Regulation of Combinations and Joint Ventures

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1. INTRODUCTION

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. This depends on the intention regarding the use of the Joint Venture as a vehicle for the purpose of limiting the competition in the market. The Competition Act has also not expressly provided for the regulation of joint ventures as constituting a combination, however the JVs which are combinations under section 5 for the Act will be appraised for appreciable adverse effect on competition taking into consideration the factors provided in sub-section (4) of Section 20 of the Act and other provisions of the Act. 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.

What is a Joint Venture?

A Joint Venture may be defined as any arrangement whereby two or more parties co-operate in order to run a business or to achieve a commercial objective. This co-operation may take various forms, such as equity-based or contractual JVs.\(^1\) It may be on a long term basis involving the running of a business in perpetuity or on a limited basis involving the realization of a particular project. It may involve an entirely new business, or an existing business that is expected to significantly benefit from the introduction of the new participant. A JV is therefore, a highly flexible concept. The nature of any particular JV will depend to a great extent on its own underlying facts and characteristics and on the resources and wishes

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of the involved parties. Overall, a JV may be summarized as a symbiotic business alliance between two or more companies whereby the complimentary resources of the partners are mutually shared and put to use. It is an effective business strategy for enhancing marketing, positioning and client acquisition which has stood the test of time. The alliance can be a formal contractual agreement or an informal understanding between the parties.

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:

- an express or implied agreement
- a common purpose that the group intends to carry out
- share profits and losses
- each member’s equal voice in controlling the project.

Why JVs

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 be

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2 The hon’ble Supreme Court of India has also tried to define the expression ‘joint venture’ in the case of Fakir Chand Gulati v. Uppal Agencies Pvt. Ltd. (2008) 10 SCC 345.
3 New Horizons Limited v. Union of India(UOI) and Ors (1995) 1 SCC 478
4 3rd Edition, Page 915
negated 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:

- **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.

- **Sharing Capabilities, Expertise and Liabilities**
  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.

- **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

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6 Economies of scale give big companies access to a larger market by allowing them to operate with greater geographical reach.

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.

- **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.⁸

**Anti-Competitive risks of Joint Venture**

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:

• **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.

• **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.

• **Market Access and Price Discrimination**

A 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.9

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.10

This report also looks at as to how JVs are governed under the competition laws of some selective jurisdictions. It is now more or less accepted in some of the jurisdictions that there is a need for a specialized treatment of JVs. They are slightly differentiated from mergers and acquisitions and have their own regulatory mechanism under the competition laws. The regulatory mechanisms applicable to mergers and acquisitions are applicable to them as well.

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9 Joseph F. Brodley, *Antitrust and Joint Ventures*, 95 Harv. L. Rev. 1521
2. **TYPES OF JOINT VENTURES**

JVs may be either contractual or structural, or both. They may be broad based or narrowly defined. The main classification of JVs is that it is either 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.\(^\text{11}\)

The three most common structures employed to constitute a JV are:

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

**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. 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. The Memorandum of

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.

- **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.

**Partnership**

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. 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 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.

A non-resident person who wishes to participate in a partnership firm registered in India or a sole proprietorship will be subject to the Foreign Exchange Management (Investment in Firm or Proprietary Concern in India) Regulations, 2000. 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.\textsuperscript{12}

\textit{Co-operation Agreements / 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 \textit{de facto} geographical presence and aid in accessing new markets, increase market penetration, sales & market share. Co-operation agreements / strategic alliances can be employed for the following types of business activities:

- technology transfer agreements,
- joint product development,
- purchasing agreements,
- distribution agreements,
- marketing and promotional collaboration, or
- intellectual advice.\textsuperscript{13}

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

\textsuperscript{12} See Press Note No.1 (2011 Series)
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.

The various types of Joint Venture are simplified as follows:
3. **J.V CONSTITUTING A CONCENTRATION: IN CONTEXT OF ECMR (139/2004)**

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 (ex Article 81 TEC). 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 concerns the objects and effects of behavioral relationships between independent parties.\(^{14}\)

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

- be concentrative,
- satisfy the relevant turnover thresholds.

