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Competition Law Treatment of Joint Ventures

A Jurisdictional Guide

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International Bar Association
Mergers Working Group of the Antitrust Section

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CHILE

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Part 1:
Joint Ventures and Merger Control

Legislation, Regulations and Guidelines

1. Please identify the relevant merger control legislation in your jurisdiction and provide a short overview of the merger control regime, noting in particular:

- **If it is suspensive.**
- **The relevant authority/ies and any regulations or guidance they have issued in relation to merger control which is specifically applicable to joint ventures (JVs).**
- **Please provide links to the relevant legislation, regulations and guidelines (if possible, in English).**

Legislation

The Chilean merger control legislation is set out in Title IV of Decree Law No 211 (*DL 211*), as amended.[1] In addition, Decree No 41/2021 of the Ministry of Economy, Development and Tourism contains the current regulation on the notification of concentrations (*Merger Regulation*).[2]

Authority

The relevant authority is the National Economic Prosecutor's Office (*Fiscalía Nacional Económica – FNE*). In certain cases, the Competition Court (*Tribunal de Defensa de la Libre Competencia – TDLC*) and, ultimately, the Chilean Supreme Court may also be involved.[3]

Guidance

Relevant guidance on merger control can be found in the different guidelines issued by the FNE, especially in its Jurisdictional Guidelines[4] and its Horizontal Merger Guidelines,[5] published in June 2017 and May 2022, respectively.

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1 DL 211 (English) <www.apeccp.org.tw/htdocs/doc/Chile/Competition/Chilean-Version1.pdf>.

2 Decree No 41 of 2 November 2021 (Spanish) <www.bcn.cl/leychile/navegar?idNorma=1167340>.

3 Following Phase II of the Chilean merger control procedure, the FNE may decide to prohibit the notified merger if it concludes that the merger could substantially lessen competition in the market. In such a case, the parties to the transaction can challenge the FNE's prohibition decision before the TDLC and, ultimately, before the Chilean Supreme Court.

4 FNE, Jurisdictional Guidelines (English) <www.fne.gob.cl/wp-content/uploads/2017/11/Guidelines-on-Jurisdiction.pdf>.

5 FNE, Horizontal Merger Guidelines (English) <www.fne.gob.cl/wp-content/uploads/2022/05/20220531.-Guia-para-el-Analisis-de-Operaciones-de-Concentracion-Horizontales-version-final-en-ingles.pdf>.

Mandatory and Suspensory System

Chile operates a mandatory and suspensory pre-merger system under which all transactions meeting certain conditions must be notified to the FNE for clearance prior to their implementation.

Parties to a notified concentration are subject to a standstill obligation. The notification before the FNE has a suspensive effect over the notified transaction. Therefore, the notified transaction can only be implemented after the FNE's clearance. Early completion can result in financial penalties.

Jurisdictional Thresholds

Pursuant to DL 211, all transactions (i) that can be deemed as concentrations from a substantive perspective, and (ii) whose parties meet or exceed the relevant turnover thresholds in Chile during the last financial year, must be notified to the FNE.

- *Definition of concentration – cease of independence*. Article 47 of DL 211 broadly defines a concentration as any fact, act, or agreement, that results in two or more previously independent economic agents not part of the same business group to cease their independence in any scope of their activities, by any of the means identified therein.

  Among those means, the association between undertakings for the creation of a new independent economic agent is considered (Article 47(c) of DL 211). In this sense, under the Chilean merger control regime, only fully functional JVs, as discussed in Question 5, are subject to merger control.
- *Mandatory jurisdictional thresholds*. A concentration must be notified to the FNE if the parties meet or exceed both of the following turnover thresholds in Chile during the last financial year:
  - Combined turnover equal to or higher than UF[6] 2,500,000; and
  - Individual turnover equal to or higher than UF 450,000.[7,8]

Please see Question 13 for the application of the thresholds in the case of JV transactions.

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6 The *Unidad de Fomento* (**UF**) is a unit of account used in Chile that is constantly adjusted for inflation. The UF value is issued by the Chilean Central Bank. The currently in force mandatory jurisdictional thresholds (which are expressed in UF) have been established by the FNE in its Exempt Resolution No 157 of 25 March 2019. FNE, Exempt Resolution (Spanish) <www.bcn.cl/leychile/navegar?idNorma=1130052>.

7 In accordance with the FNE's Exempt Resolution No 157 and the FNE's Guidelines on Thresholds Calculation (see paras 41 and following of the FNE Guidelines): (i) to convert the value of the UF into CLP (and then into EUR, USD or other foreign currency), the value of the UF as of 31 December of the year preceding the notification shall be considered, and (ii) to then convert this value into USD, EUR, or other foreign currency, the average annual exchange rate of the respective currency in the year preceding the notification shall be taken into account.

8 FNE, Exempt Resolution No 157 of 25 March 2019 (Spanish) <www.fne.gob.cl/wp-content/uploads/2019/03/Resoluci%C3%B3n-exenta-157.pdf>; and FNE, Guidelines on Thresholds Calculation of June 2017 <www.fne.gob.cl/wp-content/uploads/2017/10/Guia-Interpretacion-Umbrales-1.pdf>.

Application to JVs

2. Is the term "joint venture" defined under your jurisdiction's merger control legislation? If so, please provide the definition.

The merger control legislation does not define the term "joint venture". However, Article 47(c) of DL 211 provides that the association of two or more independent economic agents, under any modality, that creates an independent entity that performs its functions on a lasting basis will be considered a concentration (i.e. a full-function JV).

3. Does the relevant merger control legislation explicitly apply to JVs? Alternatively, are JVs subject to merger control only if they involve certain elements, such as an acquisition of shares or assets?

As noted in Question 2, the merger control legislation considers full-function JVs as a type of concentration that, if its parties meet the relevant turnover thresholds, must be notified to the FNE prior to its implementation.

A full-function JV formation must meet certain additional criteria to be notifiable as set out in Article 47(c) of DL 211 and the FNE's Jurisdictional Guidelines: (i) the creation of a new economic entity, (ii) different from its parent companies and functionally autonomous, and (iii) that performs full functions in the market on a lasting basis.

Functional autonomy or independence includes both legal and economic dimensions. In this sense, a JV will be legally independent if it enjoys the legal capacity to assume obligations and to act autonomously from its parent companies. A JV will also be economically independent if it can operate its business separately and autonomously from its parent companies, with sufficient human, financial and operational resources.

A JV's autonomy also involves the JV operating in the market beyond one specific auxiliary function for its parent companies and commercialising with third parties. However, the FNE understands that, while a JV temporarily relies on the sales or services provided to its parent companies in a start-up period (emancipation period), it does not affect its potential autonomy. In principle, the FNE considers a three-year term as a reasonable period for a temporary dependence.

In addition, following the FNE's guidelines, once a JV starts commercial operations with third parties, separately from its parent companies, a relevant factor to determine its autonomy will be the proportion that represents the sales to the parent companies out of the total JV's sales. If more than 50% of the total JV's sales are directed to third parties, it could be indicative of its economic independence.

Question 3(a) HydroCell JV: Please explain whether the HydroCell JV transaction falls within the scope of the merger control legislation in your jurisdiction. If unclear, please identify what other information would be needed to conclude your analysis. Please assume that any financial threshold or market share/share of supply/size of transaction threshold in your jurisdiction is met.

If the HydroCell JV does not fall within the scope of the relevant merger control legislation, please explain what options may be available to the parties to obtain some degree of legal certainty regarding the HydroCell JV.

The HydroCell JV would not fall within the scope of the merger control legislation. This is because it would lack full-functionality given that it is envisaged that it will only sell the manufactured vehicles to two of its parent companies.

In fact, the FNE confirmed this approach with respect to a notified JV for which it decided not to initiate the merger review procedure, since there was no evidence that such a new entity would sell more than 50% of its output to third parties.[9]

As a non-notifiable JV, the HydroCell JV would constitute an agreement subject to the general competition regulation.[10] To obtain further legal certainty in relation to such an agreement, the parties could explore two possible options: (i) file a voluntary consultation before the TDLC, seeking the safe harbour of a judicial clearance of the agreement, or (ii) settle with the FNE in the context of an ongoing investigation.

A voluntary consultation procedure is a non-contentious judicial proceeding by which the TDLC (and, potentially, the Supreme Court) analyses whether an agreement infringes competition law. Consultation procedures before the TDLC may be initiated either by the parties, the FNE or any third party with legitimate standing. All of them may participate during the procedure by providing information and their opinion on the transaction and by arguing in oral hearing. When ruling about the consultation, the TDLC has wide powers to establish potential remedies and/or conditions to be followed by the parties.

The parties may also request the FNE to open a formal investigation docket regarding the agreement and explore a settlement (Article 39(ñ) of DL 211). In procedural terms, settlements are subject to a subsequent review by the TDLC, which is only empowered to approve or reject the proposed settlement as a whole after a single hearing, in which all stakeholders can intervene. After entering into a settlement, the FNE would refrain from challenging the JV, providing a safe harbour to the parties.

4. Does the merger control legislation require that a transaction must involve a "change of control" to trigger merger control notification obligations? If so, please describe how a "change of control" is defined and how this would be applied to JVs. If not, please explain which types of JV transactions are subject to merger control notification obligations. Finally, please also indicate whether the merger control rules can apply to JV transactions in the absence of joint control by the parents (e.g. that involve only the acquisition of a minority shareholding).

