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Competition Law Treatment of Joint Ventures *A Jurisdictional Guide*

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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

COMESA competition legislation comprises the COMESA Competition Regulations (*Regulations*)¹ and COMESA Competition Rules.²

Authority

COMESA is a regional economic community and common market of 21 African countries: Burundi, the Comoros, the Democratic Republic of the Congo, Djibouti, Egypt, Eritrea, Eswatini, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Sudan, Seychelles, Somalia, Tunisia, Uganda, Zambia and Zimbabwe.

The COMESA Competition Commission (CCC) is the regional competition authority for COMESA and is based in Lilongwe, Malawi. The CCC has been operating since 14 January 2013.

Guidance

In 2014, the CCC issued its Merger Assessment Guidelines (*Merger Guidelines*).³

¹ COMESA Competition Regulations 2004 <www.comesacompetition.org/wp-content/uploads/2014/04/2012_Gazette_Vol_17_Annex_12-COMESA-Competition-Regulations-as-at-December-2004.pdf>.

² COMESA Competition Rules (December 2004) <www.comesacompetition.org/wp-content/uploads/2014/04/COMESA_Competition_Rules.pdf>.

³ COMESA Merger Assessment Guidelines (31 October 2014) <www.comesacompetition.org/comesa-merger-assessment-guidelines/>.

Mandatory and Non-Suspensory System

Article 24(1) of the Regulations provides that notification of notifiable mergers is mandatory within 30 days of the parties' "decision to merge". Paragraph 5.1 of the Merger Guidelines provides that the CCC considers a "decision to merge" to occur on conclusion of a definitive legally binding agreement or on the announcement of a public bid in the case of listed securities. Implementation of a notifiable merger that has not been notified to the CCC results in the merger having no legal effect and it being unenforceable in the COMESA common market, pursuant to Article 24(2) of the Regulations. However, the regime is not suspensory.

Jurisdictional Thresholds

Article 3(1) of the Regulations provides that the Regulations apply to all economic activities "within, or having an effect within", the COMESA common market. The CCC's jurisdiction is also (according to Article 3(2) of the Regulations) limited to conduct that has an "appreciable effect on trade" between COMESA Member States and which "restricts competition" in the COMESA common market. Paragraphs 3.7 and 3.10 of the Merger Guidelines provide that the CCC's jurisdiction should be limited to conduct capable of having an effect within the COMESA common market and that such effect is lacking where no target undertaking operates in a COMESA Member State. All mergers meeting the following thresholds must be notified:

- Both the acquiring firm and target firm (or either the acquiring or target firm) operate(s) in two or more COMESA Member States (i.e. the "regional dimension" test);
- The target undertaking operates in a COMESA Member State;
- The combined annual turnover or value of assets (whichever is higher) of all the merging parties in the COMESA common market equals or exceeds US\$50 million;
- The annual turnover or assets, whichever is higher, of each of at least two parties to the merger in the COMESA common market equals or exceeds US\$10 million; and
- Each party to the merger does not achieve two-thirds or more of its aggregate turnover or assets in the COMESA common market within one and the same Member State.

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

Application to JVs

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

The term "joint venture" is not defined in the merger control legislation. JVs are however referred to in paragraphs 2.11 to 2.15 of the Merger Guidelines.

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?

COMESA merger control legislation does not explicitly apply to JVs. However, the CCC will have jurisdiction where the formation of a JV falls within the merger definition and meets the requirements for a notifiable merger. Paragraph 2.12 of the Merger Guidelines explicitly provides that a full-function JV will fall within the merger definition.

The term “merger” is defined in Article 23(1) of the Regulations as:

the direct or indirect acquisition or establishment of a controlling interest by one or more persons in the whole or part of the business of a competitor, supplier, customer or other person whether that controlling interest is achieved as a result of :

- a. the purchase or lease of the shares or assets of a competitor, supplier, customer or other person;
- b. the amalgamation or combination with a competitor, supplier, customer or other person; or
- c. any means other than as specified in sub-paragraph (a) or (b).

The term “controlling interest” is defined in Article 23(2) of the Regulations as any interest that enables the holder thereof to exercise, directly or indirectly, any control whatsoever over an asset or over the activities or assets of an undertaking.

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 transaction will fall within the scope of the merger control legislation if it falls within the merger definition and meets the requirements for a notifiable merger. If the HydroCell JV amounts to a full-function JV, its formation will be considered by the CCC to be a merger and will be notifiable if it meets the requirements for a notifiable merger.

Paragraph 2.12 of the Merger Guidelines provides that a full-function JV must perform all the functions of an “autonomous economic entity” for a long duration (typically five or more years). On the facts, it seems unlikely that the HydroCell JV would amount to a full-function JV (as contemplated by the Merger Guidelines) given that the JV will not have any market presence and only sell the manufactured cars to two of its parent companies. However, the HydroCell JV could be notifiable even if it is not a full-function JV if its formation falls within the merger definition.

With regard to the jurisdictional thresholds, CarCo and TruckCo derive revenue from “Africa”, whereas NewCell has no African presence. More information is required on whether CarCo and TruckCo derive revenue from, or have any assets in,

COMESA Member States. CarCo and TruckCo are contributing facilities in India and Europe to the new manufacturing entity, but no mention is made of a contribution of businesses, assets, operations or revenues in or from COMESA Member States. This indicates that the HydroCell JV will not be notifiable to the CCC.

