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Treatment of Joint Ventures under Indian competition law

Neetu Ahlawat (Shardul Amarchand Mangaldas & Co) · Tuesday, September 20th, 2016

The OECD describes a JV as a situation where participating firms agree by contract or otherwise to combine, other than by merger, significant productive (tangible or intangible) assets, and to do this by going beyond ad hoc co-operation[1]. A JV can be formed by incorporation or by contract. Thus under competition law, JVs include a broader spectrum of arrangements and agreements than just a 50-50 shareholding vehicle commonly seen in marketplace.

The reason why JVs might have a separate place in antitrust is because of economic efficiencies generated by JVs, which are more easily proven than other kinds of collaborative agreements. Some of these benefits include achievement of economies of scale, spreading the risks and costs of R & D, increasing incentives for research and innovation, acquisition of new technologies or skills and synergies from pooling of complementary resources or capabilities. On the other hand, JVs can have certain anti competitive effects including the peculiar spillover collusion (coordination by two otherwise independent undertakings because they are forced while forming or running a JV), collateral restraints (which are in most cases part of a JV, for example, non compete clauses), barriers to entry and eliminating competition, refusal to deal and decreased dynamic efficiency.

Under any competition law, JVs would fall under two of the given circumstances:

1. Under merger control regime
2. Under substantive violations of competition law

<u>Treatment of JVs in other jurisdictions</u>

In US, any JV meeting the criterion of Section 7, Clayton Act and financial thresholds of HSR Act[2] will have to be notified to both FTC and DOJ for approval.

Under substantive analysis of Sherman Act, JVs are as a practice, usually analyzed under rule of reason but can be held under per se violations in certain circumstances (*Timken Roller*[3] and *Texcao v. Dagher*[4]). Furthermore, safe harbors (below 20% market share) are provided under legislation to certain JVs under Collaborative Guidelines, 2000[5].

The EU on the other hand has a qualifying criterion as to which JVs have to be notified under the EUMR[6]. Only a *"full functional"* JV meeting requisite financial thresholds and having a union dimension will have to be notified. A *"full function"* JV is defined as a JV having a management dedicated to its day-to-day operations and access to sufficient resources including finance, staff, and assets (tangible and intangible) in order to conduct on a lasting basis its business activities, that is, to operate independently on a market. The JVs after notification would be analyzed under SIEC (significant impediment of effective competition) test for any anti competitive harm caused.

Apart from merger regime, JVs can be analyzed for 101 and 102 violations as well. However, it would appear that defense of 101(3) regarding efficiencies is more readily accepted in case of JVs than other agreements.

One interesting observation in EU regime has been regarding liability of parents for the acts of the JV. After 2007, even though EU has "operational autonomy" test under merger regime, even a full functional JV's parents can be held liable for JV's competition law violations if they exercise *"strategic influence"* over the JV (*Chloroprene Rubber*7). This was confirmed in 2013 by CJEU8 where parents of a 50-50 JV were held jointly and severally liable for cartel activities of the JV. This growing practice in EU recently followed in other decisions like *LG Electronics, 2015*9 has huge practical implications for JVs and thus corporations have to be more careful about antirust liabilities while forming a JV.

Indian law

Under the Indian Competition regime, any JV would have to be notified under Combinations regulation if it meets the requisite thresholds given under the Act10. CCI has cleared JVs under Combinations and in certain cases given reasons for doing so, which include low market share of JV11, no horizontal overlap between parents or JV12, parents not being close competitors13 etc. In the recent APGDC/Shell JV14, CCI also considered the efficiencies being brought to the market because of the JV.

The treatment of JVs under substantive provisions requires special mention to presumption provided under Section 3(3) of the Act15, which doesn't give blanket immunity to a JV but does raise a presumption in its favor. However, one needs to be careful that this presumption only applies to Section 3 and thus JVs don't have any special treatment accorded to them in Section 4 cases. CCI has considered the pro competitive efficiencies provided by JVs in broadcasting sector on two separate occasions. In the Zee-Star case16, CCI said that there was no foreclosure on account of the JV and also considered market specific feature of a highly regulated market like broadcasting and media. Similarly in K Sera Sera17, CCI considered the complaint of the informant regarding DCI, a JV between 6 Hollywood enterprises regarding release of their movies in Indian theaters. Giving various reasons concerning the scope of market, piracy, IP protection and efficiencies, CCI rejected the allegations against DCI. Perhaps the most comprehensive analysis of a JV was recently done in HIPTA JV case18 where CCI examined efficiencies achieved by a TPA formed by the 4 PSU insurance companies. CCI accepted the PSUs arguments regarding the efficiency enhancement brought in the public insurance sector by a JV TPA leading to overall consumer benefits.

It would be interesting development to observe how CCI deals with *"single economic entity"* doctrine concerning JVs. If JVs and its parents are not considered single group, they can be liable under Section 3 violations but in cases where a JV and its parents act like a group, they can escape Section 3 liabilities. Whether CCI would follow the EU approach or carve out a different interpretation remains to be seen.

In any case, enterprises need to be more careful while forming and drafting a JV. The purpose of the JV and its mode of interactions with the parents need to be addressed more clearly and any overlaps need to be addressed specifically. Compliance trainings and internal firewalls might come in handy for companies looking to operate independently from its JV. Till then, happy Joint Venturing!

1 Comprehensive OECD report on JVs available at http://www.oecd.org/competition/abuse/2379097.pdf

2 Both Acts and other relevant provisions are available at https://www.ftc.gov/enforcement/premerger-notification-program

3 *Timken Roller Bearing Co. v. United States* 341 U.S. 593 (1951) available at https://supreme.justia.com/cases/federal/us/341/593/

4 *Texaco Inc. v. Dagher* 547 U.S. 1 (2006) available at https://supreme.justia.com/cases/federal/us/547/1/

5 Antitrust Guidelines for Collaborations Among Competitors, 2000 available at https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf

6 EC Merger Regulation, OJ L 24, 29.1.2004 available at http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32004R0139

7 Case COMP/38629 – Chloroprene Rubber, available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/38629/38629_1056_4.pdf

8 Court of Justice of the European Union, 26 September 2013, in Case C-172/12 P, *El du Pont de Nemours and Others v Commission* and Case C-179/12 P, *Dow Chemical v Commission*.

9 T-91/13 – *LG Electronics v Commission*, 9 September 2015 available at http://curia.europa.eu/juris/liste.jsf?num=T-91/13

10 Available at http://www.cci.gov.in/revised-thresholds

11 CCI Combination Registration No. C-2013/07/126 on 06.11.2013

12 CCI Combination Registration No. C-2013/02/110 on 19.03.2013

13 CCI Combination Registration No. C-2015/01/241 on 05.05.2015

14 CCI Combination Registration No. C-2015/10/333 on 04.02.2016

15 Section 3(3), *"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"*.

16 CCI Case No. 31 of 2011 on 21.03.2013

17 CCI Case No. 30 of 2015 on 08.06.2016

18 CCI Case No. 107 of 2013 on 04.01.2016

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