U.S. DEVELOPMENTS

Three Tenors and the Section 1 Analytical Framework: A Continuum Drawn with Bright Lines

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THE D.C. CIRCUIT'S DECISION upholding the FTC's order in the *Three Tenors* case—*PolyGram Holding, Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2005)—addresses what is usually the threshold question facing collaborations among horizontal competitors: whether the proposed collaboration runs a risk of being condemned under Section 1 of the Sherman Act without inquiry into its actual competitive effects. *Three Tenors* affects this calculus in two ways. First, it reinforces the ongoing shift of the basic threshold inquiry away from asking if the restraint might be deemed "per se unlawful"—as conventional wisdom once held—toward a more nuanced determination of where the restraint falls on a "continuum," and whether it might be viewed as "obviously anticompetitive." Second, for those restraints that require affirmative "justification" in order to escape summary condemnation, the decision rejects *as a matter of law* the notion that they could ever be justified by the aim of preventing opportunistic behavior on the part of the venturers if the restraint operates "outside the venture." Both singly and in combination, these holdings create additional uncertainty for antitrust counselors and joint venturers in settings that extend beyond the facts of the *Three Tenors* case.

The Underlying Facts

The *Three Tenor* facts should by now be familiar to followers of antitrust developments. The Three Tenors are world-renowned opera singers who have performed together at several much-celebrated concerts. Three concerts were recorded and marketed: PolyGram distributed the first of them (3T1) in 1990, and Warner the second (3T2) in 1994. The first two recordings were each very successful. Moreover, as is apparently common in the record industry, success built upon itself: PolyGram took advantage of the publicity surrounding Warner's 3T2 launch to boost sales of 3T1 through price reductions and other measures. Both companies used subsequent Three Tenor concerts as occasions to promote their respective Three Tenors offerings, and the two albums remained among the best-selling classical CDs for several years.

In 1997, the Three Tenors scheduled a major concert in connection with the 1998 FIFA World Cup in Paris, and their producer offered the rights to produce a third concert album (3T3). Warner and PolyGram each perceived the costs and risks associated with the recording as sufficiently high that neither wanted to take on the project alone, but the companies agreed to collaborate on the project. Instead of opting to merge their business or establish a new joint venture entity, they signed a joint venture agreement. The essential terms provided that they would share equally the costs of producing 3T3 (including an $18 million advance to the producer) as well as the profits from 3T3 sales and from other future Three Tenors projects, such as boxed sets or a greatest hits album. The agreement prohibited the parties from releasing another Three Tenors recording outside the venture for four years but expressly provided that each company could continue to market its own previous Three Tenors recording.

After signing the venture agreement, the companies grew concerned that competition from 3T1 and 3T2 would jeopardize the success of the 3T3 launch. They also learned that, contrary to the producer's earlier assurances, the 3T3 concert repertoire would overlap substantially with the 3T1 and 3T2 repertoires. To maximize the prospect that the 3T3 launch would be successful, the companies agreed to suspend marketing activities for 3T1 and 3T2, including advertising and discounting campaigns, during a 10-week period around the 3T3 launch. These restrictions came to be known as the "moratorium."

The FTC's Approach

The FTC did not challenge the companies' initial agreement to market 3T3 jointly, but filed a complaint alleging that the moratorium agreement constituted unfair competition in violation of Section 5 of the FTC Act. Warner settled this claim by consenting to a prohibition against agreeing with competitors to fix prices or limit truthful, non-deceptive advertising or promotion of any audio or video product.[1] PolyGram, however, disputed the FTC's allegations, and the case was tried before an FTC Administrative Law Judge. After a week-long trial, the ALJ concluded that the moratorium was illegal because (a) it was not reasonably ancillary to

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the 3T3 venture and thus was a naked price-fixing agreement subject to per se condemnation, and (b) it also failed under a quick look rule of reason analysis because the proffered justification was illegitimate.

In a 61-page opinion authored by then-Chairman Muris, the FTC affirmed.[2] Resurrecting the analytical framework set out in *Mass. Board*,[3] the FTC explained that the moratorium was "inherently suspect" because the "anticompetitive nature of the agreement not to discount is obvious." It then explained that the companies' proffered competitive justification—that the moratorium eliminated potential free riding—went "far beyond the range of justifications that are cognizable under the antitrust laws" (Op. at 41) and amounted merely to an agreement to restrict competition from products outside the venture.[4] Under the *Mass. Board* standard, these conclusions were sufficient to hold the agreement unlawful under Section 1 (and thus Section 5) without any further analysis and, in particular, without defining any market or assessing the parties' positions therein. Op. at 50.

Nevertheless, the FTC went on to find that "harm to competition . . . is established as a matter of fact." Op. at 50. The FTC reached this conclusion without conducting any market analysis or finding any market power. Instead, it relied on the observed effects of PolyGram's aggressive marketing of 3T1 during Warner's 3T2 launch in 1994, which included discounted prices in many markets. In 1998, by contrast, despite separate plans formed by PolyGram and Warner prior to the moratorium agreement to promote and discount their prior Three Tenors recordings in conjunction with the 3T3 launch, both albums (3T1 and 3T2) were sold only at full price during the moratorium period. The FTC thus concluded that the moratorium worked to eliminate "actual price discounting" that had previously occurred. The FTC also concluded that, even if the free-riding justification were legally cognizable, it would have been rejected as a factual matter because 3T2, like many other new albums, had been launched successfully without the benefit of a similar moratorium, the free-riding justification was pretextual, and the moratorium was not reasonably ancillary to the underlying venture. Op. at 55–58.

The D.C. Circuit's Decision

PolyGram petitioned for review in the D.C. Circuit. Writing for a unanimous panel, Chief Judge Ginsburg—who also authored the court's landmark 2001 decision in the *Microsoft* case[5]—upheld the FTC order. The structure of the court's analysis is revealing.

PolyGram had argued against the FTC order in fairly conventional fashion. It first explained why the moratorium agreement should not be viewed as per se unlawful: it was reasonably related to the legitimate 3T3 venture and, moreover, was supported by plausible procompetitive justifications, especially its role in fostering cooperation among the venturers and preventing opportunistic "free riding" on the launch of 3T3. Once the rule of reason applied, PolyGram argued, the moratorium's legality should have been apparent because there was no evidence that it caused any actual anticompetitive effects in the United States.[6]

The court took a very different tack. It began by rejecting PolyGram's "dichotomous categorical approach" to Section 1 analysis under which (a) a restraint that is not per se unlawful is analyzed under the rule of reason, and (b) proof of "actual anticompetitive effect (or market power as a surrogate) is required in any Rule of Reason case." According to the court, this approach was inappropriately predicated on the "vestigial line separating *per se* analysis from the rule of reason." *PolyGram*, 416 F.3d at 36. Reviewing the Supreme Court cases that are regarded as having applied an intermediate "quick look" analysis to evaluate the legality of restraints—such as *NCAA*, *Indiana Federation of Dentists*, and *Cal. Dental*[7]—the court of appeals concluded that the Supreme Court had backed away from "reliance upon fixed categories and toward a continuum." *Id.* at 35. The "essential inquiry" thus does not focus on the "category to which a particular restraint should be assigned" but is a "more nuanced and case-specific inquiry"—in the words of *NCAA*, an "'enquiry meet for the case'"—directed at the ultimate question whether the restraint "'enhances competition.'" *Id.* (quoting *Cal. Dental*, 526 U.S. at 779–80, and *NCAA*, 468 U.S. at 104).

