SECOND EDITION 2015

JOINT VENTURES

A GLOBAL GUIDE FROM PRACTICAL LAW

General Editor:
Gianmatteo Nunziante, *NUNZIANTE MAGRONE*

THOMSON REUTERS™

SECOND EDITION **2015**

JOINT VENTURES

A GLOBAL GUIDE FROM PRACTICAL LAW

General Editor:
Gianmatteo Nunziante
NUNZIANTE MAGRONE

THOMSON REUTERS

General Editor
Gianmatteo Nunziante
Nunziante Magrone

Commissioning Editor
Emily Kyriacou
emily.kyriacou@thomsonreuters.com

Commercial Director
Katie Burrington
katie.burrington@thomsonreuters.com

Publishing Editor
Dawn McGovern
dawn.mcgovern@thomsonreuters.com

Editor
Anna Sulowska
anna.sulowska@thomsonreuters.com

Editorial Publishing Co-ordinator
Nicola Pender
nicola.pender@thomsonreuters.com

Consultant
Michele O'Sullivan

Published in August 2015 by Thomson Reuters (Professional) UK Limited
Friars House, 160 Blackfriars Road, London, SE1 8EZ
(Registered in England & Wales, Company No 1679046.
Registered Office and address for service:
2nd floor, 1 Mark Square, Leonard Street, London EC2A 4EG)

A CIP catalogue record for this book is available from the British Library.

ISBN: 9780414050983

Thomson Reuters and the Thomson Reuters logo are trade marks of Thomson Reuters. Sweet & Maxwell and the Sweet & Maxwell logo are trade marks of Thomson Reuters.

Crown copyright material is reproduced with the permission of the Controller of HMSO and the Queen's Printer for Scotland.

CONTENTS

FOREWORD

Elena A Berlucchi, Partner, STUDIO BERLUCCHI, former Associate General Counsel, GE OIL & GAS

The Webster Dictionary defines the verb "to venture" as "to go somewhere that is unknown, dangerous; to start to do something new or different that usually involves risk; to do, say, or offer something (such as a guess or an opinion) even though you are not sure about it". Indeed, cross-border joint ventures (JVs) can often prove to be rather adventurous for the parties involved. This is even more the case when companies, seeking to accelerate growth in emerging markets, turn to partnering arrangements with local operators in order to establish market platforms in foreign jurisdictions. Equity or contractual co-operations in more developed markets also require an attentive focus on the applicable regulatory framework, to avoid or at least minimise difficulties.

This is why this global guide to establishing JVs abroad is so useful. Designed as a practical tool to navigate the intricacies of legal systems generally unknown to the foreign investor, the guide deserves praise for both its high level of accuracy of legal analysis, and for pulling together the findings and best practices developed by authors working on the frontline of professional legal practice.

In my most recent professional career, I mostly advised on minority investments of stakes ranging from 5% to 49%, generally stemming from a greater readiness of my clients to acquire a minority, non-controlling role, and to rely more heavily on their JV partners' capacity to successfully lead the JV. This approach may be driven by regulatory constraints in emerging markets, where foreign investment is restricted to minority investment levels. It may also reflect the actual need for a prominent local JV partner with an established presence in the market, along with the home ground advantage to operate effectively in the domestic environment. In other cases, it may come about as a recognition that the selected partner has an edge (for example, a technology or product advantage which the foreign investor cannot replicate by acting alone). Even then, it is very rare that the ultimate goal of a minority venture does not go beyond a merely passive equity play.

Therefore, the formation of the target JV is generally inspired by some basic objectives:

- Preserving the value of the foreign partner's investment. The foreign investor's counsel must ensure that his client's interest is not diluted by changes to the company capital which the foreign investor does not consent to and, more generally, that no strategic decisions are made without the minority investor's approval.
- The minority investor's contribution creating actual value (for example, areas such as compliance and risk management processes, where a developed market player can typically bring an enhanced expertise, are likely to be those in which the investor is be willing to retain control at corporate governance level).

Similarly, if the ownership and licensing of intellectual property (IP) invariably represents a sensitive topic (regardless of the size of the stake in the JV capital), drafting the relevant provisions in a minority JV shareholders' agreement will generally incline towards ensuring an increased level of control and a fairly tight protection, although obviously the allocation of the IP rights will largely depend on the ultimate objectives underlying the

creation of the investment vehicle. For example, if the main target of the investment is acquiring a steady entry into a foreign market and a minority stake is an introductory step aiming at a future buy-out of the JV company, then favouring a full transfer to the JV of the ownership of IP and possibly an option to purchase IP contributed by other JV partners upon termination or expiration will be the most advisable strategy.

