

ICN Joint Ventures Survey Report 2021

EXECUTIVE SUMMARY

1. This paper (the “Report”), authored by the Spain’s National Commission of Markets and Competition (**CNMC**), presents the main results and findings from a new workstream for the ICN Mergers Working Group (**MWG**) focusing on joint ventures.
2. A joint venture (**JV**) could be defined as an association of firms or individuals formed to undertake a specific business project. It is similar to a partnership, but limited to a specific project, such as producing a specific product or doing research in a specific area.
3. There is not previous work developed by the ICN Mergers Working Group which specifically targets the analysis of joint ventures. However, and according to the MWG 2020-2023 Workplan, during the first year of this period the MWG has established the task of conducting a comparative and informational survey and report on joint ventures as one of its main objectives.
4. Therefore, this project focuses on analysing joint ventures in merger control procedures, covering issues such as the purpose and practical aspects of joint control, the requisites for a joint venture to be notifiable, and the theories of harm used when analysing a joint venture. This new project reflects the ICN members’ interests expressed in the ICN Second Decade Report in 2016 and the poll of the MWG members and NGAs in 2019.
5. The outcome showed in this report (hereinafter the “Report”) is based on a survey¹ (hereinafter the “Survey”) completed by 40 respondent national competition authorities (**NCAs**²), which amount to around 60% of the NCAs approached, providing a solid and rich data set.
6. An important part of this project has been to compare and analyse how NCAs approach JV transaction notifications. In general, this Survey focuses on obtaining relevant information about JV notification procedures (e.g. differences

¹ See Annex.

² For the sake of clarity, given that the European Commission (EC) is considered as an independent jurisdiction although it is not a National Competition Authority, the Report gives the same treatment to the answers of both the EC and the group of 39 NCAs. Therefore, the number of total respondent NCAs considered in this Report is 40.

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among jurisdictions or notifiable situations according to the definitions of thresholds, joint control and full functionality); theories of harm; and statistics and the evolution of JV notification trends during the last five years.

7. Key findings from responses to the Survey are that:

- (i) 26 out of 40 jurisdictions (65%) have specific provisions regarding JV notification. In most of the jurisdictions that specifically cover JVs by their merger control rules, an “ex novo” creation of JVs, a change from sole control to joint control of an existing company or assets, and also the change in the composition of the joint controlling shareholders are **potential notifiable JV transactions**.
- (ii) The concept of “decisive influence” seems to be the key to define whether there is **joint control** in a JV. In this sense, there are some other concepts, such as “material influence”, that are also used when defining control in certain jurisdictions. Even though there are several jurisdictions without a legal standard of joint control, in general, the alternatives that fulfil the legal standard of joint control for most jurisdictions (c.70%) are related to voting and veto rights.
- (iii) Nearly 50% of jurisdictions consider different criteria so as to decide whether a JV is **fully functional**. Among the most common criteria are: i) having sufficient resources to operate in the market (22 NCAs – 55%); ii) carrying out activities beyond specific functions of the parent companies (21 NCAs – 52,5%); iii) having limited commercial relations between the JV and its parent companies (19 NCAs – 47.5%); and iv) the long-lasting nature of the JV (19 NCAs – 47.5%).
- (iv) Regarding the application of **notification thresholds** in JV cases, 75% of respondent jurisdictions require jointly controlling parties to notify whenever there are changes in shareholders of any JV.
- (v) The most frequent **theories of harm** that have appeared in the respondents’ jurisdictions during the last five years are: foreclosure effects (23 NCAs – 57.5%), coordinated effects (19 NCAs – 47.5%) and non-compete clauses (15 NCAs – 37.5%).
- (vi) Regarding **remedies** imposed on conflicting JVs’ transaction, the majority (70%) of the jurisdictions have not imposed remedies so far. The remaining 30% of respondents tend to prefer “structural remedies” and/or “behavioural remedies” depending on the entity of the JVs.
- (vii) In terms of **cooperation**, most NCAs have not collaborated with other jurisdictions in JV related issues within the last five years which highlights

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ample room for greater engagement. Nevertheless, it is noteworthy that among NCAs that have engaged in case cooperation, the cooperation has been overall productive.

(viii) The upward trend in average **JV notifications** that appeared in 2017 was consolidated during the two following years reaching its maximum in 2019 (39 JV notifications in average³). Despite the Covid-19 hampering effect on the economy, the year 2020 accounted for almost the double of JV notifications than 2017. Moreover, there is an expected increase in JV notifications for the foreseeable short-term⁴.

8. Finally, a Break-Out Session (BOS) on JVs took place on the 2021 ICN Annual Conference. During the BOS, the Spanish NCA presented the preliminary conclusions of the Report. This was followed by the NCAs of Taiwan, Russia, Mexico and the European Commission who discussed the main considerations when assessing JVs in their jurisdictions. The discussion included their views on methodology, techniques, and the substantive analysis of JVs in merger control, in line with their contributions to the Report. The speakers also presented recent relevant cases in a wide variety of sectors (i.e. from financial to telecommunications and airlines sectors).

³ It is important to notice that there are some jurisdictions that could be considered as outliers (the European Commission, Germany or Poland) given that they account for more than 100 of JV notifications each year.

⁴ This forecast is based, according to the economic theory and past empirical evidence, on the fact that during times with a high degree of uncertainty, companies tend to establish JVs in order to share risks and/or to obtain a better access to financial resources (bank credit mainly).

INDEX

EXECUTIVE SUMMARY 1
BACKGROUND 5
SURVEY RESULTS 8
 1. JURISDICTION..... 9
 2. NOTION OF JOINT CONTROL IN MERGER CONTROL 14
 3. FULL FUNCTIONALITY..... 22
 4. APPLICATION OF NOTIFICATION THRESHOLDS..... 24
 5. SUBSTANTIVE ASSESSMENT OF JOINT VENTURES 28
 6. REMEDIES 40
 7. GUIDELINES 42
 8. INTERNATIONAL COOPERATION..... 43
 9. STATISTICS 44
 10. RELEVANT CASES 47
CONCLUDING REMARKS 51
ANNEX: ICN SURVEY..... 52

BACKGROUND

Rationale and scope of the Joint Ventures project

9. For 2020-21, the ICN MWG decided to address a new topic to the group's work project: Joint Ventures (JVs).
10. The ICN MWG considered this to be a proper time to compare the current practices of National Competition Authorities (NCAs) on the assessment of JVs in order to understand if there had been any significant developments in their practice and thinking that may justify revisiting the existing ICN products or the preparation of additional materials.
11. Although the ICN has previously provided consolidated guidance on substantive merger analysis (e.g. on horizontal mergers, and on vertical mergers in 2018), work related to the assessment of JVs has not been conducted within the ICN framework so far.
12. It should be noted that this project focuses only on the specific case of JV creation and it does not refer to any other kind of mergers. Its main objectives are to understand the prevalence of JV origination in the work of NCAs and to understand their current approaches to the assessment of these kind of mergers, through exploring the guidelines, practices and cases from member agencies.
13. The first part of the project is aimed to compare existing practices in the assessment of joint ventures and includes two key elements:
 - (i) A brief summary of the economic framework for JVs.
 - (ii) A summary of the results and main findings from the Survey of NCAs on how JV creation is conducted in practice along different jurisdictions.
14. The second part of this project focuses on specific issues highlighted by the different NCAs in the assessment of JVs. These issues range from less common theories of harm to special application of notification thresholds.
15. This Report and the work conducted in this project in 2020-21 includes input from several NCAs and non-governmental agencies of the ICN MWG.
16. During the Break-Out Session (BOS) on JVs of the 2021 ICN Annual Conference, the speakers presented the main conclusions of the Report and shared their experience in JV assessment. In particular, the following topics were discussed:

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- (i) The speakers provided a brief introduction on how joint ventures are dealt with in their jurisdictions. As concluded in this Report, the answers reflect the heterogeneity of each jurisdiction when dealing with JVs in merger control.
- (ii) As an example, the Mexican NCA (COFECE⁵) highlighted that there are no specific provisions for JVs in its legislation. Thus, all JV's are considered as mergers, no matter their functionality, objective and duration. Therefore, the most important aspect of JV merger control in Mexico is to determine if JV are reportable according to their economic thresholds. On the other hand, the European Commission focused on those joint ventures that are notifiable under the EU Merger Regulation (EUMR⁶) providing a brief description of the full-functionality test and its practical application. the Taiwanese NCA (TFTC⁷) referred to the controversy at early stages between considering JVs as mergers or concerted actions.
- (iii) Following the general aspects of JVs, firstly, COFECE presented two recent cases regarding JVs. One of them related to a Joint Cooperation Agreement (JCA) between Delta and Aeromexico to coordinate all their flights between Mexico and the United States. COFECE concluded that the JCA could considerably reduce the competitive pressure in flights between these countries, given that Delta disciplined Aeromexico's prices and would increase entry barriers in the Mexico City Airport for other airlines. Therefore, COFECE imposed, among other conditions, the divestiture of some slots in the Mexico City Airport to airlines that can offer flights between Mexico and the United States.
- (iv) Secondly, the Russian Competition Authority (FAS⁸), referred to two cases (on 5G operators JV and Taxi aggregators). The first one, approved in May 2021 related to the application of PJSC Rostelecom, PJSC Bashinformsvyaz (subsidiary of Rostelecom), PJSC VimpelCom and PJSC MegaFon, which are the biggest companies in the telecom sector in Russia, to give preliminary consent to the conclusion of an agreement by mobile radiotelephone (cellular) operators on the territory of the Russian Federation to build 5G networks. The JV agreement contained conditions for equal access to radio frequencies for all participants in the mobile radiotelephone market. In particular, the telecom operators participating in the transaction would develop and agree with the antimonopoly authority the conditions for the use of infrastructure and (or) the sharing of radio

⁵ Comisión Federal de Competencia Económica.

⁶ Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings

⁷ Taiwan Federal Trade Commission.

⁸ Federal Antimonopoly Service.

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frequencies and the conditions for the provision of infrastructure for MVNOs of telecom operators.

- (v) Thirdly, the TFTC presented two JV cases approved in 2019 regarding online-only banks (Line Bank and Next Bank). The merging parties in these two merger cases involved financial, supermarket, natural gas, network and telecom businesses. Hence, the TFTC decided to analyse the horizontal and non-horizontal overlaps of the merging parties in the two cases. At the same time, the TFTC also evaluated certain likely competition concerns in the digital market, including the accumulation of data and protection of personal information.

SURVEY RESULTS

Introduction to the Survey scope

17. The scope of this Report covers the results from the Survey answered by different NCAs on whether and how they analyse joint ventures. The Survey received responses from 40 NCAs⁹ from the following jurisdictions: Argentina, Australia, Austria, Barbados, Belgium, Brazil, Canada, Chile, Colombia, Croatia, the Czech Republic, Denmark, El Salvador, Estonia, the European Commission, Finland, France, Germany, Hungary, Ireland, Israel, Italy, Japan, Kenya, Mauritius, Mexico, the Netherlands, New Zealand, the Philippines, Poland, Portugal, Russia, Serbia, Slovenia, South Africa, Spain, Taiwan, Turkey, the United Kingdom and the United States.
18. The Survey (provided in the Annex to this Report) was divided into ten different sections dealing with:
 - (i) Jurisdiction
 - (ii) Notion of Joint Control in Merger Control
 - (iii) Full functionality
 - (iv) Application of Notification Thresholds
 - (v) Substantive Assessment of JVs
 - (vi) Remedies
 - (vii) Guidelines regarding JVs
 - (viii) International Cooperation
 - (ix) Statistics
 - (x) Relevant cases¹⁰

⁹ More specifically, 39 NCAs and the European Commission (see footnote 2).

¹⁰ Involving a discussion with the parties in terms about the nature and/or scope of the control (sole control vs joint control).

1. JURISDICTION

Concept

19. Jurisdictions should include, within their merger control rules, those types of transactions that result in a durable combination of previously independent companies or assets which are likely to change the market structure¹¹.
20. In this sense, some jurisdictions may find it necessary to adopt specific provisions regarding joint ventures or acquisitions of interests in partnerships that fall within the scope of their merger laws, by using defined criteria to distinguish whether those JV related transactions that are subject to merger review or not. Additionally, the resultant combination must accomplish several characteristics depending on each jurisdiction, otherwise the transaction would not be analyzed under its merger control procedure.
21. On the other hand, there are many other NCAs that apply the same jurisdictional analysis to all transactions, under their general merger review procedure.
22. The aim of this section is to ascertain how many of the respondent NCAs' legislations contain specific provisions defining when the creation of a JV constitutes a notifiable transaction. Within the affirmative cases, the Survey asks for the types of JV and the criteria used in considering whether the JV constitutes a potentially notifiable transaction. Regarding those jurisdictions without specific provisions in their legislation, the objective is to know the circumstances that deter a review of a JV transaction under each national competition law.

Responses

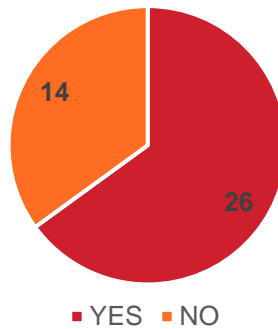
23. In terms of how joint ventures are treated within different jurisdictions, all 40 respondents state that in their jurisdictions joint ventures are discussed under a general definition of what constitutes a notifiable merger. However, 26¹² NCAs (65%) confirm that their merger control rules contain a specific provision defining when the creation of a joint venture may be notifiable.

¹¹ ICN Recommended Practices for Merger Notification and Review Procedures.

¹² Austria, Barbados, Belgium, Canada, Chile, Croatia, Czech Republic, Denmark, Estonia, the European Commission, Finland, Germany, France, Hungary, Ireland, Italy, Kenya, the Netherlands, the Philippines, Poland, Portugal, Serbia, Spain, Russia, Turkey and the United States.