The court next concluded that the so-called *Mass. Board* analytic framework—at least as the FTC applied it to invalidate the moratorium—correctly ascertained whether the challenged restraint hindered competition.[8] Judge Ginsburg restated the applicable test as follows:

> If, based upon economic learning and the experience of the market, it is obvious that a restraint of trade likely impairs competition, then the restraint is presumed unlawful and, in order to avoid liability, the defendant must either identify some reason the restraint is unlikely to harm consumers or identify some competitive benefit that plausibly offsets the apparent or anticipated harm.

416 F.3d at 36. The court proceeded to agree with the FTC's conclusion that, analyzed through this lens, the moratorium was unlawful.

First, the court noted that the moratorium "in all likelihood had a deleterious effect upon consumers" absent an "explanation to the contrary." *Id.* at 37. The reason was simple: an agreement to "restrain price cutting and advertising with respect to products not part of the joint venture looks suspiciously like a naked price fixing agreement, which would ordinarily be condemned as per se unlawful." *Id.*

As a result, the moratorium's legality hinged on the "plausibility of the sole competitive justification" PolyGram proffered: maximizing the long-term profitability of all three concert albums and preventing either venturer from taking a "free ride" on the venture's promotional efforts. *Id.* at 37.[9] The court observed that this justification may appear to have "some force" at "first glance," but upon examination was legally invalid because it amounted to an agreement not to compete on products "outside the venture." *Id.* at 37–38. To illustrate this proposition, the court recited the FTC's hypothetical involving General Motors's launch of a new SUV. GM's vigorous advertising of its new model would surely benefit other SUV manufacturers, but no one (apparently) would think that GM could justify an agreement with its competitors to restrict their prices and advertising on competing SUVs by either sharing the profits on GM's new model with its competitors or launching the new model as a joint venture with one of them. *Id.* at 38. The court stated unequivocally that a "restraint cannot be justified on the ground that it increases the profitability of the enterprise that introduces the product." *Id.* And it implicitly rejected—but did not explicitly address—PolyGram's contention that the mere fact that the moratorium was reasonably "ancillary" to the legitimate 3T3 joint venture provided an ample justification warranting rule of reason treatment.[10]

Finally, having concluded that PolyGram failed to offer any valid "competitive justification" for the moratorium, the court held that it violated Section 5 of the FTC Act without considering whether "substantial evidence supported the FTC's conclusion that the restraint caused actual competitive harm." 416 F.3d at 38.

The Decision's Two Contributions to Joint Venture Analysis

The D.C. Circuit opinion has important implications for two distinct stages in the analysis of competitor collaborations under Section 1.[11] It first rejects the historical per se/rule of reason dichotomy in favor of a "continuum," in which collaborators must justify all restraints that are "obviously anticompetitive" before being able to defend them by demonstrating that the parties' lack of market power rules out any potential for anticompetitive market effects. Although the court's approach shares a close affinity with much of the Supreme Court's recent Section 1 jurisprudence, it can fairly be read as potentially expanding—in undefined ways bound to create new uncertainty—the breadth of practices that could be condemned without proof of actual anticompetitive effects. The uncertainty created by the court's "continuum" will be felt most acutely by venturers who simultaneously compete and cooperate and who thus choose to structure complicated relationships, individual aspects of which might be viewed with suspicion if taken out of context.

The court of appeals also adjusts the Section 1 analysis applicable to such collaborations in a second way, by ruling out the possibility that restraints on competition "outside the venture" can ever be justified based on a need to limit "free riding" or other opportunistic behavior that is alleged to threaten the success of the participants' procompetitive collaboration. This categorical approach—ironically adopting a bright line rule after rejecting such rules in favor of a broader Section 1 continuum—displaces the more flexible standard of the ancillary restraints doctrine and will create new challenges for parties that wish to collaborate effectively without sacrificing their corporate independence or ending all competition between them.

The D.C. Circuit's Section 1 Analytical Framework—Beyond the Per Se Rules?

The D.C. Circuit in *Three Tenors* squarely holds that the parties' burdens in a Section 1 case do not depend on whether the conduct at issue would be treated as illegal "per se." Rather, that analysis properly focuses on the root question posed by the Sherman Act: whether the "challenged restraint hinders competition." 416 F.3d at 36. In the court's view, that question is appropriately answered by applying the following framework:

- Step 1: If based on "economic learning and the experience of the market," a particular restraint "obvious[ly]" impairs competition, it will be "presumed unlawful" (without any need for the plaintiff to put forward evidence of its actual effects). *Id.*
- Step 2: To overcome this presumption, defendants may "either identify some reason the restraint is unlikely to harm consumers or identify some competitive benefit that plausibly offsets" the harm. *Id.* If they fail, the restraint violates Section 1, and there is no occasion to examine the actual competitive effects of the practice.
- Step 3: If plaintiffs do not satisfy Step 1, or defendants succeed at Step 2, the plaintiff must prove actual anticompetitive effects as in a traditional rule of reason case. Alternatively, defendants can avoid liability by demonstrating that their lack of market power (or other factors) make such effects impossible, but *only* if they successfully reach Step 3.

This basic framework is not unfamiliar. Antitrust counselors have long known that the lack of actual anticompetitive effects is no refuge for horizontal restraints that are deemed "per se unlawful." Substitute the words "per se unlawful" in Step 1 and the *Three Tenors* framework would describe the analysis applied in Section 1 horizontal restraints cases at least since the Supreme Court ruled in *BMI*[12] that defendants could escape automatic condemnation for conduct that appeared superficially to fall within a "per se nitch [sic]"[13] by articulating a plausible procompetitive justification.