Furthermore, in order for the HydroCell JV to fall within the merger definition, one or more of the HydroCell JV parties would have to acquire a “controlling interest” in the “whole or part of the business” of another HydroCell JV party. Each HydroCell JV party will hold an equal one-third shareholding in the new manufacturing entity that will acquire the CarCo and TruckCo facilities. Paragraphs 2.5 to 2.8 of the Merger Guidelines provide that the ability to exercise “decisive influence” is sufficient to constitute control and may include minority shareholdings where the minority shareholder has certain veto or other rights. More information on the rights of each HydroCell JV party as shareholders in the new manufacturing entity would be required to assess the control requirement.

The CCC has a process whereby a “comfort letter” may be requested by an acquiring party as to whether or not a merger is notifiable to the CCC.

If the HydroCell JV is not notifiable to the CCC, its establishment and implementation would still be subject to the substantive provisions of the Regulations regulating anticompetitive conduct (see Part 2), as well as the domestic laws of any relevant COMESA Member State.

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 acquisition or establishment of direct or indirect control is required in order to qualify as a “merger”. Please see Question 3. In the JV context, the respective contributions by the JV parties to the JV will be treated as the target firm and a full-function JV is considered by the CCC to be a merger. The key question of fact is whether a JV party is acquiring or establishing direct or indirect control (in whole or in part) over the assets and/or business activities of an undertaking of another JV party. If so, the formation of the JV may amount to a merger as defined in the Regulations.

Paragraphs 2.5 to 2.8 of the Merger Guidelines provide that the ability to exercise “decisive influence” is sufficient to constitute control and may include minority shareholdings where the minority shareholder has certain veto or other rights. This will be determined on a case-by-case basis depending on the particular facts and circumstances. According to paragraph 2.6 of the Merger Guidelines, the CCC will take into account whether a person has the direct or indirect ability to:

- Determine the majority of the votes cast at a general meeting;
- Veto the appointment of the majority of the directors; and/or
- Determine the appointment of senior management, strategic commercial policy, the budget or business plan.

According to paragraph 2.7 of the Merger Guidelines, however, the CCC deems that a minority shareholding of less than 15% will not amount to decisive influence if it is held solely as a passive investment without any ability to influence the affairs of the target.

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 under the merger control rules. Paragraph 2.12 of the Merger Guidelines provides that a JV must be full-function to constitute a “merger” under COMESA’s merger control rules.

According to the Merger Guidelines,⁴ full-function JVs are those which perform, for a “long duration” (typically five or more years), all the functions of an “autonomous economic entity”. This is based on several factors, including the following:

- The JV must (i) “operat[e] on a market and performing the functions normally carried out by undertakings operating on the same market”, and (ii) “[have] a management dedicated to its day-to-day operations and access to sufficient resources including finance, staff and assets (tangible and intangible) in order to conduct, for a long duration, its business activities within the area provided for in the joint-venture agreement”.
- A JV established for a “purposefully finite period” (e.g. for a major construction project) will not be viewed as having a long duration and will accordingly not be full-function.
- A JV will not be considered to be full-function if it only takes over one specific function within the parent companies’ business activities, without access to the market.
- Finally, if the JV sells or is expected to sell more than half of its output to persons other than its parent companies, it will typically be considered to be full-function JV.

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.

The manufacturing entity will only sell its vehicles to CarCo and TruckCo, which will on-sell the vehicles under their own brands. The manufacturing entity’s only customers will accordingly be CarCo and TruckCo and it will not otherwise participate in the relevant vehicle market. It will accordingly not be an “autonomous economic entity” and will not be a full-function JV as contemplated by the Merger Guidelines.

⁴ Merger Guidelines, para 2.12–2.15.

If the HydroCell JV only engages in R&D collaboration, it will also not be a full-function JV as contemplated by the Merger Guidelines.

However, a key factual question is whether a JV party is acquiring or establishing direct or indirect control over the whole or part of the assets and/or business activities of another JV party. If so, the formation of the JV will arguably amount to a merger as defined in the Regulations, even if the JV is not a full-function JV.

- 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 COMESA.

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

The merger control regime applies in the same way to unincorporated and incorporated JVs.

- 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.**

Any contractual arrangement (including an arrangement to establish a JV) that results in the acquisition or establishment of direct or indirect control by a party over the whole or part of the assets and/or business activities of an undertaking may fall within the merger definition and may (if the merger thresholds are met) have to be notified to the CCC.

In establishing “control” via contractual means, the CCC considers that:

- a) Purely contractual means of control (such as operation under a management services contract) are only capable of conferring the possibility of decisive influence (and can accordingly fall within the merger definition) if the contracts are of a long duration (typically five or more years);
- b) Outsourcing contracts will not be considered a merger unless the assets and personnel associated with the service constituting the whole or part of a business (i.e. a business with access to the market, including customers other than the outsourcing customer) are transferred to the outsourcing supplier for a long duration (typically five or more years).⁵

⁵ See paragraph 2.10 of the Merger Guidelines.

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.