Exhibit 1

Specific provisions for JVs in merger control



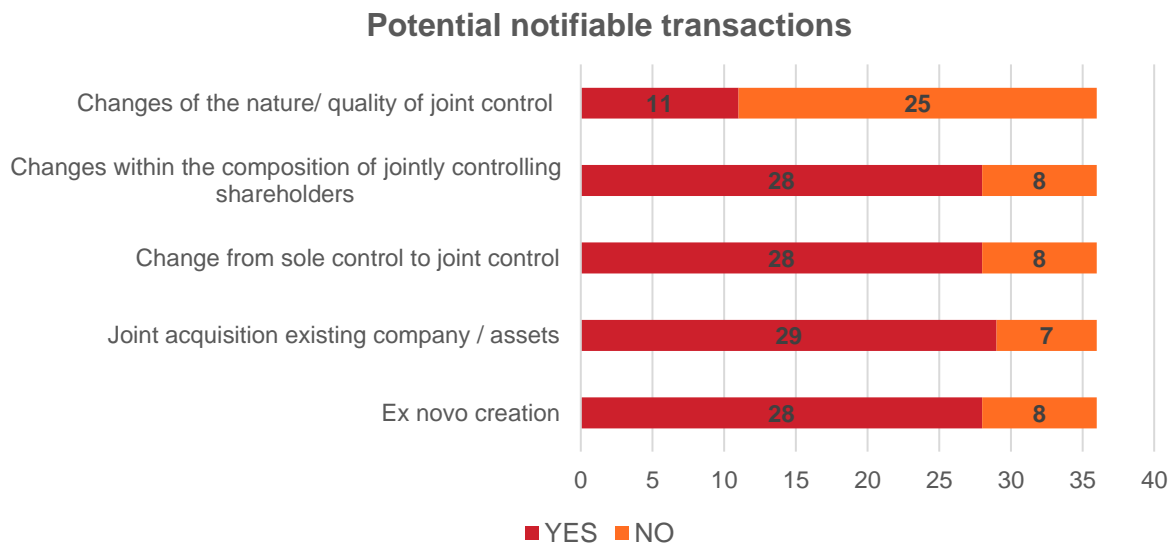
Source: CNMC's calculations based on NCAs' answers to the Survey

24. For those 26 jurisdictions where notifiable joint ventures are analysed under specific provisions contained in their merger control rules, not all kind of JVs are notifiable. Depending on the jurisdiction, some require specific criteria apart from the notification thresholds. These may include an examination of the type of transaction and also the characteristics of the combined company¹³.
25. Regarding the type of JV transaction that are potentially notifiable, the Survey reveals that 25 of the abovementioned jurisdictions, (almost all with the sole exception of Barbados) consider the joint acquisition of an existing company or assets a potentially notifiable transaction.
26. Additionally, the merger control regime of the vast majority of these NCAs (24 out of 26) include as well other type of JV related transactions as potentially notifiable, such as: an *ex novo* creation of joint venture; a change from sole control to joint control of an existing company or assets; and the option of a change within the composition of the joint controlling shareholders. However, there are some exemptions, as for instance, Barbados and Kenya, which do not consider the *ex-novo* creation of a joint venture as potentially notifiable. In this respect, Barbados neither considers the joint acquisition of an existing company or assets as a potentially notifiable JV. Finally, Poland does not consider changes from sole control to joint control or changes in the composition of the controlling shareholders when it comes to the obligation to notify.

¹³ As an example, the Italian Competition Act contains only a general definition of JV and excludes from the merger control regime any JV (or more generally any concentration) whose main object or effect is the coordination of the actions of independent undertakings, without considering full functionality a criterion demanded for a JV related transaction to be notifiable. However, under the AGCM practice, joint ventures are assessed under the merger control rules as long as they qualify as “concentrative joint ventures”, which means that it is, indeed, a full function JV and, additionally, it does not raise risks of coordination between the parent companies in those markets in which the latter continue to operate independently.

27. On the other hand, only 8 out of 26 respondents where notifiable JVs are analysed under specific provisions contained in their merger control rules¹⁴ consider a change in the nature/quality of joint control¹⁵ as a potential notifiable transaction.
28. Regarding the 40¹⁶ respondent NCAs, see Exhibit 2, there are several transaction-specific characteristics which are widely considered by NCAs when assessing potentially notifiable JV deals. Almost 75% of the respondent NCAs (i.e. c.30/40) consider that ex-novo creation, joint acquisition of existing company or assets, change from sole to joint control or changes in the composition of jointly controlling shareholders trigger the potential notification of JV transactions. Meanwhile, only c.25% of respondent NCAs consider changes in the nature or quality of the joint control.

Exhibit 2



Source: CNMC's calculations based on NCAs' answers to the Survey

29. Among the aforementioned 26 jurisdictions whose merger control rules specifically cover JVs, some identify other circumstances or types of transactions that could lead to a notifiable transaction apart from those already mentioned¹⁷. In this sense, the European Commission, France, Spain, Finland,

¹⁴ Austria, Belgium, Canada, Netherlands, Ireland, Philippines, Portugal and Turkey. In this sense, Turkey, among other jurisdictions, states that changes in the percentage of shares of the pre-existing controlling shareholders, without changes in the powers they hold in the undertaking nor in its structure of control, would not be notifiable since it does not constitute a change in the quality of control.

¹⁵ E.g. change from joint control via veto rights to joint control via voting rights.

¹⁶ Thus, including those 26 which have special provisions regarding JV, and those which do not and where joint ventures are discussed under a general definition of what constitutes a notifiable merger.

¹⁷ For example, in the particular case of Kenya, if a foreign investor seeks to jointly invest with a local firm to undertake a business activity likely to last more than ten years, it will be reviewed under national merger control rules.

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Hungary and Portugal would consider notifiable the case of a change in the activity of a pre-existing non-full function joint venture so that it becomes a full function joint venture¹⁸. In addition, Finland adds the possibility of considering a notifiable transaction when a JV acquires assets or rights from their parent companies, or a non-autonomous JV acquires business assets from third parties¹⁹. This may also be the case for the European Commission under the CJN (Consolidated Jurisdictional Notice)²⁰.

30. Having described the different types of JVs that can constitute a potential notifiable transaction in general²¹, it is important to analyse which criteria (i.e. characteristics of the resultant JV) determine whether the JV constitutes a concentration under the Merger Regulation. According to the answers of the Survey, a) the change in the joint control and b) being a sufficiently independent market player (full function), are the most commonly required criteria.
31. Among the 26 jurisdictions with special provisions regarding JVs in their merger control rules, the large majority (i.e. 24 NCAs) require the acquisition of (or a change in) joint control for a JV transaction to be considered as a concentration. Generally, in these jurisdictions the requisite for a JV transaction to constitute a concentration is not about capital share owned but control rights; and thus, only if the acquisition of a determined percentage of capital share provides joint control /influence over the JV, then the JV transaction would be deemed relevant from the point of view of merger analysis. Conversely, Barbados only considers the acquisition of a defined shareholding percentage for a JV deal to be analysed as a concentration. Out of the aforementioned 26 NCAs, only Russia exempts any of these criteria to be needed. On the other hand, full functionality is required by 19 of these 26 jurisdictions²².
32. According to the Survey, although the majority of NCAs require the acquisition or change in joint control to consider a JV operation a concentration subject to notification²³, most of them do not define any precise shareholding percentage as a reference. Nevertheless, among those NCAs that set a specific percentage (11 out of the 26), the assessment is made on a case-by-case basis determined by other criteria (e.g. the ability to exercise decisive influence).

¹⁸ The concept of full functionality is going to be analysed below.

¹⁹ According to the Finnish Merger Guidelines, even the dissolution of a non-autonomous JV can also amount to a notifiable transaction, especially when its assets are acquired by other companies.

²⁰ See paragraphs 106 and 107 of the EU CJN.

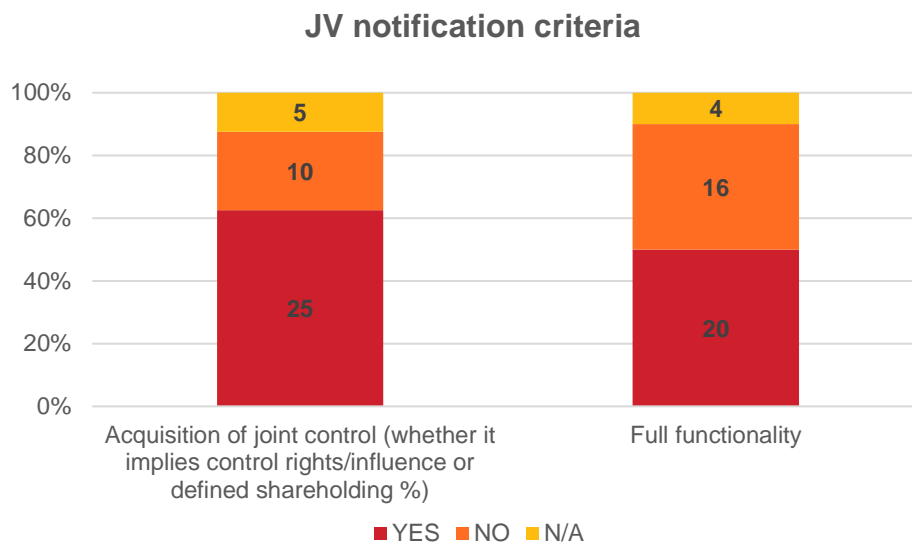
²¹ There are other types of JV that could be analysed by some NCAs, for instance the case of "buyer clubs" (i.e. where two or more firms agree to buy a product or input) which are analysed as mergers by the Mexican competition authority (COFECE).

²² All of them but Barbados, Canada, Germany, Italy, Poland, Russia and the United States.

²³ Provided it meets their notification thresholds.

33. Regarding all 40 respondent NCAs (i.e. those that have specific provisions for JVs and those that have not them), see Exhibit 3, 25 NCAs consider the acquisition of joint control (either in terms of controlling interests/decisive influence or in terms of acquiring a determined shareholding percentage) as JV notification criteria²⁴. Among them, as shown in Exhibit 4, 12 NCAs take into account only the acquisition or change in joint control rights/influence over an undertaking, 2 NCAs consider only the acquisition of defined shareholding percentages; whereas there are 11 NCAs consider a combination of both²⁵.

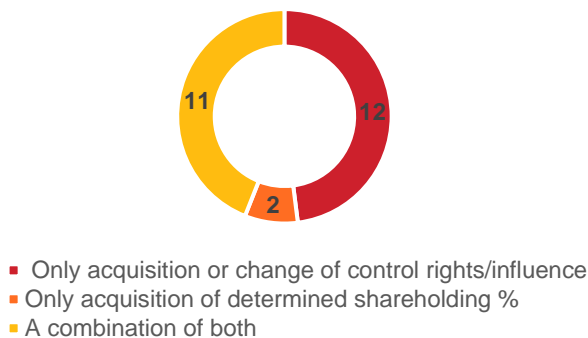
Exhibit 3



Source: CNMC’s calculations based on NCAs’ answers to the Survey

Exhibit 4

NCAs' classification among those that consider the acquisition of control as JV notification criterion



Source: CNMC’s calculations based on NCAs’ answers to the Survey

²⁴ Only a few NCAs consider the acquisition of, at least, 50% of the share capital of the firm a criterion for a JV (South Africa or Kenya) to be notifiable, but arguing that this percentage guarantees control.

²⁵ Note that all respondent NCAs are considered in the graphs (i.e. 40 NCAs), independently of their answers regarding JV special provisions within their respective legislations.

34. As for the 14 NCAs²⁶ whose merger control rules do not include a specific provision defining when a joint venture may amount to a notifiable transaction, most of them clarify that mergers and acquisitions are analysed under the same legal provisions and guidelines, whether the transaction involves a joint venture or not. Certain jurisdictions even confirm that they require the fulfilment of specific criteria such as the full functionality of the joint venture, however they do not specify which criteria would bring a JV transaction under the generally applicable definition of a merger transaction^{27, 28}.

2. NOTION OF JOINT CONTROL IN MERGER CONTROL

Concept

35. Jurisdictions should use clear definitions to identify transactions that fall within the scope of their merger laws. According to the OECD²⁹, definitions of what constitutes an “acquisition or change in control” can be based either on “objective,” numerical criteria, or on more “economic” criteria. An objective approach to the definition of a “merger transaction” typically relies on percentage thresholds for share acquisitions, whereas “economic” criteria are more directly aligned with the mechanism through which a transaction might harm competition, by focusing on whether a transaction will enable a firm to acquire the ability to exercise some form of influence over a previously independent firm. Different legal systems define different levels of intensity of influence, such as “decisive influence,” “significant influence,” “material influence,” or “competitively significant influence.”³⁰
36. Joint ventures tend to raise more legal questions in jurisdictions that define merger transactions following “acquisition of control”/“decisive influence” standards. In these cases, there is a need to determine whether the parent companies can exercise “control” and, in most cases, whether the joint venture

²⁶ Argentina, Australia, Brazil, Colombia, El Salvador, Israel, Japan, Mauritius, Mexico, New Zealand, Slovenia, South Africa, Taiwan and the United Kingdom.

²⁷ In most of these cases, the formation of any joint ventures with some integration of assets will typically include acquisitions of shares or assets, or some assets that were previously independently owned will be used to form a new “enterprise” in which some or all of the parents can exercise control or have a material influence. This would be sufficient to bring the transaction under the generally applicable definition of a merger transaction

²⁸ In this sense, Brazil points out that, even though Brazilian jurisdiction does not specify the concept of a JV, the CADE uses a definition of a “Classic or Cooperative joint ventures”, which qualifies JV as cases involving the association of two or more separate companies intended to form a new company, under common control, exclusively aiming to participate at a market in which the products/services are not horizontally/vertically related.

²⁹ Definition of Transaction for the purpose of Merger Control Review.

³⁰ See “OECD Policy Roundtables: Definition of Transaction for the Purpose of Merger Control Review” (OECD, 2013) <https://www.oecd.org/daf/competition/Merger-control-review-2013.pdf>.

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is a sufficiently independent market player (full function). This topic will be discussed in section 3.

37. Joint control may be achieved when mutual agreement is necessary for management decisions and/or where one party is capable of exercising veto rights over proposed actions. The simplest example would be a combined company that results in a 50/50 equity split. However, many jurisdictions also cover acquisitions of shares that, while falling short of a controlling interest, nevertheless give rise to the ability of the acquiring firm to exert some degree of influence over the acquired company³¹.
38. In order to verify that a transaction is covered by a NCA's merger control procedure, the information typically requested in a description of the transaction includes key elements such as the nature of the concentration and the ownership structure and control before and after the transaction (e.g. whether it is an acquisition of sole or joint control)³².
39. As shown in section 1, only two jurisdictions (Kenya and South Africa) base the definition of joint control only on objective numerical criteria determined by a specific shareholding percentage, while most rely on the "acquisition of control"/"decisive influence" standards. The latter typically have greater information requirements to verify that the requisite level of control or influence is achieved.
40. The objective of this section is to show how jurisdictions consider the concept of "joint control" in mergers assessment. Accordingly, in order to specify the notion of "joint control" it is necessary to define what is understood as just "control", specifically in jurisdictions that rely on the "acquisition of control"/"decisive influence" standards in their definitions of a merger transaction.
41. The respondent NCAs provided information regarding: the degree of "influence" that is considered to recognise joint control in a JV; the legislation that describes the joint control concept; the legal standard that establishes whether joint control indeed exists; the documentation that the corresponding NCA normally requires to assess the effective joint control of a JV; or the role of voting and veto rights or derivative securities in considering joint control. This will allow this Report firstly to shed light on the differences among jurisdictions about the *control/decisive influence* acquisition concept; and also, on the analysis of this concept applied to JV specific cases afterwards.

