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Competition Law Treatment of Joint Ventures A Jurisdictional Guide

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

International Bar Association

Mergers Working Group of the Antitrust Section

Preface by Michael Reynolds

Foreword by Terry Calvani

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Competition Law Treatment of Joint Ventures

A Jurisdictional Guide

Preface by
Michael Reynolds

Foreword by
Terry Calvani

Editors
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PREFACE

MICHAEL REYNOLDS

Former President of the International Bar Association*

The publication of this important substantive review of how joint ventures are treated under the competition laws of 22 jurisdictions is very timely.

When I first attended the International Bar Association (IBA) annual conference in Zurich in 1979 and became a member of the Antitrust Committee there were four committee officers – two from Germany, one from the US and one from Canada. The programmes of the Committee discussed developments in the European Economic Community (EEC), as it was then, Germany, the UK, Canada and the US. Today the Antitrust Section of the IBA has 25 officers from about 20 of the significant antitrust jurisdictions around the world including, in addition to the above, from Asia, South and Central America, Africa, Australia, and Central and Eastern Europe. The Committee programmes and specialist conferences take place all over the world. The Section's activities reflect how competition laws and enforcement have globalised and become increasingly complex over the past four decades.

The Antitrust Section has been a very active contributor to the development of competition policy. Over the past two decades, its specialist working groups made up of leading practitioners from these many jurisdictions have made hundreds of submissions to governments and enforcement agencies around the world. Members and officers of the Section and its working groups have also made significant contributions to the work of the International Competition Network, which the IBA played a key role in helping to found in 2001 as a result of the conferences it organised at Ditchley Park and in Brussels, jointly with the European Commission in that year.

The Section and its working groups have also provided thought leadership through their programs and publications. This excellent volume is the second book compiled by the Mergers Working Group, and follows a similar project on gun jumping that was also published in conjunction with Concurrences.

As Terry Calvani points out in his Foreword, joint ventures occur in many different forms and the ways in which they are structured can lead to very different outcomes in the way they are analysed and assessed in the ever increasing number of antitrust regimes around the world. In particular they will often fall under compulsory pre-merger notification regimes if structured in a particular manner with the major review and cost consequences that will then ensue.

This very valuable publication covering 22 jurisdictions will be an enormous help to practitioners and in-house counsel in dealing with this very complicated area. The hypothetical case study further illuminates many of the difficult issues that are likely to arise in practice and how they would be dealt with by the enforcement agencies in these jurisdictions. It is an excellent achievement making full use of the resources which Section working groups can summon up from leading practitioners from across the world. As former President of the IBA, former Chair of the Legal Practice Division and former Chair of the Antitrust Committee I am very proud to recommend and launch this publication!

* President of the IBA, 2013-2014; Chair of the IBA Legal Practice Division, 2005-2006; Chair of the IBA Antitrust Committee, 1993-1997.

FOREWORD

TERRY CALVANI
Brunswick Group

This volume, which examines the antitrust issues confronted by joint ventures (JVs) in 22 jurisdictions, is a valuable addition to the libraries of both practitioners and students of antitrust policy. Each chapter is authored by experts in each jurisdiction. Although the subject is often treated as an adjunct to the general treatment of mergers, this volume traverses the landscapes of both merger and the related horizontal collaboration problems.

A new examination of the topic is very important, given the current changes in enforcement policies in many jurisdictions. For the past 40 years, globalisation made the task of analysing transactions such as JVs much more challenging, with simultaneous review taking place in more jurisdictions. But more difficult issues are now afoot. The policies that have guided most competition regimes over the past 30 or 40 years are under assault. This renders analyses even more difficult. The authors endeavour to provide an up-to-date treatment of these issues.

A JV is generally defined as collaboration by two or more entities to pursue a common objective. As such, JVs can take many forms. A trade association, often composed of competitors, is essentially a JV. An athletic league is another, and the efforts by pharma to develop and produce vaccines during the COVID crisis is yet another. They may be formal or informal and their creators may not even think of their creation as a JV. Generally, two big questions loom large: what are the competition authority review requirements, if any? And, would the JV restrain competition?