Moreover, *Three Tenors* makes a strong case that it has not broken new ground by requiring an affirmative justification even for conduct that would not previously have been treated as per unlawful. As the court of appeals correctly points out, the Supreme Court's recent Section 1 jurisprudence—known collectively as the "quick-look" cases[14]—has evolved beyond the per se/rule of reason dichotomy to hold that certain conduct falling outside the reach of the per se rules nevertheless might be condemned without a "detailed market analysis" if the defendants fail to come forward with a procompetitive justification, or a "quick look" at their justification finds it to be invalid.[15] As *Cal. Dental* describes (without once mentioning the words "per se"), "quick-look analysis" is used when the "great likelihood of anticompetitive effects can easily be ascertained," in the sense that "an observer with even rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets."[16] The Supreme Court's "obvious anticompetitive effect" standard appears in substance identical to the trigger selected by the court of appeals in *Three Tenors*.[17]

Although the court of appeals' framework gives defendants the option of avoiding summary adjudication by identifying (in Step 2) "some reason the restraint is unlikely to harm consumers" (416 F.3d at 36),[18] this option does not allow them to argue that their lack of market power makes such harm impossible.[19] If the court of appeals's framework allowed parties to demonstrate that "the restraint is unlikely to harm consumers" by defining a relevant market and showing that they had no power therein, the court could not have ended its decision without addressing PolyGram's contention that 3T1 and 3T2 were but two albums among hundreds or thousands (depending on a market definition never decided in the case) in a hotly competitive industry. 416 F.3d at 38. Nor could it have stated so unequivocally that PolyGram's fate rested entirely on the plausibility of its free-riding justification—the "sole competitive justification" at issue in the case. *Id.* at 37. Instead, identifying "some reason the restraint is unlikely to harm consumers" appears to require defendants to offer a plausible reason why restraints *of the general type at issue*—in other words, restraints having a particular "nature"—are not likely to have anticompetitive effects no matter how much market power the participants possess. This too is a plausible interpretation of *Cal. Dental*, where the debate about competitive effects that precluded summary invalidation had nothing to do with defendants' degree of market power. In that case, the restraints could not be condemned summarily because the effect of restrictions of this sort—which were "designed to avoid false or deceptive advertising"—was ambiguous and they were imposed in professional context rather than in the "commercial world" where the competitive significance of unfettered price advertising is better understood.[20]

Three Tenors thus reminds us that firms that simultaneously collaborate and compete no longer can assume that they are safe from attack just because they lack market power and take care to avoid conduct that might be deemed "per se unlawful."[21] In other words, if a restraint is regarded as "obviously anticompetitive," the market power screen developed by *Rothery* and subsequent cases—and embodied in the 20 percent market share "safety zone" of the enforcement agencies' Competitor Collaboration Guidelines[22]—is not available until defendants successfully advance to Step 3 by meeting their initial burden of providing a procompetitive justification. So the question becomes: how far beyond the "per se" rules might courts roam in judging whether restraints are "obviously anticompetitive"?

The good news is that neither the factual context nor the rhetoric of the *Three Tenors* opinion provides any strong indication that this standard should be applied more broadly than the extant per se rules. The PolyGram-Warner moratorium—an explicit agreement between competitors to discontinue discounting and other promotional activities—was precisely the sort of agreement that courts traditionally have had no trouble treating as per se unlawful absent a valid procompetitive justification. And when the D.C. Circuit explained *why* the moratorium was "obviously anticompetitive," it spoke in the same terms used in cases applying the per se rules. In the court's view, the moratorium "in all likelihood" harmed consumers (absent PolyGram's plausible explanation to the contrary) because an agreement to restrain price cutting and advertising with respect to products not part of a joint venture "looks suspiciously like a naked price fixing agreement among competitors." 416 F.3d at 37.

The full brunt of the uncertainty will be felt by competitors who choose to collaborate as to some aspect of their business without sacrificing their corporate independence or eliminating all competition between them.

More generally, the court's standard for including conduct in the "obviously anticompetitive" class is closely in line with the Supreme Court's standard for applying a "quick look" mode of analysis: the practice's "close family resemblance" to "another practice that already stands convicted in the court of consumer welfare" based on economic learning and market experience. *Id.*[23] This standard is also difficult to distinguish from the way the Supreme Court has long described the content of the per se rules, which have always been regarded as sufficiently flexible to embrace new forms of conduct by analogy to other conduct already known to be pernicious and through the accretion of judicial experience with new types of business conduct.[24]

On the other hand, the difference between restraints that are "obviously anticompetitive" and those that have traditionally been viewed as "per se unlawful" cannot safely be written off as purely semantic. Although the Supreme Court in *Cal. Dental* observed that there often are not "bright lines" separating per se from rule of reason analysis,[25] the thrust of that case was a caution against expanding the use of a truncated analysis where the anticompetitive nature of the challenged restraint was not truly obvious. By contrast, *Three Tenors* goes out of its way to scratch out any remaining boundaries. After several decades of shrinkage in the reach of the per se rules as a result of courts taking greater care before condemning conduct as per se unlawful,[26] *Three Tenors*—like the FTC's original *Mass. Board* standard and Joel Klein's proposed "Step-Wise" approach before it[27]—raises the prospect of unpredictable further expansion in the scope of restraints that could be condemned automatically. The court of appeals' notion of a "continuum" seems necessarily to imply that courts may consider themselves free to roam at large in search of restraints they regard as "obviously anticompetitive."[28] If those courts misperceive that collaborators would not be burdened by the simple request for a "plausible justification," or if they approach the characterization issue with a presumption (implied by the rhetoric of *Three Tenors*) that venturers should be no-holds-barred rivals as to all matters not formally and completely brought within their venture, they might well apply the *Three Tenors* framework to new and uncharted categories of conduct.

During the years when the first incarnation of *Mass. Board* held sway, some observers were sharply critical of the FTC's "inherently suspect" label, which they regarded as having been applied in an "inherently elastic" manner to a "broad range of situations far outside the realm of per se or borderline per se conduct."[29] If the relative comfort of the known universe of per se rules—or the somewhat less developed scope of the "quick look" rubric as delimited by *Cal. Dental*—is supplanted by a regime in which courts (and enforcers) routinely believe that they "know obviously anticompetitive conduct when they see it,"[30] venturers and their counselors will have much to worry about. No matter how closely the court's standard ends up tracking the extant per se rules in application, the uncertainty created by a more malleable standard of "obvious anticompetitiveness" seems certain to cause mischief and ultimately to chill legitimate collaborative activity. Ironically, the FTC—the plaintiff in *Three Tenors*—has (along with the Department of Justice) recently urged the Supreme Court to consider precisely this evil in *Dagher*, where it has asked the Court to preserve the certainty provided by the present bright-line rule that activities within a venture must be considered under the rule of reason.[31]

The uncertainty that *Three Tenors* reinforces will be felt to varying degrees depending on the structure and scope of competitor collaborations. *Three Tenors* should not apply at all when parties form "fully integrated" joint ventures that extinguish all pre-existing competition between the venturers, because in such cases there are by definition no restraints on competition for "products not part of the venture." 416 F.3d at 37. Moreover, if the government prevails in its support of petitioners in *Dagher*, the Supreme Court may well preclude this kind of expansion of *Three Tenors*. The agencies have argued strenuously that the law of Section 1 should not require participants in legitimate ventures who no longer compete with one another to justify—under the ancillary restraints doctrine or otherwise—"every choice they make about what the venture does or how it is done. If so burdened, few, if any, joint venturers could survive the onslaught of antitrust attacks."[32]