Each of the scenarios will be subject to the test set out in Questions 1, 3 and 4. The key factual question in each scenario is whether the transaction results in the acquisition or establishment of direct or indirect control of the JV by a party. If so, the transaction will be a merger as defined in the Regulations. Such a merger will be notifiable if the requirements for a notifiable merger are met.

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?

The increase in TruckCo and NewCell shareholdings may be a merger as defined in the Regulations if either of them acquires or establishes direct or indirect control of the manufacturing entity as a result of CarCo's exit. Such a merger will be notifiable if the requirements for a notifiable merger are met (see Questions 1, 3 and 4). A relevant factor could be whether or not the HydroCell JV is a full-function JV, but much would depend on the facts and the general merger control rules would still apply.

The same analysis will apply if TruckCo exits the JV.

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

The key factual question in each scenario is whether the change in scope of the JV results in the acquisition or establishment of direct or indirect control of the JV by a party. See the test and rules summarised in Question 9.

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 contribution of the additional sales assets and infrastructure by CarCo (or TruckCo) results in another JV party acquiring or establishing direct or indirect control of them,

such contribution may be a merger as defined in the Regulations. If so, it will be notifiable if the requirements for a notifiable merger are met (see Questions 1, 3 and 4).

If, after its formation, the manufacturing entity changes its nature and operations to become a full-function JV without any change in its ownership, it is arguable that such change would (depending on the facts and circumstances) not be a merger as defined in the Regulations. However, the Merger Guidelines are not clear on this issue, and it may be prudent to approach the CCC for a “comfort letter” in these circumstances.

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?

A new notification would be triggered if a new controlling shareholder is introduced, provided the thresholds are met. The same test and rules summarised in Question 9 will apply.

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 of the HydroCell JV would constitute a merger as defined in the Regulations, and such a transaction will be notifiable if the requirements for a notifiable merger are met (see Questions 1, 3 and 4).

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”);
- New JV formed by the transfer of businesses/assets from the parents (e.g. “brownfield JV”); and
- Temporary JVs, such as buying consortia or other special purpose JVs.

Greenfield JV

A greenfield JV (as defined with no contribution of a business or assets by any party) will not involve the direct or indirect acquisition or establishment

of a controlling interest by a party in the whole or part of the business of another party, and accordingly will not be a merger as defined in the Regulations. However, the CCC considers the formation of a full-function JV to be a merger (please see Question 4). To that end, greenfield JVs that fulfil the criteria of full-functionality have previously been notified to the CCC.⁶

Brownfield JV

A brownfield JV involving the transfer of a business or assets by the parents may amount to a notifiable merger under the Regulations if the requirements for a notifiable merger are met (see Questions 1, 3 and 4).

Temporary JVs

The nature of the JV (more particularly, whether it involves the direct or indirect acquisition or establishment of a controlling interest by a parent in the whole or part of the assets or business activities of the other parent or the JV) will determine whether it constitutes a merger as defined in the Regulations. The Merger Guidelines:

- a) Provide that a JV established for a “purposefully finite period” (e.g. for a major construction project) will not be viewed as a full-function JV; and
- b) Require a full-function JV to be of “long duration” (typically five or more years) in order to be a merger for the purposes of the Regulations.⁷

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?

On the facts provided, HydroCell JV would be a brownfield JV and would constitute a merger as defined in the Regulations if it results in the establishment of a full-function JV or the acquisition or establishment of direct or indirect control by a party over the whole or part of the assets and/or business activities of another party. If so, it will only be notifiable if it meets the requirements for a notifiable merger.

If HydroCell JV was a greenfield JV, it is likely that it would not constitute a merger as defined and would accordingly not require notification to and approval by the CCC unless it was a full-function JV.

⁶ E.g., see Case No CCC/MER/09/33/2018 *Orange SA and MTN Group Limited*; CCC Merger Inquiry Notice No 28 of 2021 in respect of a full-function JV in Kenya and Uganda by *Nutreco International BV, Unga Farm Care EA Limited and Unga Millers (Uganda) Limited*; Case No CCC/MER/02/12/2022 *SAS Shipping Agencies Services Sarl, Kenya National Shipping Lines Limited and the Kenya Ports Authority*.

⁷ Paragraphs 2.12 to 2.15 of the Merger Guidelines.

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?

A merger is notifiable to the CCC where:

- Both the acquiring firm and target firm or either the acquiring or target firm operate in two or more COMESA Member States (the so-called “regional dimension” test);
- The target undertaking operates in a COMESA Member State;
- The combined annual turnover or combined value of assets, whichever is higher, in the COMESA common market of all parties to a merger equals or exceeds US\$50 million; and
- The annual turnover or value of assets, whichever is higher, in the COMESA common market of each of at least two of the parties to a merger equals or exceeds US\$10 million, unless each of the parties to a merger achieves at least two-thirds of its aggregate turnover or assets in the COMESA common market within one and the same Member State.⁸

The thresholds for notification are based on the annual turnover and value of assets in the COMESA common market of “all parties to a merger”. The Merger Guidelines provide that the annual turnover and value of assets of an acquiring undertaking, its subsidiaries, its direct and indirect parents and other subsidiaries of its parents must be taken into account.⁹ For target undertakings, the annual turnover and value of assets of the target undertaking and its subsidiaries must be taken into account.¹⁰

In terms of the Merger Guidelines, where a merger results in a JV, amalgamation or combination:

⁸ Regulations, art 23(3); Rule 4 of the Rules on the Determination of Merger Notification Thresholds and Method of Calculation, Rule 4.