³¹ Defining "Merger" Transactions for Purposes of Merger Review (ICN).

³² Information Requirements for Merger Notification (ICN).

Responses

42. Only 6 out of 40 countries do not have legislation that defines the concept of “control” specifically for the purpose of merger control. Some of them have designed other related concepts such as “controlling interest” in the case of Australia or “controlling shareholder” and “controlled company” in the case of Brazil. There are other countries where the concept has been developed through case-law (e.g. Austria) or has been adapted from definitions in other national laws (Israel or Russia)³³.
43. However, in the majority of the cases (32/40)³⁴, the NCA’s legislation provides a definition of control. In such cases, these NCAs state that the possibility of using a significant proportion of the acquired firm’s assets and exercising or having the ability to exercise decisive influence over an undertaking are considered when defining control.
44. Thus, most jurisdictions (27/40) include the concept of *decisive influence* in order to determine whether control exists, while others³⁵ use different but somehow equivalent concepts to define control, such as “material influence”.
45. Regarding the *decisive influence* criterion, the objective is to determine the ability of a firm to exercise decisive influence over the management of a target undertaking through majority shareholding, veto rights, or contractual covenants³⁶. In contrast, the *material influence* criterion is a lower threshold to determine control that assess an undertaking’s ability to influence affairs and management of the other undertaking through factors such as shareholding above x% (for instance, above 25% as it occurs in the UK), special rights, status and expertise of an enterprise/person, board representation, and structural/financial arrangements
46. In particular, the European Commission and the 17 EU member states that participated in the Survey replied that, in sole control scenarios, the notion of exercising *decisive influence* refers to the power to determine the strategic

³³ In the case of Russia, the definition of control is established in Part 8 of Article 11 of federal law dated July 26, 2006 No. 135-FZ “On Protection of Competition”. In the case of Israel, a definition of control exists in the Economic Competition Law (ECL), it is however a general one and is not specific for Merger Control purposes.

³⁴ All of the respondent NCAs but Australia, Austria, Brazil, Estonia, Israel, Japan, Mexico and Russia.

³⁵ Such as the United Kingdom, South Africa, Kenya, Taiwan, Mauritius or Barbados.

³⁶ For instance, the EU Merger Regulation defines “control” as the ability to exercise “decisive influence” over an undertaking, in particular, through: i) the existence of rights or contracts conferring decisive influence on the composition, voting or other commercial decisions of the undertaking; or ii) the ownership or right to use all or part of its assets. For example, an undertaking can acquire control over another undertaking when it holds 50 per cent or less of the other's voting shares, but nevertheless acquires the de facto ability to affect strategic decisions of that undertaking, e.g. where a minority shareholder would be likely to have a stable majority of the voting rights at shareholder meetings. Minority shareholders may also acquire control through the exercise of veto rights in relation to key strategic matters such as the business plan, approval of the budget, or the appointment of senior management. Control via veto rights of this nature is often referred to as “negative control”. <https://www.ashurst.com/en/news-and-insights/legal-updates/quickguide---eu-merger-control/>.

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commercial decisions of the other undertaking or to veto strategic decisions in that undertaking. In joint control scenarios, the concept refers to the possibility of a deadlock situation³⁷ resulting from the power of two or more parent companies to mutually reject proposed strategic decisions in the joint venture.

47. The responses to the Survey have provided interesting insights regarding the notion of control, as seen in the responses of Mexico and the United Kingdom.
48. On the one hand, in Mexico, control can be considered *real* or *potential*. The Mexican Competition Act does not define the concept of “control” for any procedure. However, regarding economic competition, Federal Courts have shed some light on the concept. They found that control could be exercised by a person in two different ways: first, as “real control” when a parent company effectively controls its subsidiaries given the legal and hierarchical link between them; second, “potential control” when the previous legal and hierarchical link between the companies is absent but there is a possibility of exercising control through persuasive measures.
49. On the other, in the United Kingdom three different levels of control are distinguished:
 - (i) *Material influence is generally presumed with a shareholding of above 25% of the voting rights in a UK company – such a shareholding generally enables the holder to block special resolutions. However, material influence is assessed on a case by case basis and has been found even below 15% on occasion. Other factors may also be considered, such as the distribution of shares, patterns of attendance and the status of the acquirer.*
 - (ii) *De facto control is generally presumed where an entity does not have a controlling interest but is able to unilaterally determine a company’s policy. The CMA’s Jurisdictional and Procedural Guidance states that there is no ‘bright line’ between factors which might give rise to material influence or de facto control.*
 - (iii) *A controlling interest generally means a shareholding above 50% of the voting rights in a company.*
50. Once the notion of “control” has been explained, according to the legislation and case-law of the respondent NCAs, it is interesting to analyse how the concept of control is defined and addressed for JV specific cases (i.e. “joint control” concept).

³⁷ i.e. negative control.

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51. The concept of *decisive influence* is also key to define whether there is joint control. As mentioned above, most of the respondent jurisdictions include the assessment of this concept in order to determine whether control exists. In this sense, Austria and Belgium NCAs noted that, in a general way, any structural or contractual provision in any legal or factual form (facts or rights) that enables the exercise of shared decisive influence or the need for other shareholders to obtain the consent of the party would be considered joint control.
52. Regarding the alternative criteria³⁸ to determine whether the parent companies can exercise the legal standard of (joint) control or influence³⁹ over a third undertaking, most jurisdictions (27/39) confirm the relevance of: (i) equal voting rights in the JV; (ii) joint exercise of voting rights leading to joint control; and/or (iii) veto rights (ability to block) that lead to joint control.
53. Regarding the exercise of voting rights leading to joint control, most NCAs answered that those mainly came from formal agreement (*de iure*), or *de facto* agreements. Croatia, South Africa and the United States only consider a formal agreement.
54. In relation to veto rights that may lead to joint control, most NCAs specified that the most relevant matters when analysing joint control are among the following:
 - (i) Annual business plan
 - (ii) Investment or financing plans
 - (iii) Appointment of senior management
 - (iv) Termination of senior management
 - (v) Multiannual strategic plans
 - (vi) Budget

³⁸ Although “objective” criteria (i.e. clearly defined capital share thresholds) make the system more predictable and transparent, “economic” criteria are more directly aligned with the mechanism through which a transaction might harm competition, by focusing on whether a transaction will enable a firm to acquire the ability to exercise some form of influence over a previously independent firm. Different legal systems define different levels of intensity of influence, such as “decisive influence,” “significant influence,” “material influence,” or “competitively significant influence.” These definitions capture the reason for possible competitive concerns more directly than objective criteria and therefore “target” more effectively potentially problematic transactions. They also make it more difficult to game the system. At the same time, though, they require more case specific interpretation. They can therefore create uncertainty and make the process less transparent. Guidelines by competition authorities, informal guidance, and consistent decision making can to some extent address potential problems in this respect. See “OECD Policy Roundtables: Definition of Transaction for the Purpose of Merger Control Review” (OECD, 2013) <https://www.oecd.org/daf/competition/Merger-control-review-2013.pdf>.

³⁹ There are several jurisdictions in which there is not legal standard of joint control, such as Canada and Mexico for example. In the Canadian case on the one hand, the notion of joint control does not exist in Canadian merger control. However, the presence of veto rights or other special voting privileges are factors that may be relevant to the Bureau’s analysis of whether a particular party is understood to have a significant interest. On the other hand, under Mexican Competition Law there is not legal standard of joint control, however, some of the following standards are considered when analysing it: i) voting rights in the JV (regardless the percentage that each shareholder has. There are cases where the shareholders have 70% and 30% each one, but the decisions must be done by unanimous consent); ii) joint exercise of voting rights; and iii) veto rights.

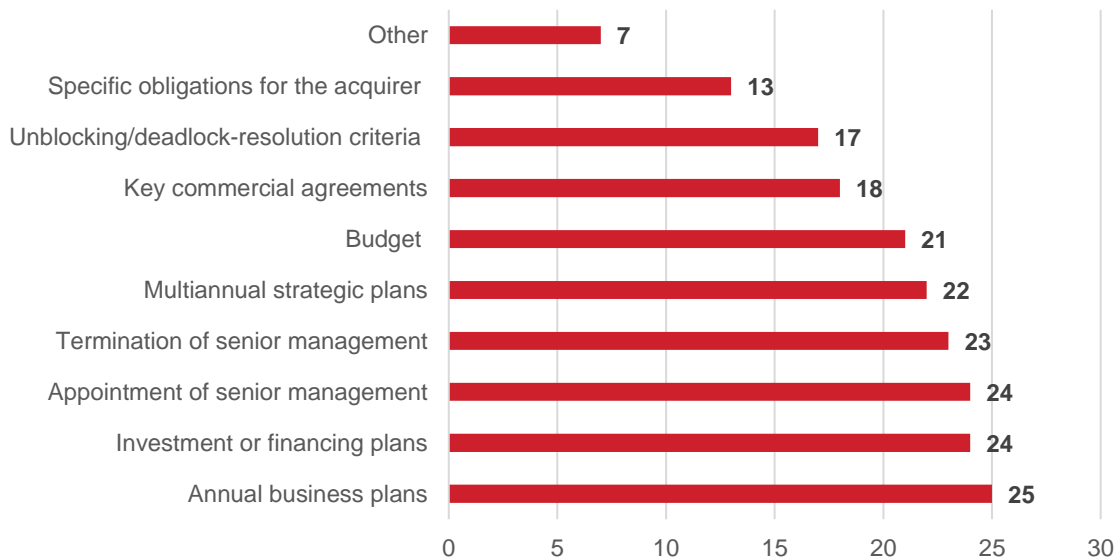
(vii) Key commercial agreements

(viii) Unblocking/deadlock-resolution criteria within the JV Administration Board

(ix) Specific obligations for the acquirer (e.g. keeping the shares during a period of time)

Exhibit 5

Most relevant subjects in veto rights



Source: CNMC's calculations based on NCAs' answers to the Survey

55. With some exceptions, for most jurisdictions the veto rights that can give rise to joint control typically relate to the budget, business plan, major investments or the appointment of senior management.
56. The answers to the Survey also indicate that almost all jurisdictions analysing the exercise of veto rights consider that a veto right on just one relevant subject is sufficient to confer joint control.
57. Nevertheless, a few NCAs consider that, in some cases, more than one veto right might be necessary. In this regard, according to the European Commission, it is not necessary for a minority shareholder to have all of the above veto rights in order to acquire joint control. It may be sufficient that only some, or even one of these rights exists. Whether this is the case depends on the precise content of the veto right itself and also on the importance of this right in the context of the specific business of the joint venture.

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58. In addition, the European Union competition law and policy and European NCA following the European Commission Jurisdictional Notice⁴⁰, consider other types of non-common veto rights that may be important in the context of the JV's particular market. For example (i) a decision on the technology to be used by the JV where technology is a key feature of the JV's activities; or (ii) in markets characterized by product differentiation and a significant degree of innovation, a veto right over decisions on new product lines to be developed by the JV.
59. According to the data gathered in the Survey, the most common aspects taken into consideration in relation to veto rights that give rise to joint control, are the following:
- (i) Strategic nature: a veto right that does not relate to strategic business policy, the appointment of senior management or the budget or business plan cannot be considered as giving joint control to its owner.
 - (ii) Non-exhaustive list: the list above is indicative which means that there could be other veto rights that have not been signalled by the respondent NCAs to this Survey. Nevertheless, it is conceivable that the list represents the most widely veto rights considered in merger control analysis.
 - (iii) Non-cumulative list: it is not necessary for a minority shareholder to have all the veto rights mentioned above, but depends on the precise content of the veto right itself and the importance of this right in the context of the particular activity of the joint venture.
60. Apart from voting and veto rights, another criterion to consider the existence of control is to analyse the possibility of exercising such rights in the future according to legally binding agreements such as, options (put, call or convert options). The study reveals that, in most jurisdictions, there is no general guidance that clarifies when such options confer joint control. Therefore, the way in which they confer such control would need to be analysed on a case-by-case basis. Indeed, according to the European Commission, options would typically not be considered as conferring joint control unless (exceptionally⁴¹) the overall situation would be sufficient to assume *de facto* control which would normally take place when they are exercised, according to most NCAs.

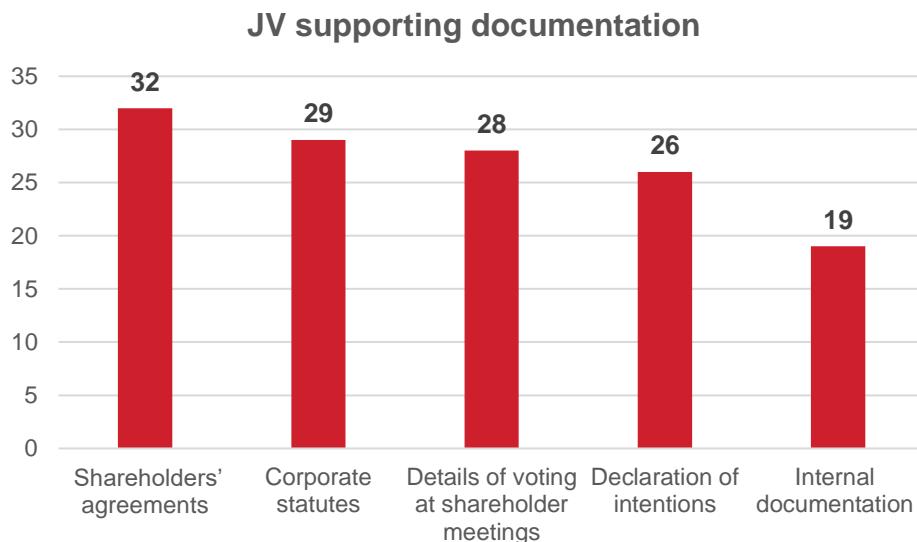
⁴⁰ The Commission on 10 July 2007 adopted a new Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (the "Merger Regulation").

