CRITICAL ANALYSIS OF JOINT VENTURES WITH SPECIAL REFERENCE TO COMBINATIONS IN INDIA

INTERNSHIP PROJECT REPORT

SUBMITTED BY:
SRIJAN SINHA
HIDAYATULLAH NATIONAL LAW UNIVERSITY
RAIPUR, C.G.

UNDER THE GUIDANCE OF:
MR. VIJAY KUMAR SINGH
DEPUTY DIRECTOR (LAW)

COMPETITION COMMISSION OF INDIA
NEW DELHI

DECEMBER 2011
ACKNOWLEDGEMENT

On the completion of this paper, I would like to place on record my sincere gratitude towards all those people who have been instrumental in its making.

Firstly, I would like to thank Mr. Vijay Kumar Singh, Deputy Director (Law), for providing me with such an interesting topic to research and for helping me with the research and for always attending on all my queries and doubts regarding the same. Also, I would like to thank all the officers at CCI for their kind co-operation towards the fulfillment of my research paper.

I also owe sincere gratitude to the staff at library for always helping in the process of finding material and other sources for research. And last but not the least I thank my family and friends for supporting me throughout in my endeavors.

SRIJAN SINHA

30.12.2011
DISCLAIMER

This study report has been prepared by the author as an intern under the Internship Programme of the Competition Commission of India for academic purposes only. The views expressed in the report are personal to the intern and do not necessarily reflect the views of the Commission or its Hon’ble Members/Chairperson in any manner. This report is the intellectual property of the Competition Commission of India and the same or any part thereof may not be used in any manner, whatsoever, without express permission of the Competition Commission of India.

SRIJAN SINHA
# TABLE OF CONTENTS

1. **INTRODUCTION** ................................................................. 3

2. **JOINT VENTURES: A CONCEPT OVERVIEW** ...................... 4
   - 2.1 **NATURE OF JOINT VENTURES** .................................................. 4
   - 2.2 **TYPES OF JOINT VENTURES** ..................................................... 7
     - 2.2.1 **PARTNERSHIP** ................................................................. 8
     - 2.2.2 **CO-OPERATION AGREEMENT/STRATEGIC ALLIANCES** .......... 10
     - 2.2.3 **EQUITY/50:50 J** ............................................................... 11
   - 2.3 **UTILITIES OF JOINT VENTURES** .............................................. 12
     - 2.3.1 **LEVERAGING RESOURCES** ................................................ 12
     - 2.3.2 **EXPLOITING CAPABILITIES AND EXPERTISE** ....................... 13
     - 2.3.3 **SHARING LIABILITIES** ..................................................... 13
     - 2.3.4 **MARKET ACCESS** .......................................................... 13
     - 2.3.5 **FLEXIBLE BUSINESS DIVERSIFICATION** ............................ 14
   - 2.4 **NEED TO REGULATE JVs** .................................................... 14
     - 2.4.1 **COLLUSION** ................................................................. 14
     - 2.4.2 **LOSS OF POTENTIAL COMPETITORS** ................................. 14
     - 2.4.3 **MARKET ACCESS & PRICE DETERMINATION** ...................... 15

3. **TREATMENT OF JOINT VENTURES UNDER FOREIGN ANTI-TRUST LAWS** ............................................ 16
   - 3.1 **EUROPEAN COMMISSION ON MERGER REGULATION** .................. 16
Critical Analysis of Joint Ventures With Special Reference to Combinations in India

3.1.1 IS A JOINT VENTURE CONCENTRATIVE..................................................17
3.1.2 FULL FUNCTION JOINT VENTURE.........................................................17
3.1.3 JOINT CONTROL..................................................................................18

3.2 U.S.A. ANTI-TRUST LAWS.......................................................................21
3.2.1 SHERMAN ACT, 1890...........................................................................21
3.2.2 CLAYTON ACT SECTION 7...................................................................21
3.2.3 HART-SCOTT-RODINO (HSR) ACT, 1976............................................24
3.2.4 FEDERAL TRADE COMMISSION ACT, 1914......................................25
3.2.5 ANTI-TRUST GUIDELINES FOR COLLABORATION AMONG COMPETITORS....25

4. REGULATION OF JOINT VENTURES UNDER THE INDIAN COMPETITION
   (AMENDED) ACT, 2007.............................................................................27
4.1 ANTI-COMPETITIVE AGREEMENTS & JVs..............................................27
4.2 APPLICATION OF COMBINATION REGULATIONS TO JVs...............29
4.3 MAJOR ISSUES.......................................................................................36

5. CONCLUSION..........................................................................................38

6. BIBLIOGRAPHY.......................................................................................39

1. INTRODUCTION
The world is looking at India as an attractive investment destination with strategic advantages and lucrative commercial incentives. Over the past year, while numerous economies saw negative GDP growth rates, India posted a growth rate of over 6%. The Indian economy, while not significantly affected during the global recession, is preparing itself for another round of aggressive growth. The basis of these lofty expectations is strongly grounded in the vast pool of untapped skilled and unskilled human resources across most economic sectors in India. We have witnessed this through the tremendous growth experienced over the last 10 years in India, in sectors ranging from manufacturing to information technology and services industries. Beyond this, India offers a vast internal market for various products and services. It is therefore apparent that India has a lot to offer to anyone looking to do business here from both the producers’ and consumers’ perspectives. In making a decision to enter India, to benefit from the inherent advantages offered by an existing Indian partner in terms of market access, local knowledge or quick ramp-up, foreign investors and companies should seriously consider forming Joint Ventures with Indian businesses (hereinafter referred to as “JVs”).

There might be some uncertainty as to how Joint Ventures (JVs) should be dealt with under the Competition Act 2002. The problem lies in the term Joint Venture which captures a broad set of arrangements. The formation or operation of a Joint Venture could also lead to anti-competitive effects. The principle of appraisal of JVs could also be studied from the related legal provisions of other jurisdictions like United States of America or European Union, which have been suitably discussed, at appropriate place in this study.

This chapter: (1) briefly describes how joint ventures have been and are currently subject to the competition regime in the European Union (EU), to demonstrate that the definitional issue is not unique to India; and (2) identifies the lessons learned from the development of the EU’s competition laws with the view to the Indian competition regime being able to benefit and avoid some of the issues the EU has faced in the past.

2. **JOINT VENTURES: A CONCEPT OVERVIEW**
2.1 **Nature of Joint Ventures**

JV is not defined under the Act or the Companies Act, 1956. However, for the limited purposes of foreign direct investment, ‘Joint Venture’ (JV) means an Indian entity incorporated in accordance with the laws and regulations in India in whose capital a non-resident entity makes an investment.\(^1\)

Further, Hon’ble Supreme Court of India has held\(^2\):

“The expression "joint venture" is more frequently used in the United States. It connotes a legal entity in the nature of a partnership engaged in the joint undertaking of a particular transaction for mutual profit or an association of persons or companies jointly undertaking some commercial enterprise wherein all contribute assets and share risks. **It requires a community of interest in the performance of the subject matter, a right to direct and govern the policy in connection therewith, and duty, which may be altered by agreement, to share both in profit and losses**\(^3\). According to, a joint venture is an association of two or more persons to carry out a single business enterprise for profit\(^4\).