It is true that every JV is unique, and that precedents should be used with caution. However, it can be equally demonstrated that experiences acquired while dealing with issues arising from JV arrangements in emerging markets can be translated to JVs in developed markets.

This guide serves as a central resource, where precision and reliability of information are coupled with easiness and straight-to-the-point exposition and no claim of exhaustiveness. It is an invaluable reference point for an intended audience of in-house counsels, business development professionals and practitioners (who may be assisting a deal team in structuring a JV arrangement). In addition, since culture does matter, the authors offer insights on the best ways to structure a JV in their respective jurisdiction. Such insight is invaluable and widely sought after, as legal research (no matter how deep and thorough) cannot replace knowledge acquired through direct professional experience with a particular legal system.

Elena A Berlucchi
July 2015

GERMANY

Andreas F Bauer, GSK STOCKMANN + KOLLEGEN

DOMESTIC COMPANY JOINT VENTURES (JVS)

REGULATION

1. ARE JVS EXPRESSLY REGULATED?

Both German business and legal practice do not have a clear definition for the term "joint venture". While some practitioners use the term in a narrow sense to define a jointly owned and managed business enterprise, others advocate a much broader concept that includes any form of formalised co-operation between independent companies. From a commercial perspective, German business practice JVs in the broader sense can be found in the following arrangements:

- Long-term supply arrangements.
- Co-operative distribution arrangements.
- Joint development agreements.
- Joint project agreements.
- Cartels.
- JV companies.

As there is no JV concept under German law, the legal form of organisation of a JV varies widely, depending on the depth of co-operation the JV partners elect. Consequently, a JV under German law can be organised as:

- Contractual JV.
- Civil law and other non-registered partnerships.
- Partnership JVs.
- Limited partnership JVs.
- JV companies (other than partnerships such as the JV corporation (*Aktiengesellschaft*) (AG) or the limited liability company (*Gesellschaft mit beschränkter Haftung*) (GmbH)).

Silent partnerships (*stille Gesellschaft*) and sub-participations (*Unterbeteiligung*) are also used in German law to organise a JV.

Due to the large variety of JV forms available under German law, the legal rules applying to the different organisational forms are found in a range of different areas of German law, in particular in the areas of contract, partnership, corporate, anti-trust and tax law.

TYPES

2. WHICH TYPES OF JV ARE ALLOWED?

All kinds of JVs are allowed under German law. No specific legal framework for JVs exists under German law (*see Question 1*).

Contractual

All types of contractual JV agreements are permissible under German law as long as they comply with general rules of German law of contracts.

Corporate

All corporate legal forms available under German law can be used to form a corporate JV. These are, in particular, the corporate forms such as the joint stock corporation (AG) or the limited liability company (GmbH) as well as partnership JVs, either organised as partnership JVs (*Offene Handelsgesellschaft*) (oHG) or as limited partnership (*Kommanditgesellschaft*) (KG). The most commonly used legal forms are the KG and the GmbH.

Others

German business and legal practice have developed some JV structures going beyond a mere contractual JV arrangement but falling short of establishing a real JV company. These forms include, in particular, civil law partnerships (*Gesellschaft des bürgerlichen Rechts*) and other non-registered partnerships such as the silent partnership (*stille Gesellschaft*) and sub-participation (*Unterbeteiligung*).

3. ARE CORPORATE JVS SUBJECT TO THE CORPORATE LAW?

Corporate JVs are subject to the respective corporate law, which depends on the corporate form that its founders have chosen. No specific rules exist for corporate JVs under German corporate law (*see Question 1*).

FORMATION AND REGISTRATION

4. IS THE USE OF FOREIGN LANGUAGE IN A JV'S FOUNDING DOCUMENTS (BOTH CORPORATE AND CONTRACTUAL) RESTRICTED?

For contractual JVs there is no restriction whatsoever in the use of foreign language for the founding documents. In fact, a civil law partnership can be validly formed under German law by oral agreement. However, whenever a corporate JV requires registration of the corporate form with the commercial register (*Handelsregister*), the founding documents must be submitted in German. However, this requirement is also fulfilled when a bilingual version (German and one other foreign language) is submitted to the commercial register.