⁴¹ Note that CJN states that 'in exceptional circumstances': "(60) An option to purchase or convert shares cannot in itself confer sole control unless the option will be exercised in the near future according to legally binding agreements (66). However, in exceptional circumstances an option, together with other elements, may lead to the conclusion that there is *de facto* sole control (67)".

However, according to the Dutch NCA, this could also happen when a party is about to exercise them.

61. In order to verify the existence of joint control under different company structures, it is necessary to analyse specific documentation (including contractual set up from regulating the parties' rights involved in the transaction or other documents evidencing the actual governance of the JV). Most jurisdictions confirmed that they usually require a shareholder's agreement (32/40). In addition, the majority of the NCAs confirmed that they normally ask for the Corporate Statutes (29/40), followed by the details of voting at past shareholders' meetings (28/40) and declaration of intentions (26/40). Lastly, many NCAs (19/40)⁴² require internal documentation.

Exhibit 6



Source: CNMC's calculations based on NCAs' answers to the Survey

62. Nevertheless, the Survey reveals that there are other types of documents that can be requested on a case-by-case basis.
63. Some of the NCAs pointed out that other criteria are considered to determine whether there is an acquisition or a change of the joint control that could be notifiable. For instance, Germany points out that it would analyse any other combination of undertakings enabling at least one of them to exercise directly or indirectly a material competitive influence on another undertaking⁴³.

⁴² It is interesting to point out that Portugal and Slovenia share an unusual kind of information required when necessary, which is the minutes of Board of Directors and General Assembly meetings, and even minutes of past voting at the general meeting of the company. Moreover, the European Commission may also request documents on previous voting patterns to ascertain control.

⁴³ According to section 37 (1) No 4 German Competition Act (GWB).

64. To sum up, the concept of *control* and thus *joint control*, is defined by the respondent NCAs referring to different levels of influence (i.e. from *decisive* influence to *material* influence). This influence is primarily exercised on the basis of voting rights, veto rights or future options to exercise such rights (actual or potential) regarding relevant decisions for the JV company such as: decisions about annual business plan; investment and financing plans; and appointment and termination of senior management. Moreover, NCAs tend to require specific documentation from the parent companies of the JV to precisely assess the delimitation and extent of the joint control exercised. These documents, in the wide majority of the cases, are shareholders' agreements, corporate statutes, voting details in past shareholders' meetings and other relevant internal documents.

3. FULL FUNCTIONALITY

Concept

65. Most jurisdictions that have JV specific provisions require an undertaking to exercise control or significant influence over the resulting JV for the transaction to be notifiable. Others also require the JV to be full function (i.e. it must be acting on the market as an autonomous economic entity).
66. Nevertheless, in the wide majority of the cases for a JV transaction to be notifiable it must comply with two characteristics: i) joint control from the parent companies; and ii) autonomous acting within the market (i.e. full functionality). Therefore, a joint venture may involve the acquisition of shares or assets that results in a structural and durable change in the market. In the absence of an autonomous entity that acts on the market place, there would be no merger transaction⁴⁴.
67. In order to be considered full function, a JV must operate on a market performing those functions typically carried out by undertakings operating on the same market. Some jurisdictions have set out the criteria to determine if a JV operates autonomously from its parent companies. For instance, according to the European Commission⁴⁵, the joint venture must represent more than a mere collaboration between companies. Rather, to qualify as a "concentration", the joint venture must constitute an autonomous economic entity that can operate on the market independently of its parent companies on a lasting basis.
68. The objective of this section is to show what are the criteria applied within the respondent jurisdictions when assessing the full functionality of a JV.

⁴⁴ OECD: Definition of Transaction for the Purpose of Merger Control Review.

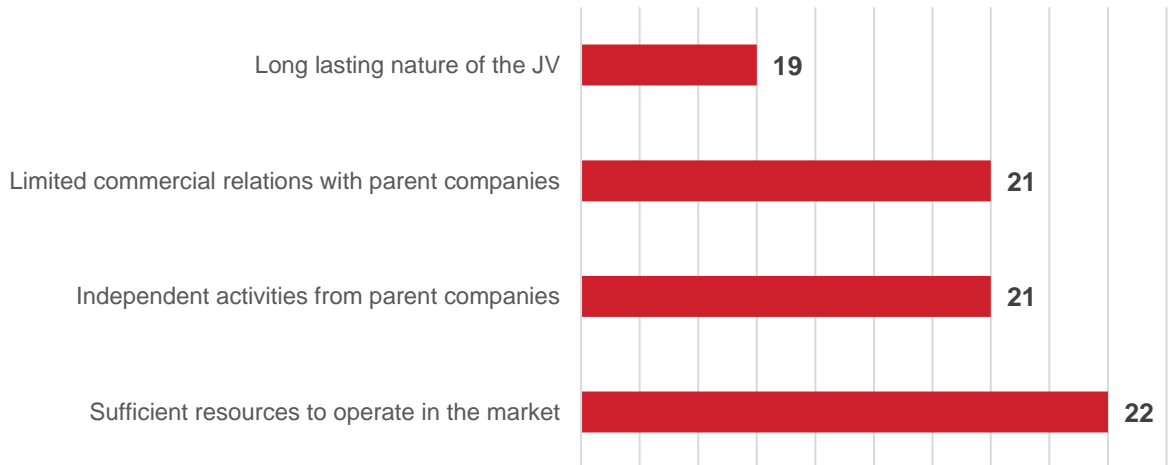
⁴⁵ European Commission Merger Regulation (ECMR).

Responses

- 69. In jurisdictions where the full functionality criterion is considered, there is a wide range of requirements for it to be applied. In order to be treated as full function, a JV must operate on a market performing functions typically carried out by undertakings operating in the same market.
- 70. Taking this into account, the thresholds, as well as its scope to determine the full functionality of a JV, can be related to several aspects.
- 71. The answers are not even close to be unanimous, since nearly half of jurisdictions consider different criteria so as to decide whether a JV is full functional or not. 22 NCAs require that the JV has sufficient resources to operate in the market and 21 NCAs use thresholds related to the fact that the JV carries out activities beyond specific functions of the parent companies. Other 19 NCAs focus on the fact that commercial relations between the JV and its parent companies shall be limited, and 19 NCAs are based on the long-lasting nature of the JV.

Exhibit 7

Full functionality criteria



Source: CNMC's calculations based on NCAs' answers to the Survey

- 72. The answers include some countries such as Argentina or Colombia that define the notion of full functionality in their jurisdiction without having special provisions for JV notifications in their merger legislation.
- 73. On the contrary, there are countries that, although their national legislation includes special provisions when it comes to JV in merger control, do not define

the criteria to consider a JV to be full function (Barbados, Canada, Germany⁴⁶ Poland and Russia).

74. According with the data gathered, there is no clear relation between having special provisions for JV and demanding full functionality of the resulting JV for the transaction to be notifiable. Therefore, it is possible to find countries such Australia or Japan that do not specifically provide for any definition of when a JV might be analysed under the scope of merger control procedures and also require full functionality for a JV to be notifiable.
75. On the other hand, there are some merger control rules that define the concept but do not consider full functionality a requirement for the resultant JV to be notifiable, such as in Colombia and Italy.

4. APPLICATION OF NOTIFICATION THRESHOLDS

Concept

76. According to the ICN MWG⁴⁷, when establishing merger notification thresholds, each jurisdiction should seek to screen out transactions that are unlikely to result in appreciable competitive effects within its territory. Moreover, notification should not be required unless the transaction has a material nexus⁴⁸ to the reviewing jurisdiction.
77. Clarity and simplicity are essential features of well-functioning notification thresholds, given the increasing number of multi-jurisdictional transactions and the growing number of jurisdictions with merger notification requirements⁴⁹.
78. Mandatory notification thresholds should be based exclusively on objectively quantifiable criteria (such as assets and sales or turnover)⁵⁰.
79. In jurisdictions utilizing a voluntary notification system, notification thresholds serve as a means to provide guidance as to which transactions are viewed as likely to raise potential competition concerns and therefore are appropriate for notification to the reviewing jurisdiction⁵¹.

⁴⁶ In Germany, the full functionality is not a requirement for the application of merger control to JV. Accordingly, full functionality is not assessed and there is no need to define such criteria.

⁴⁷ ICN Recommended Practices for Merger Notification and Review Procedures (2018).

⁴⁸ A material nexus to the reviewing jurisdiction is present when a proposed transaction has a significant and direct economic connection to the jurisdiction.

⁴⁹ See footnote 6.

⁵⁰ See footnote 6.

⁵¹ See footnote 6.

Results

80. In general terms, the notification thresholds for JV cases are based on turnover likewise sole control transactions⁵². Nevertheless, there are other relevant aspects which differ among jurisdictions such as: i) the obligation for parties to notify; ii) the turnover calculation from the activities conducted among parent companies and JVs; or iii) the consideration and treatment of transactions in which the JV has no activity, or has it but it is “de minimis”, within a given jurisdiction.
81. The data gathered show that in 30 out of 40 jurisdictions, jointly controlling shareholders are also required to notify when there is a change of shareholders in the JV, provided that the notification thresholds have been met. Conversely, in 8 jurisdictions changes in JV shareholders do not require notification. There is no information regarding the remaining 2 jurisdictions (i.e. Canada and El Salvador).

Exhibit 8

Notification requirement for existing jointly controlling shareholders



Source: CNMC’s calculations based on NCAs’ answers to the Survey

82. In cases where JVs apply either turnover or other notification thresholds, among the most frequent criteria considered by NCAs, are those related to: a) the fact that each and every joint controlling parent (post-transaction) are joint controlling parents; b) a new (post-transaction) joint controlling parent; c) parents who (post-transaction) have a defined shareholding percentage in the

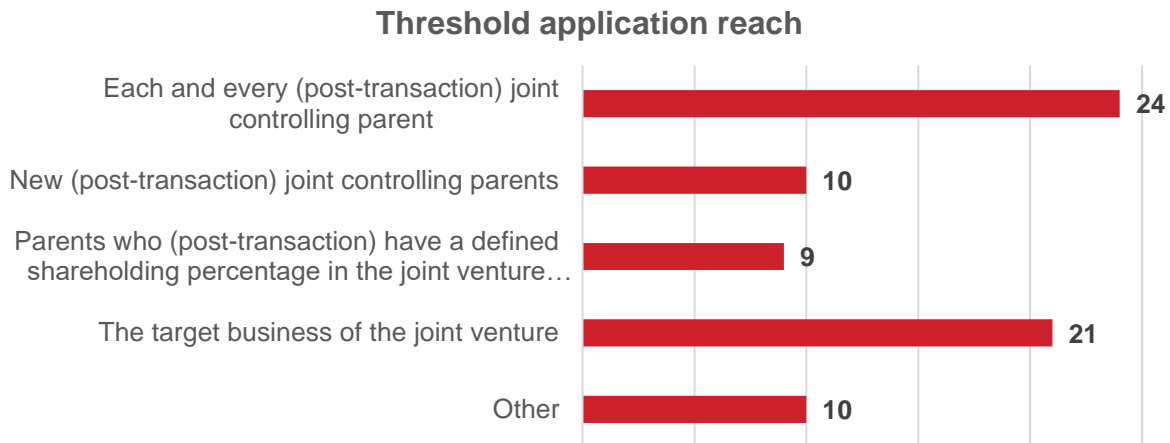
⁵² Some jurisdictions have additional thresholds to the turnover threshold when assessing both JV and sole control operations, such as market share thresholds (e.g. Portugal, Spain or the United Kingdom); or transaction value thresholds (e.g. Austria or Germany).

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joint venture business; d) the target business of a joint venture; or f) other criteria.

83. The Survey gathered the following data in order to ascertain which undertakings are relevant for the calculation of the turnover (for the purpose of verifying whether the notification thresholds are met):
84. 24 NCAs consider every single post-transaction joint controlling parent. 10 NCAs only consider “*new (post-transaction) joint controlling parents*” and 9 NCAs take into account “*parents who (post-transaction) have a defined shareholding percentage in the joint venture business*”. Lastly, 21 NCAs pay attention to “*the target business of the JV*”.

Exhibit 9



Source: CNMC's calculations based on NCAs' answers to the Survey

85. It is noteworthy that there exists a clear heterogeneity among jurisdictions when it comes to notification threshold considerations (see Exhibit 9 above). Regarding relevant business turnover threshold calculation, it is possible to highlight as an example the differences existing between Argentina and Brazil. While the Argentinian NCA considers the turnover of the acquiring firm and its controlling companies on one side, and the turnover of the acquired firm and its controlled companies on the other side; Brazil takes the turnover of the ex-ante whole economic group of both JV partners⁵³.
86. Another relevant example is the case of the European Commission. According to the Commission Consolidated Jurisdictional Notice under Council Regulation

⁵³ Literally according to these two respondents, in Argentina “in order to calculate the relevant business turnover, one has to consider the net sales of the buying firm, the net sales of the acquired firm, the net sales of the controlling firms of the acquiring firm, and the net sales of the firms controlled by the acquired firm”; meanwhile in Brazil “the only criteria considered in these cases is the annual revenue of the economic group in which companies who will become partners participate (ex ante)”.

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(EC) N° 139/2004 on the control of concentrations between undertakings⁵⁴, in a situation of joint control both before and after the operation, the undertakings concerned are the shareholders (both existing and new) who exercise joint control and the joint venture itself⁵⁵. On one hand, similar to the acquisition of joint control of an existing company, the joint venture itself can be considered as an undertaking concerned as it is an already pre-existing undertaking. On the other hand, the entry of a new shareholder is not only a new acquisition of control, but also leads to a change in the quality of control for the remaining controlling shareholders as the quality of control of the joint venture is determined by the identity and composition of the controlling shareholders and therefore also by the relationship between them. Furthermore, the Merger Regulation considers a joint venture as a combination of the economic resources of the parent companies, together with the joint venture if it already generates turnover on the market.

