation of a market or the provision of goods and services...—such an agreement limiting consumer choice by impeding the 'ordinary give and take of the market place,'

subject to a truncated rule of reason analysis, generally termed a "quick look,"⁷¹ in which the practice is struck down without an inquiry into its actual competitive effects unless a competitive justification is offered for it. A joint venture and its ancillary collateral restraints should be subject to a quick look if they eliminate independent decision making by participants over price, output (including which products to offer and whether to participate in a market at all), or any other strategy central to competition.⁷²

Whether strategies not involving price or output are central to competition depends on the nature of the competitive process in the industry. Price advertising would be a strategy central to competition unless advertised prices were of essentially no value to comparison-shopping consum-

... cannot be sustained under the Rule of Reason.")

The NCAA Court relied on the late Professor Areeda's teaching that the rule of reason sometimes can be applied "in the twinkling of an eye." See 468 U.S. at 109-10 n.39 (quoting Phillip Areeda, *The "Rule of Reason" in Antitrust Analysis: General Issues 37-38* (Federal Judicial Center, June 1981)). Professor Areeda's revision of the cited analysis can be found in AREEDA, *supra* note 5, at 403. His example of a practice that can be assessed "very quickly" is a selling joint venture formed by Chrysler, Ford, and General Motors that sets the prices of all three companies' cars.

⁷¹ See, e.g., *Law v. NCAA*, 154 F.3d 1010, 1020 (10th Cir. 1998), *petition for cert. filed*, 66 U.S.L.W. 3800 (U.S. June 23, 1998) (No. 97-2004); *California Dental Ass'n v. FTC*, 128 F.3d 720, 727 (9th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3668 (U.S. April 3, 1998) (No. 97-1625); *Chicago Prof'l Sports Ltd. v. NBA*, 95 F.3d 593, 596 (7th Cir. 1996); *United States v. Brown Univ.*, 5 F.3d 658, 669 (3d Cir. 1993); *U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589, 593-94 (1st Cir. 1993). Assistant Attorney General Joel I. Klein has termed this a "stepwise" analysis. See Joel I. Klein, *A "Stepwise" Approach for Analyzing Horizontal Agreements Will Provide a Much Needed Structure for Antitrust Review*, ANTITRUST, Spring 1998, at 41; Joel I. Klein, *A Stepwise Approach to the Antitrust Review of Horizontal Agreements*, Speech Before ABA Antitrust Section Semi-Annual Fall Policy Program (Nov. 7, 1996), *reprinted at* 7 Trade Reg. Rep. (CCH) ¶ 50,157.

⁷² *Cf. NCAA*, 468 U.S. at 100-01, 109-10, 117-20 (employing a truncated analysis for restrictions on the amount of televised intercollegiate football); *Law*, 154 F.3d at 1020-24 (employing a truncated analysis to the NCAA rule limiting total compensation for a category of basketball coaches at Division I schools); *United States v. Brown Univ.*, 5 F.3d 658, 673-78 (3d Cir. 1993) (employing a truncated analysis for agreements among universities on financial aid offerings to particular students); *Chicago Prof'l Sports Ltd. v. NBA*, 95 F.2d 667, 673-76 (7th Cir. 1992) (employing a truncated analysis for the NBA's restraints on number of games broadcast on television superstations). See also *American Ad Mgmt., Inc. v. GTE Corp.*, 92 F.3d 781, 789 (9th Cir. 1996) (refusing to employ a truncated analysis to an agreement among yellow pages publishers not to pay commissions to sales agents for certain accounts); *U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589, 594 (1st Cir. 1993) (refusing to employ a truncated analysis to an exclusive dealing arrangement); *Illinois Corporate Travel, Inc. v. American Airlines*, 806 F.2d 722, 727 (7th Cir. 1986) (refusing to employ a truncated analysis to the refusal of an airline to deal with travel agent that would not agree to refrain from advertising discounts); Timothy J. Muris, *The Federal Trade Commission and the Rule of Reason: In Defense of Massachusetts Board*, 66 ANTITRUST L.J. 773, 800 (1998) ("An agreement among competitors is inherently suspect [hence, requiring justification] if it eliminates or limits significant aspects of their competitive rivalry . . .").

ers.⁷³ Whether to submit a bid would be a strategy central to competition if buyers relied on competitive bidding.⁷⁴ Hours of operation might be a strategy central to competition for a retail business.⁷⁵ In certain circumstances, aspects of product design or quality, or new product development, could be strategies central to competition. Other strategies might be central to competition only in unusual factual settings.⁷⁶

Even in the case of strategies central to competition, the quick look should be applied only if the joint venture and its ancillary restraints eliminate an exercise of independent decision making⁷⁷ that otherwise would have occurred.⁷⁸ A restraint on competition among venture participants should not be subject to a quick look if the competition restrained is made possible only by the joint venture, or is reasonably likely only with it.

Whether independent decision making is eliminated normally is obvious on the face of a joint venture agreement or separate contractual restriction. In some situations, however, basic facts about the competitive process in a particular industry and straightforward economic analysis may be required to perceive the loss of independent decision making. Complex factual and economic evidence is never required in making this determination because the issue is the relatively proximate effects of practices rather than their ultimate effects on competition and consumers.

The quick-look analysis asks whether the economic integration among participants is likely to generate significant social benefits that could

⁷³ *Cf. California Dental*, 128 F.3d at 727-30 (applying quick look to an agreement among dentists to restrict price advertising as a part of ethical guidelines to prevent false and misleading advertising).

⁷⁴ *Cf. Professional Engineers*, 435 U.S. at 692 (apparently applying quick look to an ethical rule against competitive bidding). It is doubtful that bid rigging could ever be an ancillary restraint, and bid rigging outside the joint venture context is per se illegal and is criminally prosecuted.

⁷⁵ *Cf. Detroit Auto Dealers Ass'n, Inc. v. FTC*, 955 F.2d 457, 469-72 (6th Cir. 1992) (applying quick look to an agreement among auto dealers to restrict showroom hours).

⁷⁶ *Cf. Indiana Federation of Dentists*, 476 U.S. at 459 (agreement among members of federation of dentists to withhold X rays from dental insurers for use in evaluating claims for benefits held to "impair[] the ability of the market to advance social welfare by ensuring the provision of goods and services to consumers at a price approximating the marginal cost of providing them").