5. ARE PUBLIC OFFICERS (FOR EXAMPLE, PUBLIC NOTARIES) INVOLVED IN A JV'S FORMATION PROCEDURE?

If the JV company is formed as a limited liability company (*Gesellschaft mit beschränkter Haftung*) (GmbH) or as a joint stock corporation (AG), the formation deed (*Gründungsurkunde*) requires notarisation by a German notary public. For all GmbHs, AGs, and KGs, their formation must be registered with the commercial register (*Handelsregister*) and the signatures of founders and/or management below the application for registration with the commercial register must be authenticated by a notary public.

6. ARE JVS REGISTERED WITH ANY LOCAL REGISTRIES? ARE PUBLIC SECTOR BODIES' AUTHORISATIONS REQUIRED FOR A JV'S ESTABLISHMENT?

Local registries

German law does not have a public register listing corporate or contractual JVs. To the extent required by the respective corporate law, the JV company must be registered with the commercial register (*Handelsregister*).

Public sector bodies

If a JV is concentrative in its nature, its formation may be subject to the restrictions contained in:

- EU regulation 139/2004 EC of 20 January 2004 (EU Merger Regulation).
- German Act against Restraints of Competition (ARC).

This is normally the case when the parent companies combine their activities in a given relevant market and stop operating in that market. If both parent companies stay active in the given market, there is a risk that the JV will be considered to be of a co-operative nature. In this case, there is a risk that the competition authorities will consider this a co-operative behaviour of two previously independent market players who may infringe the cartel prohibition and therefore require an exemption.

If the JV is concentrative in nature, the EU Merger Regulation may apply, provided that the thresholds of combined annual sales of the merging enterprises exceed EUR5 billion worldwide, and at least two participating companies have annual sales in the EU of at least EUR250 million. In addition, the merging enterprises must not have more than two-thirds of their sales in one and the same member state. If the JV is concentrative in nature, Articles 101 and 106 of the Treaty on the Functioning of the European Union (TFEU) (2012/C 326/1) will not be applicable to the concentration itself or to any ancillary restrictions that are directly related to and necessary for the implementation of the concentration. If a concentrative JV is subject to scrutiny under the EU Merger Regulation, the national German rules contained in ARC will not be applicable to the JV. Additionally, if the JV obtained an exemption under EU law, the German Federal Cartel Office (FCO) cannot prohibit it.

The treatment of JVs in German anti-trust law is an extremely complicated matter. Therefore, the following summary focuses on the merger clearance process under ARC and will not deal in detail with the prohibition of cartels contained in section 1 of ARC.

Application to JVs

Where the JV partners plan to combine their existing activities or establish an entirely new business rather than only co-operating in specific, limited areas, the JV is concentrative in its nature. It is therefore subject to the merger clearance process prescribed in ARC (*sections 23 and following, ARC*) if it meets the merger (or concentration) test, irrespective of the legal form of the JV.

Definitions of merger

ARC contains six definitions of what transactions qualify as a merger (*section 23, ARC*). Without going into the details of the complicated provision, it is important to keep in mind that the transaction by which the JV is formed as a merger between the JV and the individual JV partner is considered under ARC, and mergers between the different JV partners is also considered (*section 23, ARC*).

Notifications requirements

If the JV fulfils the merger test, the JV and the JV partners must notify the merger to the Federal Cartel Office (FCO) before implementing it, if the following pre-merger thresholds are exceeded:

- One of the participating enterprises has annual sales in excess of EUR1 billion.
- Two of the participating enterprises have annual sales of EUR500 million or more.

Timing considerations

Following notification, the FCO may prohibit the JV within certain time periods. The FCO has one month to inform the parties that it intends to carry out on investigation of the case. If this one-month period runs out without the parties receiving the FCO notification letter, the merger is cleared and can no longer be prohibited. If the FCO starts an investigation, it has a maximum period of four months to issue a prohibition order. If no such prohibition order is issued, the merger is cleared and can no longer be prohibited.

Substantive test market dominance

Under the material merger control provisions contained in ARC, the JV must be prohibited if it creates or strengthens a market dominating position. If the JV partners can prove that despite the creation or strengthening of a market dominating provisions, the JV improves the competitive conditions in the same or another market that outweigh the negative impact of market dominance, the FCO may still grant merger clearance.