87. The Survey also reveals that, when applying turnover or other thresholds, only 11⁵⁶ jurisdictions exclude the revenue of a joint venture business from the revenue of an existing jointly controlling shareholders. In other jurisdictions, such as in Japan, the approach depends upon the type of transaction⁵⁷.
88. Joint ventures that have no activities/revenues/assets can be notifiable in 28 out of 40 jurisdictions if other parties of the transaction, such as the JV parent companies, meet the thresholds in its jurisdiction.
89. The minority of NCAs that responded to the Survey have a *de minimis* threshold for local activities or effects for JVs to be notifiable. Among the 12 jurisdictions where this kind of *de minimis* threshold exists are Brazil, Chile, the Philippines, Portugal, Spain or Russia.
90. In fact, the data gathered reveals that, in 23 out of 40 NCAs, a simplified or expedited notification and clearance procedure for joint ventures with a limited or no impact in a jurisdiction is granted.

⁵⁴ See paragraph 143 of the mentioned Notice.

⁵⁵ See Case IV/M.376 — Synthomer/Yule Catto, of 22 October 1993.

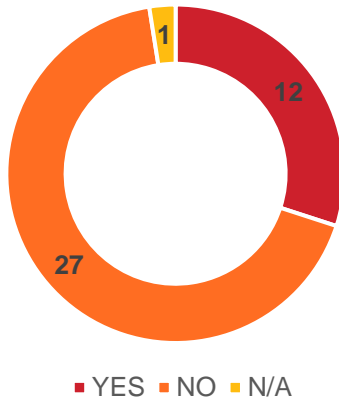
⁵⁶ These 11 jurisdictions are: Croatia, Denmark, Estonia, the European Commission, France, Italy, the Netherlands, Portugal, Spain, Russia and the United Kingdom. In the case of the United Kingdom, part of the revenue of the JV business may be excluded in specific circumstances as explained in guidance (i.e. where two or more companies form a JV incorporating all of their assets and business).

⁵⁷ In Japan, for example, if the transaction is structured as a share acquisition, the revenue of the JV business is excluded from the revenue of existing jointly controlling shareholders; otherwise, if the transaction is a joint incorporation-type company split, the revenue of the JV business is included.

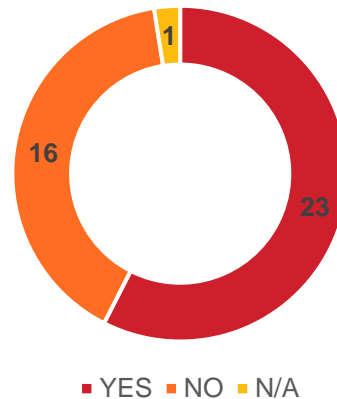
91. Out of the 40 NCAs which responded to the questionnaire, 16 NCAs do not offer such possibility. The United States, the United Kingdom, Japan and Germany⁵⁸ are good examples of the latter.

Exhibit 10

De minimis threshold



Simplified notification procedure



Source: CNMC's calculations based on NCAs' answers to the Survey

5. SUBSTANTIVE ASSESSMENT OF JOINT VENTURES

Concept

92. This section aims to highlight whether there is a difference in terms of the effective assessment procedure when analysing joint ventures compared to that applied for sole control merger cases.
93. A theory of harm is broadly defined as “*the reason why certain market features or behaviour by market participants may lead to consumer harm compared to a relevant counterfactual*”⁵⁹. It is well-known that the most widely extended theories of harm in general terms are, among others: i) the risk of price increase; ii) the potential reduction of quality and/or variety of products and services offered in the market; iii) negative impact on innovation effort; and iv) foreclosure of inputs or clients. In order to complement the knowledge about the aforementioned theories of harm, this Report aims to analyse in detail the following other theories of harm that are also closely related to JV cases:

⁵⁸ Even though Germany does not have a formalized simplified notification procedure, in practice the Bundeskartellamt accepts very short notifications and grants early clearances in cases that obviously do not lead to competitive concerns.

⁵⁹ The European Commission Expert study on “Intervention triggers and underlying theories of harm” (2020).

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- (i) Non-compete clause among the parents in the JV market: defined as the contractual clause bringing about a direct or indirect obligation causing the parties to an acquisition agreement, or at least one of them, not to manufacture, purchase, sell or resell independently goods or services which compete with the contract goods or services⁶⁰.
- (ii) Spill over effects: defined as the loss of actual or potential competition between the parent companies of the JV in relevant markets where the JV is not present. This may occur when the parent companies are present in other markets and the decisions adopted in common within the JV are capable of affecting the aforementioned markets.
- (iii) Stifling effect: defined as the capacity of the parents to block the joint venture from expanding into their fields.
- (iv) Foreclosure effect (either in the JV' relevant market or different markets): defined as denying actual or potential competitors' profitable access to a market and is said to be market distorting if it likely hinders the maintenance of the degree of competition still existing in the market or the growth of that competition and thus has a likely effect that prices will increase or maintain at a supra-competitive level⁶¹.
- (v) Coordinated effects: the possibility of the JV to engage in a cartel or other anticompetitive practice and/or to lead to coordinated/cooperative conduct between parent companies.
- (vi) Efficiencies: most of the times the underlying rationale in JV transactions is the realization of synergies⁶². Therefore, it is necessary to analyse the JV transaction and assess whether the potential synergies outweigh the potential risks on competition that may arise. Moreover, efficiencies in JV transactions, similarly to sole control transactions, need to satisfy certain specific conditions in order to be taken into account in the competitive assessment⁶³. Some of these efficiencies could take the form of cost savings, higher innovation or other kind of synergies; however, for these efficiencies to be taken into account, they have to be demonstrated, to involve a genuine increase in productivity, and their benefits have to be

⁶⁰ Glossary of terms used in EU competition policy.

⁶¹ Comments on the European Commission's discussion paper on the application of Article 82 of the Treaty to exclusionary abuses by Celesio AG.

⁶² e.g. savings increase by allowing the parent firms to reduce costs, eliminate duplicate functions, or achieve scale economies, among others.

⁶³ See for instance, paragraph 78 of the EC Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings: "For the Commission to take account of efficiency claims in its assessment of the merger and be in a position to reach the conclusion that as a consequence of efficiencies, there are no grounds for declaring the merger to be incompatible with the common market, the efficiencies have to benefit consumers, be merger-specific and be verifiable. These conditions are cumulative".

OFFICIAL

passed on to consumers in the form of lower prices, higher quality, or a wider portfolio offering.⁶⁴

(vii) Higher barriers to entry and expansion: defined as factors which could impede or obstruct access and thus competition in a given market (such as licensing restrictions, zoning regulations, patent rights, inadequate supply sources, and cost of capital, among others).

(viii) Other

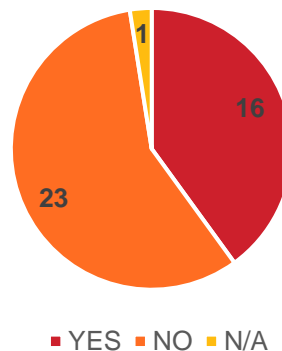
94. It should be noticed that regarding this Section, the Survey asked the NCAs to identify the theories of harm (ToH) that have been specifically applied in the assessment of JV transactions within the past five years. Therefore, if a jurisdiction has not undertaken certain ToH, this does not necessary imply that the corresponding ToH was not, is not or will not be considered by the corresponding jurisdiction when assessing a JV transaction. It would only be concluded that this specific ToH has not be applied by the NCA during the last five years in their respective JV cases.

Results

95. Regarding the differences between joint ventures analysis and cases of sole control in merger transactions, the Survey reveals that some NCAs (16 out of 40) take a specific approach when analysing a JV by carrying out an additional test that is not applied in sole control merger cases.

Exhibit 11

Additional test for JVs compared to sole control mergers



Source: CNMC's calculations based on NCAs' answers to the Survey

⁶⁴ FTC Guide to Antitrust Laws (<https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers/entry-efficiencies>).

96. Among jurisdictions where the specific approach for JVs is applied, it is interesting to highlight that these approaches may also differ in theory but also in practice. In practical terms, the respondent NCAs have shown that, when assessing a JV compared to a sole control transaction during the last five years, they have specifically analysed the following: i) information about potential coordinated effects (i.e. Mexico, France, Ireland, Germany, Denmark or Croatia); potential spill over effects (the European Commission or Chile); and general test about negative effects on competition of the JV (Russia).
- (i)* Coordinated effects: some jurisdictions assess JVs' transactions by specifically focusing on coordinated/cooperative behaviour between parent companies. As examples, it is possible to point out the cases of Mexico and France. In Mexico, JVs usually require gathering more information than in the case of sole control cases, since the Mexican Competition Authority must analyse the possibility of coordinated effects that could occur in markets out of the JV. Meanwhile, in the latter, the French Competition Authority uses three-fold cumulative criteria: i) the existence of a causal link between the creation of the joint venture and the risks of coordination between parent companies; ii) the degree of likelihood of the risks of coordination which must be of economic interest to the parent companies; and iii) the sensitivity of the effects of the risks of coordination on competition.
 - (ii)* Spill over effects: in this case, one of the jurisdictions that undertook this analysis is Chile. The Chilean Competition Authority considers the evaluation of spill over effects of the JV and its competitive impact, considering the JV parties could be competitors in other markets, different from the ones involving the JV. In fact, a JV enables the JV parties to increase their ability to coordinate their competitive behaviour (both in and outside the market in which the JV will operate), especially if their activities are in the same or related markets as those in which their constituents operate.
 - (iii)* General JV impact test: as an example, the Russian Competition Authority reveals that it conducts a multiple perspective analysis to assess whether the agreement on JV could be approved with remedies. In order to clear the transaction, the following conditions are stipulated: i) the agreement does not impose restrictions on third parties; ii) the result of such an agreement is the improvement of production, sales of goods or stimulation of technical, economic progress, or the implementation by its participants of direct investments in the territory of the Russian Federation⁶⁵; and iii) the result of such an agreement is the receipt by buyers of advantages

⁶⁵ Including the introduction of new production facilities, modernization of existing production facilities.

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(benefits) commensurate with the advantages (benefits) received by business entities as a result of the agreement.

97. Regarding all 40 jurisdictions (whether they have a specific approach by an additional test or not), a wide range of theories of harm have been identified by most NCAs when analysing JVs within the last 5 years. Some of these theories are generally and commonly applied to sole control acquisitions while others are more specifically related to joint control acquisitions and therefore will be further explained in the Case Studies proposed below in this section.
98. Foreclosure effects, either in the JV's relevant market or in other markets, represent a relevant matter for a majority of the respondents' jurisdictions (24 out of 40), as it is highlighted in the following case presented by the Turkish Competition Authority.

Case Study 1: Foreclosure effects

ARKAS/MARDAS – Turkish Competition Authority (Rekabet Kurumu) (Turkey, 2018)

In the case, it has been concluded that Arkas Group currently jointly controls the MARPORT terminal operating in the Northwest Marmara Region, and that there are (MARPORT, MARDAS and ASYAPORT, which is controlled by the other undertaking that has common control of MARPORT) 4 terminals actively operating in the Northwest Marmara sub-region.

Therefore, it has been concluded that the potential restrictive situations that may arise from the vertical effects of the transaction should also be examined.

Although the market shares of ARKAS and MARDAS remain below the threshold of 25%, it has been evaluated that input restriction effect may arise depending on the existing partnership structures.

Various solutions have been proposed by Arkas Group to address these concerns; such as Mardas will not engage in discriminatory behaviour to its customers, it cannot change the 2017 Standard Port Services tariff for a certain 12 months, except in legally valid cases, Mardas will determine the tariffs with a competitive understanding and avoid excessive pricing.

In this context, the market share of the Arkas Group and the commitments made were evaluated together. It has been assessed that it will eliminate the possibility of restricting the access of its competitors or new enterprises

99. Coordinated effects turned out to be problematic for 18 respondents, including for instance, France, South Africa, Brazil, Chile, Turkey, Taiwan and the United States. One transaction reviewed by the U.S. Department of Justice is a good example of how certain competition authorities analyse, assess and decide about JV operations that entail noticeable entanglements between parent companies.

Case Study 2: Coordinated effects

GEISINGER HEALTH/EVANGELICAL COMMUNITY HOSPITAL – AMERICAN COMPETITION AUTHORITY (FTC) (THE UNITED STATES, 2020)

According to the DOJ's complaint, the partial-acquisition agreement created significant entanglements between the hospitals, reducing their incentives to compete against each other and increasing the likelihood of harmful coordination.

For example, Geisinger was slated to obtain a 30% ownership interest in Evangelical in exchange for providing \$100 million to Evangelical for use on projects approved by Geisinger. These terms would have set Geisinger up as a critical source of funding for Evangelical for the foreseeable future and provided opportunities for Geisinger to influence strategic decisions of its competitor. The agreement also gave Geisinger rights of first offer and first refusal for certain transactions and joint ventures, which, in conjunction with other provisions in the agreement, would have made it difficult for Evangelical to partner with other healthcare entities.

The Department alleged that the provisions of the partial-acquisition agreement functioned together to substantially lessen competition and unreasonably restrain trade in the market for inpatient hospital services in central Pennsylvania. The terms of the settlement were intended to prevent Geisinger from exercising any form of control or influence over Evangelical and to restore the defendants' incentives to compete with each other on both quality and price. In addition to capping Geisinger's ownership interest in Evangelical, the settlement restricts Geisinger from increasing its ownership interest in Evangelical, making any loan or providing any line of credit to Evangelical, or exerting any control over Evangelical's expenditure of funds. Defendants are also each required to implement an antitrust compliance program.

100. One of the most common theory of harm identified by 15 respondent NCAs revolves around the existence of a non-compete clause among the parents in the JV market, as it is shown in the following case presented by Brazilian Competition Authority (CADE).

Case Study 3: Non-compete clauses

GENERAL ELECTRIC (GE)/BAKER HUGHES (BHGE) – Brazil's Competition Authority (CADE) (Brazil, 2019)

This case involved the stipulation of an exclusive obligation by which a company of the GE Group (GE Aviation) was prevented from selling to competitors of BHGE (one of the shareholders participated in the JV involved within the operation) in the segment of Oil & Gas.

In addition to that, BHGE was appointed as the exclusive distributor of Aero Derivate Gas Turbines (ADGTs) for GE Aviation in the O&G segment, and the GE Power was the exclusive distributor of ADGTs for GE Aviation in the Energy Segment.

These clauses were considered appropriate to the scope of the transaction, considering that the previous transaction also had distribution agreements between the parties.

101. Another frequent issue identified by several NCAs (14) concerns spill over effects, as it is explained in the following transaction proposed by the French Competition Authority (AdC).