The merger control regime exerts jurisdiction on transactions that result in a lasting cease of independence between two or more previously independent economic agents. In this sense, if a transaction does not lead to a lasting cessation of independence, it would not constitute a concentration.

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9 FNE, *Fábrica de Envases Plásticos SA/Envases CMF SA* (2021) F249-2020, para 29. FNE resolution (25 February 2021) (Spanish) <www.fne.gob.cl/wp-content/uploads/2021/03/arch_F249_2020.pdf>.

10 In addition, considering that, as a result of the implementation of the HydroCell JV, it is envisaged that both CarCo and TruckCo will start commercialising the hydrogen-based electric vehicles produced by the new entity, it could be assumed that they will therefore start competing in the market for the commercialisation of such vehicles worldwide. In this sense, as a non-notifiable JV, the HydroCell JV could also be considered as an agreement among competitors (or collaboration agreement) subject to the same general provisions.

One of the possible means of concentration consists in the acquisition of rights conferring the acquirer company decisive influence over the target's administration (Article 47(b) of DL 211). Under this form of concentration, one of the previously independent economic agents acquires control or decisive influence over the other, leading to a change of control.

The DL 211 does not provide a definition of control. However, in paragraphs 53–56 of its Jurisdictional Guidelines, the FNE states that it understands control as a possibility to decisively influence an economic agent's competitive strategy and/or behaviour. This implies, among other things, decisively influencing its composition, strategic or business decision-making or, in general, its competitive development in the market. Furthermore, the possibility of exercising decisive influence can exist on a de jure or a de facto basis, either directly or indirectly, and taking the form of sole or joint control, according to paragraphs 63–73 of the FNE's Jurisdictional Guidelines.

As to notifiable JVs (Article 47(c) of DL 211), neither DL 211 nor the FNE's guidelines consider the concept of control as relevant. As noted in Question 3, the relevant issue is the creation of a new economic entity that can perform full functions in the market on a lasting basis. However, with respect to already-existing JVs, a change of control is a relevant consideration because a transaction leading to a change of control within an existing entity would constitute a notifiable concentration (and in case the relevant jurisdictional thresholds are met, it shall be mandatorily notified to the FNE).

Finally, acquisitions of shareholdings above 10% in competing companies that do not lead to a mandatorily notifiable concentration (like the acquisition of a minority shareholding) could be subject to a potential post-closing reporting obligation. In particular, Article 4bis of DL 211 establishes that a mandatory post-closing reporting obligation is triggered when there is an acquisition of shareholding above 10% (no maximum percentage) in a competing company, provided that parties to the transaction each meet or exceed an individual turnover threshold of UF 100,000[11] during the last financial year.[12]

5. Is the concept of "full-functionality" relevant in your jurisdiction? In other words, does the regime distinguish between "full-function" and "non-full-function" JVs? If so, please explain how these terms are defined in your jurisdiction and how the merger control rules apply to each type of JV.

The concept of full-functionality is relevant. As explained in Questions 3 and 3(a), only transactions involving full-function JVs fall within the scope of the merger control legislation. Conversely, JVs lacking full-functionality are subject to general competition provisions outside of merger control.

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11 For further information on how to convert UF into CLP, USD, EUR, or into any other currency, please refer to n 7. The same conversion method applies.

12 For the sake of clarity, mandatorily notifiable concentrations that consist in acquisitions of controlling rights are only subject to merger control (Title IV of DL 211), and not to a post-closing reporting obligation (Article 4bis DL 211). In addition, although not expressly indicated in Article 4bis of DL 211 (but based in the FNE's practice), concentrations by means of an acquisition of rights where parties do not meet the relevant turnover thresholds are not subject to post-closing reporting obligations. Instead, such transactions can be voluntarily notified under the merger control regime.

DL 211 does not explicitly address the concept of full-functionality; however, the FNE's Jurisdictional Guidelines provide relevant guidance on the matter and prescribe that the concept of full-functionality (i.e. also, functional autonomy or independence) entails both legal and economic dimensions.[13] The key criteria of a full-function JV can be summarised as follows:

- The JV must be a legally sovereign entity, with its own assets and sufficient capacity to assume obligations and to act autonomously from a legal standpoint.
- The JV must also have sufficient human, financial and operational resources to enable it to perform in the market autonomously from its parent companies all the functions typically carried out by companies operating in the same market on a lasting basis. In this respect, a number of factors are relevant, for example:
  - A JV may not be full-function if it only assumes one specific auxiliary function for its parent companies' activities and lacks its own market presence.
  - The JV's relations with its parent companies, and in particular the presence of its parents in the upstream/downstream market(s) is also relevant as to whether the JV is considered full-function. However, it should be noted that a JV potential autonomy is not affected even if it is reliant on its parent companies during a reasonable start-up period.
  - The extent to which a JV engages in economic activity with third parties (other than its parent companies) is relevant to the conclusion of full-functionality. While not dispositive, a JV for whom more than 50% of its sales are to third parties is more likely to be considered fully functional. Below this level, a more detailed assessment is necessary.
- Finally, the JV may be full-function even if its strategic decisions are controlled by its parent companies. Rather the relevant factor is that the JV has the ability to operate autonomously from its parent companies.

Question 5(a) HydroCell JV: If your jurisdiction distinguishes between full-function and non-full-function JVs, please explain whether the HydroCell JV would be treated as full-function or non-full-function.

Would this answer change if the parties decide only to engage in R&D collaboration, but not the joint manufacturing activity? Please explain how this affects your analysis, if at all.

As explained in Questions 3 and 3(a), the HydroCell JV would not be treated as a full-function JV. It would be considered to lack economic independence as it is envisaged to sell the vehicles it manufactures only to two of its parent companies.

As to the second part of the question, if the parties decide to engage only in R&D collaboration through the HydroCell JV, the analysis will not change since the full-functionality criterion would still not be met. As a result, the HydroCell JV would not constitute a notifiable concentration.

[13] See FNE, Jurisdictional Guidelines, paras 77–90.

6. **If the concept of full-functionality is not relevant in your jurisdiction, please indicate whether and how the merger control regime distinguishes between JVs that are independent from their owners and those which are not. Please explain how the merger control rules apply to each of these situations.**

   Not applicable because the concept of full-functionality is relevant in Chile.

7. **Please explain whether the merger control regime applies in the same way to unincorporated JVs (e.g. a partnership) as to incorporated JVs.**

   Neither the merger legislation nor the FNE guidelines expressly refer to incorporated or unincorporated JVs. However, considering that only transactions that result in legally distinct economic agents that are fully functional in the market are subject to the FNE's merger control jurisdiction (Article 47(c) of DL 211), it can be concluded that the merger control regime would not apply in the same way to unincorporated JVs as it applies to incorporated JVs.

   Unincorporated JVs, based on pure contractual arrangements that do not establish a distinct legal entity, are not subject to merger control review by means of Article 47(c) of DL 211. For completeness, such transactions may still fall under one of the other means of concentrations outlined in Article 47 of DL 211, which would have to be assessed on a case-by-case basis.

8. **Please explain whether contractual arrangements between companies that do not involve the formation of a separate JV entity are subject to merger control notification.**

   Purely contractual arrangements not leading to the creation of a full-function JV are not subject to notification as they would not comprise a concentration, in accordance with Article 47(c) of DL 211.

   However, such transactions may still fall under one of the other means of concentration outlined in Article 47 of DL 211: (a) a merger, (b) an acquisition of rights conferring influence over another economic agent's management, or (c) an acquisition of control over another economic agent's assets. The relevant assessment would have to be done on a case-by-case basis.

   In this regard, it would be important to thoroughly assess whether the arrangement would affect the mutual independence of the parties in any scope of their activities. For instance, a purely contractual arrangement that directly or indirectly grants to one of the parties the possibility to exert decisive influence over the other party's management would constitute a notifiable concentration.

Changes of Ownership or Scope in Existing JVs

9. **Please explain how the merger control rules in your jurisdiction apply to changes in ownership of an existing JV. Please consider changes where:**
   - **One owner is replaced by a new owner (i.e. sale of shares or other ownership interests);**
   - **One or more new owners are added (with or without a change of control);**

- **One or more owners exit (with or without a change of control); and**
- **Changes where the identity of the owners stays the same, but there is a change in the level of shareholdings/other ownership interests/ rights.**

If one owner of a JV is replaced with another owner (e.g. via a sale of shares or membership interests) and this results in a change of control within an existing JV, a notification could be required.

Similarly, if one or more owners are added, and such additions involve a change in the control structure of the existing JV (for instance, from sole control to joint control, or simply by adding co-controllers), such transaction(s) would fall within the scope of the Merger Regulation, and a notification could be required. By contrast, if the addition of new owners does not have an effect in terms of control, no notification obligation is triggered.

On the other hand, if one or more owners leave an existing JV resulting in a change in the company's control structure (for instance, from joint to sole control), this could amount to a concentration potentially requiring notification. On the contrary, if one or more owners exit from the existing JV and this does not produce a change in the control structure, no notification would be required.

Finally, it is to note that only changes in the level of shareholdings or other corporate rights involving an acquisition or change of control for parties to the existing JV would result in a potentially notifiable concentration. However, there could be situations where there are no modifications in the level of shareholdings or other corporate rights, which could still trigger potential merger control notification obligations. Such is the case, for instance, of the joint action agreements, entered between shareholders, which could result in an acquisition or change of control on a de jure/contractual basis, falling within the broad definition of concentration of Article 47 of DL 211.[14]

Question 9(a) HydroCell JV: How would the merger control rules in your jurisdiction apply where CarCo exits, and the JV continues to be jointly owned by TruckCo and NewCell? Would the answer differ if TruckCo exited and the JV continued to be owned by CarCo and NewCell?