Presumption of market dominance

The ARC also contains certain presumptions of market dominance that lead to a shift of the burden of proof from the FCO to the JV partner and which are all based on certain market share thresholds.

7. WHAT OTHER FORMAL REQUIREMENTS MUST BE COMPLIED WITH TO VALIDLY CONSTITUTE A JV?

German law does not contain a general formal requirement to file a JV with the anti-trust authority or any other public body before it can be validly formed. However, JV companies are subject to the same regulatory provisions as all other companies in Germany. Therefore, if the JV company has a purpose for which a public licence is required (for example, financial services under the German Banking Act (*Kreditwesengesetz*) (KWG)), it can be formed. However, it will only be registered in the commercial register once the respective KWG licence is granted by the banking supervisory authority.

PERMITTED MARKETS

8. CAN THE JV INSTRUMENT BE USED IN EVERY MARKET? ARE THERE ANY RESTRICTIONS TO BE CONSIDERED AND CAREFULLY ASSESSED BEFORE INVESTING?

JVs can be used in every sector of the German economy. Based on the different types of JV arrangements most frequently used in Germany (*see Question 1*), they are mainly used for projects that require extraordinary means such as real estate development projects in the building industry or the joint development and distribution of new drugs in the pharmaceutical industry. JV arrangements are often used in old industries to institutionalise long-term supply arrangements, sometimes coupled with some form of technical co-operation and assistance to develop or adapt existing products of one party to fit a particular purpose of the other party. Additionally, where two parties' products are complementary, they may decide to enter into a co-operative distribution arrangement where one party will sell its own as well as the JV partner's products.

There are some business areas where every company (and not only JV companies) require an upfront public authorisation or licence to do business. These areas include banking, insurance, real estate distribution, drugs and pharmaceuticals, public (air and rail) transport as well as weapons and defence material production.

PURPOSE

9. CAN A JV BE ESTABLISHED WITH ANY PURPOSE?

As German law does not provide for a specific legal framework for JVs, contractual as well as corporate JVs can be established with any purpose as long as the purpose is not illegal.

SHARE CAPITAL AND PARTICIPATION

10. WHAT POSSIBLE FORMS OF PARTICIPATION ARE THERE IN A JV'S SHARE CAPITAL? HOW CAN A JV MEMBER CONTRIBUTE AND ARE THERE STATUTORY LIMITS ON THE POSSIBILITY TO MAKE CONTRIBUTIONS IN KIND?

Forms of participation

Generally, contributions can be made in cash or in kind (including goods, assets and claims against the contributing shareholder and/or third parties). Traditionally, JV members contribute in cash, or via a shareholder loan to the JV.

Contributions

Whether there are any statutory limits to the possibility of contributions in-kind depends on the specific legal form chosen as the corporate JV structure.

As civil law partnerships (*Offene Handelsgesellschaft*) (oHG) silent participations and sub-participations do not require a minimum stated (and registered) capital, the JV partners are totally free to make all or part of their contributions in-kind. The difference between the contribution in cash or in-kind will only be visible by looking at the bookkeeping entry in the JV company's balance sheet.

For joint stock corporations (AGs) and limited liability companies (GmbH), there are strict rules regulating contributions in kind at formation and for capital increases, all aimed at preserving the stated share capital of the respective companies. Although the rules contained in the Stock Corporation Act (*Aktiengesetz*) (AktG) and the Act on Limited Liability Companies (*Gesetz über die Gesellschaften mit beschränkter Haftung*) (GmbHG) differ slightly, the following general principles apply (among others):

- Contributions in-kind in formation or capital increases are only valid if the company proves by submitting an independent expert's statement that the contribution in-kind has at least the value of the nominal share capital issued by the company in exchange for the contribution in-kind.
- Contributions made in violation or circumvention of the strict statutory rules are invalid and may lead to the respective shareholder being asked by the company (or more often the insolvency receiver over its bankrupt estate) to make the contribution in-kind a second time (in cash).
- Shareholders should be extremely careful not to make "hidden contributions in-kind" (*verdeckte Sacheinlagen*), that is, contributions where the shareholder makes his contribution in cash to circumvent the strict statutory rules for contributions in-kind, only to get his cash contribution back by way of an upstream loan from the company immediately (pay back and forth, *Hin-und Herzahlen*). These hidden contributions in kind make the contribution invalid and may lead to a rejection of the registration of the capital contribution or capital increase in the commercial register. This, in turn, means that the formation or the capital increase does not become valid.