⁹ Merger Guidelines, para 3.15.

¹⁰ Merger Guidelines, para 3.16.

- a) Each undertaking that controls the JV or is amalgamated or combined will be considered to be an acquiring undertaking; and
- b) Each undertaking that controls the JV or is amalgamated or combined will be considered to be a target undertaking.¹¹

This definition is curious as it has the effect that the target and acquiring undertakings in a JV are the same firm/s. The term “target undertaking” is defined in the Merger Guidelines as (i) an undertaking whose business would be directly or indirectly controlled by an acquiring undertaking, or (ii) an undertaking that would directly or indirectly transfer control of the whole or part of its business to an acquiring undertaking.

The Merger Guidelines also provide that where a merger “consists of the acquisition of parts ... only the turnover relating to the parts which are the subject of the merger will be taken into account” (presumably the value of the assets of the “parts” will also be taken into account although this is not expressly stated).¹² In the context of a merger in the form of a JV, the target undertaking is arguably the business and/or assets contributed to the JV by a JV party and over which another JV party will acquire a direct or indirect controlling interest.

In the above example, and assuming that B’s 20% interest in C will not constitute a controlling interest in C, the annual turnover and value of assets in the COMESA common market of C, C’s subsidiaries (if any), A, A’s subsidiaries, A’s direct and indirect parents and other subsidiaries of A’s parents will be taken into account. If B’s 20% interest in C will constitute a controlling interest in C, then it will be an acquiring firm and the annual turnover and value of assets in the COMESA common market of B, B’s subsidiaries, B’s direct and indirect parents and other subsidiaries of B’s parents will also be taken into account. Whether or not A&C and B&C are separate transactions will depend on the facts.

The terms “parent” and “subsidiary” are not defined in the Regulations or the Merger Guidelines. However, the term “undertaking” is defined in the Regulations as including “any ‘person’, public or private, involved in the production of, or the trade in, goods, or the provision of services”.¹³ The Merger Guidelines provide that “a person who holds an interest in or in which an undertaking holds an interest” will be considered to be an “undertaking” as defined in the Regulations.¹⁴ The terms “parent” and “subsidiary” should accordingly not be limited to incorporated or juristic persons and should be considered to include natural persons and unincorporated firms.

- 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.

- 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.

¹¹ See the definitions section of the Merger Guidelines.

¹² Merger Guidelines, para 3.18.

¹³ Definition of “Undertaking” in Regulations, art 1.

¹⁴ See the definition of “Undertaking” in the definitions section of the Merger Guidelines.

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.

Assuming that the HydroCell JV could fall within the scope of COMESA merger control legislation and that each HydroCell JV party will (by virtue of its equal shareholding in the HydroCell JV) acquire control of the HydroCell JV (and the business and assets contributed by the other HydroCell JV parties), then the following will be taken into account:

- a) The annual turnover and value of assets in the COMESA common market of each HydroCell JV party, its subsidiaries and direct and indirect parents and other subsidiaries of its parents;
- b) The annual turnover of the business and value of assets in the COMESA common market that the other HydroCell JV parties contribute to the HydroCell JV.

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.**

Yes. The Regulations apply to all economic activities “within, or having an effect within” the COMESA common market.¹⁵ The CCC’s jurisdiction is also limited to conduct that has an “appreciable effect on trade” between COMESA Member States and which “restricts competition” in the COMESA common market.¹⁶ The Merger Guidelines provide that the CCC’s jurisdiction should be limited to conduct capable of having an effect within the COMESA common market and that such effect is lacking where no target undertaking operates in a COMESA Member State.¹⁷ The merger control rules accordingly require a local nexus for JVs.

- 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.

A physical presence is not a precondition for a merger to be notifiable to the CCC. The merger thresholds take into account the annual turnover of

¹⁵ Regulations, art 3(1).

¹⁶ Regulations, art 3(2).

¹⁷ Merger Guidelines, paras 3.7 and 3.10.

the parties in the COMESA common market. Such turnover may be made up of sales into the COMESA common market. However, the JV must have a local nexus (see Question 16). If the JV has no physical presence and makes no sales into the COMESA common market, it is unlikely that a notification will be required.

In practice the CCC is likely to enforce notification obligations if it becomes aware of a failure to notify a notifiable merger. For example, on 3 September 2021, the CCC issued its first penalty for the late notification of a merger, indicating that the CCC will strictly enforce the Regulations.¹⁸

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.

It is noted that CarCo and TruckCo derive revenue from “Africa” and that NewCell has no African presence. More information is required on exactly which African countries contribute revenue to CarCo and TruckCo and more particularly whether such revenue is derived from COMESA Member States and whether CarCo and TruckCo have any assets in COMESA Member States. The CCC will only have jurisdiction if either or both the acquiring firm and target firm “operate” in two or more COMESA Member States. Most importantly, the CCC’s approach is that it will not have jurisdiction where a target firm does not operate in a COMESA Member State. CarCo and TruckCo are contributing facilities in India and Europe to the new manufacturing entity, but no mention is made of a contribution of businesses, assets, operations or revenues in or from COMESA Member States. If this is the case, then the HydroCell JV will not (at least initially) operate in the COMESA common market and its formation will not be notifiable to the CCC.