Whether the HydroCell JV is full-function or not, the exit of either CarCo or TruckCo from the HydroCell JV would not involve a change in the HydroCell JV's control structure and hence there would be no notifiable concentration.

10. Please explain how the merger control rules in your jurisdiction apply to changes in the scope of an existing JV.

Following the FNE's Jurisdictional Guidelines, a potentially notifiable concentration could arise in either of these cases:[15]

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[14] See FNE, Jurisdictional Guidelines, paras 71 and 72.

[15] See FNE, Jurisdictional Guidelines, para 91.

– When the activities carried out by an existing JV are divided or transferred to one or more of its parent companies or third parties; or
– When an existing JV receives significant additional assets or rights from its parent companies that allow it to extend its activities to other market(s), as long as such activities may be carried out with full functions.

The first case would fall, depending on the respective transaction's structure, under letters (b) or (d) of Article 47 of DL211. The second case would fall under Article 47(c) of DL 211. In both cases, a notification would be required if the jurisdictional thresholds are met.

Question 10(a) HydroCell JV: Assume that the parties decide in the future to expand the HydroCell JV. Assume that CarCo and TruckCo contribute sales assets and infrastructure, and that the parties decide to manufacture and brand a "HydroCell" branded vehicle. Please explain if this could trigger a new filing under the relevant merger control rules.

If the parties decide in the future to expand the HydroCell JV to manufacture HydroCell-branded vehicles, and if such expansion involves the HydroCell JV commercialising these vehicles independently in the market, there could be a potentially notifiable concentration. This is because the independent presence of the HydroCell JV in the market could be indicative of the acquisition of the full-functionality it previously lacked.

11. Please explain how the merger control rules in your jurisdiction apply where a new controlling shareholder is introduced. Is it possible that a (new) notification requirement could arise?

As noted in Question 9, if a new controlling shareholder is added to an existing JV, changing its control structure (for instance, from sole to joint control or simply by adding co-controllers), this transaction would fall within the scope of the Merger Regulation, potentially requiring a notification.

Question 11(a) HydroCell JV: Assume that the parties decide in the future to expand the HydroCell JV by adding another parent, EVHybridCo, which focuses on electric and hybrid vehicles. If EVHybridCo also obtains joint control of the HydroCell JV, please explain if this could trigger a new filing under the relevant merger control rules?

EVHybridCo's acquisition of joint control in the HydroCell JV could lead to a notifiable concentration under Article 47(b) of DL 211 (i.e. an acquisition of rights conferring decisive influence over another economic agent's administration), assuming the relevant jurisdictional thresholds are met.

Formation of New JVs

12. Please explain how the merger control rules in your jurisdiction apply to the following types of transactions. In each case, please identify whether these transactions are subject to notification, and how and to which entity(ies) the jurisdictional tests apply. If helpful, please provide a case or hypothetical example:

– **Formation of an entirely new JV, with no contribution of a business or assets amounting to a business (e.g. "greenfield JV");**

The distinction between greenfield and brownfield JVs is not relevant for the purposes of Chile's merger control legislation. As noted in Question 3, the relevant factor is the creation of a new economic agent performing full functions in the market on a lasting basis.

Therefore, to the extent that the greenfield JV leads to the creation of a fully functional new economic agent, there could be a potentially notifiable concentration. In such a case, the jurisdictional test will focus on, among other aspects, potential overlaps existing between the new independent entity and its parent companies or between the latter.

– **New JV formed by the transfer of businesses/assets from the parents (e.g. "brownfield JV"); and**

As noted, the fact that a new JV is intended to be formed with or without contributions or transfers by its constituents is not relevant for the merger control legislation. The only relevant factor is the creation of a fully functional new entity.

Therefore, similarly to the case of a greenfield JV, to the extent that the brownfield JV leads to the creation of a fully functional new economic agent, there could be a potentially notifiable concentration. In such a case, the jurisdictional test will also focus on, among other aspects, potential overlaps existing between the new independent JV entity and its parent companies or between the latter.

– **Temporary JVs, such as buying consortia or other special purpose JVs.**

Considering that temporary JVs are not designed to operate in the market on a lasting basis, they would lack full-functionality and, therefore, would be outside the scope of the merger control legislation.

The FNE's Jurisdictional Guidelines reaffirm this approach, stating that temporary JVs, such as buying consortia, are excluded from the merger control jurisdiction.[16] However, general competition provisions still apply.

Question 12(a) HydroCell JV: How does the fact that the parties will each contribute existing assets to the HydroCell JV, making it a "brownfield" JV rather than a "greenfield" JV, impact your analysis?

As noted in Question 12, the distinction between greenfield and brownfield JVs is not relevant for the merger control legislation.

[16] See FNE, Jurisdictional Guidelines, paras 92–94.

Application of Merger Control Notification Thresholds

13. If the thresholds for notification in your jurisdiction are based on turnover and/or assets, please explain how these thresholds are applied to transactions involving JVs. Please indicate which specific entity(ies)'s turnover and/or assets are counted for notifiability determination and the specific test involved. For example, are any of the following taken into account:

- **The JV itself;**
- **Controlling parent(s) or any groups to which they belong;**
- **Non-controlling parent(s) or any groups to which they belong; or**
- **Any other entities?**

For example, if Parent A acquires 80% of C, and Parent B acquires the remaining 20%, how does a revenue threshold apply? Is the turnover of A, B and C relevant? Only A&C? Or both A&C and B&C, but as separate transactions?

For threshold calculation purposes, in case of a new fully functional JV (which would constitute a concentration under Article 47(c) of DL 211), the sales that shall be considered are the sales in Chile of each parent company and of all entities belonging to their respective business groups (Article 48, paragraph 2(i) of DL 211). This is regardless of their respective shareholdings in the JV since turnover calculations cannot be performed on a pro rata basis. In this sense, for the example provided:

- If parents A and B associate to create C, a new fully functional JV entity, only the sales in Chile of both parent companies and of all entities belonging to their business groups shall be taken into account.

However, an existing JV could be involved in other types of concentrations, which could require considering different entities for turnover calculation purposes. For instance, if a concentration consists in the acquisition of shares or other corporate rights of an existing JV, which confer the acquirer(s) decisive influence over the JV's management (Article 47(b) DL 211), the sales that shall be considered would be: (a) the sales in Chile of the acquirer(s) (that obtain(s) decisive influence as a result of the transaction) and of all entities of its (their) business groups, and (b) the sales of the target entity (i.e. the existing JV) and of its controlled entities (Article 48, paragraph 2(ii) of DL 211). In this sense, for the example provided:

- If companies A and B decide to acquire 80% and 20%, respectively, in an existing JV, and assuming that such 20% would not confer decisive influence or control over the target, it could be argued that B would not be part of a concentration since it would not be acquiring decisive influence of another entity. In this scenario, the sales that shall be considered for turnover calculation purposes would only be the sales in Chile of company A (and the sales of all entities belonging to its business group) and C (also taking into account the sales of entities controlled by C, the existing JV, if any).

14. If the thresholds for notification are based on market shares, please explain how these thresholds apply to transactions involving JVs. In particular, are the market shares of the JV parents' activities outside the JV taken into account?

Not applicable because merger control legislation does not consider market share as a notifiability threshold.

15. If the thresholds for notification are based on a size of transaction test, please explain how these thresholds apply to transactions involving JVs.

Not applicable because merger control legislation does not consider the size of the transaction as a notifiability threshold.

Question 15(a) HydroCell JV: Assuming that the HydroCell JV could fall within the scope of merger control legislation in your jurisdiction, please explain how the relevant financial thresholds and/or market share (or share of supply) thresholds apply, taking into account the questions above.

As noted in Question 13, in the case of a concentration under Article 47(c) of DL 211 (assuming that the HydroCell JV is full-function), the relevant sales would be the sales in Chile of each CarCo, TruckCo, NewCell, and the sales of all entities belonging to their respective business groups (Article 48, paragraph 2(i) of DL 211). It would be sufficient for the turnover of two of the parties to meet or exceed the individual jurisdictional threshold to trigger a notification obligation (Article 48, paragraph 1(b) of DL 211).

Local Nexus

16. Do the merger control rules in your jurisdiction require that a JV transaction must have a local nexus? If so, please describe how the requirement is structured under the relevant legislation.

In accordance with Article 47 of DL 211 and the FNE's Jurisdictional Guidelines, the FNE exerts jurisdiction over all concentrations that have an effect on the Chilean market.

One relevant factor to determine whether a concentration would have an effect on Chile is the existence of a geographical link with the country. The geographical link of a concentration with Chile corresponds to parties' local sales (and to the sales of entities belonging to their respective business groups in notifiable JV cases) that have to be considered when calculating the relevant turnover thresholds.

The effect of the JV's sales activities in the Chilean market would be another relevant factor in establishing a local nexus.

17. Please explain whether notification can be required for "offshore" JVs based solely on the parents' respective turnover, other financial measure or market share? Please address the situation where the JV itself:

- **Has no physical presence in your jurisdiction but makes sales into your jurisdiction; or**
- **Has no physical presence and makes no sales into your jurisdiction?**

In practice, does the competition authority enforce the notification obligations in such situations? Please provide relevant case examples if available.