By contrast, the full brunt of the uncertainty will be felt by competitors who choose to collaborate as to some aspect of their business without sacrificing their corporate independence or eliminating all competition between them. Such collaborations commonly entail fairly complex business relationships, with contractual provisions designed to establish efficient incentives for productive cooperation, prevent destructive opportunistic behavior, and provide clarity as to the permissible scope of the parties' freedom to engage in self-interested (i.e., competitive) conduct. It is not hard to see how courts applying the *Three Tenors* standard might misperceive such provisions as "obviously anticompetitive." Even if—unlike in *Three Tenors*—the parties' agreement does not explicitly limit price competition, isolated provisions may superficially appear to dampen competitive incentives for the good of the common enterprise, imply understandings as to geographic, customer, or product allocations, or otherwise seem suspicious. Venturers in this position may well be called upon to proffer a plausible competitive justification for each and every contractual provision that affects the parties' broader partly competitive, partly collaborative relationship. That requirement would not be so onerous if the venturers could count on defending their restraints by reference to the procompetitive potential of the venture itself, but if that justification is placed off limits—as the second part of the court's decision suggests—few ventures could survive such probing scrutiny.

When Can Venturers Act to Limit Opportunistic Behavior?—A Bright Line Rule Replaces the "Ancillary Restraints" Doctrine

When the court of appeals turned to its evaluation of whether PolyGram had put forward a "plausible procompetitive justification" for the moratorium, it fell into the trap of choosing between two equally unpalatable options. It perceived a choice between allowing venturers to claim a "free riding" justification for *any* restrictive agreement between them affecting competition outside their venture or, alternatively, rejecting such a justification in every case. The former choice would have been unwise because it would have allowed parties with small market shares to shelter any manner of anticompetitive arrangements from meaningful Section 1 scrutiny simply by entering a collaboration covering some small aspect of their business. The court thus chose the latter course: adopting a legal rule precluding venturers from relying on the procompetitive benefits expected to flow from their venture to justify any limitations on competition outside that venture.[33]

But the choice need not have been so sharply dichotomous. The court could instead have analyzed PolyGram's justification for the moratorium by asking a more basic question: Was the restraint (whether imposed on activities inside or outside the venture) plausibly aimed at making the 3T3 venture viable or improving its efficiency? Thinking about the issue in these terms would not have required much of a stretch. Although the court of appeals described PolyGram's "sole competitive justification" as rooted in the prevention of "free riding"[34] and did not even mention the ancillary restraints doctrine, PolyGram's brief couched this justification squarely in terms of the doctrine. The moratorium was "reasonably related," PolyGram argued, to promoting the success and efficiency of the 3T3 venture, and such ancillarity alone provided the requisite procompetitive justification.[35]

Courts have long understood that "free riding" and other forms of opportunistic behavior are problems that venturers may appropriately overcome though restrictions on their freedom to compete with the venture. As the D.C. Circuit explained in 1986—with Judge Ginsburg joining the panel majority:

> A free ride occurs when one party to an arrangement reaps benefits for which another party pays, though that transfer of wealth is not part of the agreement between them. The free ride can become a serious problem for a partnership or joint venture because the party that provides capital and services without receiving compensation has a strong incentive to provide less, thus rendering the common enterprise less effective.[36]

Opportunistic behavior may not always be a bona fide threat to the venture's success, but prior to *Three Tenors* antitrust counselors would have expected that—under the ancillary restraints doctrine—a restraint designed to prevent free riding would warrant rule of reason treatment if it was "reasonably related to the integration and reasonably necessary to achieve its procompetitive benefits."[37]

Importantly, moreover, the concepts of "reasonably related" and "reasonably necessary" have not previously been regarded as applying only when *all* competition outside the venture has been extinguished. To the contrary, as the Department of Justice and FTC have recently explained, a "classic example" of ancillary restraints are restrictions on "member conduct *outside of the joint venture*" among firms that have not "exited from" the venture markets and thus continue to compete.[38] Likewise, the seminal modern explication of the doctrine in *Rothery* applied the doctrine to contractual provisions that allowed independent moving companies to compete with the venture—Atlas's nationwide moving company network—but prevented them from doing so under their own names or using Atlas facilities or services.[39]

Had the court of appeals in *Three Tenors* rejected PolyGram's justification in ancillary restraints terms, the decision would not be particularly noteworthy. The FTC's ALJ had already concluded on the facts adduced at trial that the moratorium was *not* reasonably ancillary, because it "was not an integral part of the joint venture or reasonably necessary to market the joint venture product." Op. at 10.[40] And the well-developed factual record before the court of appeals contained plenty of facts supporting this conclusion. Not only did the parties' venture agreement expressly preserve competition with respect to 3T1 and 3T2, other circumstances—including that the moratorium was adopted after the companies learned that 3T3 would not contain much new material, that PolyGram's counsel acted to squelch the moratorium as soon as he learned of its existence, and that 3T2 had proven successful notwithstanding PolyGram's extensive use of discounting and advertising to promote 3T1 during the 3T2 launch—suggested that the moratorium on price competition to which the parties later agreed was not particularly central to their 3T3 collaboration.

Had it applied the ancillary restraints doctrine, moreover, the court could easily have answered the rhetorical question it posed in support of its bright line "outside the venture" rule. The court asked: If the moratorium could be justified, "[w]hy not an agreement by which PolyGram and Warner would eliminate advertising and price competition on all their records for a time . . . ?" 416 F.3d at 38. The answer is that the parties presumably could never hope to prove that such an agreement was reasonably related to (much less reasonably necessary to) the success of the 3T3 venture.

But the court of appeals ignored the ancillary restraints doctrine entirely, and instead went a major step farther. It interposed an additional, formalistic prerequisite for reliance on free riding justifications: that the restraint must apply to products "inside the venture." 416 F.3d at 38 (any argument that restraining competition from products "that were not part of the joint undertaking" is "'nothing less than a frontal assault on the basic policy of the Sherman Act'") (quoting *National Society of Professional Engineers*, 435 U.S. at 695). And the court erected an even more formidable barrier to reliance on the ancillarity of the restraint, holding that *even if* PolyGram could have demonstrated that restraining competition with the venture was *essential to the venture's success*—and thus seemingly four square within the scope of the doctrine—this would only prove that consumers would not be "genuinely benefitted by the new product." 416 F.3d at 38. In the court's view, such a justification should be treated no differently than claims by price fixers that their agreement increased firm profits and thus attracted new entrants to the market. *Id.* (citing *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980)).