The following definition of 'joint venture' occurring in American Jurisprudence is relevant:

A joint venture is frequently defined as an association of two or more persons formed to carry out a single business enterprise for profit. More specifically, it is in association of persons with intent, by way of contract, express or implied, to engage in and carry out a single business venture for joint profit, for which purpose such persons combine their property, money, effects, skill, and knowledge, without creating a partnership, a corporation or other business entity, pursuant to an agreement that **there shall be a community of interest among the parties as to the purpose of the undertaking, and that each joint venturer must stand in the relation of principal, as well as agent, as to each of**

---

\(^1\)Consolidated FDI policy (circular 1 of 2011), at paragraph 2.1.23
\(^3\)Black's Law Dictionary; Sixth Edition, p. 839
\(^4\)Words and Phrases, Permanent Edition at P.117, Vol. 23
Joint ventures are, in general, governed by the same rules as partnerships. The relations of the parties to a joint venture and the nature of their association are so similar and closely akin to a partnership that their rights, duties, and liabilities are generally tested by rules which are closely analogous to and substantially the same, if not exactly the same as those which govern partnerships. Since the legal consequences of a joint venture are equivalent to those of a partnership, the courts freely apply partnership law to joint ventures when appropriate. In fact, it has been said that the trend in the law has been to blur the distinctions between a partnership and a joint venture, very little law being found applicable to one that does not apply to the other. Thus, the liability for torts of parties to a joint venture agreement is governed by the law applicable to partnerships⁶.

A joint venture is to be distinguished from a relationship of independent contractor, the latter being one who, exercising an independent employment, contracts to do work according to his own methods and without being subject to the control of his employer except as to the result of the work, while a joint venture is a special combination of two or more persons where, in some specific venture, a profit is jointly sought without any actual partnership or corporate designation⁷.

To the same effect is the definition in Corpus JurisSecundum:

"Joint venture," a term used interchangeably and synonymous with 'joint adventure', or coventure, has been defined as a special combination of two or more persons wherein some specific venture for profit is jointly sought without any actual partnership or corporate designation, or as an association of two or more persons to carry out a single business enterprise for profit or a special combination of persons undertaking jointly some specific adventure for profit, for which purpose they combine their property, money, effects, skill, and knowledge.... Among the acts or conduct which are indicative of a joint venture, no single one of which is controlling in determining whether a joint

---

⁶ Supra Note 2  
venture exists, are: (1) joint ownership and control of property; (2) sharing of expenses, profits and losses, and having and exercising some voice in determining division of net earnings; (3) community of control over, and active participation in, management and direction of business enterprise; (4) intention of parties, express or implied; and (5) fixing of salaries by joint agreement.\(^8\)

Black's Law Dictionary defines `joint venture' as:

“A business undertaking by two or more persons engaged in a single defined project. The necessary elements are: (1) an express or implied agreement; (2) a common purpose that the group intends to carry out; (3) shared profits and losses; and (4) each member's equal voice in controlling the project.”\(^9\)

Further, in a case, the following were outlined as the basic element of a joint venture under the U.S. law:

- an agreement between the parties manifesting some intent to be associated as joint ventures;
- each party contribute money, property, effort, knowledge or some other asset to a common undertaking;
- a joint property interest in the subject matter of the joint venture;
- a right of mutual control or management of the enterprise; and
- an agreement to share in the profits or losses of the venture.\(^{10}\)

Under the European competition law, a joint venture has been defined as an undertaking which is jointly controlled by two or more other undertakings. A distinction has been drawn between “concentrative” joint ventures and “cooperative” joint ventures. Concentrative joint ventures are described as those that bring about a lasting change in the structure of the undertakings concerned, while cooperative joint ventures are conceived for specific purpose, for

\(^8\)Corpus JurisSecundum (Vol. 48A pages 314-315) An authoritative legal encyclopedia that provides general background knowledge of the law with footnoted citation to relevant case law.
\(^9\) 7th Edition, page 843
\(^{10}\) Inter-City Tire and Auto Center, Inc. v. Uniroyal, Inc (701 F. Supp. 1120, 1989-2 Trade Cases P 68, 839)
instance, research and development, marketing, distribution, networking, and production.\textsuperscript{11}

2.2 Types of Joint Ventures

JVs may be either contractual or structural, or both. They may be broad based or narrowly defined. The main classifications of JVs are equity / corporate JV or contractual JV. An equity JV is an arrangement whereby a separate legal entity is created in accordance with the agreement of two or more parties. The parties undertake to provide money or other resources as their contribution to the assets or other capital of that legal entity. This structure is best suited to long-term, broad based JVs. The contractual JV might be used where the establishment of a separate legal entity is not needed or the creation of such a separate legal entity is not feasible. This agreement can be entered into in situations where the project involves a temporary task or a limited activity or is for a limited term\textsuperscript{12}.

The three most common structures employed to constitute a JV are\textsuperscript{13}:

- a partnership or any other unincorporated vehicle – contractual JV
- a cooperation agreement or a strategic alliance – contractual JV
- a company incorporated under the relevant laws (a separate juristic entity) – equity/corporate JV

2.2.1 Partnership

A Partnership is defined by the Indian Partnership Act, 1932, as “the relations between persons who have agreed to share profits of the business carried on by all are any of them acting for all”. This Definition gives three minimum requirements to constitute a Partnership, viz:

- There must be an agreement entered into orally or in writing by the persons who desire to form a Partnership,
- The object of the agreement must be to share the profits of business intended to be carried on by the Partnership, and

\textsuperscript{11}Commission Notice (98/C 66/01) p.101 para. 3 of the Introduction
\textsuperscript{13}Joint Ventures in India, April 2011, http://www.nishithdesai.com/Research2011/Paper/Join
t%20Ventures%20in%20India.pdf at p.6
• The business must be carried on by all the partners or any of them acting for all of them.  

A partnership is in many respects simpler than a company, and may perhaps be regarded as a halfway house between a corporate joint venture and a purely contractual arrangement. A partnership represents a relationship between persons who have agreed to share the profits of business carried on by all or any of them acting for all.

**Advantages of Partnership:**

- Easy to form
- Availability of larger resources
- Better decisions
- Flexibility in operations
- Sharing risks
- Protection of interest of each partner

**Disadvantages of Partnership:**

- Unlimited liability:
- Uncertain life:
- Lack of harmony
- Limited capital
- No transferability of share

A partnership JV or hybrid models are unincorporated forms of JV which represent the business relationship between the parties with a profit motive. This is reflected in the tax regime, whereby partners are separately assessed even though the profits are computed as if the partnership were a separate entity. This JV has inherent disadvantages including unlimited liability, limited capital, no separate identity etc. Whilst tax and commercial factors may sometimes lead to the use of such unincorporated vehicles, the majority of business ventures tend to use a corporate vehicle for establishing a JV, the share capital of which is divided between the parties to the JV. As a result, partnerships are not normally used for major businesses except by professionals such as solicitors and accountants or where there are specific

---

14 S.4 of The Indian Partnership Act, 1932
15 Simmons & Simmons, Joint Ventures & Shareholders, (Bloomsbury Professional Ltd., West Sussex, 2009) at p. 483
tax advantages.\

In 2008, the Limited Liability Partnership Act, 2008 (“LLP Act”) introduced limited liability partnerships in India. An LLP is a beneficial business vehicle as it provides the benefits of limited liability to its partners and allows its members the flexibility of organizing their internal structure as a partnership based on an agreement. At the same time a LLP has the basic features of a corporation including separate legal identity. The LLP Act permits the conversion of a partnership firm, a private company and an unlisted public company into an LLP, in accordance with specified rules. As a consequence of the conversion, all assets, interests, rights, privileges, liabilities and obligations of the firm or the company may be transferred to the resulting LLP and would continue to vest in such LLP. An LLP is a body corporate formed and incorporated under the LLP Act.Any contribution to the capital of a firm or a proprietary concern or any association of persons in India by a person resident outside India is subject to the approval of the Foreign Investment Promotion Board and RBI, which is granted on a case-by-case basis. This acts as another impediment to such structures, which is why a corporate entity is generally preferred from a structuring perspective. As per recent news reports, the government has permitted FDI into LLPs.