**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 on a lasting 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:

(b) 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

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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.\(^\text{15}\)

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*,\(^\text{16}\) for 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)

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\(^{15}\) In Case of Banco/Santander/BT, three years was held insufficient. A seven year term was accepted in Case of GoAhead/VIA/Thameslink.

\(^{16}\) Case IV/M.285: decision of 5 July 1993.
(ii) it involves the acquisition of ‘joint control’ by two or more undertakings on a lasting basis

**Joint Control**

The European Commission will find joint control where two or more undertakings or persons have the possibility of exercising decisive influence over the joint venture.\(^{17}\) ‘Decisive influence’ is the power to block actions which determine the strategic commercial behavior of an undertaking (e.g. the possibility of a deadlock situation resulting from the power of two or more parent companies to reject proposed strategic decisions). 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.\(^{18}\) It is irrelevant to the concept of the joint control that one 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:

- 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.

\(^{17}\) See Commission Consolidated Jurisdictional Notice (footnote 6) para 62
\(^{18}\) See for example, British Telecom/Banco Santander Case.
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;

(e) 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;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.
4. **ASSESSMENT OF JOINT VENTURES IN UNITED STATES**

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**

*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.

*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;

(b) the formation of the collaboration involves an efficiency-enhancing integration of economic activity in the relevant market;

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

(d) the collaboration does not terminate within a sufficiently limited period by its own specific and express terms.\textsuperscript{20}

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 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 \textit{United States v. Penn-Olin Chemical Co.}\textsuperscript{21} 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 Olin owned 50 percent each of the stock of the Joint Venture company. One of the

\textsuperscript{20} Collaboration Guidelines 1.3

\textsuperscript{21} 378 U.S.158 (1964)
contentions of the promoters of the joint venture was that Section 7 of the Clayton Act \textsuperscript{22} 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.

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:

\textsuperscript{22} 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.
• 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.23

**Hart-Scott-Rodino (HSR) Act, 1976**

A joint venture is potentially reportable under the HSR Act.24 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”.25

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:

23 Supra note 2 at 226.
25 16 C.F.R. § 801.40
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 its 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.

**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.
The Applicable Guidelines

*Antitrust Guidelines for Collaborations among Competitors, 2000*

There are a number of Guidelines that are applicable to the JV regulation as well. 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. The CC 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.

Other than CC Guidelines and Merger Guidelines, Antitrust Guidelines for the licensing of Intellectual Property and the Statement of Antitrust Enforcement Policy in Healthcare also provide guidance on the antitrust analysis of joint ventures under certain conditions.

**Analysis under the Anti-trust Guidelines for Collaboration among Competitors**

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27 CC Guidelines, supra note 19
JVs require two separate inquiries. First, the authorities consider if the collaborative activity is of the type that is so likely to be harmful to competition and to have no significant benefits that it does not warrant any further analysis. These kind of agreement are condemned per se. But, if participants enter into an efficiency enhancing agreement that is reasonably necessary to achieve its procompetitive benefits, then the authorities apply the rule of reason. The analysis, in this case, involves a flexible inquiry into the nature of the agreement, including its business purpose, whether the participants have market power and whether an agreement in operation has actually caused harm to competition. If there is no anti-competitive harm then the agreement is not looked into or challenged any further. If there is anti-competitive harm, then the agreement is challenged by the authorities. In these cases, the agreements are studied in-depth and analysed to see the pro-competitive and anti-competitive measures. The two are weighed against each other and a final decision is arrived at. In the case of *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.* the U.S Supreme Court held that where JVs involve the integration of the parties productive assets in a manner that “holds the promise of increasing a firm’s efficiency and enabling it to compete more efficiently needs to be subject to the Rule of Reason under Section 1 of Sherman Act.

The U.S Supreme Court has also held in another case that the existence of integrative efficiencies qualifies a JV for Rule of Reason analysis. The Court identified two factors, which can independently support a finding of integrative efficiencies:

- the JV involves some pooling of parents resources and sharing of risks by the parents of the joint activity.
- the JV leads to the creation of new product or is reasonably necessary to the development, manufacture, marketing or distribution of some product.

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30 472 U.S 284 (1985)
31 Arizona v. Maricopa County Medical Society, 457 U.S.332.
5. DEALING WITH JOINT VENTURES UNDER THE COMPETITION ACT, 2002

As already discussed above joint ventures may be broadly classified as having one of two forms: (i) equity/corporate or (ii) contractual. In an equity joint venture, the parents would hold voting shares in a corporate vehicle. This corporate vehicle could either be newly incorporated or could 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.