- 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?**

If a JV transaction does not meet the jurisdictional thresholds (which include a local nexus – see Question 16), the CCC does not have the power to investigate the JV under the merger control rules in the Regulations.

¹⁸

Decision MER/20.2/2021, merger involving *Helios Towers Limited, Madagascar Towers SA and Malawi Towers Limited*.

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 Regulations do not prescribe which party to a notifiable merger must notify the merger to the CCC. A joint notification by the parties to the merger is the usual practice, although individual notifications are permitted. In the case of a public bid for listed securities, the bidder will notify the merger to the CCC. The answer to this question would not vary having regard to the different scenarios related to existing and new JVs in Questions 9 and 10.

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

No.

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.

There are no simplified treatment provisions or special procedural rules or exemptions for JVs.

As set out in Question 19, the Regulations do not prescribe which party to a notifiable merger must notify the merger to the CCC. In practice a joint notification would likely be made.

- 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)?**

A clearance of a JV by the CCC does not prevent future interventions under substantive competition law rules. The implementation of the JV and JV transaction in practice must comply with the Regulations, including provisions of the Regulations dealing with restrictive business practices,¹⁹ the abuse of a dominant position²⁰ and prohibited business practices.²¹ Compliance with applicable local laws of COMESA Member States is also required.

¹⁹ Regulations, art 16.

²⁰ Regulations, art 18.

²¹ Regulations, art 19.

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).

Notifying the HydroCell JV to the CCC (together with full disclosure of all relevant information and documents) will give the CCC the opportunity to raise any concerns with the parties. An unconditional approval of the HydroCell JV by the CCC will provide some legal certainty to the parties with regard to at least the initial compliance of the JV with the Regulations. However as stated in Question 21, the implementation of the JV and JV transaction in practice must still comply with the Regulations and applicable local laws of COMESA Member States.

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.**

Under the Regulations, the CCC must determine whether or not a merger is likely to “substantially prevent or lessen competition”.²² There are no special tests applicable to JVs.

In determining whether the merger is likely to “substantially prevent or lessen competition”, the CCC must take into account the level of import competition, barriers to entry, levels and trends of concentration, any history of collusion, the degree of countervailing power, the post-merger market power of the merged entity, dynamic market characteristics, vertical integration issues and whether the merger involves a failing firm or will remove an efficient competitor.²³ The Merger Guidelines provide general guidance on the CCC’s approach to assessing mergers in accordance with these factors.²⁴

If the CCC concludes that a merger is likely to “substantially prevent or lessen competition”, efficiencies and public interest considerations must be considered.

The Regulations provide that a merger shall be contrary to public interest if the CCC is satisfied that the merger:

²² Regulations, art 26.

²³ Regulations, art 26(2).

²⁴ Merger Guidelines, s 7–8.

- Has lessened substantially or is likely to lessen substantially the degree of competition in the COMESA common market or any part thereof; or
- Has resulted, or is likely to result in, or strengthen a position of dominance that is or will be contrary to the public interest.²⁵

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.

The CCC would likely focus on whether the formation of the HydroCell JV would result in (i) any decrease or loss of competition and/or potential collusion in the relevant vehicle market/s in the COMESA region, (ii) any increase in market power of CarCo and/or TruckCo in the COMESA region, and (iii) potential vertical foreclosure effects in the COMESA region. The fact that the manufacturing entity will only sell vehicles to CarCo and TruckCo would be a material factor. Much would depend on the commercial terms and conditions of the JV agreement and the direct and indirect activities of the JV parties in the COMESA common market.

The analysis would differ under the substantive competition (i.e. non-merger control) rules (see Part 2).

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.

If the CCC concludes that a merger is likely to “substantially prevent or lessen competition”, the CCC must then determine:

- Whether the merger is likely to result in any technological efficiency or other pro-competitive gain that will be greater than and offset the effects of such prevention or lessening of competition and would not likely be obtained if the merger is prevented; and
- Whether the merger can be justified on substantial public interest grounds.²⁶

The CCC will take into account all matters that it considers relevant in the circumstances; it is obliged to have regard to the desirability of (i) maintaining and promoting effective competition between persons producing or distributing commodities and services in the COMESA region, (ii) promoting the interests of consumers, purchasers, and other users in the COMESA region, in regard to the prices, quality and variety of such commodities and services, and (iii) promoting, through competition, the reduction of costs and the development of new commodities, and facilitating the entry of new competitors into existing markets.²⁷

²⁵ Regulations, art 26(3). See Question 23 for further discussion.

²⁶ Regulations, art 26(1).

²⁷ Regulations, art 26(4).

- 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 CCC will consider arguments relating to failing firms. However, it will need to be convinced that it was inevitable that the failing firm would have exited the market and that there is no alternative purchaser, before clearing a transaction in this basis.²⁸

In principle, the Regulations allow other exigent/emergency considerations to be taken into account by the CCC but the weight given to such considerations by the CCC will depend on the facts of the case.

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

Parties are generally free to jointly petition or lobby governments, subject to any applicable competition law restrictions relating to sharing of competitively sensitive information. COMESA, however, comprises 21 countries (i.e. 21 separate governments) and the CCC is an independent, non-governmental body. The CCC's director and members of the Board of Commissioners (which is the CCC's "supreme policy body"²⁹) are appointed by the COMESA Council of Ministers.³⁰

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?