The limited partnership (*Kommanditgesellschaft*) (KG) does not require a stated minimum capital. However, the limited partners have the possibility to register the amount of their partnership contribution (*Kommanditeinlage*) in the commercial register (*Handelsregister*), thereby limiting their personal liability to third parties in relation to their registered partnership contribution. Contributions in-kind during formation or capital increases

are possible at any time and will not be examined by the commercial register before registering the increase of the partnership contribution. However, for insolvencies of KGs, the insolvency receiver regularly checks whether or not the contribution in-kind was done and least at par value (that is, had at least the value of the nominal amount of the partnership share issued to the respective shareholder in exchange for the contribution in-kind). If this is not the case, the receiver will always bring a claim against the KG partner asking him to fulfil his contribution commitment in cash.

11. CAN A CORPORATE JV'S SHARE CAPITAL BE INDICATED BY MAKING REFERENCE TO A FOREIGN CURRENCY?

The share capital of a corporate JV can only be indicated by making reference to a foreign currency if the JV company's legal form does not require registration with the commercial register (*Handelsregister*). Therefore, such a reference is only possible for the civil law partnership, the silent partnership, the sub-participation and the partnership JVs (*Offene Handelsgesellschaft*) (oHG). It is not possible for the legal form of JV corporation (*Aktiengesellschaft*) (AG), the limited liability company (*Gesellschaft mit beschränkter Haftung*) (GmbH)) or the limited partnership (*Kommanditgesellschaft*) (KG).

DURATION AND LIMITS ON MEMBERSHIP

12. ARE THERE STATUTORY LIMITS ON A JV'S DURATION?

From a corporate law perspective, there are no legal limits to the duration of a JV. Normally, however, cautious JV partners provide for a limited duration in the JV's articles of association, either by prescribing a fixed end date or by giving each of the JV partners the possibility to terminate the JV once its purpose is achieved.

13. ARE THERE STATUTORY LIMITS ON THE NUMBER OF MEMBERS PARTICIPATING IN A JV?

There is no maximum number for the membership in a German JV. The minimum number for all corporate legal forms available for JVs is one, except for civil law partnership, silent partnership and sub-participation, which all require at least two partners.

PUBLIC SECTOR BODIES

14. CAN A PUBLIC SECTOR BODY ENTER INTO A JV AGREEMENT? SUBJECT TO WHAT CONDITIONS? IN PARTICULAR, DO PUBLIC PRIVATE PARTNERSHIPS (PPP) LAWS AND REGULATIONS APPLY?

Generally, public sector bodies can enter into JV agreements, provided that the purpose of the JV and the liabilities incurred comply with the relevant public (that is, local, regional or national) laws. In general, it is fair to say that this will be the case if the purpose of the JV is to set up or operate a company that provides public services and that does not expose the public body to unlimited liabilities. Therefore, public bodies will normally not enter into JVs organised as a civil law partnership (*Gesellschaft bürgerlichen Rechts*) or assume the

role of a general partner in a limited partnership (*Kommanditgesellschaft*) (KG), because both positions go along with unlimited liability.

NON-COMPETITION AND ANTI-TRUST CLAUSES

15. ARE THERE STATUTORY CONSTRAINTS ON THE USE OF NON-COMPETITION OR ANTI-TRUST CLAUSES IN A JV AGREEMENT?

During period of effectiveness

If the JV is concentrative in its nature, the non-competition clause will normally not violate Articles 101 and 106 of the Treaty on the Functioning of the European Union (TFEU) (2012/C 326/1) or section 1 of the Act against Restraints of Competition (ARC). In these cases, the non-competition clause is seen as proof that the JV partners have stopped doing business in the relevant market. If the JV is co-operative in its nature, non-competition clauses will normally violate both the cartel prohibition clauses of both the EU Treaty and ARC. To avoid such a violation, the JV partners would have to notify the EU and the German anti-trust authorities in order to avail themselves of one of the statutory exemptions granted by EU law and ARC.

Following termination

The same principles apply following termination (*see above, During period of effectiveness*).