⁷⁷ While the formation of joint ventures and ancillary restraints may be subject to the quick look, the denial of access to a joint venture necessarily should not be.

⁷⁸ For example, in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979), the blanket license was a new product made possible by the joint venture. To the extent that pricing that product is understood to involve an agreement on price among the venture's participants, that agreement, standing alone, does not warrant per se or

justify the elimination of independent decision making. The existence of the requisite integration will already have been determined, as will have been the ancillarity of the relevant restraints (i.e., whether the elimination of independent decision making on strategies central to competition is reasonably necessary to the integration).

Once the plaintiff has shown that a joint venture and its ancillary restraints eliminate independent decision making by participants over a strategy central to competition, the joint venture's participants have a burden of persuasion.⁷⁹ To carry that burden, they must do more than vaguely assert a social benefit that could be served; rather, they must put forward evidence demonstrating a clear causal nexus between the restraint and the social benefit⁸⁰ and indicate why the social benefit could not reasonably be achieved in a substantially less anticompetitive manner.⁸¹ There is no requirement that a joint venture restraint be the least restrictive alternative, but obvious and far less restrictive alternatives must be shown either infeasible or inadequate.⁸² If defendants are unable

quick-look treatment. Hence, the Court reversed the contrary determination by the lower court. *Id.* at 6-10, 23-24.

⁷⁹ Although no court has endorsed such an approach, economic logic dictates an alternative path. Rather than demonstrate significant plausible efficiencies, joint venture participants could demonstrate the absence of a plausible anticompetitive effect. See C. Frederick Beckner III & Steven C. Salop, *Decision Theory and Antitrust Rules*, 67 ANTITRUST L.J. (forthcoming 1999). In some cases, such a demonstration could be accomplished without elaborate market analysis, as when the joint venture participants collectively have only a small share of any plausible relevant market. Cf. *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 221 (D.C. Cir. 1986) (opinion by Bork, J.) (suggesting that a small share of a well defined market may be sufficient to establish that a restraint is efficient, since the small share assures that the restraint could not restrict output).

⁸⁰ See generally William J. Kolasky, Jr., *The Department of Justice's "Stepwise" Approach Imposes Too Heavy a Burden on Parties to Horizontal Agreements*, ANTITRUST, Spring 1998, at 41, 45 (arguing that a defendant's burden should be commensurate with the showing the plaintiff has made); Chang et al., *supra* note 7, at 308-11 (cautioning against an application of the quick look that imposes a heavy burden to demonstrate efficiencies).

⁸¹ See, e.g., *Law v. NCAA*, 134 F.3d 1010, 1019 (10th Cir. 1998) (inquiring whether a venture's "objectives can be achieved in a substantially less restrictive manner"), *petition for cert. filed*, 66 U.S.L.W. 3800 (U.S. June 23, 1998) (No. 97-2004); *Sullivan v. NFL*, 34 F.3d 1091, 1103 (1st Cir. 1994) ("One basic tenet of the rule of reason is that a given restriction is not reasonable, that is, its benefits cannot outweigh its harm to competition, if a reasonable, less restrictive alternative to the policy exists that would provide the same benefits as the current restraint"); *Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d 1566, 1581 (11th Cir. 1991) (inquiring whether the restraint is "reasonably necessary to the accomplishment of the legitimate goals and narrowly tailored to that end"). For detailed applications of these principles, see *NCAA v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 117-20 (1984); *Chicago Prof'l Sports Ltd. v. NBA*, 874 F. Supp. 844, 859-62 (N.D. Ill. 1995).

⁸² This standard is comparable to that in the revised efficiency section of the Horizontal Merger Guidelines promulgated jointly by the U.S. Department of Justice and the Federal Trade Commission: "Only alternatives that are practical in the business situation faced by the merging firms will be considered in [determining whether efficiencies are merger

to carry their burden, the joint venture is condemned under the rule of reason "without further ado."⁸³

Defendants are obliged to defend joint ventures not subject to the per se rule or a quick look only upon a showing that the defendants possess significant market power or that the venture has an actual anticompetitive effect.⁸⁴ Both joint ventures not subject to a quick look and ventures for which the defendants carry their burden of persuasion require a more developed rule of reason analysis. The issue is whether the joint venture (and its ancillary restraints) "enhances competition."⁸⁵ If such is the case, there is no further obligation on the venture to enhance competition as much as possible. Issues of less anticompetitive alternatives arise in determining whether collateral restraints are ancillary to the potentially efficiency-enhancing integration of the joint ven-

specific); the Agency will not insist upon a less restrictive alternative that is merely theoretical." § 4, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,104, at 20,573-13 (revised Apr. 8, 1997).

⁸³ See, e.g., *Chicago Prof'l Sports Ltd. v. NBA*, 961 F.2d 667, 674 (7th Cir. 1992) (interpreting Supreme Court precedent to hold that "any agreement to reduce output . . . requires some justification—some explanation connecting the practice to consumers' benefits—before the court attempts an analysis of market power. Unless there are sound justifications, the court condemns the practice without ado, using the 'quick-look' version of the Rule of Reason").

⁸⁴ See, e.g., *Levine v. Central Fla. Med. Affiliates*, 72 F.3d 1538, 1551 (11th Cir.), *cert. denied*, 117 S. Ct. 75 (1996); *K.M.B. Warehouse Dist. v. Walker Mfg. Co.*, 61 F.3d 123, 129 (2d Cir. 1995); *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995); *United States v. Brown Univ.*, 5 F.3d 658, 668 (3d Cir. 1993); *Flegel v. Christian Hosp. Northeast-Northwest*, 4 F.3d 682, 688 (8th Cir. 1993); *Lie v. St. Joseph Hosp.*, 964 F.2d 567, 569 (6th Cir. 1992); *Wilks v. AMA*, 895 F.2d 352, 359-60 (7th Cir. 1990). These cases follow *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 461 (1986) ("the finding of actual, sustained adverse effects on competition . . . is legally sufficient to support a finding that the challenged restraint was unreasonable even in the absence of elaborate market analysis").