This objective would not be material in assessing whether the formation and implementation of the HydroCell JV raises competition concerns or complies with substantive competition rules. Depending on the specific factual situation within the COMESA common market, it may assist or form the basis for an argument that the merger may generate efficiencies and/or be in the public interest.

Remedies

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

Both structural and behavioural remedies are available in mergers cases (and there are no provisions in the Regulations that are specific to JVs).

The potential remedies include: (i) divestiture; (ii) the termination of any association or the dissolution of an organisation involving a person concerned in or party

²⁸ See Merger Guidelines, paras 7.18–7.26.

²⁹ Regulations, art 12.

³⁰ Regulations, art 9(1) and 13(1).

to the merger; (iii) the transfer or vesting of property, rights, liabilities or obligations; (iv) the adjustment of contracts; (v) the creation, allotment, surrender or cancellation of shares, stocks or securities; (vi) the formation or winding up of any undertaking; or (vii) the amendment of the memorandum or articles of association or any other instrument regulating the business of any undertaking.³¹

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 CCC is in principle willing to negotiate commitments designed to ensure that a merger does not have anticompetitive effects, and this applies to JVs as well. The Regulations do not provide for a formal negotiation process with regard to commitments, and in practice the process generally takes the form of discussions between the parties and the CCC.

In the JV between Orange SA and MTN Group Limited,³² the CCC identified competition concerns that were addressed by the undertakings so that: (i) the JV would not discriminate in the provision of its interoperability platform to any other mobile money service provider; (ii) the JV would not conclude any exclusive agreements with its affiliates, participants and parent companies' affiliates; (iii) the sharing of sensitive business information would be restricted; and (iv) Orange and MTN would not be involved in the day-to-day operations of the JV business.

In the JV between SAS Shipping Agencies Services Sarl (wholly owned by MSC Mediterranean Shipping Company SA), Kenya National Shipping Lines Limited (KNSL) and the Kenya Ports Authority,³³ the CCC identified both competition and public interest concerns. The public interest concerns related to the risks of job losses and termination of supplier agreements. The CCC's concerns were addressed by undertakings relating to the allocation of space in and access to a container terminal, non-discriminatory tariffs for container services, fair and transparent procedures for rebates and discounts, the exchange of commercially sensitive information, no merger-specific job losses at KNSL and the maintenance of certain supplier contracts by KNSL.

³¹ Regulations, arts 26(7) and 26(8).

³² Case No CCC/MER/09/33/2018.

³³ Case No CCC/MER/02/12/2022.

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).**

The Regulations do not specifically regulate JVs. JVs outside of merger control are not defined. The implementation of the JV in practice must comply with the Regulations as a whole, including provisions dealing with:

- Restrictive business practices,³⁴ which are prohibited (any such prohibited agreement or decision is void);³⁵
- The abuse of a dominant position within the COMESA common market;³⁶ and
- Prohibited practices³⁷ by "undertakings engaged in the market in rival or potentially rival activities" (i.e. horizontal practices), which are an "offence".³⁸

³⁴ Regulations, arts 16(1) and 16(2). Defined as all agreements, decisions by associations of undertakings and concerted practices that (i) may affect trade between COMESA Member States; (ii) have as their object or effect the prevention, restriction or distortion of competition within the COMESA common market; and (iii) is, or is intended to be, implemented within the COMESA common market.

³⁵ Regulations, art 16(3).

³⁶ Regulations, art 18.

³⁷ Regulations, art 19. Certain practices are specified and viewed by the CCC as "hard core cartels" or "per se" offences and include agreements fixing prices, collusive tendering and bid-rigging, market or customer allocation agreements, collective action to enforce arrangements and concerted refusals to supply goods or services to a potential purchaser, or to purchase goods or services from a potential supplier.

³⁸ Regulations, art 19(3); RBP Guidelines, para 15.

In 2019, the CCC issued Guidelines on Restrictive Business Practices (*RBP Guidelines*), which will be relevant for the manner in which a JV is implemented in practice. The RBP Guidelines do not contain specific provisions relating to JVs but set out the CCC's approach to assessing horizontal and vertical business practices including information exchanges, R&D agreements and production, joint purchasing, commercialisation and exclusive supply/distribution agreements. The implementation of the JV in practice must comply with substantive COMESA antitrust law as well as applicable laws of relevant COMESA Member States.

- 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.**

Not applicable. There is no distinction between cooperative and concentrative JVs. If the JV does not fall under the notification obligation, its establishment can still be investigated under the substantive competition law rules (please see Question 28). This also applies to the conduct of the JV after a merger clearance decision as well as to the relationship between the parent companies outside of the JV.

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?

Regardless of whether the HydroCell JV has been approved by the CCC in a merger review, it will (like any other undertaking) still be subject to the substantive competition laws set out in the Regulations (see Question 28). This also applies to the relationship between the parent companies outside of the JV.

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?**

An investigation may be launched by the CCC on its own initiative³⁹ or following receipt of a third-party complaint.⁴⁰ The investigation period is 180 days but this period may be extended by the CCC. Provision is made for a hearing at which the respondent may make submissions.⁴¹ There is no time bar for the CCC to investigate any conduct (including with regard to a JV after its establishment).