Case Study 4: Spill over effects

GLOBAL BLUE/PLANET PAYMENT – French Competition Authority (AdC) (France, 2018)

The Global Blue and Planet Payment case was carried out in the context of a competitive bidding process organized by the Paris Aéroport group for the operation of commercial areas dedicated to VAT refund activity (tax refund) within the airports of Paris-Orly and Paris-Roissy. The parties had committed to Paris Aéroport group that if they won the tender, they would set up a joint company in charge of the activity covered by the tender, separate from each of the parties. This final offer submitted by Global Blue and Planet Payment was selected.

The AdC considered that the transaction, analysed as the creation of a JV by Global Blue and Planet Payment, was not likely to harm competition through vertical effect (the operation does not lead to horizontal overlaps).

However, in this case, because of the weight of the Paris airports in French international air traffic and the size of the markets for tax-free reimbursement services in the Paris airports, the JV would probably process a significant proportion of the vouchers issued and reimbursed in France by the tax-free operators active on the upstream market. The volume of information accessible through the JV would guarantee a significant degree of reliability of the information relating to the upstream market, making it likely that a coordination mechanism would be set up between its parent companies on the basis of a shared assessment of the market.

Such elements would tend to demonstrate that such coordination could have significant effects on the parties' competitors. However, in this case, the AdC decided to not further characterize the possible risk of coordination of parent companies that could result from the notified transaction because the parties proposed commitments in order to prevent this type of risk.

Thus, the AdC accepted the main commitment proposed by the parties based on establishing a strict separation of the information ("Chinese Wall") which will be accessible to them via the JV. In particular, they have undertaken to ensure that under no circumstances will the representatives of the partners in the JV have access to individual information relating to the tax-free vouchers processed by the JV. In addition, the representatives of the members will be subject to confidentiality agreements covering information relating to the activities of the joint venture to which they may have access in the course of their duties.

102. Some NCAs (11 out of 40) pointed out cases where efficiencies were mentioned, among them, Colombia, the European Commission, Japan, Kenya or Spain. In particular, the Case Study submitted by the Colombian Competition Authority (Superintendence of Industry and Commerce) shows the idea of clearing a JV transaction entailing efficiencies but, at the same time, imposing behavioural remedies to control certain potential conducts.

Case Study 5: Efficiencies

INVERSIONES ROA V SOLANO/INVERSIONES C&M – Colombian Competition Authority (Superintendence of Industry and Commerce) (Colombia, 2018)

The transaction consisted on the creation of a JV (with joint control shared by the parent companies) for building a plant/port facility in Palermo, department of Magdalena, Colombia. In the aforementioned plant/port facility, among other raw materials, the dry paddy rice previously imported from the US would be threshed. Therefore, the benefits of TLC product would be realized in the Colombian market. Once threshed, the paddy rice would be sold to parent companies or related companies as well as to other interested third parties. Moreover, market conditions of the sale would be exactly the same for every buyer.

The relevant market considered in this transaction would be the paddy rice purchasing, processing and packaging of white rice. After the analysis conducted by the Colombian Superintendencia de Industria y Comercio, the conclusion obtained was that this transaction had a neutral effect on the market due to several facts: i) no competitor would be erased from the market; ii) market share of competitors in the corresponding market would not be affected; iii) the parent companies would continue to be completely independent and to compete individually in the market; and iv) there would not be any kind of control lost from parent companies.

Moreover, the operation could bring efficiencies into the market due to the availability under same market conditions of the plant/port offered services (i.e. threshing, processing and packaging).

Nevertheless, the Colombian NCA also found that, in case of clearing this JV transaction, there existed the risk of setting discriminatory market conditions in accessing the plant/port facility by the JV. Moreover, the risk of flow of information about competitors from the JV towards the parent companies was also assessed. For this last reason, the Colombian NCA cleared the transaction subject to two behavioural remedies: i) commitments by the parent companies to avoid information flow among themselves; and ii) commitments seeking to mitigate the risk of potential restrictions in threshing services.

103. Another 8 NCAs highlighted the fact that the creation of some JVs could lead to higher barriers of entry and expansion for potential or actual competitors with a consequent negative impact on competition. In this line, the Directorate-General for Competition of the European Commission has shared a relevant transaction in which the creation of a JV in the car sharing market would lead to higher barriers of entry and expansion which would lessen competition.

Case Study 6: Higher barriers to entry and expansion

DAIMLER/BMW – Directorate-General for Competition (the European Commission, 2018)

The Transaction concerns the acquisition by BMW and Daimler of joint control over six legal entities (separately, "the JVs"; all six together, the "JV"), bringing together the Parties' mobility services in five business fields, i.e. (i) car sharing services DriveNow and car2go, (ii) ride hailing services, (iii) parking services, (iv) charging services as well as (v) other on-demand mobility services. The sixth joint venture will manage the brands and license them out to the other joint ventures. The Parties will transfer existing business to the JV. The JV will offer its services to commercial customers, public entities and private customers. It is planned that the JV will operate in various countries worldwide. In the EEA, the Parties' activities will overlap in seven cities within the EU, namely in Austria (Vienna), Germany (Berlin, Cologne, Dusseldorf, Hamburg and Munich) and Italy (Milan).

After an examination and a market test the following commitments are considered suitable to entirely remove the serious doubts about the potential negative impact on competition identified: the Parties commit (i) to remain, under certain conditions, visible on third parties' aggregator platforms and (ii) to allow, under certain conditions, competing mobility service providers to be visible on the Parties' combined Multimodal App ('moovel'). In this spirit, the Parties will (i) grant application programming interface (API) access to third aggregator platforms and (ii) grant access for all interested car sharing providers to their Multimodal App.

The commitments notably aim to lower the barriers of entry for third mobility providers in the overlap cities of Berlin, Cologne, Dusseldorf, Hamburg, Munich and Vienna. Furthermore, the commitments secure that the Parties do not terminate or deny contracts with third aggregator apps in order to launch and expand their own app exclusively so that third party aggregator apps would be cut off immediately.

According to the Commission, the commitments entered into by the undertakings concerned are sufficient to eliminate the serious doubts as to the compatibility of the transaction with the internal market. Therefore, the Commission has decided not to oppose the notified operation as modified by the commitments annexed to the decision and to declare it compatible with the internal market and with the functioning of the EEA Agreement, subject to full compliance with certain additional conditions.

104. Stifling effects, meaning the capacity of the parent companies to block the joint venture from expanding into their fields, although they are not widely spread among NCAs, they were pointed out by 5 NCAs, in particular Germany, Japan, Kenya, Slovenia and Russia. This kind of theory of harm has been illustrated by the Russian Competition Authority in the case Murom/Novosibirsk.

Case Study 7: Stifling effects

MSZ/NSZ – Russian Competition Authority (Federal Antimonopoly Service, FAS Russia, 2018-2019)

In accordance with Article 33 of the Federal Law on Protection of Competition, the FAS Russia in 2018-2019 considered the application of large switcher companies "Murom Strelachny Zavod JSC" and "Novosibirsk Strelachny Zavod JSC" to conclude an agreement on joint activities in the territory of Russian Federation.

Both companies operate in the markets of production of parts for railway locomotives, trams and other motor cars and rolling stock; production of track equipment and devices for railway, tramway and other tracks, mechanical and electromechanical equipment for traffic control.

In accordance with the FAS Order "On Approval of the Procedure for Analysis of Competition in the Commodity Market" the analysis of competition on the market of switches within the geographical boundaries of the Russian Federation showed the following: i) the cumulative share of the Parties in the market of points' transfers exceeds 50%; ii) the market of switches for high-speed lines is a related commodity market; and iii) there are no producers of points for high-speed lines and economic entities engaged in the development of points for high-speed lines in the Russian Federation.

Thus, the share of the joint venture established by the parties in the market of switchers for high-speed lines within the geographical boundaries of the Russian Federation could have amounted to more than 50%. The parties failed to prove that the Agreement could be recognized as admissible under Part 1 Article 13 of the Law on Protection of Competition. In order to approve the agreement on joint ventures, the FAS Russia proposed to the parties to follow the certain provisions namely to create an opportunity for certain persons to eliminate competition in the market of switches for high-speed lines. The parties stated that such requirements also were imposed on third parties that went against the goals of the Agreement.

Considering the above, the FAS Russia decided to refuse to satisfy the application.

105. Only 8 NCAs specified other types of theories of harm, among which it is possible to underline the “unilateral horizontal effects” (2 NCAs⁶⁶); the “conglomerate effects” (2 NCAs⁶⁷); and the “sensitive information flows” (2 NCAs⁶⁸). In order to further explain these other types of theories of harm, the United Kingdom’s Competition and Markets Authority has highlighted the following transaction.

Case Study 8: Other theories of harm

**COX AUTOMOTIVE UK/AUTO TRADER – the United Kingdom
Competition and Markets Authority (CMA) (United Kingdom, 2018)**

Horizontal unilateral effects: The CMA examined an anticipated JV in the supply of B2B online vehicle remarketing and assessed three horizontal unilateral theories of harm: the supply to franchised dealers as sellers, the supply to franchised and independent dealers as buyers, and the supply to original vehicle manufacturers and large corporate sellers.

However, the CMA found no competitive concerns because the competitive constraint lost as a result of the JV was limited, and the JV will be constrained by several credible competitors.

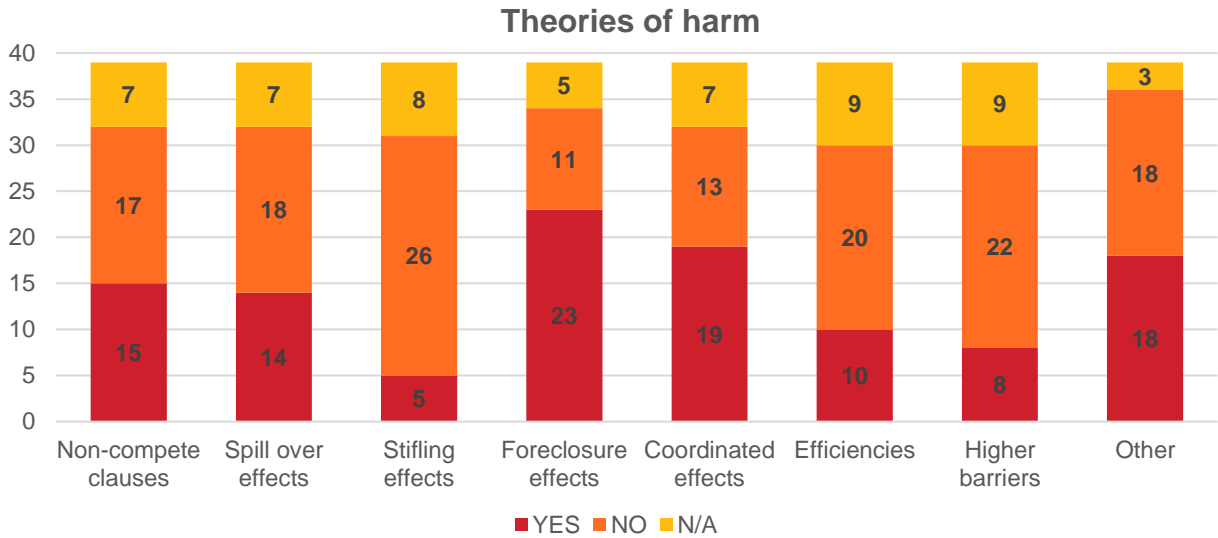
The CMA also considered whether the JV could give rise to conglomerate effects as a result of bundling one parent companies’ online B2C vehicle listings with the JV’s B2B online remarketing services however the CMA found that the Parties lack incentive to foreclose rivals.

⁶⁶ The United Kingdom and the European Commission.

⁶⁷ Denmark and the United Kingdom.

⁶⁸ Germany and Ireland. These jurisdictions highlight that this conduct could be encompassed in spill over effects or coordinated effects. Nevertheless, Germany and Ireland establish slight differences that allow them to consider the aforementioned theories of harm separately.

Exhibit 12



Source: CNMC's calculations based on NCAs' answers to the Survey

6. REMEDIES

Concept

106. As for the remedies, one of the purposes of the Survey was to ascertain whether the authorities tend to impose specific remedies if a JV is deemed to be problematic, compared to those implemented in sole control cases. In this regard, each jurisdiction has its own preferences about the election of remedies in order to avoid harm on competition derived from a JV transaction.
107. In general, merger control rules make a distinction between structural remedies and behavioural (or conduct) remedies, even though the line between the two can be somewhat blurred. In practice, a remedy will often include structural as well as some behavioural elements (so-called hybrid remedy)⁶⁹.
108. Structural remedies (such as divestitures⁷⁰) are generally “one-off” measures that are intended to maintain or restore the structure of the market by creating a new or enhanced competitive player. Such remedies are designed to have an immediate market impact (as opposed to having an effect only over time), are

⁶⁹ See Wolters Kluwer Competition Law Blog: <http://competitionlawblog.kluwercompetitionlaw.com/2020/02/21/merger-remedies-is-it-time-to-go-more-behavioural/>

⁷⁰ The “classic” structural remedy is a divestiture, i.e. the commitment to sell a business unit.

intended to be irreversible in nature and do not require continuous monitoring by the authority or third parties⁷¹.

109. Behavioural remedies relate to the future behaviour of the merged entity. Examples include granting access to key technology or infrastructure (if these measures require on-going monitoring), supply obligations, licencing or firewall provisions. Behavioural commitments are more commonly accepted in deals where the competition concern relates to foreclosure as opposed to an increase in market power and where a divestment of the upstream or downstream business would be disproportionate in light of expected efficiency gains. Behavioural remedies are also more likely to be accepted in regulated industries, where a government body can monitor market conditions on an on-going basis⁷².