⁸⁵ *NCAA*, 468 U.S. at 104 ("[T]he essential inquiry [is] whether or not the challenged restraint enhances competition. Under the Sherman Act the criterion to be used in judging the validity of a restraint on trade is its impact on competition."); see also *National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 691 (1978) (the issue is whether the restraint "is one that promotes competition or one that suppresses competition"). What this means is open to debate. Most recently in *NCAA*, the Supreme Court held that "Congress designed the Sherman Act as a 'consumer welfare prescription.'" 468 U.S. at 107 (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979), quoting *BORK*, *supra* note 38, at 66). Judge Bork defined "consumer welfare" to include profits, i.e., to mean aggregate economic welfare. See *BORK*, *supra*, chs. 2-5. The Ninth Circuit has elaborated: "[R]eduction of competition does not invoke the Sherman Act until it harms consumer welfare. Consumer welfare is maximized when economic resources are allocated to their best use, and when consumers are assured competitive price and quality. Accordingly, an act is deemed anticompetitive under the Sherman Act only when it harms both allocative efficiency and raises the prices of goods above competitive levels or diminishes their quality." *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1433 (9th Cir. 1995) (citations omitted). In economic terms, this means that the test under the Sherman Act is whether a restraint enhances aggregate economic welfare. For more on the welfare debate, see Gregory J. Werden, *An Economic Perspective on the Analysis of Merger Efficiencies*, ANTITRUST, Summer 1997, at 12, 13-14.

ture (except when the only competition restrained was created by the joint venture) and when taking a quick look, but they do not arise once again in the fuller rule of reason analysis.

III. COMPETITIVE EFFECTS OF COMPETITOR JOINT VENTURES

A. LOSS OF INDEPENDENT DECISION MAKING⁸⁶

No significant loss of independent decision making by participants with respect to competitive strategies is inherent in the concept of a joint venture.⁸⁷ Nevertheless, joint ventures and their ancillary restraints may result in a loss of independent decision making, and the nature and extent of that loss (including the duration of restraints) is a major focus of the antitrust analysis for most joint ventures.

A joint venture and its ancillary restraints most directly reduce independent decision making by transferring to the joint venture (or perhaps to another participant) control over the competitive strategies of one or more of its participants. Joint ventures that are mergers have this effect with respect to all competitive strategies, while joint ventures that are not mergers have this effect with respect to only some competitive strategies: an R&D joint venture is likely to decide which projects are worth pursuing, and an input supply joint venture is likely to decide who supplies the venture.

A joint venture and its ancillary restraints also may directly reduce independent decision making by restraining decisions on competitive strategies that continue to be made separately by the venture's participants.⁸⁸ Consider a manufacturing joint venture in which participants

⁸⁶ The issues in this section are usefully discussed, although from a different perspective, by Michael S. McFalls, *The Role and Assessment of Classical Market Power in Joint Venture Analysis*, 66 ANTITRUST L.J. 651 (1998).

⁸⁷ A production joint venture embracing an entire industry may lead to competitive performance if any unused productive capacity can be employed by any participant willing to pay the associated variable costs. See Ian Gale, *Price Competition in Noncooperative Joint Ventures*, 12 INT'L J. INDUS. ORG. 53 (1994). This concept—often referred to as a "competitive rules joint venture"—originated in the Department of Justice in the 1970s. See Lucinda M. Lewis & Robert J. Reynolds, *Appraising Alternatives to Regulation for Natural Monopolies*, in OIL PIPELINES AND PUBLIC POLICY 135 (Edward J. Mitchell ed., 1979). The concept was applied in crafting the decree in *United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 625 (W.D. Ky. 1985) (approving proposed merger consent decree).

⁸⁸ An illustration in a somewhat unusual context is provided by the landmark case, *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918). The Chicago Board of Trade was and still is a large market in which agricultural commodities are traded by its members. The Board adopted a rule prohibiting trade between sessions at prices other than the closing price. The Supreme Court found that the effect was primarily to restrict hours of

maintain independent sales and distribution functions. Some independent decision making is lost if participants are subject to restraints on where or to whom they may sell, or if they are subject to limitations on the quantities they are permitted to sell.⁸⁹ In some cases, such restraints may reduce independent decision making to a very small degree, as when there are territorial restraints only on relatively unimportant foreign markets. In other cases, however, such restraints also may be tantamount to a total elimination of independent decision making on competitive strategies central to competition, as when each joint venture participant has an exclusive territory for both joint-venture and non-joint-venture products.

A joint venture and its ancillary restraints can also indirectly reduce independent decision making by providing incentives to raise prices or reduce quantities. Although achieved indirectly, the loss of independent decision making can be total: if a joint venture's participants pool all revenues and costs, they each have the incentive to act as if they were all commonly owned and operated. Of course, a less than total loss of independent decision making occurs with partial pooling of revenues or profits, as with pooling of television revenues by sports leagues or partial equity interests in competitors.

A total or partial loss of independent decision making also can result from a scheme of taxation on venture participants.⁹⁰ If the tax payment is related to output and some tax revenue is rebated through a mechanism not related to output, the effect is to raise the effective marginal costs of the venture's participants and thereby to raise their prices.⁹¹ For example, a joint venture might supply an input to participants at a price far in excess of its marginal cost of production. This may result in profits to the venture that are rebated to the participants. If the rebate payments

trading and that the restraint was reasonable. The opinion by Justice Brandeis articulated an oft-quoted statement of the rule of reason. *Id.* at 238.

⁸⁹ In the 1970s the Department of Justice was concerned that several joint ventures in the petroleum industry produced anticompetitive effects by sizing facilities to produce monopoly, rather than competitive, levels of output. See Donald L. Flexner, *Oil Pipelines: The Case for Divestiture*, in OIL PIPELINES AND PUBLIC POLICY 135 (Edward J. Mitchell ed., 1979).

⁹⁰ This possibility is little noted in the joint venture literature but is discussed by Brodley, *supra* note 1, at 1550-51; and Carl Shapiro & Robert D. Willig, *On the Antitrust Treatment of Production Joint Ventures*, J. ECON. PERSP., Summer 1990, at 113, 115.