Three Tenors's categorical approach alters the antitrust risk assessment for prospective venturers who, for their own good and sufficient business reasons, prefer not to extinguish all competition between them when they agree to collaborate in one area of their business. *Three Tenors* suggests that, once having made the choice to leave some amount of their competitive activities "outside the venture," they may not so much as lift a finger to limit the effects of opportunistic behavior by their co-venturer. There are numerous problems with that approach.

First, the court's reliance on a formalistic "inside/outside" distinction seems more likely to lead to new kinds of "characterization" disputes than to substantively correct antitrust outcomes. For example, is a law partner's agreement not to provide legal services other than through her law firm "inside" or "outside" the venture? If one views the firm's partnership agreement as covering all law practice, this restraint might appear to involve services that are "part of the joint undertaking." But, of course, the only services restrained by such an agreement are those that would be provided "*outside*" the law firm. Yet few would think such an agreement should be invalidated without regard to the law firm's market power. Applying an ancillary restraints analysis resolves this question with ease; indeed, law firms present a paradigm case.[41] Applying the *Three Tenors* standard leads to less obvious results; it would seem to invite inherently difficult line drawing based on often-metaphysical distinctions. And the underlying question would in any case be better answered by focusing on substantive relationships rather than matters of pure form.

This problem is not necessarily avoided by viewing the *Three Tenors* rule as applicable only to "limitations" on competition among venturers and not to outright prohibitions on such competition, as some commentators have suggested in response to the FTC's decision in the case.[42] The debate would merely shift to the issue of whether competition had been eliminated or merely limited. If a venture is structured to prevent all competition with the venture (or among venturers) in particular geographies, for some classes of customers but not others, at particular times of day (e.g., during working hours) but not others, or in specific product space, has competition been eliminated or merely limited? If the answer is that preserving *any* competition at all in a market is enough to invoke the bright-line rule, this approach would achieve clarity at the price of common sense: In the law firm example, why should a rule forbidding the practice of law outside the firm potentially be reasonably ancillary to the partnership, whereas a requirement that every attorney devote 95 percent of her professional effort to the firm—or 50 percent, or even one hour a month—could never be? Or a covenant that members who spend some of their time practicing "outside the firm" will not poach clients that might otherwise have chosen firm services?

Second, by invoking a bright-line inside/outside rule, the court of appeals rejects free riding as a justification in the only setting in which it is likely to be a real concern to venturers. If the product is "inside" the venture, presumably restraints aimed at preventing opportunistic behavior will be "justifiable" but will not be needed because there is no remaining competition. If the product is "outside," however, the court holds that a free-riding justification is entirely unavailing as a matter of law no matter what evidence defendants might put forward to demonstrate that such opportunism poses a serious threat to the venture.

Consider, for example, the difficulties that would have been posed by somewhat different facts in *Three Tenors* itself. If heavy promotion of 3T1 and 3T2 during the launch of 3T3 in fact would have had destructive effects on 3T3 and thus the entire future of the Three Tenors recording franchise—as PolyGram sought but failed to establish—is it so clear that those effects should be viewed as having too little nexus with the venture to warrant the kind of probing market analysis called for by the rule of reason? This problem is brought into sharper focus by considering whether the *Three Tenors* rule would have applied had only *one party's* product remained outside the venture. Suppose, for example, that Warner and PolyGram had collaborated when 3T2 was launched (instead of waiting for 3T3), perhaps because Warner—which marketed 3T1—had developed a relationship with the Three Tenors's manager but was too risk averse to launch the second album on its own. One could certainly understand PolyGram's concern about Warner acting opportunistically and thus exploiting PolyGram's investment primarily for Warner's own gain in the form of higher 3T1 sales. Yet would the rule of *Three Tenors* nevertheless preclude justifying any restraint on Warner's marketing of 3T1 in competition with the venture unless that album were formally rolled into the venture? Nothing in the *Three Tenors* decision suggests that such a justification would be any more legally valid in this setting.

Third, although the court takes solace in the observation that consumers will lose little if ventures fail because participants are no longer able to regulate their own opportunistic behavior, basing antitrust rules on this view flies in the face of the basic objective of antitrust law to rely on a competitive marketplace to direct behavior. Reconsider, for example, the FTC's SUV hypothetical—also recited by the court of appeals—under slightly modified facts: a venture between two automakers (let's say Volvo and Subaru) to introduce a new SUV into a hotly competitive market. We may assume (perhaps ignoring ties to larger manufacturers) that both firms' entire lines of SUVs would comprise at most a tiny sliver of the overall market. They hope to achieve success by combining attributes for which each is known—Volvo's reputation for safety and Subaru's strong four-wheel-drive heritage. But they have no interest in ceding to the other (or to a new venture company) their existing SUV (or other) products. They face a problem: voluminous studies tell both companies that the only hope they have of being successful is in achieving "buzz" when the new vehicle is launched. And the only way to accomplish that, these studies also show, is to stay "on message" by funneling 100 percent of their SUV-related promotional activity into the new vehicle during its launch period. (This assumption may appear less than plausible in the auto market, but it is not so hard to imagine for many products the success of which hinges on the attention they attract upon their initial launch.)

Under the *Three Tenors* opinion, what are these companies to do? If they believe that their research is correct, they will not invest in the new vehicle since they could only launch it under conditions that ensure its failure. And we have posited that neither is interested in an outright combination of their SUV businesses (which would in any event be less desirable from the perspective of competition).[43] The result will be that consumers are deprived of an innovation that the companies involved—with no power to force consumer choice—

think would be attractive. Who better than parties without market power—and the consumers whose interest they are seeking to attract—to judge whether the venture will succeed best by focusing efforts on the venture product to the exclusion of the parties' own independent activities?

Finally, why should antitrust rules overtly favor one form of business structure over another? If venturers combine their resources outright—through merger or otherwise—the antitrust laws give them complete latitude to coordinate in pursuit of competitive success by substituting Section 7 review for Section 1 scrutiny (assuming the *Dagher* case is reversed). Based on the FTC's discussion of the *Three Tenors* case, this surely would have been the outcome had Warner and PolyGram merged their Three Tenors assets and launched 3T3 from this platform.[44] Presumably the parties' internal business analyses of that new product would have turned out the same: the combined firm would have opted to increase overall sales of 3T3—and thus the buzz surrounding the entire Three Tenors catalog—by focusing their promotional activities (yes, including discounting) on 3T3 instead of 3T1 and 3T2. And this would have been entirely lawful. By outlawing restraints aimed at regulating opportunistic conduct by co-venturers, *Three Tenors* will push venturers hard—and for no obviously good reason—in the direction of complete integration. Yet we know that this structural option will often be suboptimal from an efficiency standpoint (because venturers without market power presumably would have chosen alternative paths had they been more efficient) and may well be affirmatively undesirable from a competitive standpoint.