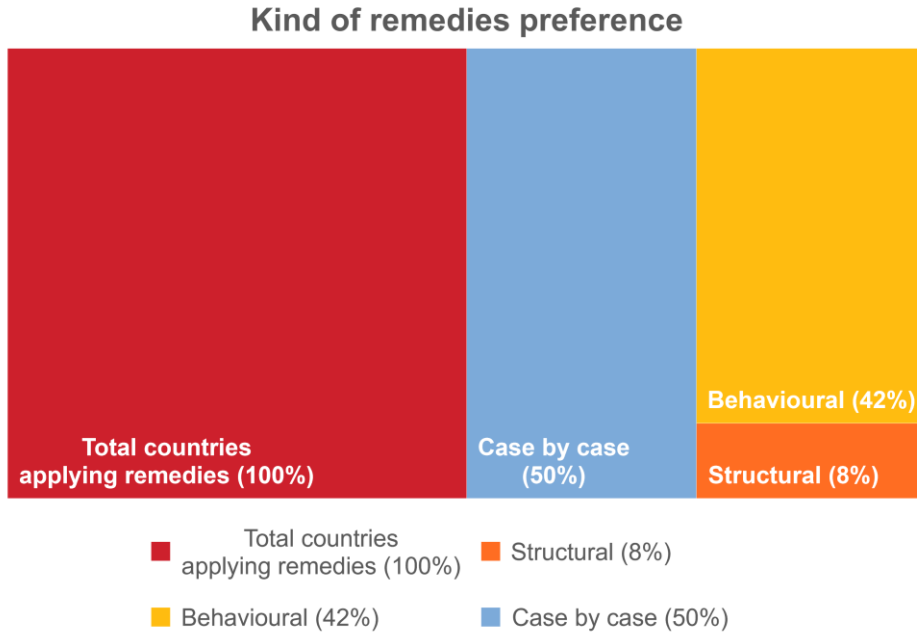
Results

110. The answers received show that most of the NCAs did not impose specific remedies in problematic JV cases, at least during the last five years.
111. Only 12 out of 40 respondents have confirmed that they did impose certain kind of specific remedies. However, from the answers provided to the Survey by the NCAs it is derived that, in the majority of the cases, they are not specific remedies strictly applied to JV cases (i.e. they could be also applied to sole control transactions). Previous transactions analysed within the respondent jurisdictions show a preference towards applying certain kind of remedies. For example, this preference tends towards: i) "*behavioural remedies*" (e.g. South Africa or Taiwan); ii) "*structural remedies*" (e.g. Colombia); or iii) "*a mix of behavioural and structural remedies*" (e.g. Kenya).
112. In conclusion, despite the aforementioned tendencies in preferences when applying remedies, in general terms all the NCAs will impose the most appropriate remedies from a case-by-case perspective and after the due consideration of all the information available.

⁷¹ See footnote 16.

⁷² See footnote 16.

Exhibit 13



Source: CNMC's calculations based on NCAs' answers to the Survey

7. GUIDELINES

Concept

- 113. The main aim of this section is to analyse whether the different jurisdictions have developed a specific set of rules for joint venture cases.
- 114. The aforementioned set of rules, where they exist, could be exclusively designed to regulate JV deals or, on the contrary, could be a part of a more holistic approach including mergers in general.

Results

- 115. Answers to the Survey revealed that most jurisdictions (34 out of 40) have not developed specific guidelines regarding JVs.
- 116. Only 6 NCAs have published or are currently drafting guidelines regarding JVs. However, some of these guidelines tackle not only JVs but also business agreements (e.g. Colombia⁷³ and New Zealand⁷⁴). Only Kenya, the

⁷³ https://www.sic.gov.co/sites/default/files/files/CARTILLA_ACUERDOS%2019-03-2015.pdf

⁷⁴ https://comcom.govt.nz/__data/assets/pdf_file/0036/89856/Competitor-Collaborationguidelines.pdf

Philippines⁷⁵, South Africa and Russia⁷⁶ referred specifically to guidelines addressing JVs only.

117. In South Africa, the Competition Commission of South Africa (CCSA) has published a public document (i.e. Practice Note⁷⁷) for the application of merger provisions of the Competition Act 89 of 1998, as amended, to joint ventures for the use of competition practitioners in South Africa.

8. INTERNATIONAL COOPERATION

Concept

118. It is well-known that the mission⁷⁸ of the ICN Merger Working Group (MWG) is to promote the adoption of best practices in the design and operation of merger review regimes in order to: (i) enhance the effectiveness of merger review; (ii) facilitate procedural and substantive convergence; and (iii) reduce the public and private time and cost of merger reviews.
119. In order to fulfil the mission of the Working Group, the MWG seeks, as its first long-term goal, to promote greater international cooperation and convergence in merger review standards, practices, and outcomes.
120. Since the proposal of the “*Framework for Merger Review Cooperation*” was promoted by the Japan Fair Trade Commission (JFTC) in 2012, the idea of cooperation among member jurisdictions of the MWG has definitely become more relevant. In this line, the MWG completed the work on enforcement cooperation in 2015, and the work on enforcement cooperation tools in 2019.

Results

121. In terms of cooperation, most NCAs have not collaborated with other competition authorities in JVs’ related issues within the last 5 years.
122. Interestingly from those NCAs that have actually cooperated with other competition authorities recently, only 4 (Germany, Israel, Spain and Russia) consider that cooperation has increased. The majority of the respondents (19 out of 40) consider that there is no significant variation in terms of cooperation between competition authorities.

⁷⁵ <https://www.phcc.gov.ph/guidelines-on-notification-of-joint-ventures/>

⁷⁶ <https://fas.gov.ru/documents/575737>

⁷⁷ For further information on the aforementioned Practice Note, see: <https://www.compcom.co.za/wp-content/uploads/2017/11/Practitioner-Update-Joint-Ventures-Published-version.doc>

⁷⁸ According to the “Merger Working Group 2020-2023 - Working Group structure and 3-year plan”

123. The increasing trend in cooperation among different national competition authorities cannot be considered as intense during the last five years. Most NCAs have not collaborated with other jurisdictions in JVs' related issues within the last five years which highlights an ample room for improvement in this field. Nevertheless, it is noteworthy that among NCAs who have cooperated a certain degree of robustness, stability and resilience of cooperation is shown.

9. STATISTICS

Concept

124. The main aim of this Survey's section is to underline the existing trends during the last five years in relation to the following aspects: i) evolution of JVs notification; ii) volume of JVs notified; iii) percentage of JVs notified over total notifications (i.e. including any kind of transaction notified to the due national competition authority); and iv) percentage of JVs cleared with commitments over total JVs transactions notified⁷⁹.
125. In this regard, the results drawn from the answers provided by the respondent NCAs allow to obtain valuable conclusions about the trends observed in the JV specific transactions field.

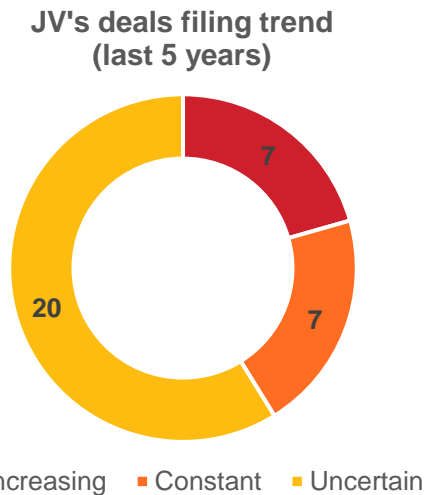
Results

126. Regarding how the tendency of JV notifications has evolved during the past five years, as the figure below shows, only 7 NCAs (Estonia, Finland, Italy, Kenya, Poland, Portugal and the United States) have stated that the trend in the notification of JVs' transactions has remained stable, while other 6 jurisdictions (the European Commission, Hungary, Russia, Serbia, Taiwan and Turkey) confirm an increase in this trend during the aforementioned time frame. Meanwhile, the remaining 20 respondents state that no clear tendency has been observed during the last 5 years regarding JV operations filing. None of the jurisdictions has mentioned a decreasing trend.
127. The majority of respondents out of those who have explicitly answered to this question (20/34 NCAs) have pointed out their uncertainty regarding JVs' filing trend during the last five years. However, it is noteworthy that for the remaining respondents (14 NCAs) the trend shows a stable-growing pattern in general terms⁸⁰.

⁷⁹ In case the final decision taken by the corresponding NCA was blocking or prohibiting the JV transaction, the theory of harm that justified the prohibition is included.

⁸⁰ 50% of NCAs (i.e. 7 NCAs) consider this trend to remain stable; whereas for the remaining 50%, the tendency is undoubtedly increasing.

Exhibit 14



Source: CNMC's calculations based on NCAs' answers to the Survey

128. From a global perspective, the JV filing data from all consulted NCAs shows (see Exhibit 15 below):
129. In terms of total volume of JV transactions notified, two clear trends are shown within the last five years⁸¹:
- (i) A clear decrease in the number of JV notified during 2015, 2016 and 2017. Moreover, the minimum is reached in 2017, when less of 20 JV transactions were notified on average by the respondent NCAs.
 - (ii) An increase in the number of JV notified after 2017 that reaches its peak in 2019 with close to 40 JV notifications on average (i.e. more than doubling the data set floor). Although a sensitive reduction has taken place in 2020, it could be explained by the general economic downturn associated to Covid-19 pandemic⁸².
- (ii) In relation to the percentage of JVs notified over total notifications (i.e. including any kind of transaction notified to the corresponding national competition authority), the trend has followed a smooth increasing pattern. It started close to 10% in 2015 and has grown up to a consistent 14% on

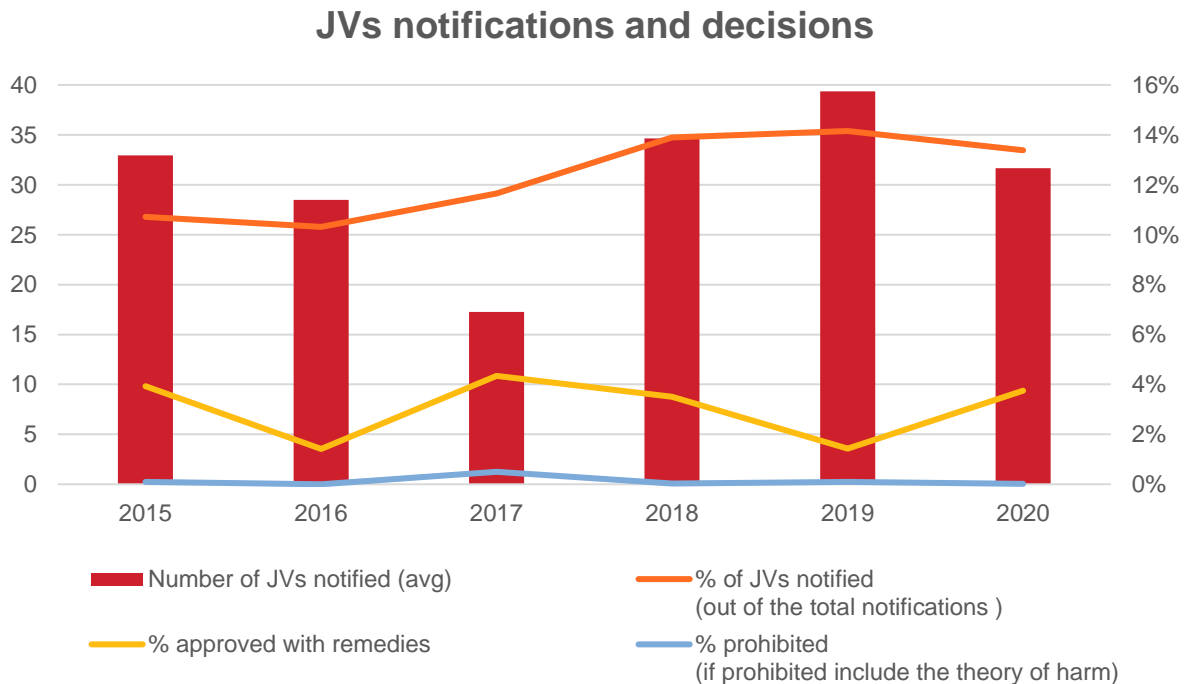
⁸¹ Note that these statistics are affected by the existence of three jurisdictions that could be considered as outliers (i.e. Germany, the European Commission and Poland) given that they have received a number of JV notifications notably higher than the rest of jurisdictions.

⁸² Therefore, if the economic downturn had not existed, possibly the level of JV transaction would have been noticeably higher than in 2019. Given that this is a contrafactual scenario, this cannot be proved but the trend allows us to foresee this potential evolution.

average during the period 2018-2020, although it is slightly decreasing from 2019 onwards.

- (iii) Regarding the percentage of JVs cleared with commitments over total JVs transactions notified, its evolution is not really smooth. Indeed, it is saw-shaped fluctuating in an approximated range between 2% and 4% all along the time framework of the data series. In particular, 2016 and 2019 were the years when less JV transactions were approved with remedies. This is particularly significant in the case of the year 2019 given that it was the year with more JV notifications in average among the respondent NCAs.
- (iv) Finally, regarding final decisions taken by the corresponding NCA that led to the prohibition of the JV transaction, the Survey asks the respondents to further explain the insights of the operation as well as the theory of harm that justified the prohibition. As it is drawn from the responses provided by the NCAs, prohibitions of JV transactions are not very widespread. In fact, only the European Commission⁸³ has consistently stated to have prohibited two JV transactions during the last five years.

Exhibit 15



Source: CNMC's calculations based on NCAs' answers to the Survey

⁸³ The EC prohibit 2 cases in the last five years (2017 and 2019) due to the existence of "horizontal effects": i) Case M.7878 HeidelbergCement/Schwenk/Cemex Hungary/Cemex Croatia; and ii) Case M.8713 – Tata Steel/Thyssenkrupp/JV.

Table 1

	2015	2016	2017	2018	2019	2020	Average
Number of JVs notified (avg)	33	28	17	35	39	32	31
% of JVs notified (out of the total notifications)	11%	10%	12%	14%	14%	13%	12%
% approved with remedies	4%	1%	4%	4%	1%	4%	3%
% prohibited (if prohibited include the theory of harm)	0,1%	0,0%	0,5%	0,0%	0,1%	0,0%	0,1%

Source: CNMC's calculations based on NCAs' answers to the Survey

10. RELEVANT CAS ES

Concept

130. The aim of this last section is to highlight relevant cases (analysed in the last 5 years) where the nature of the control was subject to discussion between the notifying party and the NCA and explain the implications this had for the analysis of the case.
131. This will allow the reader to discover what were the arguments provided by the parties and also the rationale of the final decision.

Results

132. In order to obtain a good insight of this issue, 4 relevant cases have been selected. They are related to the NCAs of Spain, the European Commission, Brazil and the United Kingdom.

Case Study 9: Spanish relevant case

**BARCELÓ/GLOBALIA – Spanish Competition Authority (CNMC)
(Spain, 2020)**

The relevant market of this operation was the tourism sector, in particular the subsector of travel agencies and transport of passengers.

At the beginning the operation was notified as a JV according to the shareholders agreement. However, the Parties withdrew the initial notification in order to substitute this JV operation for a sole control one, but the enforceable shareholders agreement was still the same.