⁹¹ There is an anticompetitive effect whenever a joint venture supplies participants with an input at an incremental cost to them in excess of the venture's short-run marginal cost of production. Hence, the socially optimal way in which to finance a joint venture's fixed costs is through lump sum payments by participants (perhaps original contributions of capital). Such a systems works perfectly, however, only if the shares of the fixed costs are allocated in proportion to usage of the venture's output.

are based on usage of the input, the net effect is as if the input price had been set at average total cost; but if rebate payments are unrelated to usage in the short term, the net effect is to price the input above its average total cost and to induce corresponding price increases in the downstream products of the joint venture's participants.⁹² At least in theory, such a device could be used to induce participants in an input supply venture to price their downstream products as if they were merged.⁹³

A joint venture and its ancillary restraints can also indirectly reduce independent decision making by compelling or facilitating an information exchange through the venture. As a general matter, information about prices and outputs, particularly detailed information, can help to

⁹² The mere existence of some form of taxation scheme is neither surprising nor suspect. Industry trade associations must tax their members to fund informational and promotional functions for the benefit of the entire industry. Any procompetitive activities of a joint venture have to be financed by taxing the participants in some manner. A tax levied on output also may be reasonably necessary. If taxes are disproportionate to output, it is likely that some joint venture participants disproportionately benefit from its activities, and the possibility of disproportionate benefits may prevent participants from joining in the first instance.

⁹³ A scheme using labor contracts to collect taxes was held to be per se illegal price fixing. *Premier Elec. Constr. Co. v. National Elec. Contractors Ass'n*, 814 F.2d 358 (7th Cir. 1984); *National Elec. Contractors Ass'n v. National Constructors Ass'n*, 678 F.2d 492 (4th Cir. 1982). Both cases arose from the same conduct. Members of the National Electrical Contractors Association (NECA) carry out about half of the nation's electrical contracting work. The International Brotherhood of Electrical Workers (IBEW) represents workers at NECA and non-NECA firms. An agreement between NECA and IBEW established the National Electrical Industry Fund to defray costs associated with collective bargaining. The agreement called for the IBEW to include a clause in contracts with non-NECA members requiring them to contribute 1% of gross payroll to the Fund, just as NECA members did. Without a provision like this, the non-members could have free ridden on the negotiations. Judge Easterbrook's *Premier* decision recognized this free-rider issue but held that the antitrust laws encourage and protect this sort of free riding because it is akin to the free riding of a cheater on a cartel. 814 F.2d at 368-71. It is certainly true, as the court suggested, that the Fund could be a cartelization device if the revenues collected exceeded the negotiation costs and the excess was somehow rebated, but there was no indication that such was the case. It is also true that, as the court suggested, the Fund could have been used to raise the costs of non-NECA contractors and thereby lessen competition among contractors, but there was no indication that nonmembers paid more than members.

The sort of free riding in these cases is commonly addressed by government intervention. For example, under the authority granted by Agricultural Marketing Agreement Act of 1957, as amended, 7 U.S.C. § 608c(6)(I), the Department of Agriculture has organized thirty-six generic advertising and promotion programs. See NICHOLAS J. POWERS, U.S. DEPARTMENT OF AGRICULTURE, AGRICULTURAL ECONOMIC REPORT NO. 629, FEDERAL MARKETING ORDERS FOR FRUITS, VEGETABLES, NUTS, AND SPECIALTY CROPS 18-20 (1990). The constitutionality of several of these programs was upheld in *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997).

coordinate otherwise independent decision making on price or output.⁹⁴ Some information flow probably is inevitable in most joint ventures. To determine whether they are being fairly treated, participants in an input supply venture, for example, are likely to insist on having access to information on the quantities supplied to each participant. Information flow can also occur coincidentally through a joint venture, when participants' necessary conversations related to the venture stray into other areas, or "spillover."⁹⁵

Many details of a joint venture, its participants, and the nature of competition in the relevant market affect the nature and extent of the loss of independent decision making, so case-by-case assessments are essential. Governance structure is critical for many joint ventures: a production joint venture involves no significant loss of independent decision making if individual participants can unilaterally control the amount of production on their behalf, but a substantial loss of independent decision making if competitor participants must concur. As a general rule, purchasing joint ventures, input supply joint ventures, and R&D joint ventures are likely to involve relatively little loss of independent decision making. This is certainly so for ventures with no way to pay out monopoly profits to participants, that do not directly restrain pricing and output decisions by participants, and that do not give rise to significant information spillovers. Selling joint ventures and final product joint ventures are likely to involve relatively more loss of independent decision making, since it was assumed at the outset that a joint venture's participants are actual or potential competitors absent the joint venture.

No measure of market share for a joint venture is indicative of the extent of the loss of independent decision making resulting from the venture. A joint venture encompassing all actual and potential competi-

⁹⁴ The classic problem of a cartel is cheating, which is normally highly profitable if not easily detected. See George J. Stigler, *A Theory of Oligopoly*, 72 J. POL. ECON. 44 (1964). Exchange of information on prices, quantities, or customers served can be enormously useful in detecting cheating. For essentially this reason, information exchanges may violate the antitrust laws. See *United States v. Container Corp. of Am.*, 393 U.S. 333, 337 (1969) (finding unlawful an exchange of price information that "had an anticompetitive effect in the industry, chilling the vigor of price competition"). While the exchange of information concerns the antitrust laws, it is the information itself, without regard to its source, that produces the anticompetitive effect. A recent study concludes that the Danish government produced a significant anticompetitive effect by publishing price data for concrete. Svend Albæk et al., *Government-Assisted Oligopoly Coordination? A Concrete Case*, 45 J. INDUS. ECON. 429 (1997).

⁹⁵ The most competitively worrisome information exchanges are likely to be clearly non-ancillary, as when a joint venture requires participants in an input supply venture to exchange final product prices.

tors in a market may entail only the most trivial loss of independent decision making. For example, an input supply venture serving an entire industry might eliminate independent decision making only on the choice of upstream raw materials suppliers. Thus, there is no relevant market in which a large market share is indicative of a significant competitive problem. Nevertheless, when a joint venture does result in a significant loss of independent decision making, the potential competitive effect of that loss is likely to be closely related to the aggregate market shares of the venture's participants in relevant markets. Consequently, a joint venture and its ancillary restraints may become anticompetitive only if the venture is overly inclusive. The appropriate remedy in such a case is likely to be reducing the scope of the joint venture rather than enjoining its collateral restraints.