How to Deal with the Risks Created or Confirmed by *Three Tenors*

Three Tenors may in time be narrowed to its core facts: (1) a venture formed between two head-to-head competitors that explicitly preserved competition between their extant products, followed by (2) an explicit price-fixing agreement entered when the venture product appeared too weak to succeed in the market. Even so narrowed, the case's reasoning warrants a careful reevaluation of the practical risks confronted by many forms of collaborative conduct. And if (as seems more likely) courts and private antitrust litigants view the court's decisional standard as having broader prescriptive force, parties considering collaborations with their competitors will in some situations have no choice but to alter their behavior.

They should consider taking at least the following steps:

1. First and foremost, think more carefully about the risks. Just as *Dagher* has (at least for the time being) caused venturers to fret over how their integrated ventures are operated on a day-to-day basis, *Three Tenors* highlights the importance of scrutinizing very carefully in advance how the venturers will interact with the venture and with each other once the venture is up and running.

2. If the contemplated venture will leave one or more parties with competitive activities that are not contributed to and made part of the venture, consider *at the outset* how unfettered competition from these activities will affect the venture's effectiveness and success. The *Three Tenors* facts, as much as the court's holding, illustrate why it is important to consider all possible scenarios at the beginning, before the "ill" effects of such competition cause problems later on but become harder to deal with, both commercially and as a matter of antitrust risk.

3. If potential activities by a venturer involving products left outside the venture might pose a problem, consider first whether the parties' business interests allow the venture to be expanded to encompass such activity, so that it can be regulated as part of the venture. There is a separate antitrust dimension to this assessment: Will expanding the venture increase the risks that its *formation* will trigger antitrust concerns under a Section 7 analysis.

Before rejecting the expansion option too quickly, think creatively about alternative ways of stretching the venture. For example, existing products might be wrapped into the venture but subject to a separate set of cost- and revenue-sharing formulae. Or they may be included for some purposes—sales and marketing, perhaps, so as to bring within the venture those functions that might bear most directly on the venture's success—but not others. Assuming there are bona fide business reasons for the structure that is chosen, there may be a variety of options that give the parties latitude to explain why restraints on unfettered competitive behavior as to those products are needed to make the venture work more effectively. At the very least, some ground might be gained simply by leaving out of the venture agreement a provision that explicitly places related products outside the venture.

4. If expansion of the venture is undesirable, but unfettered competition from the parties' existing or future separate products poses too great a threat for the venturers to leave unchecked, *Three Tenors* suggest that the risks associated with restraining that competition may be great. But there are some steps that may reduce those risks, perhaps significantly.

First, think carefully about what kinds of measures are needed to achieve the desired result. Can the venture's chances of success be increased through steps short of "marketing moratoria" or other agreements that sound like per se unlawful price fixing or market allocation? Consider whether positive incentives can be built into the venture agreement—in addition to the incentive flowing from a share of overall venture profits—that encourage each party to work for the venture's success in specific ways without restricting either party's freedom (if one chooses to exercise it) to compete heartily against the venture. Less overtly restrictive options will stand a better chance of being viewed as plausibly procompetitive or competitively benign—or at least less obviously anticompetitive. For example, compensating each venturer for the customer contacts made by its sales force during the launch period—over and above any other share of venture profits—would be a far cry from the outright moratorium ruled illegal in *Three Tenors*.[45]

Second, also consider carefully how to frame the justification. If there are benefits from limiting competition outside the venture that have independent force, justify them in those terms rather than based on the kind of "free-riding" rationale that *Three Tenors* rejects. It is usually far more effective to emphasize the positive rather than fearing the negative: be prepared to tell a story about how the venture will be *more effective* at bringing its benefits to consumers—building a successful brand, communicating product attributes, etc.—rather than expressing concern over profits lost to competition from the venturers. And by all means be prepared to back up this story with evidence that the proffered rationale is not a post hoc rationalization. As the FTC's analysis in *Three Tenors* indicates, the parties' justification may be viewed as pretextual if the explanation was concocted after the fact or if past experience suggests that restraints are not really necessary. The successful launch of 3T2 notwithstanding the explicit "free riding" by 3T1 led the FTC to view PolyGram's proferred justification with a jaundiced eye.

[1] Warner Communications Inc., FTC Docket No. C-4025 (Sept. 21, 2001), *available at* http://www.ftc.gov/os/caselist/c4025.htm.

[2] PolyGram Holding, Inc., FTC Docket No. 9298, 2003 WL 21770765 (July 21, 2003), *available at* http://www.ftc.gov/os/2003/07/PolyGramopinion.pdf.

[3] Massachusetts Bd. of Registration in Optometry, 110 F.T.C. 549 (1988).

[4] The FTC also analyzed the issue by asking whether the moratorium was "ancillary" to the venture's "production efficiencies." Op. at 47. The FTC concluded it was not, because the ancillary restraints doctrine has "consistently been limited" to restraints that "affect the joint venture at issue but not products outside its scope." *Id.* This reasoning is strikingly different from the FTC's description of the doctrine in the *Dagher* case. *See infra* notes 37 and 38 and accompanying text.

[5] United States v. Microsoft, 253 F.3d 34 (D.C. Cir. 2001).

[6] Brief for Petitioners, *PolyGram Holding, Inc. v. FTC*, No. 03-1293 (D.C. Cir. Apr. 9, 2004) at 19–20 [PolyGram Brief]. In its brief, PolyGram argued that there was no evidence of anticompetitive effects even on the prices of Three Tenors products themselves, and also that 3T1 and 3T2 were but "two of many products in the [otherwise undefined] relevant market." *Id.* at 52, 55.

[7] NCAA v. Board of Regents, 468 U.S. 85 (1984) (*NCAA*); FTC v. Ind. Fed'n of Dentists, 476 U.S. 447 (1967) (*IFD*); California Dental Ass'n v. FTC, 526 U.S. 756 (1999) (*Cal. Dental*).

[8] By contrast, the Sixth Circuit rejected the *Mass Bd.* analytic framework, although it ultimately affirmed the FTC's conclusions. *See* FTC v. Detroit Auto Dealers Ass'n, Inc., 955 F.2d 457, 472 (6th Cir. 1992) ("[W]e find some legal basis and support for [the FTC's] conclusions in an area that is murky and unclear."). The appellate court rebuffed the FTC's attempt to impose liability without any "demonstrated effect" on competition, found that "a Rule of Reason is the preferable analysis," and started its own evaluation by asking whether the FTC had "demonstrated 'actual detrimental effects' or 'the potential for genuine adverse effects on competition.'" *See id.* at 469–70.