The CCC may not prevent or suspend the JV's implementation or operation (or impose interim measures) while it carries out its investigation.

³⁹ Regulations, art 22.

⁴⁰ Regulations, art 21.

⁴¹ Draft Hearing Procedure Guidelines were issued by the CCC in September 2021 for comment.

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?

The COMESA merger control regime is non-suspensory, so the HydroCell JV will be able to begin and continue operations pending both the grant of merger clearance and a subsequent CCC investigation. The nature and scope of a subsequent investigation would be a material factor and could in practice affect the JV's operations so the implementation of the HydroCell JV should include self-assessment of substantive competition compliance by the JV and the JV parties.

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?

Conduct that would otherwise amount to a restrictive business practice may be declared as permissible if the relevant agreement, decision, concerted practice or category of agreements or concerted practices contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and does not:

- Impose restrictions that are not indispensable to the attainment of these objectives; and
- Afford the relevant undertakings the possibility of eliminating competition in respect of a substantial market for the goods or services in question.⁴²

The CCC may, on application by the relevant undertaking(s), grant an authorisation or exemption for contracts, arrangements or understandings (even if they are anticompetitive), if the CCC determines that there are “public benefits” (that may include efficiencies) outweighing their anticompetitive effect(s).⁴³ The authorisation will be given for a defined period and will lapse on expiry of the period.⁴⁴ An appeal against the CCC's decision may be made to the Board of Commissioners.⁴⁵

The CCC will not grant an authorisation or exemption for “hard core cartels”.⁴⁶ However, conduct that would otherwise amount to a prohibited practice is permitted if it occurs in the context of a “common entity wherein they are under common control or where they are otherwise not able to act independently of each other”.⁴⁷ This may (depending on the JV structure) apply to JVs.

⁴² Regulations, art 16(4).

⁴³ Regulations, art 20.

⁴⁴ RBP Guidelines, para 68.

⁴⁵ Constituted by Regulations, art 12, and appointed by the COMESA Council of Ministers.

⁴⁶ RBP Guidelines, para 92; Regulations, art 19(3).

⁴⁷ Regulations, art 19(1).

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.**

Please see Question 28.

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.

Please see Question 28. Much will depend on how the HydroCell JV is implemented in practice.

- 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?**

There is no difference in the substantive framework.

- 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.**

There are no specific provisions in the Regulations or RBP Guidelines with regard to JVs. (The Merger Guidelines have provisions dealing with full-function JVs – please see Question 5).

- 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. Please see Question 31.

Remedies and Sanctions

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

A contravention of the Regulations may result in the CCC requiring:

- a) The immediate cessation of the relevant conduct;
- b) The payment of a fine in an amount to be determined by the Commission but which may not exceed 10% of the party's annual turnover in the COMESA common market;⁴⁸ and/or
- c) Whatever action the CCC deems necessary to remove and/or diminish the effect of the illegal conduct.⁴⁹

Furthermore, an agreement or decision that is a prohibited business practice is void and unenforceable.⁵⁰

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.

The CCC is open to negotiating commitments/settlements. In September 2021, it issued draft guidelines on settlement procedures for public comment. The final guidelines have not yet been issued.

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

There are no specific penalty laws or regulations that apply to JVs. Please see Question 36 for the general penalty framework in the Regulations.

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.

Private rights of action or class actions are not specifically dealt with in (or precluded by) the Regulations. However, in principle, damages and other claims could be brought by customers or other parties. These claims could be brought in the national courts of COMESA Member States and would have to comply with the procedural and other rules applicable in the relevant court.

⁴⁸ Draft Guidelines for the determination of administrative penalties were issued by the CCC in September 2021 for comment.

⁴⁹ Regulations, art 21(10).

⁵⁰ Regulations, art 16(3).

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.**

There are no exemptions or safe harbours specifically applicable to JVs.

For merger control purposes, the CCC deems that a minority shareholding of less than 15% will not amount to decisive influence if it is held solely as a passive investment without any ability to influence the affairs of the target.⁵¹

The CCC considers, regarding agreements between actual or potential competitors, that:

- a) Such agreements will not appreciably restrict competition where the aggregate market share of the parties does not exceed 10% in any of the relevant markets affected by the agreement (this threshold is reduced to 5% where competition is restricted in a relevant market by the cumulative effect of agreements for the sale of goods or services entered into by different suppliers or distributors);
- b) Individual suppliers or distributors with a market share not exceeding 5% are in general not considered to contribute significantly to a cumulative foreclosure effect;
- c) A cumulative foreclosure effect is unlikely to exist if less than 30% of the relevant market is covered by parallel (networks of) agreements having similar effects;

⁵¹ Merger Guidelines, para 2.7.

- d) Agreements are not restrictive of competition if, during two successive years, the market shares do not exceed the above thresholds of 10%, and 5% by more than 2%; and
- e) The exemptions and safe harbours do not however apply to “hard core cartels”.⁵²

The CCC considers, regarding vertical business practices, that:

- a) Agreements between non-competitors do not appreciably restrict competition within the meaning of Article 16(1) if the market share held by each of the parties to the agreement does not exceed 15% on any of the relevant markets affected by the agreement (this threshold is reduced to 5% where competition is restricted in a relevant market by the cumulative effect of agreements for the sale of goods or services entered into by different suppliers or distributors);
- b) Individual suppliers or distributors with a market share not exceeding 5% are in general not considered to contribute significantly to a cumulative foreclosure effect;
- c) A cumulative foreclosure effect is unlikely to exist if less than 30% of the relevant market is covered by parallel (networks of) agreements having similar effects; and
- d) Agreements are not restrictive of competition if, during two successive years, the market shares do not exceed the above thresholds of 10%, and 5% by more than 2%.⁵³

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.