2.2.2 CO-OPERATION AGREEMENT/STRATEGIC ALLIANCES

The most basic form of association is to conclude a purely contractual arrangement like a cooperation agreement or a strategic alliance wherein the parties agree to collaborate as independent contractors rather than shareholders in a company or partners in a legal partnership. This type of agreement is ideal where the parties intend not to be bound by the formality and permanence of a corporate vehicle. Such alliances are highly functional constructs that allow companies to acquire products, technology & working capital to increase production capacity and improve productivity. Strategic alliances provide companies an opportunity to establish a de facto geographical presence and aid in accessing new markets, increase market penetration, sales & market share. Co-operation agreements or strategic alliances can be employed for the

---

18 Supra note 13
19Ramappa T., Competition Law in India, (Oxford India Paperbacks, New Delhi, 2009)
20See Press Note No.1 (2011 Series)
following types of different business activities which exist presently\(^{21}\):
- technology transfer agreements,
- joint product development,
- purchasing agreements\(^{22}\),
- production & distribution agreements\(^{23}\),
- marketing and promotional collaboration\(^{24}\), or
- research and development\(^{25}\).

In such a JV the rights, duties and obligations of the parties as between themselves and third parties and the duration of their legal relationship will be mutually agreed by the parties under the contract. The contract will be binding on the parties and breach of it will entitle the other party to seek legal recourse against the defaulter. Even though no corporate vehicle is involved and the parties to the agreement are not partners in a legal sense, it is possible for them to be exposed to claims and liabilities because of the activities of their co-participants on a contractual or quasi-contractual basis. Therefore, an indemnity should be included in the agreement under which one party will indemnify the other for any losses that are caused through the actions of the co-participants. Technology transfer agreements are the best examples of cooperation agreements\(^{26}\).


\(^{22}\)Joint buying collaborations, which involve agreements between competitors to buy inputs need for each firm’s production process could facilitate collusion because the information flow and transparency they make possible may allow the participants to coordinate their behavior in various anticompetitive ways. For example, joint purchasing could facilitate collusion because it becomes easier to monitor a participant’s output level through knowledge of its input purchases.

\(^{23}\)These collaboration often raise more serious anti-competitive concerns than other joint venture because they deal with the core elements of competition i.e. pricing and output decision.

\(^{24}\)Marketing joint ventures involve firms agreeing to jointly sell, distribute, or promote particular goods or services. A marketing joint venture can allow otherwise independent competitors to limit independent decision making and coordinate pricing and output decisions, divide territories or customers or combine assets in such a way as to undermine their incentives to compete independently. At the very least, the venture may allow its participants to engage in information exchanges about competitively sensitive topics, thereby facilitating collusion.

\(^{25}\)Generally R & D joint venture are pro-competitive, however, R&D collaborations do hold the potential for anti-competitive effects, such as limiting independent decision making and reducing innovation that could occur through competition.

\(^{26}\)ABA Section of Antitrust Law, Joint Venture: Antitrust Analysis of Collaborations Among competitors (2006), at p.7. (Although joint ventures “come in an infinite variety of structure and durations and forms and scopes,” there are six primary types of competitor collaborations: fully-integrated, research and development, production, marketing, purchasing and network joint ventures).
2.2.3 **EQUITY/CORPORATE JV**

Here the parties to the JV would hold shares in a company (“JV Co”), freshly incorporated or in existence under the Companies Act, 1956 and would subscribe to the shares of such company in an agreed proportion. The documents of incorporation, i.e. the Memorandum of Association and Articles of Association of the JV Co. would be suitably drafted so as to reflect the rights, intentions and obligations of the parties.\(^{27}\) This route is preferred since it allows structural flexibility in terms of creating an entity, which is tailor made to suit the specifications of both the parties. Further, the new investor can collaborate with the promoters of an existing company and convert the same to a JV Co.

Association and the Articles of Association of the company would be amended accordingly to incorporate the JV’s into it. The advantages of using a corporate vehicle are:

- it is a universally recognized medium which gives an independent legal identity to the JV
- it puts in place a better management and employee structure
- the participants have the benefit of limited liability and the flexibility to raise finance
- the company will survive as the same entity despite a change in its ownership

The three most common types of joint venture companies may be described as follows:

- **Transfer of business or technology by one party and share subscription by the other:** Parties to the JV, (individuals or companies), one of them non-resident or both residents, incorporate a company under the relevant laws. One of the parties transfers its business or technology to the newly incorporated company in lieu of shares issued by the company. The other party subscribes to the shares of the company for cash consideration.

- **Parties subscribe to shares on agreed terms:** Parties to the JV incorporate a new company and subscribe to the shares of the company in mutually agreed proportion and terms, and commence a new business.

---

\(^{27}\)Woolich Anthony, Joint Ventures in the European Union, (Tottle publishing, West Sussex, 2008)
Collaboration with the promoters of an existing company: Promoters of an existing company and third parties (individuals or companies), one of them non-resident or both residents, collaborate to jointly carry on the business of that company and its shares are taken by the said third party as agreed between the parties.

2.3 Utilities of Joint Ventures

The reasons and motivations for establishing a joint venture will of course differ in each individual case. However, generally speaking, a joint venture will be established between companies or individuals who each lack one or more of the resources necessary to establish and carry on a new business, or develop an existing business, but by pooling their resources are able to do so. Some of the main stumbling blocks for Indian companies in achieving expected levels of global presence could be deficiencies in terms of product quality, technology, infrastructure and even management processes. These deficiencies could benegated by way of an alliance with a foreign counterpart being a strategic fit. Alliances between those possessing varying expertise and capabilities in technology, marketing and distribution, etc. are necessary to meet the growing needs of modern business. Some of the reasons for entering into Joint Venture are as follows:

2.3.1 Leveraging Resources

Modern business revolves around the concept of economies of scale and the canvas has evolved by leaps and bounds. Today, business commitments are far too large to be executed by a single company because from a wider perspective, the conduct of many businesses mandates a huge pool of resources extending from massive financial backup to plenty of skilled manpower. Cross-border business projects are all the more demanding and the best solution is to either outright acquire or share them by entering into JV. Co-operation is a great way of reducing manufacturing costs or other overheads by achieving economies of scale. The best example is sharing of technology between companies.

2.3.2 Sharing Capabilities, Expertise and Liabilities

---

28 Simmons & Simmons, “Joint Ventures & Shareholders”, 3rd Ed, Bloomsbury Professional Ltd., West Sussex, 2009 at p. 4

29 Economies of scale give big companies access to a larger market by allowing them to operate with greater geographical reach
Parties to a JV may have complementary skills or resources to contribute to the JV; or parties may have experience in different industries which it is hoped will produce synergistic benefits. The basic tenet of a JV is the sharing of capabilities, expertise and liabilities of both the partners on mutually agreed terms. Such sharing grants a competitive advantage to the JV partners over other players in the market.\(^7\)

### 2.3.3 Market Access

JVs are the most efficient mode of gaining better market access. Companies utilize JV agreements to expand their business into other geographic markets and also into other product markets. The capabilities of both the partners are channelized to reap maximum benefits out of the new markets. For instance, in India, certain market sectors remain restricted for foreign investment and a local partner with a certain shareholding in the company is a regulatory necessity for commencing business and making investments\(^{30}\).