DE FACTO COMPANY/PARTNERSHIP

16. MUST THE CONTRACTUAL JV SATISFY ANY CONDITIONS TO AVOID FALLING WITHIN THE DEFINITION OF DE FACTO COMPANY/PARTNERSHIP?

The civil law partnership (*Gesellschaft bürgerlichen Rechts*) (GbR) is the simplest form of economic co-operation offered by German law. Under the Civil Code (*Bürgerliches Gesetzbuch*) (BGB), a GbR can be formed by mere oral agreement of two or more partners to pursue a common aim, provided that the oral agreement is sufficiently specific (*sections 705 and following, BGB*).

To distinguish this de facto partnership (*Gelegenheitsgesellschaft*) from a partnership JV (*Offene Handelsgesellschaft*) (oHG), German courts and literature look in particular at the duration of the partnership. While the de facto partnership is aimed only at a co-operation for one single project or transaction, the oHG is aimed at permanent co-operation at least for a certain period of time.

LIMITING MEMBER LIABILITY

17. CAN A JV AGREEMENT PROVIDE THAT A JV MEMBER CAN PARTICIPATE WITHOUT INCURRING ANY RISK, LOSS OR REWARD?

To the extent the JV partners have chosen to form the JV as a partnership JV, that JV is subject to the general statutory provisions applicable to the civil law partnership contained in the Civil Code (*Bürgerliches Gesetzbuch*) (BGB), which provides the greatest flexibility (*sections 705 and following, BGB*). The JV agreement can therefore foresee that one JV member can participate without incurring any risk or loss or reward. However, a JV agreement clause shielding one JV member from any risk is not valid in relation to third parties, due to the fact that civil law partnerships (*Gesellschaft bürgerlichen Rechts*) (GbR) and partnership JVs (*Offene Handelsgesellschaft*) (oHG) are both based on the general principle of joint and several liability (*gesamtschuldnerische Haftung*) of all partners. In practice, this clause is interpreted to give the respective partner a claim against the other JV members to hold him harmless against any claims brought against him by third parties. Only the limited partnership (*Kommanditgesellschaft*) (KG) would give all limited partners the possibility to be shielded from any third party risks, provided they have fully paid in their partnership contribution (*Hafteinlage*) and such contribution has not been paid back to them.

Alternatively, the JV partners can enter into a silent partnership. This is a JV structure offered by the German Commercial Code (*Handelsgesetzbuch*) (HGB) where a passive investor, the silent partner, makes a contribution to a business venture anticipating adequate return from the profits of that business without having any responsibility for the day-to-day business or any control of the management (except for structural decisions fundamentally changing the business).

In this case, the JV agreement is made between the silent partner and the business (that is, the operating company, rather than with the shareholders or partners who own the company). Depending on the exact terms of the silent partnership agreement, the silent partner often does not participate in the profit and loss of the business but rather receives a fixed annual interest on his contribution. This type of silent partnership where the silent partner has a position similar to a lender is called the typical silent partnership (*typische stille Gesellschaft*) because it is the statutory model proposed by sections 235 and following, of the HGB.

However, the more frequently used version is the atypical silent partnership (*atypische stille Gesellschaft*) where the silent partner participates in both the profits and the losses of the business. If as a result of losses his account is reduced below the amount of his initial contribution, he is not entitled to a distribution of profits until the losses allocated to him are compensated by subsequent profits. Additionally, the atypical silent partner normally participates in any increase of hidden reserves during the term of the partnership.

ANTI-TRUST

18. DO ANY ANTI-TRUST RULES, GUIDELINES OR POLICIES APPLY TO A JV AGREEMENT?

Any JV agreement must comply with both the (EU and German) Merger Regulations contained in EU Merger Regulation and the Merger Clearance Process under the Act

against Restraints of Competition (ARC) and the (EU and German) prohibition of cartels contained in Articles 101 and 106 of the Treaty on the Functioning of the European Union (TFEU) (2012/C 326/1) and section 1 of ARC (*see Question 6*).

Generally, research and development JVs are not considered as a prohibited practice that would automatically be in violation of the EU and German cartel prohibition. However, where the JV partners have an elevated market share and/or are in industry sectors where the competition in the field of innovation is limited (for example, for certain technical factors such as patents held by one or both of the potential JV partners), the likelihood of a breach of the cartel prohibition rises.