“Pre-merger” notification requirements for JVs vary widely and can be complicated. Failure to get this right can create huge problems for the deal. With the very large number of jurisdictions that require a pre-closing notification and review, wading through these swamps can be very difficult for the novice. The following chapters provide significant assistance to both counsel and their clients on this front. The authors very carefully review both the filing requirements and the review process of the covered jurisdictions.

The substantive analyses can also be difficult. A great many JVs present issues like those presented in a merger. Do the parties compete or potentially compete? Does the venture provide opportunities for objectionable exclusion? Delineation of a market or markets, measurement of market power, entry barriers, efficiencies and the like are part and parcel of the exercise. While the definition of markets is pretty uniform across jurisdictions, the assessment of market power is not. And like mergers, horizontal collaboration issues are present. While due diligence and “gun jumping”, are not generally as troublesome as in a merger context, they can still present problems. The well-versed contributors explore these issues.

Except where a merger presents ongoing entanglements, once the deal has closed the tasks of the merger counsel generally come to an end. Not so with many JVs. The creation of the new venture often poses ongoing issues of improper collaboration, where the parents are actual or potential competitors. The composition of the JV’s board of directors requires care. Where the JV is a significant investment, the parents may want one or more of their senior executives to be board members. It takes no imagination whatever to see the possible problems than can arise.

This desk volume should aid counsel in navigating these sometime tumultuous waters.

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INTRODUCTION AND SYNTHESIS

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1. Competition Law Treatment of Joint Ventures: A Need for Clarity

More than two decades ago, the OECD wrote that “the business community considers joint ventures to be one of the most difficult areas of competition law to understand and follow”.¹ The OECD predicted that “[b]usiness uncertainty will probably increase given that joint ventures are taking new forms; they increasingly involve sharing ideas rather than brick and mortar”.²

The OECD’s comments have proved prescient. Competition and merger control enforcement has increased worldwide, at the same time as fundamental questions are being raised about whether competition law has an even greater role to play in delivering a range of economic policy objectives. Joint ventures (JVs) are also taking on more complex and varied forms, employing new technologies and business models, and affecting a multitude of jurisdictions. Taken together, these developments lead to significant uncertainty for businesses and their advisers, and significant challenges for competition authorities.

¹ OECD Policy Roundtable, “Competition Issues in Joint Ventures” (2000), Executive Summary, para 5.

² Ibid.

1.1 The Competition Concerns

JVs can take on an almost unlimited number of forms. Some are structured as separate corporate or other legal entities that have a full range of business functions. Others may use partnership or contractual arrangements.

Despite the considerable variation in form, a key common denominator is that JVs are typically used to share risk and cost while combining resources, expertise, technology and capital to pursue a common objective. Companies engage in JVs for several reasons: they may provide with an efficient mechanism to expand, develop new products or services, enter new markets and commercialise new ideas. JVs can enable outcomes that might not otherwise be possible without the involvement of partners.

JVs often provide effective and efficient vehicles for companies to pursue innovation, growth, cost reduction or other objectives that may enhance competition or that are competitively neutral or pro-competitive. However, some JVs may give rise to competition issues, ranging from complex procedural questions of merger notification to substantive concerns about anticompetitive effects, or both. It is critical to identify and distinguish JV transactions that may lead to serious competition issues from those that are competitively neutral or pro-competitive and are likely to yield efficient outcomes.

Complexity arises because competition laws (including merger control systems) take diverse approaches to the regulation of JVs and can be difficult to apply in practice in the context of JV transactions. This leads to legal uncertainty on fundamental issues, such as whether and how merger control rules apply, and, if they do not apply, how businesses and their advisers should conduct a “self-assessment” under substantive competition laws. These uncertainties have become more – not less – pronounced as competition law enforcement has increased, and fundamental principles of competition law analysis are being adapted and extended for the digital economy. At a minimum, such uncertainties risk chilling efficient JV transactions, and a lack of predictability in assessing substantive competition issues that may arise from JV transactions.