As noted in Question 13, the FNE exerts jurisdiction only over concentrations that have an effect on the Chilean market. In this sense, the relevant issue regarding the notifiability of offshore JVs is to determine: (i) whether the parent companies (or entities of their business groups) had sales in Chile during the year preceding the potential notification and (ii) whether the offshore JV is expected to have activities with either direct or indirect effect in the Chilean market.

An offshore JV intended to have no physical presence, but making sales into Chile, could be notifiable, provided that its parent companies (or entities belonging to their business groups) had sales in Chile during the last financial year meeting or exceeding the relevant jurisdictional thresholds. Conversely, an offshore JV with no physical presence nor sales into Chile would be outside the scope of the merger control legislation.

Question 17(a) HydroCell JV: If your jurisdiction requires a local nexus for a JV transaction to be notifiable, please explain whether the HydroCell JV would likely be considered to have a local nexus with your jurisdiction and how this would be determined. CarCo and TruckCo each respectively sell through independent and owned dealerships in the various countries and regions in which they are active. If the facts are not sufficient to make this determination, please identify what else you would need to know.

The HydroCell JV formation would not constitute a notifiable concentration in Chile based on the previous responses. Putting that aside, and assuming that the transaction is notifiable solely to examine the local nexus requirement, as noted in Question 16, the FNE would have jurisdiction over a concentration only if it has an effect in the Chilean market. Accordingly, to determine whether the HydroCell JV would have an effect in Chile, the parties would have to be active in Chile, either directly or indirectly. If so, it is likely that the HydroCell JV's activities would, to some extent, impact the Chilean market.

Based on the available facts, CarCo's and TruckCo's products are commercialised in the Americas, which would include Chile. In fact, the parties' operative distribution networks in Chile (either owned or operated by third-party importers/distributors) would correspond to their local/Chilean presence.

As to the HydroCell JV, considering that it is envisaged that its entire vehicle production will be distributed by two of its parent companies (whose distribution networks are locally present), this will likely have an indirect effect on the Chilean market.

Therefore, the HydroCell JV would likely have a local nexus with Chile.

18. If a JV transaction does not meet the jurisdictional thresholds for review in your jurisdiction, does the relevant competition authority nevertheless have the power to investigate the JV under the relevant merger control rules? What is the relevance of the JV's local nexus in this respect?

The FNE has the power to initiate *ex officio* investigations regarding any concentration that was not voluntarily notified within one year of closing (Article 48 of DL 211). The parties to a transaction can voluntarily notify concentrations when their sales do not meet or exceed the mandatory turnover thresholds. A voluntary

notification can be a recommendable action in some cases (convenience being a factor that the parties shall self-assess or discuss with the FNE).

In this respect, the local nexus would matter, as, given its existence, the FNE would have jurisdiction to review non-notified concentrations.

Notification of JV Transactions

19. Which party(ies) is (are) obliged to provide a notification to the competition authority in your jurisdiction in a JV transaction? For example, does each parent separately submit a notification, or is there one joint notification? Does the JV itself have to notify? Please explain if this varies for the different scenarios related to existing and new JVs (see Questions 9 and 10), and how the rules apply in each scenario.

The parties obliged to provide a notification to the FNE in a JV transaction are the parties to the agreement by means of which the JV is created. Where the relevant concentration does not correspond to a JV creation but rather to a change of control occurring with an existing JV, the parties required to provide a notification would be those involved in the change of control event and not all parties to the JV.

Parties required to file must jointly submit the notification.

20. Are JVs eligible for any simplified notification procedures or other special procedural or timing rules or exemptions?

Pursuant to Article 48 of DL 211, any concentration can be notified to the FNE through Simplified Notification Forms if the parties meet any of the objective conditions set out in Article 4 of the Merger Regulation.[17] Specifically, a notifiable JV may be notified through a Simplified Notification Form if:

- There are no horizontal or vertical overlaps between the economic agents involved in the transaction, because none of them performs or plans to perform economic activities in the same relevant product or geographic market or do not perform or plan to perform, in the short term, activities in vertically related markets (Article 4(1) of the Merger Regulation);
- The share of the economic agents involved in the transaction, in some of the overlapping markets, collectively: (a) does not reach a combined share equal or above 20% in the same relevant market, and (b) does not reach an individual or combined share equal or above 30% in a vertically related market (this is regardless of the existence of a client/supplier relationship between them) (Article 4(3) of the Merger Regulation);
- The existing horizontal or vertical overlaps between the economic agents involved in the transaction exclusively correspond to overlaps between economic agents over which the parties or members of their respective business groups have, in each of them, joint control (Article 4(4) of the Merger Regulation); or

[17] For the sake of clarity, the Merger Regulation came into force on 2 November 2021, replacing the previous merger regulation contained in Decree No 33/2017.

– Specifically in relation to concentrations under Article 47(c) of DL 211, the new entity's projected activities differ from those performed by its parent economic agents and, in the event that the new entity starts performing economic activities vertically related to those carried out by one or more of its constituents, market shares of both the new entity and its parent economic agents in any of the vertically related markets do not exceed, either individually or jointly, a 30% share (Article 4(6) of the Merger Regulation).

For the sake of clarity, the hypothesis established in Article 4(1) of the Merger Regulation corresponds to the shortest Simplified Notification Form available (i.e. Simplified Notification Form for no-overlap transactions). On the other hand, the other referred hypotheses (i.e. Article 4 numbers (3), (4), and (6)) correspond to a regular Simplified Notification Form. In general, both types of Simplified Notification Forms require less information than an Ordinary Notification Form, and they usually speed up the FNE's review process as they generally refer to low-risk concentrations with no or minor entity overlaps and/or vertical relations. Both Simplified and Ordinary Notification Forms are subject to the same two-phase review procedure.

Finally, it is to note that Article 4 of the Merger Regulation sets out additional hypotheses for concentrations to be eligible to be notified through a regular Simplified Notification Form (i.e. Article 4 numbers (2) and (5)). However, those hypotheses do not apply to concentrations under Article 47(c) of DL 211.

Question 20(a) HydroCell JV: Assuming that the HydroCell JV is subject to the merger control legislation in your jurisdiction, based on the available facts, is the transaction eligible for simplified treatment, or do any special procedural rules or exemptions apply? What other information would be needed to make this determination?

In addition, assuming that the HydroCell JV is subject to mandatory (or voluntary) review in your jurisdiction, please indicate which party(ies) is (are) obliged to file.

To determine whether the HydroCell JV would be eligible for a simplified notification, further information about the parties (including the various entities within their business groups) and their activities/presence in the relevant market(s) is needed (mainly on market shares and/or potential plans to enter in the short term into other markets involved in the transaction). The objective conditions set out in Article 4 of the Merger Regulation require analysing the potential horizontal overlaps and vertical relations.

In connection to the final part of the question, and as noted in Question 19, the parties which would have to notify the HydroCell JV correspond to the parties to the agreement that create the HydroCell JV (i.e. the three parent companies: CarCo, TruckCo, and NewCell).

21. Please explain the extent to which notifying a JV transaction (and receiving clearance) provides the parties with protection from future intervention under substantive competition law rules (see also Part 2 below)?

The FNE's clearance of a notifiable JV provides the parties to the JV a safe harbour as to its inability to substantially lessen competition in the local relevant market(s) involved, provided its implementation follows the description and elements informed to the FNE (see Question 22 for further details on the competition test

applied to notified mergers). In this sense, after the issue of an FNE's clearance decision, there would be no further competition scrutiny of the JV's implementation either by the FNE or by third parties.

Notwithstanding the above, any potential anticompetitive conduct by either the parties or the JV will always be subject to the general competition provisions.

Question 21(a) HydroCell JV: One of the parties' stated objectives is legal certainty. Please explain the extent to which the parties will obtain legal certainty from notifying the HydroCell JV (assuming that it falls within the scope of the relevant merger control legislation).

The parties would obtain legal certainty in relation to the HydroCell JV's implementation once the FNE issues its clearance decision.

Assessment of a JV Under Merger Control

22. Please explain the competition test that applies to transactions subject to merger notification and, in particular, how this test applies to JV transactions. Please describe the primary (horizontal, vertical, conglomerate or any other) theories of harm and factors normally considered. Are there separate tests, theories of harm or factors that apply to the concentrative effects of a JV transaction (e.g. significantly impede effective competition) and the cooperative effects (e.g. coordination of competitive behaviour of the parents)? Please include references to relevant legislation/guidelines and important case law.

The merger control regime contemplates a substantive standard by means of which the FNE may prohibit a concentration when it concludes that it can substantially lessen competition in the markets.[18]

Following the FNE's Horizontal Merger Guidelines, published in May 2022, when reviewing horizontal mergers to determine whether they can substantially lessen competition, the FNE bases its analysis on the information provided by the parties to the transaction or on other background information gathered during the review process; depending on the specific transaction, the FNE also supplements its qualitative assessment with quantitative economic tools. In its review process, the FNE focuses on the following, at a minimum:[19]

- The rationale of the transaction;
- The affected relevant market(s) in both its (their) product and geographic dimensions;[20]

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18 Articles 54 and 57 of DL 211.