A small aggregate market share for joint venture participants in the relevant upstream and downstream markets is necessarily indicative of a limited potential for a venture to suppress competition. For this reason, it would make sense to employ safe harbors based on market shares for joint ventures not subject either to the *per se* rule or a quick look. But the utility of market share safe harbors is limited, because determining market shares is apt to be difficult and time consuming.⁹⁶

A joint venture and its ancillary restraints can reduce competition and therefore violate the antitrust laws. It is notable, however, that joint ventures that have run afoul of the antitrust laws in the past have been analyzed as cartels or mergers, or have imposed non-ancillary restraints. There appears to be no reported case in which a joint venture not treated as a cartel or merger was dissolved by court order following an antitrust challenge. Indeed, quite the reverse occurred in the well-known *Aspen Skiing* case,⁹⁷ in which the principal conduct held to violate the Sherman Act was the dissolution of a joint venture offering combined lift tickets for the four mountains controlled by the two competing ski companies in Aspen.

B. ACCESS TO COMPETITOR JOINT VENTURES⁹⁸

If a joint venture's participants compete with nonparticipants in markets vertically related to the market in which the venture operates, limit-

ing access to the venture can affect competition between participants and nonparticipants.⁹⁹ For example, if the joint venture provides an input important to downstream competition, the denial of that input to rivals could raise their costs, reduce their product quality, or entirely exclude them from the market. Useful illustrations are provided by leading Supreme Court cases—*Terminal Railroad*¹⁰⁰ and *Associated Press*.¹⁰¹

In 1889 Jay Gould and fourteen railroads serving St. Louis formed the Terminal Railroad Association for the purpose of acquiring various independent terminal facilities and the only existing railroad bridge in St. Louis. There remained ferry companies, and the following year another railroad bridge was constructed. After the Association gained control of the new bridge and the largest ferry company,¹⁰² the government brought suit under the Sherman Act to dissolve the Association.¹⁰³ The government appears not to have argued that rivals were being excluded or disadvantaged, nor was there any evidence of exclusion,¹⁰⁴ but the Court emphasized that nonmember railroads served the city, and there was power to exclude them.¹⁰⁵ The Court was persuaded that it was efficient to unify control over terminal facilities and bridges,

S. Frankel, *The Antitrust Economics of Credit Card Networks*, 63 ANTITRUST L.J. 643 (1995); Dennis W. Carlton & Alan S. Frankel, *The Antitrust Economics of Credit Card Networks: Reply to Evans and Schmalensee Comment*, 63 ANTITRUST L.J. 903 (1995); Dennis W. Carlton & Steven C. Salop, *You Keep on Knocking But You Can't Come in: Evaluating Restrictions on Access to Input Joint Ventures*, 9 HARV. J.L. & TECH. 319 (1996); Chang et al., *supra* note 7; David S. Evans & Richard Schmalensee, *Economic Aspects of Payment Card Systems and Antitrust Policy Toward Joint Ventures*, 63 ANTITRUST L.J. 861 (1995); Herbert Hovenkamp, *Exclusive Joint Ventures and Antitrust Policy*, 1995 COLUM. BUS. L. REV. 1; Thomas A. Piraino, Jr., *The Antitrust Analysis of Network Joint Ventures*, 47 HASTINGS L.J. 5 (1995); William H. Pratt et al., *Refusals to Deal in the Context of Network Joint Ventures*, 52 BUS. LAW. 531 (1997).

⁹⁶ It was assumed at the outset of this article that participants in joint ventures were competitors. That assumption needs to be modified slightly in the context of access issues. What is relevant is whether those excluded from a joint venture compete with those included. It is possible that none of a joint venture's participants compete with one another, yet they do compete with other would-be participants.

⁹⁷ *United States v. Terminal R.R. Ass'n of St. Louis*, 224 U.S. 383 (1912).

⁹⁸ *Associated Press v. United States*, 326 U.S. 1 (1945).

⁹⁹ *Terminal Railroad*, 224 U.S. at 391-94. The relevant facts are presented in greater detail by David Reiffen & Andrew N. Kleit, *Terminal Railroad Revisited: Foreclosure of an Essential Facility or Simple Horizontal Monopoly?*, 33 J.L. & ECON. 419, 425-31 (1990).

¹⁰⁰ *Terminal Railroad*, 224 U.S. at 390, 409.

¹⁰¹ See Reiffen & Kleit, *supra* note 102. Reiffen and Kleit further argue that there was no reason for the Association to exclude rivals; it was a monopoly, and could act accordingly simply by charging monopoly prices. Their argument is correct as a proposition of economic theory, but its applicability to the real world is less clear. If the Association had no satisfactory means of paying monopoly profits out to its owners in a lump-sum form, simply setting monopoly prices for its services would not be its profit-maximizing strategy.

¹⁰² *Terminal Railroad*, 224 U.S. at 397-405.

⁹⁶ McFalls, *supra* note 86, opposes market-share safe harbors on these and other grounds.

⁹⁷ *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 589-91, 605-11 (1985).

⁹⁸ These issues have been the subject of intense debate in recent years. Leading contributions include: Donald I. Baker, *Compulsory Access to Network Joint Ventures Under the Sherman Act: Rules or Roulette?*, 1993 UTAH L. REV. 999; David A. Balto, *Access Demands to Payment Systems Joint Ventures*, 18 HARV. J.L. & PUB. POL'Y 623 (1995); Dennis W. Carlton & Alan

provided that all railroads participated in the joint venture.¹⁰⁶ Hence, the Court rejected the government's suggested relief and instead imposed a decree providing for both admission of other railroads to the Association and nondiscriminatory treatment for nonmembers.¹⁰⁷

At the time of the Supreme Court's decision, Associated Press (AP) was a cooperative with members accounting for 82.6 percent of daily newspaper circulation in the United States. AP's bylaws required members to publish AP news and furnish their news to AP, and they prohibited members from selling their news to anyone else. Admission to AP had for some time been subject to the veto of a competing newspaper, and the Court appears to have concluded that such was still the practical effect of revised membership rules.¹⁰⁸ Four justices had no difficulty in finding a Section 1 violation because the bylaws worked to confer on members "a competitive advantage over their rivals" and to "seriously to limit the opportunity of any new paper to enter."¹⁰⁹ Justice Frankfurter's critical fifth vote was predicated on the threat he perceived to a "public interest so essential to the vitality of our democratic government" because news was involved.¹¹⁰

In cases such as these, protecting competition in vertically related markets is not necessarily a sufficient rationale for mandating open access to a monopoly joint venture. Adding a second, vertically related monopoly would have no effect on downstream prices if the products of the two monopolies were used in fixed proportions.¹¹¹ Rather, the best case for mandating open access is that it can mitigate or eliminate the incentive of a concededly efficient monopoly joint venture to exercise its market power.¹¹² It is possible to realize all of the benefits flowing

¹⁰⁶ *Id.* at 405-06.