On the other hand, a JV with the sole aim of bundling research work in the area of cancer research (for example, the work of two or more universities or other research institutions) benefit from a greater leniency than JV partners who are pharmaceutical conglomerates that are also active in the areas of drug development and distribution.

This general attitude of both the EU and the German anti-trust authorities is also expressed in the communication of the EU Commission concerning the assessment of co-operative JVs under Article 85 of the EU Treaty (93/C 43/02). This communication states that in exceptional cases research development joint ventures can restrict competition if they exclude the parent from activity in an area or if competition in the parent's market is restricted. This can occur where, for example, the joint venture exploits newly developed or improved products or processes.

GOVERNANCE AND LIMITS ON DIRECTORS

19. CAN THE PARTIES TO A JV FREELY REGULATE THE JV OR ARE THEY SUBJECT TO CERTAIN RESTRICTIONS?

In a contractual JV the parties are totally free to regulate the JV as they wish, to the extent the provisions agreed on do not violate German public order.

In a corporate JV there are restrictions, the breadth of which depends on the legal form chosen by the JV partners. Generally, it is fair to say that the joint stock corporation (*Aktiengesellschaft*) is the most stringently regulated form. The Stock Corporation Act allows relatively few deviations from its general statutory principles. On the other end of the flexibility spectrum are JV partnerships such as partnership JVs (*Offene Handelsgesellschaft*) (oHG) and limited partnership (*Kommanditgesellschaft*) (KG), where the statutory framework is relatively basic and even the basic principles can be abrogated by the parties by unanimous decision.

20. ARE THERE LIMITS OR RESTRICTIONS ON THE ELIGIBILITY OF AN INDIVIDUAL AS A MEMBER OF THE BOARD OF DIRECTORS/STATUTORY AUDITOR?

There are no limits or restrictions to the eligibility of an individual as a member of the board of directors or as statutory auditor based on nationality. Foreigners are fully eligible to be members of the board of directors (*Vorstand*) of a joint stock corporation or as managing directors (*Geschäftsführer*) of a limited liability company as long as they fulfil the required criteria (for example, their reliability and have not been found guilty of certain crimes) (*section 6(2), GmbHG*).

TERMINATION

21. WHAT LEGAL REGIME APPLIES TO A JV'S TERMINATION? CAN A JV BE TERMINATED FOR JUST CAUSE ON REQUEST OF ONE PARTY?

JV agreements can be concluded for an unlimited period of time, but this is normally not the case. Rather, it normally provides that the agreement will end automatically if one of the JV partners terminates the JV agreement. In addition, the JV agreement normally provides for a regular termination right for each of the JV partners. In such case, the agreement must stipulate that the JV is continued between the remaining JV partners. The right of each JV partner to terminate the agreement for (important) cause cannot be abrogated by mutual consent of the JV members (*section 723(1), Civil Code (Bürgerliches Gesetzbuch) (BGB)*).

22. IS THE TERMINATION OF A JV AGREEMENT SUBJECT TO ANY PUBLIC SECTOR BODY'S APPROVAL?

The termination of a JV in Germany does not require any public-sector body's approval.

CHOICE OF LAW AND JURISDICTION

23. ARE THERE CONSTRAINTS ON THE CHOICE OF THE LAW AND THE JURISDICTION APPLICABLE TO A JV?

In contractual JVs the partners can choose to set up the JV vehicle under any other law than German, unless such a choice of law is considered to be fraudulent.

A corporate JV that needs to be registered with the German commercial register can only be governed by German law.

JVS WITH FOREIGN MEMBERS

VALIDITY AND AUTHORISATION

24. WHAT ARE THE RULES RELATING TO VALIDITY AND AUTHORISATION OF JVS WITH FOREIGN PARTIES?

Validity

JVs with foreign parties are generally permitted under German law and are not subject to any statutory approval.

Limits

There is no requirement for a minimum/maximum number of parties who must be local.

Authorisation

Sectors where prior public consent is required include:

- Communication interception.
- Nuclear power.
- Defence.
- Other military equipment.

EFFECT OF FOREIGN MEMBERSHIP

25. ARE ANY OF THE RULES RELATING TO DOMESTIC COMPANY JVS (*SEE QUESTIONS 1 TO 23*) DIFFERENT FOR JVS WITH MEMBERS INCORPORATED UNDER, OR GOVERNED BY, THE LAWS OF A FOREIGN COUNTRY?