19 See FNE, Horizontal Merger Guidelines, ss II, III(b), III(c), III(d) and III(e).

20 Affected markets are those in which the parties' combined market shares exceed 20% post-transaction, or markets vertically related to any of the relevant markets, in which any of the parties surpass a 30% market share.

- Resultant concentration levels in the market(s);
- Potential effects on competition;
- Entry and expansion conditions in the affected relevant market(s) (i.e. analysis on potential barriers to entry or expansion); and
- Existence of counterweights to potential competition concerns (i.e. expected efficiencies or customers' countervailing buyer power etc.).

Specifically, in relation to the primary theories of harm (i.e. potential effects on competition), the FNE aims its review on both (a) potential unilateral risks, and (b) coordinated effects. Depending on the facts of each case, the FNE might also focus on (c) conglomerate effects, or (d) theories of harm, especially applicable to notifiable JVs:

a) *Unilateral effects*. The FNE pays close attention to whether the transaction is likely to eliminate/lessen competition by allowing the merged entity to exert unilateral market power through price increases, reductions in output, innovation or product/service quality levels etc.

   The FNE may consider different approaches for the evaluation of unilateral effects, depending on the parties to the transaction, their offered products or services, and the characteristics of the market(s) involved. Specifically, the FNE might review (i) the degree of differentiation of products/services, (ii) the level of competitive closeness of products/services, and (iii) whether the transaction involves the acquisition of a recent or potential entrant, among other aspects.

b) *Coordinated effects*. Considering that structural changes resulting from a concentration may affect the incentives of firms to compete on the merits, the FNE also analyses whether the transaction is likely to raise coordinated risks in the market.

   In particular, a concentration could lessen competition if it allows, facilitates or makes more effective potential coordination involving the merged entity and one or more of its competitors. In this context, the FNE particularly focuses on potential coordinated effects in concentrations involving structural links between competitors (e.g. cross-shareholdings, JVs, vertical relations, or contractual agreements).

c) *Conglomerate effects*. In some cases, the FNE might also be interested in assessing whether the concentration is likely to affect competition in markets other than those affected by the transaction. This would be the case for transactions that raise portfolio effects concerns, or that may have an effect in secondary markets.

d) *JVs and spill-over effects*. When assessing a notifiable JV, the FNE pays close attention to potential coordinated effects since the JVs create or strengthen structural links between the parent companies, which can increase their ability to coordinate their competitive behaviour even in markets not involved in the transaction (i.e. spill-over effects).

If the parent companies participate in the same market as the JV, or if the JV concentrates its parent companies' activities in the same market, the FNE also pays attention to the potential unilateral effects of the notified JV.

Question 22(a) HydroCell JV: Please provide a short summary of the competition considerations that would apply to the HydroCell JV if it is subject to your jurisdiction's merger control rules. In responding to this question, please consider the primary (horizontal and vertical) theories of harm that may be considered under the merger control rules. Please also consider whether the analysis of the HydroCell JV would differ under the substantive competition (i.e. non-merger control) rules.

When assessing the HydroCell JV, the FNE would likely focus on the following, at a minimum:

- A potential loss of competition between CarCo and TruckCo in the manufacturing and sale of cars;
- Potential coordinated risks between CarCo and TruckCo in the market where HydroCell's products will be distributed; and
- Potential vertical concerns related to NewCell's incentives to foreclose the supply of hydrogen fuel cell and/or the accompanying fuel cell technology to actual or potential competitors of the HydroCell JV's products.

As explained in Question 32, the substantive analysis of the HydroCell JV as a non-notifiable JV would, in principle differ. This is because as a non-notifiable JV, the HydroCell JV would constitute an agreement subject to general competition provisions (and not to the provisions of Title IV of DL 211). However, given the nature of the HydroCell JV, it is likely that the FNE would focus on the same theories of harm, especially in relation to potential coordinated effects between CarCo and TruckCo, which could be understood as competitors under a broad market definition.

23. Is there any scope for productive, dynamic or other efficiencies or public interest considerations to be taken into account when assessing a JV that is subject to merger control? If yes, explain how this is done.

As noted in Question 22, the FNE considers the existence of potential counterweights to the identified competition concerns when reviewing a concentration. These counterweights correspond, among others, to the expected efficiencies and the countervailing buyer power that customers may hold.

- *Expected efficiencies*. In accordance with the FNE's Horizontal Mergers Guidelines, efficiencies that arise from a transaction can be (a) productive (i.e. efficiencies that entail cost reductions) or (b) dynamic (e.g. efficiencies that entail incentives for innovation or higher quality products).[21]

  To be considered by the FNE, the expected efficiencies or synergies must be (i) verifiable, (ii) inherent to the notified transaction, and (iii) capable of compensating the greater market power to be obtained by the merged entity (which includes the passing-on of a fair share of the benefits to consumers).
- *Countervailing buyer power*. In addition to the competitive pressure exercised by current or potential competitors, the FNE may consider the buyer power held by customers of the JV. This countervailing factor consists of

[21] See FNE, Horizontal Merger Guidelines, para 148 and following.

customers being able to exercise competitive pressure on the JV's ability to raise prices or set other competitive parameters above competitive levels.[22]

The countervailing buyer power of customers may be analysed by the FNE from different perspectives, such as (i) the size, commercial relevance and level of sophistication of customers, and (ii) the ability and incentives of customers to use such countervailing power.

24. Is there any scope for exigent/emergency considerations (e.g. a firm failing, possible pandemic-related competitor collaborations, energy shortages etc.) to be taken into account in the assessment of a JV that is subject to merger control?

The merger control regime has not undergone any formal modifications due to the COVID-19 pandemic. However, during this period, the FNE cleared a transaction based on the failing firm defence.[23]

The failing firm defence has been included by the FNE in its new Horizontal Merger Guidelines, establishing that the parties to a concentration may invoke such defence in relation to potential competition concerns arising from the notified transaction.[24] In particular, the failing firm defence would be admissible where one of the parties to the transaction suffers financial distress so that, absent the merger, its assets would exit the market, causing a greater loss of welfare than would occur if the merger were permitted.

In the CGL/COPEC case,[25] which involved the acquisition of a white flag service station (i.e. an independent gas service station not belonging to any business conglomerate active in this industry at a national level) by the Chilean company COPEC, the parties invoked the failing firm defence, arguing that the restrictions imposed due to the pandemic led the target's business to critical financial distress that would have probably led to its exit from the market in the near future. In its competitive analysis, the FNE reviewed the fulfilment of each requisite for the failing firm argument to be acceptable: (i) that the allegedly failing firm would be forced to exit the market in the near future unless it is acquired, (ii) the firm's financial distress would make inevitable the company's assets exit from the market, and (iii) that there is no other reasonable alternative less harmful to competition to prevent the expected exit.

25. What limits – if any – exist in your jurisdiction on parties' ability to jointly petition/lobby governments?

There are no specific rules or guidelines in the competition regulation in relation to joint petitioning or lobbying. However, if undertakings formally engage authorities, potential limits in relation to their petition or lobby activities could be found in the general competition provisions, especially regarding the exchange of commercially sensitive information.[26]

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22 See FNE, Horizontal Merger Guidelines, para 170 and following.

23 FNE, *Inmobiliaria y Administradora CGL Ltda/COPEC SA* (2020), F216-2019. FNE, approval report (8 June 2020) (Spanish) <www.fne.gob.cl/wp-content/uploads/2020/06/inap2_F216_2019.pdf>

24 See FNE, Horizontal Merger Guidelines, para 177 and following.

25 FNE, *Inmobiliaria y Administradora CGL Ltda/COPEC SA* (2020), F216-2019. FNE, approval report (8 June 2020) (Spanish) <www.fne.gob.cl/wp-content/uploads/2020/06/inap2_F216_2019.pdf>

26 FNE, Guidelines on Trade Associations (August 2011) (Spanish) <www.fne.gob.cl/wp-content/uploads/2011/08/guia_-asociaciones_-gremiales.pdf>.

Question 25(a) HydroCell JV: How would the parties' objective of encouraging governments to invest in hydrogen fuelling infrastructure likely be viewed under the substantive competition and/or merger control rules?

The FNE's substantial merger control assessment strictly focuses on competition law considerations. Therefore, this objective would not influence the FNE's merger control decision.

Notwithstanding the above, if the HydroCell JV were a notifiable transaction, the FNE would analyse the HydroCell JV's objective in relation to potential coordinated risks that may arise between CarCo and TruckCo, as actual or potential competitors in the car commercialisation business. If such risks are identified, the FNE would seek potential mitigation measures from the parties.

Remedies

26. If a notified JV (or agreements/provisions related to it) is found to be anticompetitive, what are the available behavioural and/or structural remedies that can be imposed by the competition authority or the courts to address the concerns?

When reviewing a notifiable JV or merger, if the FNE raises competition concerns that are not fully addressed by the expected efficiencies, the parties' rebuttal arguments or the characteristics of the affected relevant market(s), the parties can offer remedies at any stage of the review procedure to obtain a conditional clearance. If the parties offer remedies, the FNE will analyse whether they are feasible and sufficient to properly address the competition concerns.