From the point of view of the Spanish Competition Authority (CNMC) there were still veto rights for both Parties in strategic decisions. In addition, there was a clause that stood for a change in the Board of Directors of the company in the case of specific events. This change consisted on the election of 2 board of directors' members by each of the Parties instead of 3 and 2 members, respectively. Therefore, there was still a possibility of joint control.

Accordingly, the solution proposed by the CNMC was to require the signing of a new contract so as to guarantee that only the buyer was going to be able to take strategic decisions. In addition, the elimination of the aforementioned clause was also required.

Case Study 10: the European Commission relevant case

ATLANTIA-ACS-HOCHTIEF/ABERTIS – Directorate General for Competition (the European Commission, 2018)

The relevant market of this operation was the toll motorway concessions.

The parties decided that one party appoints 5 out of 9 directors and has a majority of voting rights on all relevant issues.

A shareholders' agreement defines "Reserved Matters" that require consent by minority shareholder. These matters include investments or divestments above a certain threshold. In toll motorway concessions, these investments are important. A large majority of all projects during the last 10 years would have exceeded these thresholds. In case of a deadlock, a long and cumbersome process gets started.

Therefore, the JV is considered to be jointly controlled.

Case Study 11: Brazil relevant case

TICKET SOLUCOES/REPOM – Brazil's competition authority (CADE) (Brazil, 2019)

The relevant market of this operation was the management of digital payments for road freights.

The acquisition of shares would be solemnly done by the sole controlling shareholder (no existence of a joint control).

The TicketLog (buyer) had the shared control of Repom (object of sale), notwithstanding its high importance on Repom's management. Also, the joint control of Repom was made by TicketLog and other minority shareholders, and, finally, the operation would result in TicketLog acquiring the sole company control as a minority shareholder.

The conclusion was that the notification would be mandatory in this case, considering that the buyer did not have the sole control and therefore, the operation would involve a change at the company's control.

Case Study 12: the United Kingdom relevant case

AMAZON/DELIVEROO – Competition and Markets Authority (the United Kingdom, 2020)

The relevant market of this operation was the online restaurant platforms and online convenience groceries.

The Parties submitted that the CMA did not have jurisdiction to review the Transaction because Amazon would not be capable of exercising material influence over Deliveroo.

CMA found that Amazon's acquisition of a 16% shareholding alongside board representation and certain other rights in Deliveroo would result in having material influence over Deliveroo and looked at three channels: i) Influence through Amazon's shareholding in Deliveroo; ii) Influence through Amazon's right to representation on Deliveroo's board; and iii) other sources of influence.

The CMA disagreed with the Parties that each potential source must be considered in isolation. The CMA observed a strong body of evidence that Deliveroo's management and other shareholders perceived Amazon had a special status as a 'strategic' investor, had relevant commercial and operational expertise and was a current/future potential strategic/commercial partner of Deliveroo. Together, these factors would mean Amazon's views are likely to be given more weight and give the ability materially to influence decisions.

The CMA considered the cumulative influence via these three channels and concluded that the Transaction was more likely than not to confer on Amazon the ability to exercise material influence over Deliveroo. The CMA considered Amazon's voting rights, its rights as a shareholder, its status and expertise, as well other commercial relationships between Amazon and Deliveroo.

CONCLUDING REMARKS

133. The high level of heterogeneity among ICN jurisdictions when assessing JV transactions altogether with the fact that during times with a high degree of uncertainty (such as nowadays with the Covid-19 pandemic) companies tend to establish JVs in order to share risks and/or to get better access to financial resources, underlines the current relevance of the topic discussed in this Report.
134. Only in 65% of the jurisdictions of the respondent NCAs there is, at least, a specific provision regarding JV notification in the merger control rules.
135. Taking everything into consideration, a JV transaction would be notifiable if it implies that the emerging company exhibits two main characteristics: i) joint control from the parent companies and ii) full functionality of itself within the market. Joint control is considered to be effective as long as all parent companies can exercise a relevant degree of influence (“decisive influence” and/or “material influence”). These kinds of “influence” are supposed to be realised through voting rights and/or veto rights ownership, mainly.
136. Within the JV transactions analysed by the respondent NCAs during the last five years (i.e. 2015-2020), the theories of harm that have been most commonly assessed were foreclosure effects and coordinated effects.
137. International cooperation among national competition authorities during the last five years shows clear margin for improvement, that could be accomplished through both a greater use of the opportunities the ICN offers to the its members and a greater commitment from them.
138. Therefore, the results, findings and conclusions arising from these Survey and Report conducted by the CNMC could serve as an initial step to prompt further discussion about JV analysis in the core of the ICN Mergers Working Group (MWG).

OFFICIAL

QUESTIONNAIRE FOR JOINT VENTURES

1. Jurisdiction: How joint ventures are dealt with under merger control

a) Do your jurisdiction’s merger control rules contain a specific provision defining when the creation of a joint venture may (subject to notification thresholds being satisfied) constitute a notifiable⁸⁴ transaction?

Yes

No

b) If joint ventures are expressly covered by your merger control rules, please complete the following table indicating which types of joint ventures can (subject to notification thresholds being satisfied) constitute a notifiable transaction.

Type of Joint Venture	Answer (Y/N)
Ex novo creation of a joint venture	
Joint acquisition of an existing company / assets	
Change from sole control to joint control over an existing company/assets	
Changes within the composition of jointly controlling shareholders (e.g. one of the parties of the JV sells its participation to a third party)	
Changes of the nature/ quality of joint control (e.g. change from joint control via veto rights to joint control via voting rights)	
Other: Please specify	
Identify the relevant legislation in which the notion of a joint venture is described, if any	

c) To the extent that there are specific provisions for joint ventures under your jurisdiction’s merger control rules, please indicate which of the following criteria are used in determining whether a joint venture is a potentially notifiable transaction.

Criteria	Relevant in assessment (Y/N)	Explanation
Acquisition of (or change in) joint control		
Acquisition of defined shareholding percentages		

⁸⁴ “Notifiable”, throughout this questionnaire, includes either mandatory or voluntary notification.

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Full functionality ⁸⁵		
Other: (please specify)		

- d) If your jurisdiction's merger control rules do not include a specific provision defining when a joint venture may amount to a notifiable transaction, please complete the below table to identify in what circumstances a joint venture may be reviewed under your competition law rules.

Criteria	Answer (Y/N)	Explanation
Under a general definition of what constitutes a notifiable merger		
Under the restrictive practices provisions of your competition law		
Other: (please specify)		
Joint ventures are not subject to competition law?		

2. Notion of joint control in merger control

- a) Does your legislation define the concept of "control" specifically for merger control purposes?

Yes

No

If **Yes**, please provide the definition. If **No**, please specify where the concept of control is established (e.g. commerce code) and provide such non-merger specific definition

Answer:

- b) Does your legislation include the concept of exercising or having the possibility to exercise "decisive influence" over an undertaking when defining control?

Yes

No

⁸⁵ In order to be considered full function, a JV must operate on a market performing those functions typically carried out by undertakings operating on the same market. Some jurisdictions such as the European Commission have set out the criteria to determine if a JV operates autonomously from its parent companies.

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If **Yes**, please explain its meaning. If **No**, please explain what other concept (e.g. “material influence”) is used when defining control.

Answer:

c) Do your merger control rules require “joint control” for a joint venture to be a potentially notifiable transaction?

Yes

No

d) Please identify the relevant legislation in which the notion of joint control is described, if any (if available online, please provide a link to the legislation)

Answer:

e) Please indicate the alternatives that fulfil the legal standard of joint control in your Jurisdiction:

a. Equal voting rights in the JV: please specify the type of majorities considered (50/50 voting rights or others)

b. Veto rights (ability to block) that lead to joint control

c. Joint exercise of voting rights leading to joint control

d. Other: Please specify

Answer (please include all the relevant options):

f) In relation to veto rights that lead to joint control, please indicate the relevant subjects your Jurisdiction considers when analysing joint control:

a. Budget

b. Investment or financing plans

c. Annual business plans

d. Multiannual strategic plans

e. Appointment of senior management

f. Termination of senior management

g. Key commercial agreements

h. Unblocking/deadlock-resolution criteria within the JV Administration Board

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- i. Specific obligations for the acquirer (e.g. keeping the shares during a period of time)
- j. Other: Please, specify

Answer (please include all the relevant options):

- g)** In relation to veto rights that may lead to joint control, please indicate if:
- a. A veto right on one relevant subject, is sufficient to confer joint control
 - b. Veto rights over more than one relevant subject are required to confer joint control
 - c. Other

Please specify if your answer is option a, whether all veto rights have the same relevance. If your answer is option b, please indicate the relevant subjects and/or number of necessary subjects. If your answer is c, please explain how veto rights can lead to joint control:

- h)** In relation to the exercise of voting rights leading to joint control, please indicate if they could come from:
- a. Formal agreements (de jure)
 - b. De facto agreements
 - c. Other:

Please specify the most common types in your jurisdiction:

- i)** In relation to derivative securities such as futures, options (call, convert), please indicate if and how they may be considered to confer joint control in your Jurisdiction:

Answer:

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- j) What kind of supporting documentation does your authority typically require the parties of a JV to submit in order to determine whether there is joint control?

Documents Required	Answer (Y/N)	Comments
Shareholders' agreements		
Declaration of intentions		
Corporate statutes		
Details of voting at shareholder meetings		
Internal documentation (such as emails, presentations or documents regarding the negotiations of the agreements)		
Other: Please Specify		

3. Full functionality⁸⁶

- a) If the full functionality criteria applies in your jurisdiction, please fill in the following table regarding the requirements for the full functionality criteria to be applied in your jurisdiction:

Thresholds to determine full functionality of a JV	Answer (Y/N)	Scope of the thresholds to be fulfilled and problems identified
Sufficient resources to operate in the market		
The JV carries out activities beyond specific functions of the parent companies		
Commercial relations between the JV and its parent companies shall be limited.		
Long lasting nature of the JV		
Other: Please specify		

⁸⁶ In order to be considered full function, a JV must operate on a market performing those functions typically carried out by undertakings operating on the same market. Some jurisdictions such as the European Commission have set out the criteria to determine if a JV operates autonomously from its parent companies.

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Identify the relevant legislation in which the notion of full functionality is described, if any (if available online, please provide a link to the legislation)		
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4. Application of notification thresholds

As to the application of thresholds for notification in JV cases:

a) Where there is a change in shareholders in an existing JV, are the existing jointly controlling shareholders also required to notify / does this create jurisdiction for the authority to investigate, subject to notification thresholds being satisfied (in voluntary regimes)?

- Yes No

b) When applying turnover or other notification thresholds, which of the following are considered:

- a. Each and every (post-transaction) joint controlling parent;
- b. New (post-transaction) joint controlling parents;
- c. Parents who (post-transaction) have a defined shareholding percentage in the joint venture business;
- d. The target business of the joint venture;
- e. Others (please specify)

Answer

c) When applying turnover or other thresholds, is the revenue of a joint venture business excluded from the revenue of existing jointly controlling shareholders?

- Yes No

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Answer (If **Yes**, please specify):

d) Are joint ventures that have no activities/revenue/assets in your jurisdiction notifiable in your Jurisdiction if other parties (e.g., the JV parents) to the transaction meet the thresholds in your jurisdiction?

Yes

No

Answer (If **Yes**, please specify):

e) Is there any de minimis threshold for local activities or effects for JVs to be notifiable?

Yes

No

Answer (If **Yes**, please specify):

f) Does your jurisdiction offer a simplified or expedited notification and clearance procedure for joint ventures that have limited or no impact in your jurisdiction?

Yes

No

Answer (If **Yes**, please explain when this procedure can apply):

5. Substantive Assessment of Joint Ventures

In order to assess the main difference when analysing joint ventures instead of mergers where there is sole control, please answer the following:

a) Is there any specific approach (additional test) considered when analysing a JV in comparison to sole control cases?

Yes

No

Answer (if **Yes**, please provide a brief explanation):

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b) Please fill in the table below regarding the specific theories of harm considered when analysing JVs within the last 5 years:

Theories of Harm applied within the last 5 years	Answer (Y/N)	Case reference	Problems detected and brief explanation of how it was addressed
Non-compete clause among the parents in the JV market			
Spill over effects ⁸⁷			
Stifling effect ⁸⁸			
Foreclosure effect (either in the JV' relevant market or different markets)			
Coordinated effects (e.g. the possibility of the JV to engage in a cartel or other anticompetitive practice)			
Efficiencies			
Higher barriers to entry and expansion			
Other: Please Specify			

6. Remedies

a) Is there a tendency in your authority to impose specific remedies when a JV is deemed to be problematic?

Yes No

⁸⁷ Spill over effect is defined as the loss of actual or potential competition between the parent companies of the JV in relevant markets where the JV is not present. This may occur when the parent companies are present in other markets and the decisions adopted in common within the JV are capable of affecting the aforementioned markets.

⁸⁸ The Stifling effect is defined as the capacity of the parents to block the joint venture from expanding into their fields.

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If **Yes**, please briefly describe the remedies mostly used (structural / behavioural) and the theory of harm that it solves.

Answer:

7. Guidelines regarding joint ventures

a) Does your jurisdiction have specific guidelines regarding JVs?

Yes No

If **Yes**, please attach the link to the guidelines.

Answer:

8. International cooperation

a) Has your jurisdiction cooperated with other competition authorities on JV cases within the last 5 years?

Yes No

b) If **Yes**, has the cooperation with other competition authorities increased within the last 5 years?

Increased Decreased No significant variation

9. Statistics

a) Please indicate the trend in the notifications of joint ventures, over the last 5 years, in your jurisdiction.

Increasing Decreasing Constant Uncertain

b) Please provide the number of joint ventures notified in the last 5 years

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Year	Number of JVs notified	% of the total number of notifications received	% approved with remedies	% prohibited (if prohibited include the theory of harm)
2015				
2016				
2018				
2019				
2020				

10. Relevant cases involving a discussion with the parties about the nature and/or scope of the control (sole vs joint control)

The concept of joint control and sole control is discussed in certain mergers that are notified to Competition Authorities and may, indeed, be a key point of the substantive analysis of the merger. Taking this into account, please fill in the table below with relevant cases (in the last 5 years) where the nature of the control was subject to discussion between the notifying party and the Competition Authority and explain the implications this had for the analysis of the case.

Year (2015 to 2020)	Case (Parties / case number / link to public case page)	Relevant market	Arguments of the parties	View of the Authority	Final decision taken and its reasoning
	<i>[Please list the most relevant cases]</i>				