[9] In fact, PolyGram's principal argument on appeal was that the moratorium was justified because it was reasonably ancillary to the 3T3 venture. PolyGram raised the concept of free riding in response to the FTC's reliance on *NCAA*; it contrasted PolyGram and Warner's concern about free riding with the sole purpose at issue in *NCAA* of "insulating the joint venture product from competition." PolyGram Br. at 36.

[10] *See* PolyGram Br. at 16–17.

[11] Although the FTC alleged a violation of Section 5 of the FTC Act, the court of appeals' decision sets forth rules fully applicable to Section 1. As both the FTC and the D.C. Circuit emphasized, the analysis of a "case such as this" under Section 1 and Section 5 would be substantively identical. 416 F.3d 29, 32 (D.C. Cir. 2005). Moreover, although the court of appeals did acknowledge that "'some deference'" is owed the FTC's "informed judgment that a particular commercial practice is to be condemned as 'unfair'" (*id.* at 33 (quoting *IFD*, 476 U.S. at 454)), its decision unqualifiedly "accepts" the legal framework adopted by the FTC as "follow[ing] from the caselaw" addressing Section 1 of the Sherman Act. *Id.* at 36.

[12] Broadcast Music, Inc. v. CBS, 441 U.S. 1, 19–20 (1979).

[13] U.S. Healthcare, Inc. v. Healthsource, Inc., 986 F.2d 589, 593 (1st Cir. 1993).

[14] *Cal. Dental*, 526 U.S. at 770 (referring to *NCAA* and *IFD*).

[15] *Id.*; *see also*, *e.g.*, *NCAA*, 468 U.S. at 109–10 & n.39 ("The essential point is that the rule of reason can sometimes be applied in the twinkling of an eye." (citation omitted)).

[16] *Cal. Dental*, 526 U.S. at 757.

[17] *Compare Cal. Dental*, 526 U.S. at 1617, *with Three Tenors*, 416 F.3d at 36 ("obvious" that restraints "likely impair competition"). There are other formulations of the standard for applying a "quick-look" approach. *IFD* upheld the FTC's condemnation of an insufficiently justified restraint where "no elaborate industry analysis [was] required to demonstrate the anticompetitive character of such an agreement." 476 U.S. at 459 (quoting Nat'l Soc'y of Prof'l Engineers v. United States, 435 U.S. 679, 692 (1978)). The federal enforcement agencies' Competitor Collaboration Guidelines cite *Cal. Dental* as support for the proposition that "overriding benefits" must be presented when "the likelihood of anticompetitive harm is evident from the nature of the agreement." U.S. Dep't of Justice & Federal Trade Comm'n, Antitrust Guidelines for Collaborations Among Competitors § 3.3 (2000) (Collaboration Guidelines).

[18] The court also described the FTC's *Mass. Board* test as allowing defendants to escape summary condemnation by showing that their restraint "in fact does not harm consumers." 416 F.3d at 36.

[19] Based on somewhat similar language in *Cal. Dental*, PolyGram argued unsuccessfully to the court of appeals that the Supreme Court's quick look cases are properly read as allowing defendants to avoid automatic condemnation by demonstrating that their lack of market power makes anticompetitive effects impossible. *See* PolyGram Br. at 41–43. PolyGram relied on the language in *Cal. Dental* explaining that "the plausibility of competing claims about the effects" of the restraint at issue might rule out abbreviated rule-of-reason analysis because those effects were not sufficiently "obvious." 526 U.S. at 778. It also cited the decision's note that a "theoretical claim of anticompetitive effects" cannot shift to defendants the burden of demonstrating procompetitive benefits unless the court has both "properly identified the theoretical basis for the anticompetitive effects and considered whether the effects *actually are anticompetitive*." *Id.* at 775 n.12 (emphasis added). What better "plausible competing claim" to rebut the "intuitively obvious inference of anticompetitive effects" (*id.* at 778, 781) than a demonstration that the parties lack market power? PolyGram also contended that each of the Supreme Court's "quick look" cases involved situations where actual anticompetitive effects (or at least market power) were present. PolyGram Reply Br. at 3–6.

[20] *Cal. Dental*, 526 U.S. at 771, 778.

[21] The ability to rely on these facts for antitrust comfort has been limited not only by the "quick look" doctrine but also by the trend toward proof of anticompetitive effects "directly" rather than via inferences drawn from market structure. *See* Collaboration Guidelines § 3.3 (citing *IFD*, 476 U.S. at 460–61). There is debate over the appropriateness of finding such effects absent any proof of the relevant market boundaries and the parties' power therein, without which one might question whether the "effects" were anticompetitive at all. *See generally* Andrew I. Gavil, *A Comment on the Seventh Circuit's* Republic Tobacco *Decision: On the Utility of "Direct Evidence of Anticompetitive Effects*,'" ANTITRUST, Spring 2005, at 59; David L. Meyer, *Direct Evidence of What?:* Republic Tobacco *and the Proper Use of "Direct Evidence" of Anticompetitive Effects*, ANTITRUST, Spring 2005, at 67. The FTC's opinion in *Three Tenors*, which addressed the supposed "anticompet-

itive effects" of the moratorium (Op. at 50–52), illustrates the pitfalls of finding anticompetitive effects in natural experiments devoid of market context. Who is to say that the temporary avoidance of price discounting effected by the moratorium was any more "anticompetitive" than an individual firm's decision that its brand was best served by a higher rather than lower price? If the market were all classical recordings, presumably the Three Tenors recordings as a whole would be competitively insignificant, and the only realistic explanation for the parties' conduct was that they were attempting to achieve commercial success by hook or by crook in that market, a seemingly procompetitive objective. If, on the other hand, one could view the Three Tenors as operating in a market unto themselves for at least some significant group of customers, a different conclusion might be valid.

[22] As the D.C. Circuit held in *Rothery*—with Judge Ginsburg joining the panel majority—"[a]nalysis might begin and end with the observation that Atlas and its agents command between 5.1 and 6% of the relevant market . . . . It is impossible to believe that an agreement to eliminate competition within a group of that size can produce any of the evils of monopoly." Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 217 (D.C. Cir. 1986) (citations and internal reference omitted). *See also, e.g.*, Valley Liquors, Inc. v. Renfield Importers, Ltd., 822 F.2d 656, 666 (7th Cir. 1987) (dismissing claims where defendant's market share was less than 3 percent and stating that a "20%°–25% market share or less does not constitute market power") (citations omitted). The agencies' Collaboration Guidelines include a "safety zone" for legitimate collaborations and ancillary restraints related thereto involving firms with combined market shares below 20 percent. *See* Guidelines § 4.2.

[23] *Compare with Cal. Dental*, 526 U.S. at 781.