Remedies are not imposed by the reviewing authorities but negotiated after formal presentation by the parties. The FNE's Guidelines on Remedies[27] classify the remedies which can be offered by the parties, as follows:

- *Structural remedies*: These correspond to divestments, which can be further classified in two types: (i) divestitures that involve the sale of assets to a suitable purchaser, and (ii) divestments that seek to remove links between the parties and competitors (e.g. minority shareholdings in third parties).
- *Quasi-structural remedies*: These correspond to remedies that intend to influence the market's structure affected by the concentration. Granting access to certain assets or inputs, or licensing obligations, may be considered to be quasi-structural remedies.
- *Behavioural commitments*: These are remedies of behavioural nature aimed to affect the parties' relationships with their affiliates, competitors and/or third parties active in the market. These commitments may constrain the parties' behaviour in the affected market(s) by establishing certain conditions

[27] FNE, Guidelines on Remedies (English) <www.fne.gob.cl/wp-content/uploads/2017/11/Guidelines-on-Remedies.pdf>.

they must comply with to mitigate the identified competition risks (e.g. prohibition or limitations to execute certain agreements, information barriers or the implementation of firewalls).

27. Is the competition authority in your jurisdiction willing to negotiate commitments designed to ensure that a JV does not have anticompetitive effects? If yes, please provide examples.

The FNE will generally negotiate remedies (commitments) designed to ensure that a notifiable JV does not produce anticompetitive effects in the local market, as it would in relation to any notified concentration. Neither the Merger Regulation nor the FNE's Guidelines provide a different treatment in relation to notifiable JVs.

The remedies must be presented to the FNE in writing and do not constitute an acknowledgement of potential competition concerns. Should the remedies offered by the merging parties be accepted by the FNE, they become binding upon them and are subject to compliance. Note that, depending on the remedy offered, the FNE could perform market tests to analyse if it fully addresses the identified competition risks.

Based on publicly available information, the competition authorities have not analysed cases where notifiable JVs generated competition concerns that had to be mitigated by remedies. All JVs notified to the FNE thus far have been unconditionally cleared.

However, although it did not consist in a remedy or commitment, in the *ISA Inversiones/Transelec/China Southern Power Grid* case,[28] the FNE considered in its competitive assessment a draft protocol that regulated the exchange of commercially sensitive information between the parties to the JV. In the FNE's opinion, such draft protocol, prepared prior to the notification and in line with the FNE's standards on the matter, substantially reduced potential coordinated risks. Based on this precedent, it could be expected that in the future the FNE would be willing to consider the implementation of a similar protocol as an acceptable commitment to mitigate potential coordinated risks arising from a notified JV.

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[28] FNE, *Inversiones Chile/Transelec Holding Rentas Limitada/China Southern Power Grid International* (2022), F303-2021, paras 64 and 66. FNE, approval report (Spanish) <www.fne.gob.cl/wp-content/uploads/2022/03/inap1_303_2021.pdf>.

Part 2: Analysis of Non-notifiable Joint Ventures or Issues Arising After Merger Control Clearance

Please note that these questions relate specifically to JVs that (a) are not subject to your jurisdiction's merger control laws; or (b) arise after merger control clearance and consummation of the notified transaction. Collectively, these are described in the questions below as "outside of merger control".

Legislation and Enforcement

28. Aside from the merger control rules described in Part 1, is there any other legislation and/or guidelines governing JVs under your jurisdiction's competition laws? Please provide a short description, including how JVs outside of merger control are defined. Please provide a link to the relevant legislation, regulations and guidelines (if possible, in English).

As noted in Questions 3(a) and 5, non-notifiable JVs constitute agreements subject to general competition provisions. Article 3 of DL 211 states that whoever carries out or enters, either individually or collectively, into any conduct, act or agreement that impedes, restricts or hinders competition, or that tends to produce such effects, will be sanctioned with the measures established therein.[29]

The competition regulation does not define non-notifiable JVs (it only provides the definition of notifiable JVs). Further information on how non-notifiable JVs are treated under DL 211 (i.e. as agreements subject to the general competition provisions) is provided in Question 32 below.

29. If your jurisdiction distinguishes between "concentrative" and "cooperative" JVs, what rules apply to concentrative JVs that do not trigger the notification thresholds? What rules are applied to JVs that have been cleared in merger control? Please also briefly indicate the authority responsible for enforcement.

The merger control legislation does not explicitly distinguish between concentrative and cooperative JVs.

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[29] See link to an English version of the DL 211 provided in n 3.

Although the competition authorities have previously analysed this distinction (for instance, in a public consultation case before the TDLC in 2007, the distinction between concentrative and cooperative JVs was part of the overall discussion),[30] it appears to be nowadays irrelevant. After the last legal modification in 2016 (which created the merger control regime in force since July 2017), there is now a clear distinction between notifiable and non-notifiable JVs.

As set out in Question 28, non-notifiable JVs would constitute agreements subject to the general competition provisions.

Notifiable JVs that have been cleared (and have been already created) are subject to general competition provisions (i.e. any potential anticompetitive conduct by an existing JV will always be subject to the general competition provisions). In addition, certain provisions of Title IV of DL 211 may still apply, for instance, in relation to potential changes in the assessed structure of the JV that could merit an additional notification. The authority responsible for enforcement is the FNE.

Question 29(a) HydroCell JV: If the HydroCell JV is subject to the merger control rules of your jurisdiction, to what extent could the substantive competition laws nevertheless apply to the HydroCell JV?

As noted in Question 21, notwithstanding the merger clearance of the HydroCell JV, any potential anticompetitive conduct (unilateral or coordinated) by either the parties or the HydroCell JV would be subject to general competition provisions.

Investigations

30. Please describe the process (e.g. procedural steps, timeline etc.) for the assessment of JVs outside of merger control? Is there a time bar for the authority to investigate a JV after its establishment? Can the authority prevent or suspend the JV's implementation/operation while it carries out its investigation?

As explained in Question 3, there is no clearance process for JVs outside of merger control, save for those submitted for voluntary consultation before the TDLC. There are no fixed deadlines in the voluntary consultation procedure. However, if a consultation request is filed, the proceeding might last over 12 months until the TDLC issues its decision, or for several additional months if the final decision is challenged before the Supreme Court.

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[30] TDLC Decision No 22/2007 on "public consultation procedure initiated by ENDESA and Colbún SA in relation to HidroAysén JV", NC 134-2006. TDLC Decision (Spanish) <www.tdlc.cl/wp-content/uploads/resoluciones/Resolucion_22_2007.pdf>.

The FNE may initiate an investigation, either *ex officio* or by complaint, in case of non-notifiable JVs that may impede, restrict or hinder competition (Article 3 of DL 211). Complaints must first undergo an admissibility stage before the FNE (which can last for up to four months, extendable for two additional months).

The only time bar for the authority would be the statutory prescription period for each type of anticompetitive infringement (i.e. three years for general infringements counted as of their occurrence, and five years for cartels since the effects of the conduct ceased in the market).

The FNE has no power to prevent or suspend the implementation of a non-notifiable JV, even if it is being investigated. However, potential judicial actions regarding an unimplemented JV (e.g. the initiation of a voluntary consultation procedure, or the filing of an antitrust claim) may eventually allow the FNE to request the TDLC to impose potential interim measures with suspensory effects over the transaction.

Question 30(a) HydroCell JV: If the HydroCell JV is investigated, what are the implications for the parties' timing objectives? Will they be able to begin operations pending the competition authority's investigation?

A potential FNE investigation would not imply any legal standstill obligation over the HydroCell JV and the parties. Should they decide to implement the non-notifiable JV, the parties would be able to begin operations even pending the results of such investigation. However, FNE has the possibility to impose interim measures during the investigations.

Authorisations

31. Is there a possibility to apply for an exemption order, approval or other form of authorisation for a JV? If not, is competition compliance based on self-assessment by the parties?

See Question 3(a) for possible options to obtain legal certainty in relation to non-notifiable JVs.

In general terms, competition compliance regarding non-notifiable JVs is always based on self-assessment by the parties. This was confirmed by the FNE when providing guidance for the economic agents' self-assessments of potential agreements among competitors in the context of the COVID-19 pandemic.[31]

[31] FNE, "Public Statement on agreements among competitors in the context of the COVID-19 pandemic" (3 April 2020) (Spanish) <www.fne.gob.cl/declaracion-publica/>.

Substantive Assessment of a Non-Notifiable JV

32. Please explain the substantive test that applies to JVs outside of merger control. Please describe the primary (horizontal, vertical, conglomerate, complementary or any other) theories of harm and factors normally considered. Please include citations to relevant case law and examples.

As noted in Questions 3(a), 5, 28, and 29, non-notifiable JVs constitute agreements subject to general competition provisions.

In general, to assess the legality of an agreement that may restrict competition (i.e. not per se illegal), the competition authorities will examine both its potential pro- and anticompetitive effects before determining whether it infringes the competition regulation (following the rule of reason). In this context, several relevant factors will be considered, such as the business rationale of the agreement, the market power of the parties involved, the level of competition in the relevant market(s) and other market considerations.

Furthermore, notwithstanding that the rule-of-reason analysis is applicable to those non-notifiable JVs that can be considered as agreements among competitors, to the extent that they involve cooperation of horizontal nature, they must also be assessed in accordance with specific principles to determine their lawfulness.

Agreements among competitors may produce both efficiencies and risks of abuse of dominance and/or of being considered as a platform that facilitates potential unlawful coordinated practices or lessens the competitive intensity in the market. Therefore, their legality is analysed on a case-by-case basis by weighing their efficiencies and risks.