The term ‘acquisition’, ‘agreement’ and ‘control’ are defined in Section 2(a), Section 2(b) and at Explanation (a) to Section 5 respectively of the Act. If we read these provisions along with Section 3 and Section 5 of the Act, we find that joint ventures would come within the ambit of the Act depending on the specific facts, nature and circumstances of a given agreement or transaction. Notwithstanding that joint ventures are not expressly mentioned under the Section 5 of the Act, however, all fully functional joint ventures which constitute combination under the provisions of section 5 of the Act will be subject to filing under Section 6(2) of the Act.

As provided under the HSR Act and rules, as mentioned earlier, each collaborator will be “acquiring person” and the joint venture company will be “acquired person”, the Greenfield full functioning joint venture will be covered within the purview of Section 5 and 6 of the Act, if meeting the threshold.

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32 Acquisition is defined as meaning “directly or indirectly, acquiring or agreeing to acquire
   (i) shares, voting rights or assets of any enterprise or control any enterprise; or
   (ii) control over management or control over assets of any enterprise.”
33 “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;
34 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.
Joint ventures not covered under the definitions of combinations and joint ventures agreements being anti-competitive under the provisions of Section 3(3) of the Act, will be dealt under the proviso to Section 3(3) of the Act.

However, it has to be kept in mind that as per proviso to Section 3(3) of the Act, nothing contained in sub-section (3) of Section 3 of the Act 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, Per se rule (or Rule of presumption) will not apply and the assessment of such joint ventures will be under around Rule of reason approach. 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 governed by Per se rule to determine appreciable adverse effect on competition.

If seen in the background of EU, in relation to joint ventures, prior to 1997, when a distinction was made between ‘concentrative’ and co-operative’ joint ventures, concentrative joint ventures above thresholds which were combinations fell within the scope of Merger Regulation (1989) whereas co-operative joint ventures regardless of thresholds were dealt under the Article 81(1) of the Treaty, (i.e. equivalent rules of section 3 of the act dealing with anti-competitive agreements). Now under Merger Regulations 2004, “full function joint ventures” that meet the turnover threshold should be notified to the EC. Thus joint ventures deemed co-operative previously because of elements of co-ordination between the parents are now examined under the Merger Regulation (139/2004) if meeting the following conditions for being classified as full function joint venture (already dealt with earlier) :-
• 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.

If a joint venture constitutes a combination within purview of Section 5 of the Act then such combination would be assessed as per sub-section 4 of Section 20 of the Act.

Sub-section 4 of Section 20 provides that:

For the purposes of determining whether a combination would have the effect of or is likely to have an appreciable adverse effect on competition in the relevant market, the Commission shall due regard to all or any of the following factors, namely:-

a. actual and potential level of competition through imports in the market;
b. extent of barriers to entry into the market;
c. level of combination in the market;
d. degree of countervailing power in the market;
e. likelihood that the combination would result in the parties to the combination being able to significantly and sustainably increase prices or profit margins;
f. extent of effective competition likely to sustain in a market;
g. extent to which substitutes are available or are likely to be available in the market;
h. market share, in the relevant market, of the persons or enterprise in a combination, individually and as a combination;
i. likelihood that the combination would result in the removal of a vigorous and effective competitor or competitors in the market;
j. nature and extent of vertical integration in the market;
k. possibility of a failing business;

l. nature and extent of innovation;

m. relative advantage, by way of the contribution to the economic development, by any combination having or likely to have appreciable adverse effect on competition;

n. whether the benefits of the combination outweigh the adverse impact of the combination, if any.

However, if has to be seen that if a fully functional joint venture which is combination under Section 5 of the Act:

- has elements of co-ordination between the parents
- is in horizontal or vertical line of business along with parents
- has possibility of eliminating competition and also,
- does not increase efficiency

would such a joint venture be governed by rule of presumption as provided under sub-section (3) of Section 3 of the Act based on the principle drawn from ECMR (139/2004)?
6. **Conclusion**

To 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 Commission may issue Guidelines in due course of time, to provide regulatory certainty.
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