[24] *See, e.g.*, Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 344 (1982) ("Once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable."); Los Angeles Mem'l Coliseum Comm'n v. National Football League, 726 F.2d 1381, 1387 (9th Cir. 1984) ("When judicial experience with a particular kind of restraint enables a court to predict with certainty that the rule of reason will condemn that restraint, the court will hold that the restraint is per se unlawful.") (citing United States v. Topco Assocs., 405 U.S. 596 (1972)).

Some conduct has been condemned as per se unlawful only after considerable evaluation by courts. *See, e.g.*, United States v. Capitol Serv., Inc., 756 F.2d 502, 503 (7th Cir. 1985) (noting debate as to whether certain movie distribution "split agreements" should be considered per se unlawful but concluding that per se treatment was appropriate). Indeed, *Three Tenors* aptly cites *BMI* and *Cal. Dental* for this very point: "it is only after considerable experience with certain business relationships that courts classify them as per se violations." *See* 416 F.3d at 37 (quoting *BMI*, 441 U.S. at 9).

[25] 526 U.S. at 779; *see also id.* at 780–81 (generally no "categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment").

[26] As the First Circuit has observed, the Court's "quick look" cases, such as *IFD* and *NCAA*, "actually contracted the per se rule by refusing to apply it to horizontal agreements that involved price and output fixing." *See* U.S. Healthcare, Inc. v. Healthsource, Inc., 986 F.2d 589, 593–95 (1st Cir. 1993).

[27] Joel I. Klein, *A "Stepwise" Approach for Analyzing Horizontal Agreements Will Provide a Much Needed Structure for Antitrust Review*, ANTITRUST, Spring 1990, at 41, 42.

[28] It is somewhat ironic that Judge Ginsburg has embraced an analysis that could expand the scope of conduct requiring affirmative justification. In a 1988 article, he argued that antitrust enforcement policy should be focused on, if not limited to, merger enforcement and criminal prosecution of hard core price fixing and other "clearly anticompetitive" conduct because of the high costs of uncertainty associated with other policies. *See* Douglas H. Ginsburg, *The Appropriate Role of the Antitrust Enforcement Agencies*, 9 CARDOZO L. REV. 1277, 1282–83 (1988) (if practice is not "so likely to be anti-competitive in the run of cases as to warrant per se condemnation, then the government should not be in court, enforcement under the rule of reason is simply too likely to inhibit pro-competitive and neutral business conduct to be justified even if one is highly confident that the particular facts of a case reveal an anti-competitive effect.").

[29] Joseph Kattan, *The Role of Efficiency Considerations in the Federal Trade Commission's Antitrust Analysis*, 64 ANTITRUST L.J. 613, 625 (1996).

[30] *Cf.* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (remarking about obscenity).

[31] The Supreme Court's pending review of *Dagher* seems unlikely to affect the *Three Tenors* case directly. *Dagher* involves restraints imposed with respect to products plainly *within* the parties' venture, and as to which the venturers no longer competed outside the venture. Although the Supreme Court's discussion of the application of Section 1 to joint venture analysis may have broad bearing, its holding need not upset *Three Tenors*' treatment of the obverse situation: the appropriate analysis of restraints on competition involving products intentionally left *outside* a venture. Indeed, in urging reversal of *Dagher*, the Department and FTC cite *Three Tenors* as illustrating the appropriate role of courts in demanding justifications for restraints on competition outside the venture. Brief for the United States as Amicus Curiae Supporting Petitioners, Texaco, Inc. v. Dagher, Nos. 04-805 & 04-814 (Sept. 2005), at 21 n.13 & 28 n.22 [DOJ/FTC *Dagher* Br.].

[32] DOJ/FTC *Dagher* Br. at 27.

[33] The debate in this magazine over the FTC's *Three Tenors* decision similarly drew sharply dichotomous battle lines, with one author characterizing the other's position as arguing for a rule that would require antitrust plaintiffs to prove actual anticompetitive effects for *all* limitations on "present competition between a parent and a JV," and then arguing for a rule that would instead summarily condemn all such limitations. *See* Ronald W. Davis, *Limitations on Competition and the Joint Venture Parents that Impose Them: A Fair and Balanced Look at* PolyGram, ANTITRUST, Spring 2004, at 56, 60, 62; William Kolasky & Richard Elliott, *The FTC's* Three Tenors *Decision: "Qual due fiore a un solo stello*," ANTITRUST, Spring 2004, at 50.

[34] 416 F.3d at 37 (in the court's words, the moratorium enhanced the sales of 3T3 and thus made subsequent collaborative products—such as a "greatest hits" album—more likely by preventing each venturer from opportunistically taking advantage of promotions surrounding 3T3 to grow sales of its own album at the expense of the new album).

[35] Polygram Br. at 16–17, 29.

[36] *Rothery*, 792 F.2d at 212–13.

[37] DOJ/FTC *Dagher* Br. at 23 (quoting Collaboration Guidelines § 3.2); *see also Rothery*, 792 F.2d at 228 (holding free-riding justification applicable to ancillary horizontal restraints). The enforcement agencies' distillation of the doctrine in *Dagher* masks some variation among courts in the precise formulation of the test. *Compare, e.g.*, SCFC ILC, Inc. v. Visa USA, Inc., 36 F.3d 958, 970 (10th Cir. 1994) (restraint must be "no broader than necessary to effectuate" objectives), *with* Fleer Corp. v. Topps Chewing Gum, Inc., 658 F.2d 139, 151 n.18 (3d Cir. 1981) (rejecting test of "whether the defendant displayed the least restrictive alternative" in favor of "whether the restriction actually implemented is 'fairly necessary' in the circumstances of the particular case").

[38] DOJ/FTC *Dagher* Br. at 25–26 & n.19 (emphasis added).

[39] *Rothery*, 792 F.2d at 213.

[40] The FTC (ironically in light of its position in *Dagher*), rejected this justification as a matter of law because 3T1 and 3T2 were outside the venture and thus restraints on them could never be reasonably ancillary. Op. at 47–48 ("the Commission has long recognized that restraints on activities 'outside the ambit of the joint venture' cannot be hidden under its cloak.").

[41] *See, e.g.*, Polk Bros. v. Forest City Enters., Inc. 776 F.2d 185, 190 (7th Cir. 1985) (using law firm partnership agreement to exemplify applicability of ancillary restraints doctrine).

[42] Davis, *supra* note 33, at 62.

[43] *See* Collaboration Guidelines § 1.3 ("most competitor collaboration preserve some form of competition . . . [which] may reduce competitive concerns" relative to outright merger).

[44] Op. at 42 n.56 ("Had this case involved a merger to create a single entity with rights to market all *Three Tenors* products, a different analysis would have been required . . . under the standards of Section 7").

[45] *Cf. Cal. Dental*, 526 U.S. at 773 (restrictions on false and deceptive advertising "are very far from a total ban on price or discount advertising").