In this regard, the FNE has established that agreements can be deemed pro-competitive when collaborative to produce efficiencies for the parties, and such efficiencies are passed on at least partly to consumers (premises under which a treatment different from the one applied to collusive agreements would be justified).[32]

Question 32(a) HydroCell JV: If the HydroCell JV is unlikely to fall within the scope of the merger control rules of your jurisdiction, please provide a short summary of the analysis that would apply to the HydroCell JV.

Considering that as a result of the implementation of the HydroCell JV, CarCo and TruckCo would compete in both a broad market for the manufacturing and/or commercialisation of cars (given that TruckCo recently launched a new line of cars) and a market for the commercialisation of hydrogen-based electric vehicles, the HydroCell JV would be analysed as an agreement among competitors. Therefore, the analysis that would apply would be one in relation to non-notifiable JVs.

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[32] FNE, *Acuerdo de cooperación MSD Saval SA* (2016), F25-2013, paras 8 and 9. FNE, approval report (10 June 2016) (Spanish) <www.fne.gob.cl/wp-content/uploads/2016/06/Trabajo-2.pdf>.

33. For JVs involving parents that have competing entities within their respective groups, does the substantive analysis of JVs differ from that of other coordination between competitors? If so, how?

The competition legislation does not provide a different substantive analysis or standard especially applicable to this scenario.

When analysing a JV involving competing business groups, competition authorities will determine the existence of potential coordinated risks if the competing agents are the parties to the JV or other entities of their business groups.

34. Does the legislation, regulations or guidelines have specific provisions addressing particular types of JVs (e.g. production JVs, marketing JVs, R&D JVs, distribution JVs, joint-bidding JVs, purchasing JVs etc.)? Please provide a short description of any distinctive elements.

Neither DL 211 nor the FNE's guidelines provide definitions of particular types of JVs. However, the FNE's Jurisdictional Guidelines make brief references to different types of JVs when detailing the criteria for a notifiable JV.

35. Is there any scope for productive, dynamic or other efficiencies or public interest considerations to be considered when assessing JVs outside of merger control? If yes, explain how this is done.

Yes, as noted in Questions 3(a), 5, 28, 31, and 32, non-notifiable JVs would constitute agreements subject to the general competition provisions and, therefore, susceptible to be analysed under the rule of reason to determine whether they may impede, restrict or hinder competition. The FNE's analysis includes both its potential anti- and pro-competitive effects, including potential efficiencies or productive considerations.

Remedies and Sanctions

36. If a JV (or agreements/provisions related to it) is found to be anticompetitive, what are the available behavioural and/or structural remedies that can be imposed by the competition authority or the courts to address the concerns?

Potential measures of behavioural or structural nature can be agreed with/imposed by competition authorities when analysing a non-notifiable JV that produces anticompetitive effects. For instance:

– *In the context of an ongoing FNE investigation*. If in the context of an ongoing FNE investigation, a non-notifiable JV is found to produce anticompetitive effects, the parties to such a JV can explore reaching a settlement with the FNE to close such investigation subject to conditions (Article 39(ñ) of DL 211).

  In particular, the parties to the JV can explore committing to the FNE certain obligations, usually behavioural, to dismiss the FNE's concerns in relation to the JV and obtain a formal closing of the investigation, subject to the compliance of such measures or commitments.

  As noted in Question 3(a), settlements reached between investigated parties and the FNE, properly approved by the TDLC, provide a safe harbour since

the FNE would refrain from challenging the JV object of the agreement as long as the parties comply with the commitments.

– *In the context of a judicial procedure before the TDLC*. Whether in the context of a consultation or in a contentious procedure, if a JV is found to produce anticompetitive effects, the TDLC has broad powers to impose (in addition to potential sanctions in case of a contentious procedure) the preventive, corrective or prohibitive measures it deems appropriate (Article 26 of DL 211).

  Such measures could be structural (e.g. divestitures) or behavioural (e.g. prohibition to implement certain agreements or the implementation of firewalls) – there is no comprehensive list of measures to which the TDLC must adhere when preventing, correcting or prohibiting anticompetitive circumstances.

  For instance, in 2018, the TDLC conditionally approved the implementation of two commercial collaboration agreements (JVs of strategic alliance) entered between the airline groups LATAM, American Airlines and IAG for the services of air transportation of passengers and cargo in South America–North America and South America–Europe routes[33] (Joint Business Agreements (JBAs)). The JBAs were submitted to a consultation procedure by the Chilean Association of Tourism Companies (ACHET), requesting their rejection by the TDLC since, in its opinion, their implementation would have seriously impeded effective competition in certain highly concentrated origin and destination pairs.

  Through its Decision No 54/2018, the TDLC ultimately approved the JBAs, subject to compliance with nine different mitigation measures. Among others, the TDLC imposed (i) the implementation of a certain income distribution formula between the parties to the JBAs, (ii) a commitment to maintain a minimum passenger capacity in direct flights and to increase such capacity on certain routes, and (iii) limits to charging lower prices for indirect flights than those charged for direct flights, when the latter are used as input for the former.

  The TDLC's decision was later overruled by the Supreme Court on May 2019 by prohibiting the implementation of the JBAs as to passenger's air transportation services.

37. Is the authority open to negotiating commitments designed to ensure that a JV does not have an anticompetitive effect? If yes, please provide examples.

Yes, see Questions 3(a) and 36 for further details on settlements.

38. Please describe any fining/penalty legislation/regulations in your jurisdiction that apply to anticompetitive JVs.

As noted in Questions 3(a), 5, 28, 31, and 32, non-notifiable JVs would constitute agreements subject to the general competition provisions. If a non-notifiable JV

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[33] TDLC, Decision No 54/2018 on "public consultation procedure initiated by the ACHET in relation to LATAM/AA/IAG JBAs", NC 434-2016. TDLC's Decision (Spanish) <www.tdlc.cl/wp-content/uploads/resoluciones/Resoluci%C3%B3n_54_2018.pdf>.

is found to be anticompetitive by the TDLC (i.e. the JV infringes Article 3 of DL 211), the TDLC can impose a wide range of sanctions both on the involved undertakings and individuals, as set out in Article 26 of DL 211. The general sanctions include the following:

- The modification or termination of anticompetitive agreements;
- The dissolution or modification of any legal entity involved in the infringement; or
- Administrative fines of up to (i) 30% of the offender's sales corresponding to the product line associated with the infringement, during the period of such infringement, or (ii) the double of the economic benefit obtained from the infringement. In the event neither (i) nor (ii) are practicable, the TDLC can impose administrative fines of up to UF 60,000.

In addition, the TDLC can impose the following sanctions in relation to offenders of collusive practices:

- The prohibition of up to five years (i) to contract with the state administration organs, the congress, and the judiciary, as well as with state-owned companies, and (ii) to be awarded public concessions.

Individuals behind collusive practices are also subject to potential criminal sanctions (i.e. imprisonment for 1–10 years).

Finally, in accordance with Article 30 of DL 211, individuals or undertakings negatively affected by anticompetitive practices can pursue private follow-on competition damages claims before the TDLC.

39. Please describe any scope for customers or other parties who may be negatively affected by an anticompetitive JV to pursue private or class actions to recover damages or obtain other remedies.

As noted in Question 38, individuals or undertakings can seek compensation for damages suffered because of anticompetitive conduct already sanctioned by the TDLC (Article 30 of DL 211). The party seeking damages does not need to prove that there was an infringement of competition law (as it is already established by the TDLC) but only the existence of the damages, their quantum and the causal link between the infringement and the damages.

When the victims of an anticompetitive practice are consumers, they can seek compensation either by themselves (individually or collectively in groups of consumers) or represented by National Consumer's Agency or by a consumer association.

Part 3:
General Questions

Please provide brief responses to the questions below. Please note that these questions relate both to JVs that (a) are subject to and have been reviewed and cleared under your jurisdiction's merger control laws and subsequently consummated; and (b) are not subject to your jurisdiction's merger control laws. To the extent there is a difference in your responses to situations (a) and (b), please indicate.

Exemptions / Safe Harbours

40. Do the competition law rules in your jurisdiction include exemptions or "safe harbours" (e.g. where market shares are below a particular level) for either a) the merger notification obligations as they apply to JVs; and/or b) the application of substantive competition rules to JVs? Please explain whether the exemption or safe harbour is the same or different from general competition law concepts and how they are applied in practice.

The competition legislation does not envisage any exemption or safe harbour for merger notification obligations relating to JVs.

There are exceptions in relation to transactions involving low market shares when assessing whether a concentration can be notified through a Simplified Notification Form, which requires less information and is usually reviewed more quickly (see Question 20).

The competition legislation does not contemplate exceptions or safe harbours in relation to the application of substantive competition rules regarding JVs.

Ancillary Restraints

41. How are ancillary competition restrictions that are related to the formation or operation of JVs dealt with? For example, are there legislative provisions, guidelines or case law concerning non-compete provisions, licensing agreements or exclusive supply/purchasing obligations? Do these rules apply to the relationship between the parent companies, and to the relationships between the parents and the JV? If so, please describe.

The competition legislation does not explicitly regulate restraints ancillary to a transaction, such as non-compete provisions, licensing agreements or exclusivities.

Guidance particularly applicable to vertical restraints can be found in the FNE's Guidelines on Vertical Restraints of June 2014.[34]

– **Regarding notified JVs, are such ancillary restrictions i) required to be identified in the notification of the JV transaction; ii) subject to separate notification requirements; or iii) not subject to notification? Please provide relevant case examples that illustrate the analysis.**

Regarding notified JVs, Article 3(1) of the Merger Regulation requires the parties notifying through an Ordinary Notification Form to inform about the existence of other potential agreements or covenants related to the notified transaction (including all ancillary restrictions), such as non-compete clauses, licensing agreements or exclusivities. For the sake of clarity, the informed ancillary agreements or restrictions are not subject to separate notification requirements.