### 2.3.4 Flexible Business Diversification

JVs offer many flexible business diversification opportunities to the partners. A JV may be set up, as a prelude to a full merger or only for part of the business. It offers a creative way for companies to exit from non-core businesses. Companies can also resort to JV as a method to gradually separate a business from the rest of the organization and eventually, sell it off. In certain circumstances, JVs may be set up with strategic investors in the process of entering a new market so as to provide the foreign participant local infrastructure and guidance with a view to taking up independent operations in the future. In this situation, the foreign participant may choose to acquire the local participant’s interest once the venture is up and running. This can be highly beneficial to both parties as the foreign party is able to establish itself in the local market while the local party gets a liquid exit\(^{31}\).

### 2.4 Need to Regulate JVs

---

\(^{30}\)ABA Section of Antitrust Law, Joint Ventures: Antitrust Analysis of Collaborations Among Competitors, (2006)

At the same time as regards formation of JVs among companies, compared to a single firm, the organization of a JV is more complex. The central authority is not in one person and is always divided among two or more persons. This can lead to deadlocks in decision making. There are certain anti-competitive risks that could also result from the formation of a JV. Some of the risks involved are as follows:

2.4.1 **COLLUSION**

A JV may intensify the risk of collusion among the parents if they are competitors or potential competitors. Direct collusion occurs when the operation of the joint venture enables the parents to regulate their individual outputs jointly. The JV may also require close cooperation among the parent firms for its day to day working. Primestar Partners, L.P. (“Primestar”) joint venture illustrates how a Joint Venture can be viewed as creating anti-competitive collusion amongst competitors.

2.4.2 **LOSS OF POTENTIAL COMPETITION**

A Joint venture may also intensify anticompetitive risk by reducing potential competition, either between the parents or between the parents and the joint venture.

2.4.2 **MARKET ACCESS AND PRICE DISCRIMINATION**

Joint venture may also injure competition by excluding or hampering outside firms from access to the market which is an essential requirement of the competition. This will most likely occur when competitors with market power form a marketing or input supply Joint Venture and the Joint Venture has natural monopoly characteristics. The Joint Venture’s ability to deprive a rival of access to a scarce input may also be used by parent firms operating in a cartel-like fashion.

From the above, Joint Ventures may be used as price fixing, quota fixing market sharing or co-ordination of other competitively sensitive policies of otherwise independent parties.

3 **TREATMENT OF JOINT VENTURES UNDER FOREIGN ANTI-TRUST**

---


33 United States v. Primestar Partners, L.P., 1994-1 Trade Cas. (CCH) Para 70, 562 (S.D.N.Y. Apr. 4, 1994). In 1993, the DOJ filed a civil anti-trust suit against Primestar, its ten member companies, and their parent companies alleging they blocked other firms from entering the Direct Broadcast Satellite (DBS) business.

34 Joseph F. Brodley, *Antitrust and Joint Ventures*, 95 Harv. L. Rev. 1521
3.1 **European Commission on Merger Regulation**

European Union merger law is a part of the law of the European Union which regulates whether firms can merge with one another and under what conditions. It is part of competition law and is designed to ensure that firms do not acquire such a degree of market power on the free market so as to harm the interests of consumers, the economy and society as a whole.\(^{35}\)

Mergers and acquisitions are regulated by competition laws because they may concentrate economic power in the hands of a smaller number of parties. Oversight by the European Union has been enacted under Merger Regulation 139/2004, known as the "ECMR".\(^{36}\) The law requires that firms proposing to merge apply for prior approval from the Commission; a specifically merger that transcend national borders and with an annual turnover of the combined business exceeds a worldwide turnover of over EUR 5000 million and Community-wide turnover of over EUR 250 million must notify and be examined by the European Commission. Merger regulation thus involves predicting potential market conditions which would pertain after the merger. The standard set by the law is whether a combination would "significantly impede effective competition... in particular as a result of the creation or strengthening of a dominant position...".\(^{37}\)

The European Commission’s analysis of joint ventures has different approaches towards the joint ventures regarded as “full function”, which are assessed under the EC Merger Regulation (139/2004) if the relevant turnover thresholds are exceeded and those regarded as ‘non-full function’ or ‘partial function’ which are under Article 101 of TFEU (Treaty on the Functioning of European Union).\(^{38}\) The assessment of full-function joint ventures under the ECMR (139/2004) concerns the structural arrangements affecting the joint control of a single enterprise while the assessment of joint ventures that are non-full-function under Article 101 of TFEU concernsthe objects and effects of behavioral relationships between independent parties. For

---


joint ventures to fall within the EC Merger Regulation (139/2004) it must:

- be concentrative and
- satisfy the relevant turnover thresholds.

3.1.1 Is a Joint Venture Concentrative?

Not all joint ventures will constitute a concentration for the purposes of the ECMR (139/2004).

Article 3(4) of ECMR(139/2004) provides that:

“the creation of a joint venture performing onlasting basis all the functions of an autonomous economic entity shall constitute a concentration within the meaning of paragraph 1(b) of Article 3”,

which further provides that:

“A concentration shall be deemed to arise where a change of control on a lasting basis results from: the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings.”

Full-Function Joint Venture

The joint venture constituting a concentration must act as an independent supplier and buyer in the market. If it deals only with its parents or is substantially dependent on them for the development of its business, it will lack the autonomy required of a concentration. The joint venture must be intended and able to carry out its activities for an unlimited or at least a sufficiently long time so as to bring about a long-term change in the structures of the market concerned.  

The joint venture must also have its own independent management and have sufficient assets to operate independently. The joint venture must be autonomous in planning, deciding upon and implementing its own commercial policy. In the case of Pasteur-Merieux/Merck, for

---

39 In Case of Banco/Santander/BT, three years was held insufficient. A seven year term was accepted in Case of GoAhead/VIA/Thameslink.
example joint venture was deemed not to be concentrative because it was not in a position to make autonomous decisions relating to key areas of its business.

The following conditions must to be met to define full function joint venture:

- existence of joint control;
- availability of sufficient resources, assets, and financial resources to operate its business autonomously;
- existence for a sufficiently long duration as to bring about a lasting change in the structure of the market concerned.

A full-function joint venture constituting a concentration will only fall under the scrutiny of the Merger Regulation if:

(i) it has a ‘Community dimension’ in terms of Article 1 of ECMR (139/2004)

(ii) it involves the acquisition of ‘joint control’ by two or more undertakings on a lasting basis

3.1.2 Joint Control

The European Commission will find joint control where two or more undertakings or personshave the possibility of exercising decisive influence over the joint venture. Joint control can arise though equality of shareholdings or voting rights, or equality in respect of appointments to the board, provided that the other terms of the arrangement are consistent with the principle of equality between the parent companies. The mere existence of a casting vote will not necessarily preclude joint control if it is available essentially only as a last resort. It is irrelevant to the concept of the joint control that on shareholder has more than a 50 percent interest in the share capital of the joint venture. Control may also arise through the ability to block strategic decisions by exercise of a right of veto. The types of veto rights which are commonly considered to give rise to joint control are in respect of:

41 See Commission Consolidated Jurisdictional Notice (footnote 6) para 62
42 See for example, British Telecom/Banco Santander Case.
• budget
• appointment of key officers and management
• business plan and
• Control over major investments.