1.2 A Multi-Jurisdictional Survey Dedicated to the Competition Law Treatment of JVs

Against this background, the Mergers Working Group (MWG) of the Antitrust Section of the International Bar Association (IBA) formulated the first multi-jurisdictional survey dedicated exclusively to the competition law treatment of JVs across 22 jurisdictions. The MWG’s work is guided by the principle that merger control and competition law should allow the competitive effects of transactions to be assessed in an effective, efficient and predictable manner. Since both merger control and substantive competition law principles are relevant to JVs, this requires clear jurisdictional thresholds and clarity as to which transactions require merger control approval. It likewise requires clarity as to how the substantive competition laws apply to JVs. The MWG considered that a comparative survey of key issues across a wide cross-section of significant jurisdictions would make a useful contribution in the pursuit of these objectives.

The MWG designed a survey by considering critical issues and questions that businesses and their advisers face when dealing with JVs in light of merger control and substantive competition laws. These issues were then transformed into a series of concrete questions

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that were addressed to experts in each of the 22 jurisdictions covered by the survey, to generate a guide and comparative analysis. The results of the survey are set out in each of the following chapters, which cover 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.

Each of the following chapters is presented in three parts in order to provide an up-to-date and comprehensive overview of the state of the law concerning the competition law treatment of JVs.

- Part 1 concerns the application of merger control to JVs. It focuses on key issues such as whether merger control applies to JVs and, if so, in which circumstances. It addresses key concepts such as “full-functionality” and “change of control”, as well as whether JV transactions that fall short of full-functionality (or other key thresholds) are notifiable and, if so, when. It also addresses whether merger control applies to minority shareholdings, greenfield or brownfield JVs, or to temporary JVs – or even to changes to existing JVs. To the extent merger control applies in principle, this section also addresses how jurisdictional thresholds are applied, whether a local nexus is required and other difficult jurisdictional issues. Finally, Part 1 concludes with an overview of the substantive analysis of JVs in the context of merger control, including key concepts such as “spill-over” and “coordination” effects.
- Part 2 addresses the treatment of JVs under substantive competition laws outside the context of merger control. It examines key issues such as whether notification or other clearance procedures are available for JVs outside merger control, when and how competition authorities conduct investigations, and what are the potential substantive concerns related to such JVs. It also analyses remedies and sanctions under substantive competition laws, with reference to case examples where applicable.
- Finally, recognising that JVs implicate both merger control and substantive competition laws, Part 3 addresses issues common to both areas. This includes exemptions and safe harbours, the treatment of ancillary restraints (e.g. non-competition provisions), and issues relating to information exchanges and interlocking directorates.

1.3 Illustrative Hypothetical JV

To illustrate how these principles apply in practice, and to facilitate comparative analysis, the MWG also developed a hypothetical JV transaction – the HydroCell JV – that appears throughout each chapter to explain and provide a practical analysis of key issues. The HydroCell JV is a fictional, cross-border JV formed by fictional parent companies, raising issues that are typical of those present in the development of actual JV transactions. A detailed summary of the “facts” of the HydroCell JV is set out on pages XXIII-XXIV. While the hypothetical HydroCell JV does not constitute legal advice and the responses from the various jurisdictions are not a substitute for legal advice, it is hoped that it will provide useful illustrations, guidance and clarification for practitioners, companies contemplating transactions and competition agencies alike.

2. Overview of Key Survey Results

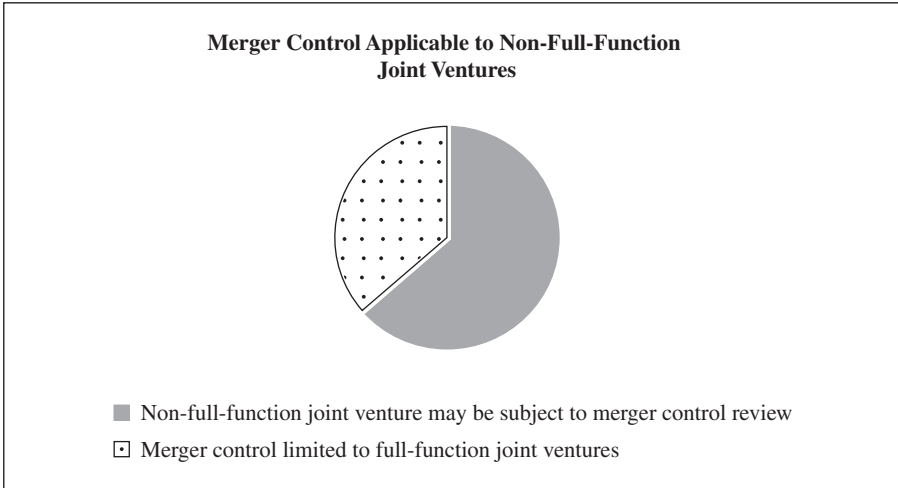
Overall, this volume shows that competition authorities in all 22 jurisdictions have the ability to scrutinise JV transactions under their respective merger control and substantive competition laws, even though – with notable exceptions – the term “joint venture” is in many cases undefined. Indeed, although the merger control and substantive competition laws apply to JV transactions, these laws in most cases were not designed for JV transactions. Thus, there is significant divergence in how JVs are analysed.