¹⁰⁷ *Id.* at 411-12.

¹⁰⁸ 326 U.S. 3-4, 8-11 & n.4.

¹⁰⁹ *Id.* at 13, 17.

¹¹⁰ *Id.* at 29.

¹¹¹ See, e.g., RICHARD A. POSNER, ANTITRUST LAW 173 (1976); Robert H. Bork, *Vertical Integration and the Sherman Act: The Legal History and Economic Misconception*, 22 CHI. L. REV. 157, 196-98 (1951). With variable proportions, forward integration by a monopolist is likely to raise final product price. See, e.g., Martin K. Perry, *Vertical Integration: Determinants and Effects*, in 1 HANDBOOK OF INDUSTRIAL ORGANIZATION 183, 191-92 (Richard Schmalensee & Robert D. Willig eds., 1989); FREDERICK R. WARREN-BOULTON, VERTICAL CONTROL OF MARKETS 91-107 (1978); Fred M. Westfield, *Vertical Integration: Does Product Price Rise or Fall?*, 71 AM. ECON. REV. 334 (1981). Vertical integration also can be used to evade price regulation.

¹¹² This may not be what he had in mind, but Learned Hand's majority district court opinion in *Associated Press* could be read to make precisely this point. (In the district court, the case was heard by a three-judge panel of circuit court judges under provisions of the since-repealed Expediting Act of 1903, ch. 544, 32 Stat. 823, § 1. The same panel later

from the joint venture's superior technical efficiency without any of the costs of monopoly flowing from the venture's monopoly price and output decisions. If it is properly structured to prevent the loss of participants' independent decision making, a joint venture owned and operated by its customers can be expected to act competitively and to promote competition among the participants.¹¹³ It is doubtful that the Supreme Court had this in mind in either *Terminal Railroad* or *Associated Press*, but the ultimate disposition of both cases is consistent with this philosophy.

The essential premise for mandating open access to a particular joint venture, therefore, is that society prefers that the joint venture be a monopoly. That was an explicit premise of *Terminal Railroad* and was at least implicit in *Associated Press*. But if competing joint ventures would be better than just one, mandating access probably makes matters worse by providing firms that would rather not compete with a tool to suppress their competition.¹¹⁴ Consequently, the antitrust laws should not mandate access unless it has first been determined that the usual presumption of antitrust¹¹⁵ is incorrect and a monopoly joint venture best serves the interests of society.¹¹⁶

A monopoly joint venture is most likely to be in the interest of society when the venture does not eliminate independent decision making on any significant competitive strategies. That is not likely to be the case

heard *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945), when the Supreme Court failed to reach a quorum.) Judge Hand was not concerned that open access would lead to monopoly. He reasoned that "if AP were open to all who wished the service, could pay for it and were fit to use it, it would no longer be a monopoly: a monopoly of all those interested in an activity is no monopoly at all, for no one is excluded and the essence of monopoly is exclusion." 52 F. Supp. 362, 374-75 (S.D.N.Y. 1943).

¹¹³ See note 87 *supra*.

¹¹⁴ Donald Baker has argued that the decree in *Associated Press* may well have led to the demise of competing organizations. Baker, *supra* note 98, at 1034-35, 1068-72. More recently, the antitrust laws may also have been responsible for the common ownership and control of the Visa and MasterCard networks and a consequent reduction in competition between the networks. See *id.* at 1057-60; Balto, *supra* note 98, 625-27. Visa (originally BankAmericard) and MasterCard began as exclusive networks. In 1971 a MasterCard bank challenged Visa's exclusivity, and the district court held that the exclusivity was a per se violation of § 1 of the Sherman Act. *Worthen Bank & Trust Co. v. National BankAmericard, Inc.*, 345 F. Supp. 1309 (E.D. Ark. 1972). The court of appeals reversed the per se characterization and remanded the case for trial under the rule of reason. 485 F.2d 119 (8th Cir. 1973). Thereupon, the case settled. All exclusivity bylaws were eliminated after a requested business review letter from the Department of Justice failed to provide an unqualified endorsement of the association's revised exclusivity bylaws.

¹¹⁵ The Supreme Court has suggested that the presumption is irreversible: "statutory policy precludes inquiry into the question whether competition is good or bad." *National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978).

¹¹⁶ It is also possible in some cases that mandating access would not tend to produce monopoly because joint ventures may serve significantly different purposes and compete only to a limited extent.

for joint ventures that perform R&D,¹¹⁷ develop and promote brands, or sell to anyone other than members and excluded would-be members. In all of these cases, there are quite conventional reasons to believe that competition is superior to monopoly. Hence, there should be no general rule of mandated open access in such cases.

There should also be no general rule of mandated open access when it is doubtful that competition can be materially enhanced by adding additional participants to a joint venture. There is no sound basis for mandating access to additional participants when a joint venture already has a very large number of competing participants not subject to restraints significantly limiting their independent decision making with respect to competitive strategies.¹¹⁸

Moreover, joint ventures may have sound reasons for excluding particular firms or classes of firms, including competitors. Much like human beings, some firms may just not get along with certain other firms. Forced marriage under such circumstances may significantly intensify the difficulties inherent in joint venture coordination¹¹⁹ and thus lessen a joint venture's ability to achieve its efficient ends. The antitrust laws normally would hope that firms have difficulty getting along with their competitors, so that they are unable to collude successfully. A policy of excluding competitors—even just competitors—from joint ventures, thus, should not be seen as especially suspect.¹²⁰

Open access is particularly likely to impede rather than promote competition when the access sought is to a brand. The value of the brand can be significantly reduced by the conduct of a single licensee. An antitrust claim based solely on a single firm's denial of a license to a

¹¹⁷ Because the benefits of an R&D effort may be partially captured by firms that do not participate in that effort, combining competitors in an R&D joint venture can increase the incentives to innovate and enhance economic welfare. See, e.g., Claude d'Aspermont & Alexis Jacquemin, *Cooperative and Noncooperative R&D in Duopoly with Spillovers*, 78 AM. ECON. REV. 1133 (1988); Morton I. Kamien et al., *Research Joint Ventures and R&D Cartels*, 82 AM. ECON. REV. 1293 (1992); Michael L. Katz, *An Analysis of Cooperative Research and Development*, 17 RAND J. ECON. 527 (1986); Janusz A. Ordover & Robert D. Willig, *Antitrust for High-Technology Industries: Assessing Research Joint Ventures and Mergers*, 18 J.L. & ECON. 311 (1986); Joanna Poyago-Theotoky, *Research Joint Ventures and Product Innovation: Some Welfare Aspects*, 5 ECON. INNOVATION & NEW TECH. 51 (1997). Yet economic analysis indicates that the socially optimal number of competing R&D ventures is likely to be more than one. See Morton I. Kamien & Israel Zang, *Competing Research Joint Ventures*, 2 J. ECON. & MGMT. STRATEGY 23 (1993).