By way of example, the FNE has cleared an acquisition in the broadcast television industry that included, among others, ancillary non-soliciting agreements between the parties (*CHV/Viacom*[35] – 2021). In this case, the FNE analysed such ancillary agreements, finding that they did not produce anticompetitive effects as they were (i) directly related to the notified transaction, (ii) necessary for the transaction's implementation, and (iii) duly limited in terms of time.

– **Does a merger control clearance include (specific or implicit) clearance of ancillary restraints, and does a clearance preclude future enforcement action by the authority in respect of ancillary restraints related to the JV transaction?**

In addition, if the FNE clears a transaction involving ancillary agreements, not raising concerns in their respect or the existing countervailing elements that led to such clearance, it is arguable that the FNE's decision implicitly clears such ancillary restraints.

– **Is the concept of "ancillary restrictions" also relevant in the review of JVs outside of merger control, and do the rules differ from the ones applied in merger control?**

Finally, based on publicly available information, neither the FNE's nor the TDLC's practices have addressed ancillary restraints as a relevant element for the analysis of non-notifiable JVs thus far.

Question 41(a) HydroCell JV: Would the non-compete obligations between the parents and the JV, as well as purchase and supply obligations between the parties and the JV, be viewed as part of the merger control process if the JV had been notifiable? And if not, how would these restrictions be analysed under the substantive competition law rules in your jurisdiction?

If the HydroCell JV is notified through an Ordinary Notification Form, the parent companies must notify any ancillary agreement between them, including potential non-compete clauses or purchase and supply obligations.

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34 FNE, Guidelines on Vertical Restraints (Spanish) <www.fne.gob.cl/wp-content/uploads/2017/10/Gu%C3%ADa-Restricciones-Verticales.pdf>.

35 FNE, *Red de Televisión Chilevisión SA/Viacom Camden Lock Limited*, Case Docket F276-2021. FNE, approval report (5 July 2021) (Spanish) <www.fne.gob.cl/wp-content/uploads/2021/07/inap_F276_2021.pdf>.

If such ancillary agreements are not assessed in the merger review procedure, they would be subject to the general competition provisions and, if relevant, the FNE's Guidelines on Vertical Restraints.

Information Exchange; Interlocking Directorates

42. Are there specific legislative provisions, guidelines or case law concerning the exchange of information between the owner companies through JVs, and/or between parents and the JV itself? Are there any safeguarding measures, such as clean teams, firewalls, ring-fencing etc. that are prescribed or generally accepted to address such concerns?

Unlike other anticompetitive conduct, the exchange of commercially sensitive information between competitors is not expressly regulated in Article 3 of DL 211. However, under certain circumstances, the exchange of information could lead to potential coordinated conducts sanctionable under Article 3(a) of DL 211 (i.e. collusive and concerted practices).

The FNE has partly addressed this matter in its Trade Association Guidelines, establishing the general criteria to determine the lawfulness of information exchanges as to (a) the level of aggregation of the information, (b) the age of the information, (c) the frequency of the information exchanges, and (d) the parties involved, and the exchange mechanism used.[36]

Safeguarding measures such as clean teams are not considered in the competition legislation, but the FNE's Guidelines on Remedies briefly mention some types of measures. Nevertheless, these types of safeguarding are commonly recommended and applied in practice.

Question 42(a) HydroCell JV: Are there specific rules or case law in your jurisdiction concerning how the parties may exchange information – for example, through their steering committee or in connection with their joint manufacturing efforts?

There are no specific rules or local case law concerning how the parties may exchange information. However, the parties can follow the general criteria established by the FNE in its Trade Association Guidelines, which illustrate best practices. In addition, the FNE tends to follow, among others, the European Commission's practice and approaches, so the parties can always complement the information available with this foreign law as guidance.

[36] See FNE, Trade Association Guidelines, 15 and 16.

43. Are there legislative provisions, guidelines or case law that restrict whether a person can become a director, officer or employee of a JV (e.g. can a person employed by or serving as a director of a parent also serve as a director of the JV)? If so, please describe.

Article 3(d) of DL 211 prohibits the simultaneous participation of individuals in relevant executive positions or as director in two or more competing companies. The infringement of this provision constitutes anticompetitive conduct, provided it surpasses the turnover threshold of UF 100,000[37] during the last financial year.

As a result, an individual who already works as a relevant executive or director in a parent company that could be considered a competitor within a certain market would be subject to the interlocking prohibition. Further information on the FNE's approach to interlocking can be found in the FNE's document on minority shareholdings and common directors between competing companies (2013).[38]

International JVs

44. Describe whether the impact of a JV on competition at an international level is a factor that may be considered when assessing the impact of a JV (i.e.does the competition authority focus only on the impact of a JV in its own jurisdiction, or take into account the market definition, competitive effects and efficiencies of the overall transaction on an international basis)? If yes, please provide examples where this was done and any guidelines on this subject.

When assessing either notifiable or non-notifiable JVs, the competition authorities focus on the effects in the Chilean market. Consequently, whether the JV produces effects overseas and the nature of those effects do not, in principle, matter when deciding a notifiable JV's clearance or whether a non-notifiable JV is anticompetitive.

However, competition authorities do consider the international impact of a JV in their substantive analysis, especially when establishing the relevant substantive frameworks, such as relevant market definitions, and when identifying potential measures of international scope that could address potential concerns that affect the Chilean market. For instance, in the *Maersk/Hamburg Süd* merger case[39] (2017), the FNE defined the relevant markets per route, involving different national markets at each end, and the remedies to which the clearance was conditioned contained measures of international scope.

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37 See the conversion method described in n 7.

38 FNE, Minority shareholdings (Spanish) <www.fne.gob.cl/wp-content/uploads/2017/10/Participaciones-minoritarias.pdf>.

39 FNE, Clearance Decision (11 October 2017), *Maersk Line A/S/Hamburg Süd* Case Docket F83-2017. FNE, approval report (11 October 2017) (Spanish) <www.fne.gob.cl/wp-content/uploads/2018/01/inf_aprob1_F83_2017.pdf>.

In addition, the FNE might also consider competition at an international level in its substantive analysis when determining the level of contestability of a relevant market. This arises because the potential entrance of a competitor active in other national markets into the Chilean scenario or the fact that imports may discipline national producers or distributors, is usually considered by the FNE.

Trends and Expected Developments

45. Please describe any competition law policy and enforcement trends or expected changes in your jurisdiction related to JVs.

Like in many other jurisdictions, the COVID-19 pandemic has raised the question of whether the Chilean competition regulation is in line with potential unprecedented levels of cooperation between businesses (including potential JVs), which is likely to need an urgent review and/or a more flexible application of competition substantive provisions.

Both the FNE and the TDLC have given guidance on this matter. While the FNE considered that the COVID-19 pandemic does not allow different standards or a diverse application of the substantive provisions, the TDLC has internally regulated that consultation procedures initiated in relation to collaborations can be, in any case implemented prior to its decision. This is subject to such agreements' efficiencies outweighing their anticompetitive effects, if such agreements contribute to the maintenance of the supply chain of indispensable goods, the continuity of transport services, and the provision of medicines and other medical items.

In this scenario, it is still unclear whether regulation will be able to address potential challenges that a growing collaboration may present in the future. In any case, competition authorities have always shown themselves to be proactive and up-to-date with international trends, so it is likely to expect that they will follow the experience gathered overseas when approaching local cases.

Competition Law Treatment of Joint Ventures

A Jurisdictional Guide

Benedict Bleicher, Neil Campbell, Andrea Hamilton,
Niko Hukkinen, Arshad (Paku) Khan, Alastair Mordaunt (eds.)

Preface by Michael Reynolds
Foreword by Terry Calvani

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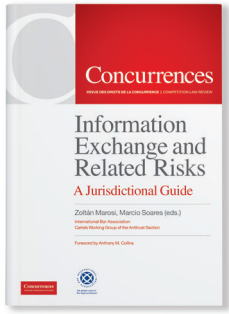

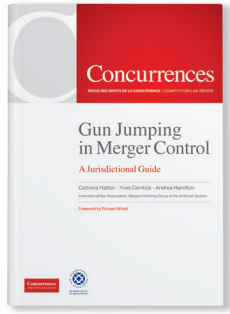

The Mergers Working Group (MWG) of the Antitrust Section of the International Bar Association (IBA) has formulated the first multi-jurisdictional survey dedicated exclusively to the competition law treatment of joint ventures (JVs) across 22 jurisdictions. The survey considers critical issues and questions that businesses and their advisers face when dealing with JV transactions in light of merger control and substantive competition laws, in order to provide an up-to-date and comprehensive overview of the state of the law. A practical analysis of key issues is also provided, by using a hypothetical JV transaction developed by the MWG that appears throughout each chapter, as well as a high-level overview of key results compiled by the editors.

The jurisdictions covered include Australia, Brazil, Canada, Chile, China, COMESA, the European Union, France, Germany, India, Japan, Mexico, Poland, Russia, Singapore, South Africa, South Korea, Spain, Switzerland, Ukraine, the United Kingdom and the United States.

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