The following chapters examine in detail how merger control and substantive competition law apply to JVs, and – at a high level – examples of the issues addressed are set out below.

1.1 Jurisdictional Scope of JVs

A comparison of the following chapters shows significant variation in the jurisdictional scope of merger control systems to review JV transactions.

By way of example, a minority of jurisdictions require that a JV comprises a “full-function” JV³ to be subject to merger control review – i.e. 8 out of 22, while 14 of 22 jurisdictions extend the merger control notification requirements more broadly. Notably, the requirement of “full-functionality” is one of the hallmarks of merger control review of JVs in the European Union. By way of example:



In those jurisdictions that did not require a JV to be full-function as part of the jurisdictional requirements, the reasons for this varied.

One interesting trend that emerged is that non-full-function JVs were more likely to fall within the jurisdictional scope of merger control in jurisdictions that either do not require

³ The concept of “full-functionality” is generally understood to mean an autonomous entity operating on the market.

a change of control to trigger merger control (e.g. United States, Australia, Canada, Japan, Mexico and Russia), or those that expressly include minority acquisitions with the scope of merger control (e.g. Germany, Brazil and United Kingdom).

In addition, although there is some nuance by jurisdiction, the majority of jurisdictions apply merger control rules to greenfield JVs as well as brownfield JVs. In contrast, temporary JVs maybe subject to merger control review in only a minority of jurisdictions. However, it should be noted that the application of merger control to temporary JVs in most cases results from the concept of duration not featuring in the applicable legislation. In most jurisdictions, changes in scope or composition of shareholders of an existing JV can also potentially give rise to merger control requirements.

The following chapters also show that many jurisdictions require a JV transaction to have a local nexus to the jurisdiction for it to be reportable. But this is not uniform: indeed, the European Union, among other jurisdictions, can require the notification of transaction that has no connection to the EU. This typically occurs as a result of the parents alone fulfilling the merger control thresholds, irrespective of the “target” (i.e. the JV).

The following chapters address these and other merger control issues in detail. As the application of these rules to the hypothetical HydroCell JV illustrates, a clear understanding of the jurisdictional requirements for a collaboration project is crucial, given the impact on timing and strategy – and risks if filings are missed.

1.2 Substantive Review Under Merger Control Rules

As a general theme, greater commonality emerged in the application of substantive merger control rules once it is determined that a merger control notification is required or advisable. Competition authorities conducting a substantive merger control assessment typically consider unilateral, coordinated and portfolio effects arising from the establishment of the JV itself, much in the same way as in any merger review.

Beyond these traditional themes, competition authorities in most jurisdictions also focus on risks arising where one or more of the parent companies compete in the same or in related markets to the JV. Concerns over information-sharing and “spill-over” (i.e. the JV transaction affecting competition outside the scope of the JV) can be a significant concern. By way of example, the EU Merger Regulation specifically identifies risks associated with “coordination effects” in the context of JV transactions.

One notable area of potential divergence with the review of JV transactions compared with general mergers and acquisitions may relate to remedies. While this volume is focused on JVs, it is notable that behavioural remedies (e.g. relating to limitations on information-sharing, licensing etc.) appear to be accepted more frequently than in general M&A transactions. This is an area where further comparative study may be helpful, particularly given the frequent statements from competition authorities worldwide on the strong preference for structural remedies.