¹¹⁸ In *SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958 (10th Cir. 1994), there were already more than 5,000 Visa members not subject to restraints on their price or output decisions.

¹¹⁹ See Chang et al., *supra* note 7, at 243-44, 246-49.

¹²⁰ This view is shared by Balto, *supra* note 98, at 663-66.

trademark would readily be dismissed,¹²¹ and that attitude should not be drastically altered when the trademark is the property of a joint venture.

There is also likely to be no satisfactory way in which to solve the access pricing problem. The simplest solution is to allow new participants to join on the same terms as the original participants, but this solution virtually assures that latecomers will free ride on founding members. Adding a latecomer fee carries the significant difficulty of determining that fee. More importantly, latecomers still would avoid having to pay for any joint ventures that did not succeed and that they, happily, never attempted to join. This too is free riding, and no fee for access can address the problem.¹²²

Perhaps most importantly, the primary incentive to invest in risky but potentially efficient joint ventures may be the prospect of a product or process innovation that will advantage the joint venture participants over their competitors. Any public policy that threatens to take away much of the benefit from successful innovation is bound to retard innovation, and innovation by a joint venture is no less deserving of consideration than innovation by a single firm. Even if joint venture access pricing could totally eliminate free riding, mandating open access could remove the incentive to invest in the joint venture in the first instance. It is irrelevant that the investment in a particular joint venture may already be sunk, and that the joint venture would not be dissolved if access were compelled. The issue is what is the best public policy toward joint ventures, and a policy of open access could significantly retard future investment.¹²³

The foregoing makes a strong case for limiting the circumstances in which access is mandated. A reasonable approach would be to require access to joint ventures only in circumstances in which access to the

¹²¹ That was precisely what occurred in *Valley Products Co. v. Landmark*, 128 F.3d 398, 404-05 (6th Cir. 1997). According to a leading authority on trademark law, "in no reported private antitrust litigation has a plaintiff received the sanction of compulsory trademark licensing." J. THOMAS MCCARTHY, 4 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 31:107, at 31-159 (4th ed. 1997). Trademark licensing has been agreed to as a remedy in government cases, *id.* at 31-160-63, although the antitrust violations remedied were not merely the refusal to license the trademarks.

¹²² At the formation of a joint venture, access pricing is not an issue. If a joint venture explicitly excludes some would-be participants at its formation, the venture should not be permitted to use access pricing issues in subsequent litigation as a basis for not granting relief.

¹²³ See, e.g., POSNER & EASTERBROOK, *supra* note 57, at 768-69; Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841, 851 (1990); Chang et al., *supra* note 7, at 266-67; Joseph Kattan, *Antitrust Analysis of Technology Joint Ventures: Allocative Efficiency and the Rewards of Innovation*, 61 ANTITRUST L.J. 937, 963 (1993).

property of a single firm would be required.¹²⁴ Mandating access to the property of a single firm makes the most sense when that property is a physical (or in this high-tech era, possibly virtual) facility that is a natural monopoly. Mandating access to intellectual property makes the least sense.¹²⁵ Both of these propositions are equally valid in the joint venture context.¹²⁶ In the joint venture context, mandating access also makes the most sense when the venture serves only its participants and similarly situated firms and is essentially invisible to consumers, and when there is minimal loss of independent decision making from the joint venture.¹²⁷

The ultimate issue in a joint venture access case is the likely impact on competition and consumers of a denial of access. Hence, the threshold market power inquiry must be into the effect of access denial on rivals.

¹²⁴ This view is shared by Baker, *supra* note 98, 1105-11; Chang et al., *supra* note 7, at 287-89; Kattan, *supra* note 123, at 963.

¹²⁵ For a detailed discussion of the essential facility doctrine and an argument in favor of a very narrow construction, see Gregory J. Werden, *The Law and Economics of the Essential Facility Doctrine*, 32 ST. LOUIS U. L.J. 433 (1987). For other useful recent treatments of the subject, see SA PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶¶ 772-74 (1996); Areeda, *supra* note 123; Kenneth L. Glazer & Abbott B. Lipaky, Jr., *Unilateral Refusals to Deal Under Section 2 of the Sherman Act*, 63 *ANTITRUST L.J.* 749 (1995).

¹²⁶ AREEDA & HOVENKAMP, *supra* note 125, ¶ 772a, argue that a variety of considerations suggest that mandating access is more likely to be appropriate in the case of joint ventures than in the case of single firms, but the distinctions drawn are not persuasive. They correctly argue that a price for access will already have been set for a joint venture but not for a single firm, but the price already set for the joint venture is unlikely to be appropriate for a latecomer. They argue that a need to ration limited capacity is less likely with a joint venture, but that is not true with respect to the physical facilities of joint ventures. They argue that mandated access is less likely to impair efficiencies with a joint venture, but mandated joint venture access may severely complicate already difficult coordination problems. They argue that "[c]ompelling admission on equal terms at the outset of a [joint venture] would chill only [ventures] designed to exclude or to impair rival's competitive vitality," but that is correct only if an odd definition of "exclusion" is employed. Any firm's incentive to innovate is largely the prospect of gains that could be made at the expense of rivals.