When there is a question to determine that whether there is a joint control or not then each case must be assessed on its facts. So a “Full-Function Joint Venture” constituting a concentration with a community dimension must be notified to the of DG Competition, European Commission prior to implementation, for its appraisal in terms of Article 2 of ECMR (139/2004).

Moreover, in the terms of Article 2(4) and 2(5) of ECMR (139/2004)

“4. To the extent that the creation of a joint venture constituting a concentration pursuant to Article 3 has as its object or effect the coordination of the competitive behavior of undertakings that remain independent, such coordination shall be appraised in accordance with the criteria of Article 81(1) and (3) of the Treaty, with a view to establishing whether or not the operation is compatible with the common market.

5. In making this appraisal, the Commission shall take into account in particular:

- whether two or more parent companies retain, to a significant extent, activities in the same market as the joint venture or in a market which is downstream or upstream from that of the joint venture or in a neighbouring market closely related to this market,
- whether the coordination which is the direct consequence of the creation of the joint venture affords the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products or services in question.”

Article 101 of TFEU (ex Article 81 TEC) provides as under:

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:
(a) directly or indirectly fix purchase or selling prices or any other trading conditions;
(b) limit or control production, markets, technical development, or investment;
(c) share markets or sources of supply;
(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
— any agreement or category of agreements between undertakings,
— any decision or category of decisions by associations of undertakings,
— any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) Impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.
(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

3. 2 Anti-trust Laws Of U.S.A.
The Competitor Collaboration Guidelines, 2000 issued by the Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (DOJ) define JVs as “a set of one or more agreements, other than merger agreements, between or among competitors to engage in economic activity, and the economic activity resulting there from.”

ANTITRUST STATUTES AND REGULATIONS

3.2.1 SHERMAN ACT, 1890
There are a number of statutes in the United States which are applicable to JVs from an antitrust viewpoint. As JVs involve an agreement of separate and independent parties, Section 1 of the Sherman Act, 1890 applies to the formation and operation of the venture. Section 2 of the Act is also applicable if the venture’s formation, operation or any other agreement is used to monopolise, attempt to monopolise or engage in conspiracy to monopolise a relevant market.

3.2.2 CLAYTON ACT, 1914
Section 7 of the Clayton Act prohibits mergers and acquisitions “where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.” Under the antitrust laws, the formation of a joint venture in some respects will be treated as an acquisition and subjected to the same Section 7 analysis, as a merger between the collaborators. For example the agencies will treat a competitor collaborating as a horizontal merger in a relevant market when:

a) the participants are competitors in the relevant market; the formation of the collaboration involves an efficiency-enhancing integration of economic activity in the relevant market;

b) the integration eliminates all competition among the participants in the relevant market and;

c) the collaboration does not terminate within a sufficiently limited period by its own specific and express terms.\textsuperscript{44}

Because horizontal mergers increase market concentration by reducing the number of competitors, to assess the impact of a proposed horizontal merger, the agencies initially will determine the relevant market and then review the market share of the merging firms and the resulting concentration ratio, as well as other market-specific factors. The agencies also consider whether the proposed merger would likely result in efficiencies that otherwise would

\textsuperscript{44}Collaboration Guidelines 1.3
be unachievable and whether, absent the merger, either one or both firms would be likely to fail. Essentially, Section 7 imposes a balancing test that weighs the potential anticompetitive effects that might result from the merger – or competitor collaboration – against the prospect of integrative and other economic efficiencies that could result.

The United States Supreme Court, in the case of United States v. Penn- Olin Chemical Co\textsuperscript{45} held that Section 7 of the Clayton Act, including in situations where two companies form a JV to engage in an entirely new business, would be applicable to JVs.

Penn-Olin Co. was a joint venture company, formed by two companies not in competition with each other at the time of the formation of the joint venture, but the question that had to examined in that case was if the joint venture blocked any potential competition from any one of the two companies. Pennsalt Chemicals Corporation and Olin Mathieson Company formed a new company, Penn-Olin Chemical Company, for the manufacture and sale of sodium chlorate, product which Pennsalt was engaged in manufacturing and for which Olin was a selling agent. Olin did not produce that product at the time of the complaint. Pennsalt and Olim owned 50% each of the stock of the Joint Venture Company. One of the contentions of the promoters of the joint venture was that Section 7 of the Clayton Act\textsuperscript{46} would not apply to a newly formed company such as Penn-Olin, as the requirement was that the acquired company was to be engaged in commerce.

The US Supreme Court held that the joint venture in that case would be subject to the regulation of Section 7 the Clayton Act, as the joint venture was ‘organized specifically to engage in commerce’. More than that, according to the record, the joint venture company was actually engaged in commerce at the time of the suit and the Supreme Court held that the economic effects of an acquisition were to be measured at that point rather than at the time of the acquisition.

\textsuperscript{45} 378 U.S.158 (1964)

\textsuperscript{46} No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition maybe substantially to lessen competition, or to tend to create a monopoly.
acquisition.

On the criteria to be applied in considering the applicability of Section 7 to such cases of promotion of joint ventures, the Supreme Court stated that what had to be considered was the elimination of potential competition by the joint venture. It said ‘just as a merger eliminates actual competition, this joint venture may well foreclose any prospect of competition between Olin and Pennsalt in the relevant sodium chlorate market.’

Since the Court found that the District Court had not considered in determining the effect of the Joint Venture on the competition between the two promoters, the reasonable probability, if there was no joint venture, of either one of them building a plant in the relevant market area for engaging in the business for which the joint venture was created, while the other would have remained a significant potential competitor, and so it remanded the case to the District Court for that purpose.

The US Supreme Court listed the following criteria to take into consideration in assessing the probability of a substantial lessening of competition:

- number and power of the competitors in the relevant market.
- background of their growth, the power of the joint venturers.
- relationship of their lines of commerce.
- competition existing between them.
- power of each in dealing with the competitors of the other.
- setting in which the joint venture was created.
- reasons and necessities for its existence.
- joint venture’s line of commerce and the relationship thereof to that parents.
- adaptability of its line of commerce to non-competitive practices.
- potential power of the joint venture in the relevant market.

The Court observed in conclusion: ‘In weighing these factors the court should remember that the mandate of the Congress is in terms of the probability of a lessening of substantial competition not in terms of tangible present restraint.’ The Court ruled that Section 7, as
amended, relation to acquisition of stock was intended to arrest incipient threats to competition which the Sherman Act did not ordinarily reach and that in those cases actual restraints need not be proved.\textsuperscript{47}

3.2.3 **HART-SCOTT-RODINO (HSR) ACT, 1976**

A joint venture is potentially reportable under the HSR Act.\textsuperscript{48} If the collaborators form a corporation or unincorporated entity such as a partnership or LLC; each collaborator will be an “acquiring person” and the joint venture company will be the “acquired person”.\textsuperscript{49} As of April 2005, the FTC’s new rules require filing of notification for the formation of certain partnerships, LLCs, and other non-corporate entities. A pre-acquisition filing will be required if the following conditions are met:

1. At least one person will control the newly formed entity, meaning that at least one person will have a right either to 50\% or more of its assets in the event of dissolution.
2. Each person that controls the newly formed entity is viewed as acquiring it’s pro rata share of all of the assets that the forming persons have agreed to contribute at any time, including credit or loans to the entity that the collaborators have agreed to extend or guarantee at any time. Because the HSR Act does not apply to transactions valued at less than $ 53.1 million, acquisition by each acquiring person that will control the new entity is reportable only if such acquisition is valued at more than $ 53.1 million.
3. For transaction valued between $ 53.1 million and $ 212.3 million, either the acquiring person must have annual net sales or total assets of at least $ 106.2 million and the newly formed entity must have total assets of at least $ 10.7 million, or the acquiring person must have annual net sales or total assets of at least $ 10.7 million and the newly formed partnership must have total assets of at least $ 106.2 million. Special rules apply to determining the total assets of the newly formed entity. For transactions valued at more than $ 212.3 million, this size of person test does not apply and the transaction is reportable if the first two conditions above are satisfied.