Key issues relating to the substantive assessment of JV transactions under merger control rules are treated in detail in Parts 2 and 3 in each chapter, and the application of the relevant principles is illustrated through several elements of the HydroCell JV transaction.

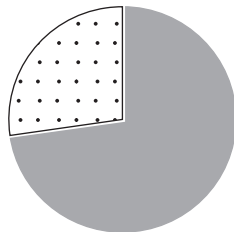
1.3 Review of JV Transactions Under Substantive Competition Law

In most cases, JV transactions that fall outside of the scope of merger control in each of the 22 jurisdictions considered in this volume are subject to “self-assessment” under applicable substantive competition laws. This means that parties to a JV transaction must, together with their advisers, determine whether their JV complies with relevant substantive competition law. Most jurisdictions did not envisage authorisations outside the scope of merger control, but there were some exceptions where authorisation may at least theoretically be available (e.g. Japan, Russia, South Korea).

As a general matter, substantive competition laws, including laws concerning restrictive agreements and the abuse of dominance/monopolisation, apply generally to JVs and there are no special rules for JVs. Typically, the substantive analysis focuses on whether the cooperation by competing parent companies through a JV gives rise to concerns of naked competition restrictions (e.g. disguised cartels), or whether otherwise legitimate cooperation in (e.g. production, distribution or R&D) may have restrictive effects on the relevant markets that outweigh the efficiencies generated by the cooperation. Each chapter explains how the relevant substantive laws are applied in practice, including with regard to concepts such as ancillary restraints. Also addressed are investigations, including process and outcome (remedies and penalties), with case examples where applicable.

One notable area of divergence that emerges is the availability of exemptions or safe harbours that may be applicable to JVs that are subject to self-assessment. Typically, these are not safe harbours that are designed expressly for JVs, but rather cover matters such as collaboration among competitors (United States, EU) or agreements of “minor importance”. Overall, the chapters show that most jurisdictions report some form of safe harbours or exemptions that may apply to the review of JVs under substantive competition law. This position, however, was not uniform, with at least six jurisdictions reporting limited or no safe harbours (Chile, COMESA, India, Mexico, Russia and South Korea).

**Availability of Safe Harbours or Exemptions
under Substantive Competition Law**



- Safe harbour and/or exemption available under substantive competition law
- ▣ No safe harbour/exemption

3. The HydroCell JV

The HydroCell JV transaction, which is intended to reflect the practical exercise that businesses and their advisers must undertake to determine whether and how competition law applies to a sample JV.

As the hypothetical facts of the HydroCell JV make clear, the parties to the HydroCell JV initially approach the collaboration project with no clear structure in mind, but with clear business objectives. Each chapter shows how businesses and advisers must take into account the divergent treatment of JVs to determine the optimal structure and strategy that, on balance, best reflects their objectives, achieves competition law compliance and manages timing and execution risk.

The result for the HydroCell JV project is that its objectives will most likely be achieved using a consistent strategy that results in a combination of self-assessment and merger filing obligations. This is not unusual for cross-border JV transactions, and it underscores the complexity of issues with which businesses and advisers must contend.

4. Concluding Remarks

In sum, more than 20 years have passed since the OECD's commentary on the difficulties of competition analysis of JVs, and its prediction of increasing complexity. This has come to pass and the complexities make it even more crucial than ever for businesses and their advisers to have a clear and comparative view as to how a JV is likely to be assessed under merger control and substantive competition law. This volume is intended to provide a guide to help businesses and their advisers do precisely that. It is also intended to provide greater clarity to competition authorities regarding the divergent approaches that arise and how they may be addressed.

Hypothetical Fact Pattern: “HydroCell JV”

Please note: The facts set out below are purely fictional, based on a hypothetical joint venture proposed by fictional companies. The questions that follow are designed to generate a purely illustrative discussion of how the merger control and/or substantive competition rules of selected jurisdictions may apply to a hypothetical set of facts. It is understood that the responses to these questions do not constitute legal advice and should not be relied upon as such. The antitrust analysis of joint ventures is highly fact-specific and will vary from case to case.