¹²⁷ The approach to joint venture access suggested here is equally applicable when access is sought not to the joint venture as such, but rather to the services it provides. Such is the issue in real estate multiple listing litigation. The typical factual setting is that access to multiple listing services is conditioned on membership to a local real estate association, for which dues must be paid that finance more than the multiple listing service. The cases have held that when denial of access to the multiple listing service inflicts a severe competitive handicap, the conditioning must be shown to be reasonably necessary. *Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d 1566 (11th Cir. 1991) (holding that the membership condition was overly restrictive); *Pope v. Mississippi Real Estate Comm'n*, 872 F.2d 127, 129-30 (5th Cir. 1989) (rejecting a challenge to the fee structure for membership); *Wells Real Estate, Inc. v. Greater Lowell Bd. of Realtors*, 850 F.2d 803 (1st Cir. 1988) (rejecting a *per se* tying claim based on a membership condition); *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351 (5th Cir. 1980) (holding that a membership condition was overly restrictive).

Although some cases have properly framed and addressed this issue,¹²⁸ the most prominent decision on this issue is muddled. *SCFC ILC, Inc. v. Visa USA, Inc.*¹²⁹ arose from an attempt by the owner of the Discover card to become a Visa card issuer. The court of appeals determined that the threshold issue therefore was market power because the rule of reason governed the case.¹³⁰ The plaintiff's economic expert witness argued that Visa (and MasterCard) issuers could exercise market power over credit card users collectively, through the making of association rules, and urged the court to assess market power by aggregating the shares of all Visa issuers (and all MasterCard issuers as well, because the two networks were owned by the same banks).¹³¹ The court rejected any aggregation of issuer shares because "the issuance of credit cards [was agreed] as the relevant market"¹³² and issuers actively competed with each other. Hence, the court looked to market shares for individual card issuers (mostly banks), which were relatively low.¹³³ The court's response to plaintiffs' argument should have been that the issue was not the market power of Visa issuers—individually or collectively—but rather whether membership was vital to effective competition, and market shares imply nothing about the importance of Visa membership. The Visa members might collectively possess significant market power for reasons unrelated to the importance of Visa membership.¹³⁴

IV. CONCLUSION

The term "joint venture" can reasonably be applied to competitor collaborations infinite in variety. Some joint ventures are highly efficient and not restrictive of competition, while others are cartels. A large class of joint ventures falls into neither category and has a wide range of possible competitive effects. Sorting out the facts of actual cases under

¹²⁸ See, e.g., *Realty Multi-List*, 629 F.2d at 1373 ("[T]he question before us is not whether [the multiple listing service] has a monopoly in the relevant market; rather, we must determine whether [the service] is of sufficient economic importance that exclusion results in the denial of the opportunity to compete effectively on equal terms.")

¹²⁹ 36 F.3d 958 (10th Cir. 1994).

¹³⁰ *Id.* at 962-66.

¹³¹ *Id.* at 967-68.

¹³² *Id.* at 967.

¹³³ *Id.* at 967-68.

¹³⁴ See *Evans & Schmalensee*, *supra* note 98, at 866-75. Even if several credit card networks were perfect substitutes from the standpoint of an issuer, a large group of issuers could account for all of the cards in each of the networks. This group could have considerable collective market power even if membership in any one network were unimportant to competition.

the rule of reason is apt to be difficult and subject to significant error. Antitrust enforcement with respect to joint ventures, therefore, is made more efficient through the use of a structured analysis employing presumptions and burden shifting.¹³⁵ This article presents such an approach to the antitrust analysis of competitor joint ventures which finds substantial support in the case law.

An economic integration test determines whether a joint venture could be a cartel and hence subject to *per se* condemnation. A joint venture is not a cartel if it entails a potentially efficiency-enhancing integration of economic activity among participants. This threshold is quite low; joint performance of any nontrivial business function is sufficient. Moreover, the economic integration test focuses on the fact of the integration rather than its effects; no demonstration of actual efficiencies is required.

An ancillarity test determines whether a joint venture's collateral restraints are analyzed separate and apart from the joint venture. Restraints producing a loss of independent decision making by participants with respect to competitive strategies are termed "ancillary" if reasonably necessary to the accomplishment of a venture's efficiency-enhancing purposes. Restraints on competition created by a joint venture also are treated as ancillary; otherwise, a joint venture could run afoul of the antitrust laws even though it enhances competition. Non-ancillary restraints are analyzed separately—as if there were no joint venture. A *per se* rule may apply to non-ancillary restraints of a joint venture, even if the venture entails a potentially efficiency-enhancing integration of economic activity among participants. When, however, a joint venture features the requisite integration, its formation and its ancillary restraints are analyzed as a package under the rule of reason.

¹³⁵ The significant problems created by the classic, unstructured rule of reason and some suggested remedies are insightfully discussed by Philip Areeda, *Antitrust Law as Industrial Policy: Should Judges and Juries Make It?*, in ANTITRUST, INNOVATION, AND COMPETITIVENESS 29 (Thomas M. Jorde & David J. Teece eds., 1992); and Frank H. Easterbrook, *Ignorance and Antitrust*, in ANTITRUST, INNOVATION, AND COMPETITIVENESS 119 (Thomas M. Jorde & David J. Teece eds., 1992). Among other things, Areeda notes: "Open-ended legal standards applied by juries under general instructions have the virtue of flexibility, but at the expense of quixotic results." Areeda, *supra*, at 42. Judge Easterbrook offers a more colorful and dire evaluation: "[N]o matter how well-intentioned the plaintiffs, no matter how astute the judges, the process of common law litigation is one of uncertainty. Until the last case is over, no one knows whether the practice can survive—indeed, no one knows whether its practitioners can survive (given the prospect of stupendous damages). Common law litigation is high-risk litigation. By the time the other shoe drops, the moment for this generation of products is past. Some other nation, with a legal system able to give quick and binding answers to tough questions, will take the baton. Antitrust must recognize this and adjust, or a system designed to promote consumers' welfare will inflict the wound of Amfortas." Easterbrook, *supra*, at 132.

A quick-look version of the rule of reason is applied to joint ventures and their ancillary restraints that eliminate independent decision making by participants over price, output, or any other strategy central to competition. When the quick look is applied, defendants must demonstrate a clear causal nexus between the restraints that eliminate independent decision making and significant social benefits that may derive from a joint venture's economic integration. Critically, a joint venture and its ancillary restraints are not subject to a quick look when the only competition restrained would not have occurred absent the joint venture.

A fuller rule of reason analysis is most unlikely to condemn a joint venture and its ancillary restraints when the requisite integration is present and those restraints do not eliminate independent decision making by participants over strategies central to competition. The brief treatment of the relevant inquiries issues above is commensurate with their relative importance. What is likely to matter the most is the basic mode of analysis applied.