\textsuperscript{47}Supra note 2 at 226
\textsuperscript{49}16 C.F.R. § 801.40
3.2.4 **FEDERAL TRADE COMMISSION ACT, 1914**

Section 5 of the Federal Trade Commission Act, 1914 which prohibits unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce also applies to the formation and operation of joint ventures.

3.2.5 **ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS, 2000**

The primary set of rules that govern this is the Antitrust Guidelines for Collaborations among Competitors which were issued by the Federal Trade Commission and the Antitrust Division of the Department of Justice in April, 2000. The Guidelines provide a general outline of the analytical framework for evaluating collaborations among competitors, unless there is a high degree of integration among the parent companies leading to analysis under the Merger Guidelines.\(^{50}\) The Competitor Collaborations Guidelines provides that a collaborative venture will be analysed as a merger under the 1992 Merger Guidelines if:

- the participants are competitors in a relevant market
- the formation of the collaboration involves an efficiency-enhancing integration of economic activity in the relevant market.
- the integration eliminates all competition between the participants in the relevant market and
- The collaboration does not terminate with in sufficiently limited period by its own specific and express terms.\(^{51}\)

Other than CC Guidelines and Merger Guidelines,\(^{52}\) the Statement of Antitrust Enforcement Policy in Healthcare\(^{53}\) also provide guidance on the antitrust analysis of joint ventures under certain conditions.

4 **REGULATION OF JOINT VENTURES UNDER THE INDIAN THE**

---

\(^{50}\) United States Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines (1992)

\(^{51}\) CC Guidelines, supra note 19


Critical Analysis of Joint Ventures With Special Reference to Combinations in India

COMPETITION ACT, 2002 (AS AMENDED)

Joint ventures may broadly be classified as having one of two forms: (i) equity/corporate or (ii) contractual. In an equity joint venture the parent undertakings would hold voting shares in a corporate vehicle. This corporate vehicle could either be newly incorporated or may already be in existence. In distinction, a contractual joint venture does not directly centre on a corporate vehicle, but takes the form of a cooperation agreement or agreements that together define the activity of cooperation. It will be shown in this chapter as to how Joint Ventures can be understood to fall within the ambit of Sections 3, 4 & 5 of the The Competition Act, 2002 (As Amended).

4.1 ANTI-COMPETITIVE AGREEMENTS AND JVs

S. 3 of the Act\(^{54}\) discusses the treatment of anti-competitive agreements. In order to establish how JVs fall under this Section the term ‘agreement’ has to be defined.

"agreement" includes any arrangement or understanding or action in concert,—

(i) whether or not, such arrangement, understanding or action is formal or in writing; or

(ii) whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings\(^ {55}\);

A joint venture is frequently defined as an association of two or more persons formed to carry out a single business enterprise for profit. More specifically, it is in association of persons with intent, by way of contract, express or implied, to engage in and carry out a single business venture for joint profit, for which purpose such persons combine their property, money, effects, skill, and knowledge, without creating a partnership, a corporation or other business entity, pursuant to an agreement\(^ {56}\).

Under S.3 sub-section (3) a proviso has been provided to exempt certain JVs from scrutiny

\(^{54}\) Competition Act 2002 (with latest amendment in 2009)

\(^{55}\) S.2(b) The Competition Act, 2002 (With the latest amendment in 2009)

\(^{56}\) Supra Note 5
which reads as follows:

“Provided that nothing contained in this sub-section shall apply to any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services.”

It implies that in such cases where joint ventures agreements are anti-competitive under the provisions of sub-section (3) of Section 3 of the Act but if increases efficiency, then applying the rule of reason approach penalties will not apply to such a joint venture, entered into by way of agreement.\(^{57}\) It implies that joint venture agreements falling within preview of sub-section (3) of Section 3 of the Act but not increasing efficiency will be scrutinized to determine appreciable adverse effect on competition.

These definitional elements are important because a joint venture is not defined in the Act. Joint ventures are however stated to be exempt from the application of Section 3 sub-section 3 of the Act dealing with presumption of appreciable adverse effect on competition if they increase efficiency in production, supply distribution, storage, acquisition or control of goods or provision of services\(^ {58}\).

### 4.2 Applicability of Combination Regulations to JVs

Section 5 and 6 of the The Competition Act, 2002 (As Amended), defines and regulate combinations, it provides various thresholds, crossing which an enterprise or a person entering into a combination shall report of the Competition Commission of India (the Commission) in the prescribed forms/notification.

Under the Act, “No person or enterprise shall enter into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India and such a combination shall be void.”\(^{59}\)

The word “or” in section 6(1) shall be read as disjunctive; so any person (i.e., any legal entity-

---

\(^{57}\) Joint Ventures: Anti-trus Analysis of Collaboration Amongst Competitors, 2006 at p.45  
\(^{58}\) Proviso to Sub-section (3) of S.3 The Competition Act, 2002 (With the latest amendment in 2009)  
\(^{59}\) S.6(1), Competition (Amended) Act 2007
that could be LLP, company, individual, association of persons, partnership etc) or any enterprise\(^{60}\), if they enter into a combination referred to in section 5- they need to notify the Commission about it.

In light of the above, all JVs, in whatever form, which take place in India or outside India with an effect in India, clearly fall within the ambit of the Act. The question would therefore be whether such joint ventures constitute combination in a manner contemplated in the Act.

This shall be explained taking the definitions of ‘Combinations’ and ‘control’ have been defined at Section 2(a), Section 5 and at Explanation (a) to Section 5 of the Act.

**COMBINATION:**

In terms of Section 5 of the Competition Act, a ‘combination’ includes:

1. The acquisition of control, shares or voting rights or assets by a person;
2. The acquisition of control of an enterprise where the acquirer already has direct or indirect control of another engaged in identical business; and
3. A merger or amalgamation between or among enterprises, that cross the financial thresholds set out in Section 5 of the Competition Act.\(^{61}\)

**Acquisition:**

‘Acquisition’ is defined as meaning “directly or indirectly, acquiring or agreeing to acquire shares, voting rights or assets of any enterprise or control over management or control over assets of any enterprise.”\(^{62}\)

An acquisition or takeover is the purchase by one company of controlling interest in the share capital, or all or substantially all of the assets and/or liabilities, of another company. A takeover may be friendly or hostile, depending on the offeror company’s approach, and may be effected through agreements between the offeror and the majority shareholders, purchase of shares from the open market, or by making an offer for acquisition of the offeree’s shares to the entire body of the offeree.

---

\(^{60}\)Section 2(h) of the Act

\(^{61}\) S.5, The Competition Act, 2002 (With the latest amendment in 2009)

\(^{62}\) S.2(a) The Competition Act, 2002 (With the latest amendment in 2009)
of shareholders.\(^{63}\)

Control:

- ‘Control’ includes controlling the affairs or management by:
  - (i) one or more enterprises, either jointly or singly, over another enterprise or group
  - (ii) one or more groups, either jointly or singly, over another or group or enterprise;\(^{64}\)
- “Control” shall include the right to appoint majority of the directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders agreements or voting agreements or in any other manner.