1. Parties to the HydroCell JV

HydroCell will be a joint venture formed by three parties (the “Parties”):

- **CarCo:** a leading global car manufacturer, headquartered in India. Please assume its global revenues exceed €15B, with ~60% of its revenue derived in Asia, 25% derived in Europe and 7% derived in the Americas; 5% in Africa, and 3% in Oceania.
- **TruckCo:** a leading global manufacturer of light passenger trucks. TruckCo recently launched a line of cars. TruckCo is headquartered in Europe, where it has a significant market presence in most countries. TruckCo’s global revenues exceed €10B, with ~65% derived in Europe, and the balance roughly equally divided between the Americas and Asia and a small presence in Africa and Oceania.
- **NewCell:** a new technology firm developing a “next generation” hydrogen fuel cell and accompanying fuel cell technology that could revolutionise demand for hydrogen-based electric vehicles. NewCell is headquartered in the United States and also has small research affiliates in India and China. It has limited revenues and market presence as it has not yet commercialised its technologies.

CarCo and TruckCo each respectively sell through independent and owned dealerships in the various countries and regions in which they are active.

2. HydroCell JV’s Objectives

The HydroCell JV has three stated objectives:

- First, through the HydroCell JV, the Parties intend to develop a new line of hydrogen-based electric vehicles, which will be designed to operate using NewCell’s proprietary fuel station technology.
- Second, the Parties intend to jointly manufacture passenger vehicles using hydrogen fuel cell technology.
- Third, the Parties intend to encourage governments to invest in hydrogen fuelling infrastructure, based on the NewCell fuel station technology, with the objective of ensuring that it becomes “the standard” over time.

Overall, the Parties wish to start operations as soon as possible, mitigate competition law risks as much as possible, and ensure maximum legal certainty. Prior to starting joint manufacturing, the Parties wish to start collaborating right away, as they perceive urgency relating to the development of environmentally-friendly vehicle technologies.

Please also note:

- The Parties are proposing non-compete obligations between the parents and the UK, as well as supply and purchase obligations between the parents and the JV.

3. Proposed Structure of the HydroCell JV

The Parties have not settled on a corporate structure. However, any structure should incorporate at least the following two elements.

- **R&D Collaboration:** The Parties wish to form a steering committee and coordinate R&D activities to develop the technology and vehicles. Each of the Parties would have access to the resulting technology, intellectual property, and products. The Parties will also develop a joint strategy to encourage government investment in fuel station infrastructure (based on NewCell’s technology).
- **Joint Manufacturing:** CarCo and TruckCo will each contribute facilities in India and Europe, respectively, to a newly-created manufacturing entity. The manufacturing entity will sell the vehicles it manufactures only to CarCo and TruckCo. Each Party will have equal 1/3 shareholdings in the JV manufacturing entity. CarCo and TruckCo will sell the vehicles under their own brands using their own marketing, sales and distribution channels in the countries where they are active, including Europe, India and the US.

At present, the Parties are not considering joint marketing of the new line(s) of vehicles, but they recognize that this may be a possible direction for the future.

BIOGRAPHIES

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Iñigo is the head of the EU and Competition Law practice of Gómez-Acebo & Pombo. He specialises in competition law, damages claims, distribution, e-commerce, administrative law and European and Spanish litigation. He is recognised as a leading lawyer by the major legal directories. Iñigo is a member of different international and Spanish associations specialized in competition law such as the International Bar Association (where he was President of the Antitrust Law Section), and Asociación Española de Defensa de la Competencia, among others.

Ismael Bahamonde

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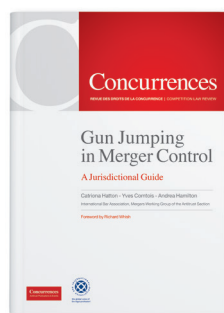
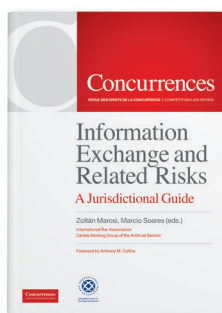
Competition Law Treatment of Joint Ventures

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

ALSO IN THIS SERIES:



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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