- 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.
- 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?

⁵² RBP Guidelines, paras 100–102.

⁵³ RBP Guidelines, paras 132–135.

- **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?**

Ancillary restrictions may be taken into account by the CCC in assessing the JV, if it is notified to the CCC as a merger. The merger control process requires disclosure of documents relating to the merger. Although it is not a strict requirement to specifically identify ancillary restrictions in the merger notification, it would be prudent to include in the notification all documents containing ancillary restrictions on the parties so that full disclosure is made to the CCC. Clearance by the CCC of the merger does not preclude future enforcement action; however, full disclosure to the CCC as part of the assessment of an unconditionally approved merger may be helpful in reducing the likelihood of, or defending, a future enforcement action. Ancillary restrictions will also be regulated outside merger control by the substantive competition laws (please see Question 28). These substantive laws will apply to the relationship between the parent companies, and to the relationships between the parents and the JV. There is no obligation to notify ancillary restrictions separately.

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?

The non-compete and purchase and supply obligations between the parents and the JV would be considered part of the merger control process if the JV is notifiable. If the JV is not notifiable, these restrictions will be analysed under substantive competition law as set out in Question 28.

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?**

The Regulations contain no specific provisions relating to information exchange. The RBP Guidelines, however, contain provisions relating to information exchange in the context of horizontal restraints.⁵⁴ These provisions may be relevant if the JV parties are actual or potential competitors and the CCC will

⁵⁴

RBP Guidelines, paras 105-108.

consider whether the exchanges facilitate coordination between them or lead to foreclosure in a market.

Safeguarding measures are JV – and transaction-specific and are not specifically prescribed in the Regulations, Merger Guidelines or RBP Guidelines.

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?

No. Please see Question 42.

- 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.**

The Regulations, Merger Guidelines and RBP Guidelines contain no specific provisions relating to whether a person can become a director, officer or employee of a JV. The ability to appoint (or veto the appointment of) directors may indicate decisive influence/de facto control for merger control purposes and may also raise information exchange concerns that will be dealt with in accordance with the general competitive effects framework (see Question 28).

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.**

The Regulations apply to all economic activities “within, or having an effect within,” the COMESA common market.⁵⁵ The CCC’s jurisdiction is also limited to conduct that has an “appreciable effect on trade” between COMESA Member States and that “restricts competition” in the COMESA common market.⁵⁶ The impact of a JV on competition at an international level (i.e. outside the COMESA common market) will, accordingly, only be relevant to the extent that it has an effect within the COMESA common market.

⁵⁵ Regulations, art 3(1).

⁵⁶ Regulations, art 3(2).

Trends and Expected Developments

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

On 25 February 2021, the CCC issued a cautionary notice on restrictive business agreements, which stated that the CCC had decided to “focus more on hard enforcement through screening, detection, investigation and punishment of offenders” and would work closely with the national competition authorities in COMESA Member States to ensure that offenders are detected, investigated and punished. Following the issue of this cautionary notice:

- a) In June 2021, the CCC commenced an investigation into potential violations of Articles 16 and 19 of the Regulations by beer manufacturing companies operating in the common market, namely AB InBev, Castel, Diageo and Heineken (market allocation arrangements between the companies and territorial restrictions in their distribution agreements with third-party independent distributors);
- b) In September 2021, the CCC imposed its first ever fine for the late notification of a merger;⁵⁷
- c) In March 2022, the CCC commenced an investigation into potential violations of Articles 16 and 19 of the Regulations relating to price announcements by various shipping liner companies operating in the common market, namely Maersk, CMA-CGM and United Africa Feeder Line;
- d) In April 2022, the CCC commenced an investigation into potential violations of Articles 16 and 19 of the Regulations by medical laboratories operating in the common market, namely Pathcare and Lancet; and
- e) In June 2022, the CCC commenced an investigation into potential violations of Article 16 of the Regulations by Toyota Tsusho Corporation relating to its distribution agreements in the common market.

An increased focus by the CCC on combatting anticompetitive practices (including cartels and the abuse of dominance) is accordingly likely.

⁵⁷

Decision MER/20.2/2021 *Helios Towers Limited, Madagascar Towers SA and Malawi Towers Limited*.

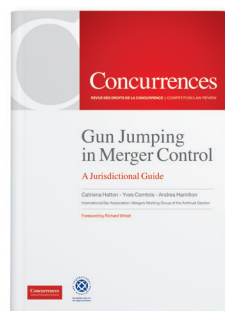
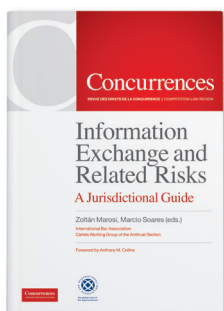
Competition Law Treatment of Joint Ventures

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.

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