[Explanation.—(i) Where there are two or more persons in control over the target company, the cesser of any one of such persons from such control shall not be deemed to be a change in control of management nor shall any change in the nature and quantum of control amongst them constitute change in control of management:

Provided that the transfer from joint control to sole control is effected in accordance with clause (e) of sub-regulation (1) of regulation 3.

(ii) If consequent upon change in control of the target company in accordance with regulation 3, the control acquired is equal to or less than the control exercised by person(s) prior to such acquisition of control, such control shall not be deemed to be a change in control;\(^{65}\)

**JV & Acquisitions**

As such, defined simply, Joint Ventures are less risky than acquisitions because they are negotiable, co-operative and easier to walk away from. They bring two firms together with mutual interests but different strengths to work on particular projects that offer benefit to both. If we read these terminologies together along with international practices, we find that joint


\(^{64}\) S.5 Explanation (a) The Competition Act, 2002 (With the latest amendment in 2009)

\(^{65}\) S.2 (c) SECURITIES AND EXCHANGE BOARD OF INDIA (SUBSTANTIAL ACQUISITION OF SHARES AND TAKEOVERS) REGULATIONS, 1997
ventures come within the ambit of Section 5 of the Act depending on the facts and circumstances of a given transaction. While JVs are seen as enhancing efficiencies, depending on how they are structured, they may create a fertile ground for collusion between competitors and eliminate or lessen competition in the market. A JV that results in a combination may not only result in lessening or elimination of competition but more importantly, may result in elimination of an effective competitor and therefore reduction in the number of market players.

**Mergers & Amalgamation**

The term ‘merger’ is not defined under the Companies Act, 1956 (the ‘Companies Act’), the Income Tax Act, 1961 (the ‘ITA’) or any other Indian law. Simply put, a merger is a combination of two or more distinct entities into one; the desired effect being not just the accumulation of assets and liabilities of the distinct entities, but to achieve several other benefits such as, economies of scale, acquisition of cutting edge technologies, obtaining access into sectors / markets with established players etc. Generally, in a merger, the merging entities would cease to be in existence and would merge into a single surviving entity.

Very often, the two expressions "merger" and "amalgamation" are used synonymously. But there is, in fact, a difference. Merger generally refers to a circumstance in which the assets and liabilities of a company (merging company) are vested in another company (the merged company). The merging entity loses its identity and its shareholders become shareholders of the merged company. On the other hand, an amalgamation is an arrangement, whereby the assets and liabilities of two or more companies (amalgamating companies) become vested in another company (the amalgamated company). The amalgamating companies all lose their identity and emerge as the amalgamated company; though in certain transaction structures the amalgamated company may or may not be one of the original companies. The shareholders of the amalgamating companies become shareholders of the amalgamated company.

**Mergers & JV**

Unlike a merger, a joint venture does not involve the emergence of a new combined entity. Each participant in the joint venture retains their individual entity but choose to compete against

---

66 S.2 Income Tax Act, 1961
competitors as a unified business force. Recently, the world’s largest retailer Wal-Mart entered into a joint venture with India’s Bharti Enterprises to get a toe hold in the booming Indian retail market\textsuperscript{67}. This move was the only way Wal-Mart could have entered the Indian market as regulatory restrictions prohibit a full owned foreign retail chain to operate in the Indian market. As such, this joint venture was a market entry strategy for Wal-Mart. Consider another example – Costa Coffee, the leading coffee brand across the UK and Western Europe. This brand entered the Chinese market recently with a joint venture with the Yueda Group based in Jiangsu Province in China.\textsuperscript{68} This was not because of any regulatory restrictions but more because of its need to learn about an alien market and get a foot hold.

Therefore joint ventures are indeed a very common entry strategy for companies. This approach has its own pros and cons. The obvious advantage is that companies entering markets through JVs would benefit from the local knowledge of the local company. The obvious disadvantage is that companies entering new markets may be taken for a ride if joint ventures are not agreed upon carefully.

Aforementioned are various combinations recognized under S.5 of the Competition Act and their differences with regard to Joint Ventures. Following are the various structures that can be formulated as per the provisions of the Act.

**Different JV Structures Permissible U/S.5 of the Competition Act**

For including a JV into the purview of the Act and the Competition Commission of India Regulations, 2011 (Combinations Regulations), it would be helpful to consider, how a JV is structured. There could possibly be two situations:

- Where two or more firms jointly form a new entity; and
- Where two or more firms acquire joint control over an existing firm or business thereof.

  i. *Where two or more firms jointly form a new entity*

Under this head, there could be following structures:

\textsuperscript{67}http://jvmergerhelper.businessdevelopmenttemplates.com/ Last accessed on 27.12.2011
• Where two or more persons/entities combine to form a new enterprise-under which, the parties to the JV holds certain percentage in the new enterprise, none of the parties holds any shareholding in the other enterprise.

• Where the parties to the JV transfer assets or interests into the newly created entity.

• Where, a special purpose vehicle company is created, which then acquires certain divisions or businesses of the said creating companies. The creating companies therefore cease to operate their independent businesses in respect of the transferred divisions and operate them through the newly created entity. This technically and factually results in the creating companies merging their divisions or businesses into one operation.

If we analyze, the first situation above- this would typically not fall under the definition of combination under section 5 of the Act. Whereas, in the next two situations, if the threshold is crossed, then a possible case can be made out of bringing the JV into the purview of combination under section of the Act.

ii. _Where two or more firms acquire an existing firm or business thereof_

Under this head, there could be following structures:

• Where two or more companies acquire an existing entity or any part of the business thereof-this would constitute merger under the provisions of the Act and consequently, if the threshold are met, such combination may be treated as combination under section 5 of the Act. This recently happened in the recent acquisition of Camlin Limited (Camlin) by Kokuyo S&T Co. (Kokuyo) of Japan, where under a JV agreement was signed between Camlin and Kokuyo, under which 14,044,850 shares of Camlin was acquired by Kokuyo^69_.

• In certain instances, the transaction may involve the issue of shares by the acquiring companies in consideration for the acquisition. Therefore, depending on the amount of shares issued, the share issue may result in a further notifiable combination. That may be the case if, for instance, the acquiring companies issue shares that confer control over their businesses or a part thereof to the seller.

An example of this is where Company A and Company B jointly acquire control over Company C in order to use it as a vehicle for a joint venture through a sale agreement. Instead of cash, the two companies each issue 50% shares to Company C in their respective businesses. Therefore, the shares issued may result in Company C acquiring control over the businesses of Company A and B respectively. This subsequent issue of shares by Company A and B may therefore constitute notifiable mergers if they meet the threshold. Therefore, one transaction may result in multiple mergers that may require notification.

From a transactional point of view, there could be various structures possible, above mentioned structures were only indicative of what might be construed as combination by the regulatory authority i.e., the Competition Commission of India. While structuring a JV above observations may be noted, so as to help the enterprises (parties to JV) to surpass the provisions of filing a notification to the Commission without violating the provisions of the Act and Combination Regulations.

4. 3 MAJOR ISSUES

(i) Definitional Issues
There is uncertainty as to how joint ventures should be dealt with under the Competition Act 2002 (As Amended—hereinafter referred to as the Act). This poses significant problems for the Competition Commission of India (CCI), the business community and their advisors. The root of the problem is that the term joint venture captures a broad set of arrangements. This set includes structural changes between businesses, such as the traditional 50/50 corporate joint ventures, which may be treated as combinations (Sections 5 & 6 of the Act) to traditional bilateral agreements (Section 3 of the Act) limited by time period of operation and restricted to perform one or more business functions such as research and development, production, distribution or sales.

The lesson to be drawn from the EU is that the definitional issues surrounding joint ventures can be problematic and there is no perfect solution. Because of the drafting of the original EU Merger Regulation, the EU jurisprudence revolved around concepts referred to as
“concentrative” and “cooperative” joint ventures, which probably used-up more competition law resources than any other competition law subject at the time. This concentrative (combination) against cooperative (anti-competitive agreement) distinction became such a clear problem in the EU that the law was changed.\(^70\) The business community would clearly prefer legal certainty, and so would likely prefer for joint ventures as far as possible to fall within Section 5. This carries the downside of having to seek prior consent if the relevant turnover thresholds are satisfied, but avoids the continual risk of challenge that exists if instead Section 3 potentially applies.

From the CCI’s point of view, it is also worth noting that the likely very large volume of joint ventures that at least potentially may be within the ambit of Section 3, and so which may be subject to a complaint (referred to as “information” under the Act) by a third party, risks overloading the CCI’s resources.

(ii) Guidance

In the EU the complex rules described above have become less formalistic – less rules based – and more based on guidance produced by the competition authority, which is largely based on experience. Robust rules and guidelines develop over time through an evolutionary process. Currently the CCI has insufficient decisional practice or case law on which it can issue guidance\(^8\). However, it can look to foreign jurisdictions to give clarity to some of the more non-controversial aspects to raise the level of regulatory certainty for the business community. To state the obvious, guidelines would help practitioners and thereby businesses understand the standards the CCI would adopt in investigation and enforcement action. It would also help the staff within the CCI to follow a uniform approach thus ensuring similar outcomes in similar cases.\(^71\)

**Uncertainty as Regards Application of S.3 and S.5 of the Act**


\(^71\)This follows from the judgement and order of 31.03.2010 in the Kingfisher Airlines case in The High Court of Bombay, WP No. 1785/2009.
Star Den Media Services and Zee Turner Joint Venture dated: 26.05.2011

In May, Star Den Media Services Pvt Ltd and Zee Turner Ltd [Zee Turner Ltd is an existing 74:26 joint venture between Zee Entertainment Enterprises Limited (ZEEL) and Turner International India Private Limited (TIIPL)]\(^\text{72}\) had announced a joint venture to combine distribution of their respective channel bouquets in the country. Currently, Zee channels are distributed by Zee Turner Ltd, a joint venture company of Zee’s parent Essel Group and Turner International, which runs channels like Cartoon Network and Pogo in India\(^\text{73}\). Normally, such big amalgamations require the Commission’s approval, but since the deal was announce before June 1 — the date when Sections 5 and 6 of the Competition Act became effective, it would be investigate for concerns of violations of Sections 3 and 4 of the Act. While Sections 5 and 6 mandates companies to seek CCI’s approval before going ahead with a merger, sections 3 and 4 deals with anti-competitive agreements and abuse of dominant market position, respectively. The Media Pro Enterprise India Pvt Ltd will be 50:50 joint venture between Zee Turner and Star Den Media Services and would jointly aggregate and distribute channels licensed to Zee Turner and Star Den.

Issues for Concern:

- Whether this joint venture should be examined under S.3 & S.4 of the Act or under S.5 of the Act, given that it would qualify as a combination?

Since it’s an amalgamation it definitely falls within the purview of S.5 of the Act. As per the facts of the case since the joint venture happened before the merger notification of June 1, 2011 CCI shall not look into the matter as a case of S.5 but most certainly based on prima facie evidence it can go ahead and look into the merger.

- Both Star den and Zee Turner together hold 60% of the market share which is considerably large and pro-monopoly?\(^\text{74}\)

Given this fact, it can be argued that this could well be a valid case under S.4 as this venture could very well have a dominant position in the market which permits scope for abuse. Thus the Commission will have to carefully deal with the nuances.


\(^\text{73}\)http://www.deccanherald.com/content/202833/star-india-zee-group-alliance.html last accessed on 26.12.2011

\(^\text{74}\) Supra Note 55
- Whether such a JV would fall within the exception provided in the proviso to subsection 3 of S.3 of the Act?

As per the exception provided under sub-section 3 of S.3 of the Act, if this joint venture is concluded to be a contractual agreement and if it is increasing efficiency in the ‘relevant market’ for the consumers, then such a JV shall be exempted from scrutiny.
5 CONCLUSION

India is presently one of the world’s fastest growing economies with one of the largest domestic markets. Before 1991, India’s restrictive economic policies resulted in the unavailability of state-of-the-art products and technologies in the country. While the situation has significantly improved since then, the Indian market lagging developed economies in terms of the quality of products and services sold in the domestic market. In this context, joint venture between foreign partners and Indian companies is a great way to bridge this gap. Joint ventures can utilize the best in technology and local market knowledge in order to take advantage of India’s massive domestic market and, further, to use India as an attractive export hub. Recent exchange control liberalizations on payments to foreign technology providers will further spur JV activity in the country.

India’s competition regime will need to suit the particular business needs of its economy. However, there is benefit in ensuring that the regime is not so out of sync with the competition principles and practices around the world. The last decade has seen a lot of multinational companies investing in India, often through joint ventures, either by choice or because this is required under sector-specific FDI rules. Consequently, to the extent that uncertainties about the treatment of joint ventures can be cleared-up, this would benefit both Indian businesses and the FDI community.

The EU regime had its own uncertainties in dealing with joint ventures, and addressed them. India has the ability to avoid such uncertainties, and Indian and international business communities would do well to encourage the government to address the issue.

To upkeep the growth and give further clarity to the subject of joint ventures which are combinations or anti-competitive agreements and for the appraisal and assessment of such joint ventures, the Competition Commission of India may issue Guidelines in due course of time, to provide regulatory certainty.
6 BIBLIOGRAPHY

STATUTES

- Antitrust Guidelines for Collaborations Among Competitors, 2000
- European Union Merger Regulation, 2004
- Foreign Exchange Management (Investment in Firm or Proprietary Concern in India) Regulations, 2000
- The Clayton Act, 1914
- The Competition Act, 2002 (As Amended)
- The Federal Commission Act, 1914
- The Hart-Scott-Rodino (HSR) Act, 1976
- The Sherman Act, 1890

CASES

- New Horizons Ltd v. Union of India(1995)1SCC478;
- Inter-City Tire and Auto Center, Inc. v. Uniroyal, Inc (701 F. Supp. 1120, 1989-2 Trade Cases P 68, 839)
- Pasteur-Merieux/Merck Case IV/M.285: decision of 5 July 1993
- United States v. Penn- Olin Chemical Co.378 U.S.158 (1964)

ARTICLES

- Brodley F Joseph, Antitrust and Joint Ventures, 95 HARV. L. REV. 1521
• Chakravarthy S, Are Joint Ventures an Escape Valve under the Indian Competition Law, Competition Law Report, 2009


**Books**

• ABA Section of Antitrust Law, Joint Ventures: Antitrust Analysis of Collaborations Among Competitors, (ABA Books, United States of America, 2006)

• Gutternan S. Alan, International Joint Ventures, (World Trade Press, California, 2009)

• Hewitt Ian, Joint Ventures, (Thomson Sweet & Maxwell, London, 2005)

• Ramappa T., Competition Law in India, (Oxford India Paperbacks, New Delhi, 2009)

• Simmons & Simmons, Joint Ventures & Shareholders, (Bloomsbury Professional Ltd., West Sussex, 2009)