There are sensitive industry sectors such as armament and weapons or nuclear power where the investment of a foreign entity requires prior public authority approval.

ECONOMIC OR FINANCIAL INCENTIVES

26. ARE THERE ECONOMIC OR FINANCIAL INCENTIVES FOR FOREIGN DIRECT INVESTMENTS IN A JV?

There are no economic or financial incentives for direct foreign investment in a German JV.

MINIMUM INVESTMENTS/CONTRIBUTIONS

27. ARE THERE MANDATORY MINIMUM EQUITY INVESTMENTS OR CONTRIBUTIONS IN KIND THRESHOLDS FOR A FOREIGN JV MEMBER?

There is no minimum equity investment and/or contributions in kind threshold required for a foreign JV member.

THE REGULATORY AUTHORITIES

COMMERCIAL REGISTER (*HANDELSREGISTER*)

Main activities. The Commercial register (*Handelsregister*) contains the main information of all registered companies in Germany.

W www.handelsregister.de

FEDERAL CARTEL OFFICE (*BUNDESKARTELLAMT*)

Main activities. The Federal Cartel Office (*Bundeskartellamt*) is responsible for the supervision of the German Act against Restraints of Competition.

W www.bundeskartellamt.de

ONLINE RESOURCES

FEDERAL MINISTRY OF JUSTICE (ORIGINAL LANGUAGE TEXTS)

W www.gesetze-im-internet.de/index.html

Description. Original language texts of relevant laws are available on this official website of the Federal Ministry of Justice.

FEDERAL MINISTRY OF JUSTICE (ENGLISH LANGUAGE TRANSLATIONS)

W www.gesetze-im-internet.de/Teilliste_translations.html

Description. English language translations of relevant laws are available on the official website of the Federal Ministry of Justice.

CONTACT DETAILS

GENERAL EDITOR

Gianmatteo Nunziante
Nunziante Magrone
Piazza di Pietra, 26
00186 Rome
Italy

T: +39 06 695181
F: +39 06 69518333
E: g.nunziante@nmlex.it
W: www.nunziantemagrone.it

FOREWORD

Avv. Elena Antonia Berlucchi
Studio Legale Berlucchi
Via A. Gramsci 43
Brescia 25100
Italy

T. +39 03045463
F. +39 0302400606
E: berlucchi@studionassini.it
E: elena.berlucchi@icloud.com

ALBANIA

Enyal Shuke (Mrs)
Shuke Law Office
Mustafa Matohiti Street P.No. 7/2, Suite 1/3
Tirana
Albania

T: +355 4224 1479
F: +355 4224 1479
E: enyal.shuke@shukelaw.com
W: www.shukelaw.com

AUSTRALIA

Adam Handley, Matthew Knox, Bryn Davis and Matthew Caddy
Minter Ellison
Allendale Square
77 St Georges Terrace
Perth, WA 6000
Australia

T: +61 8 6189 7800
F: +61 8 6189 7999
E: adam.handley@minterellison.com
E: matthew.knox@minterellison.com
E: bryn.davis@minterellison.com
E: matthew.caddy@minterellison.com
W: www.minterellison.com

BELGIUM

Roel Nieuwdorp
Ambos NBGO
Generaal Lemanstraat 27
2018 Antwerp
Belgium

T: +32 3 201 27 60
T: +32 2 290 04 68
F: +32 3 201 27 65
E: roel.nieuwdorp@amboslaw.be
W: www.amboslaw.be

BRAZIL

Marcelo Viveiros de Moura, André Santa Ritta
Pinheiro Neto Advogados
Rua Humaitá, 275 – 16° andar
22261-005
Rio de Janeiro, RJ
Brazil

T: +55 21 2506 1600
F: +55 21 2506 1660
E: mvmoura@pn.com.br
E: asantaritta@pn.com.br
W: www.pinheironeto.com

BULGARIA

Yordan Naydenov & Dr Nikolay Kolev
Boyanov & Co
82 Patriarch Evtimii Blvd. Sofia 1463
Bulgaria

T: +359 2 8 055 055
F: +359 2 8 055 000
E: mail@boyanov.com
W: www.boyanov.com

CANADA

Neil Hazan
Borden Ladner Gervais LLP
1000 De La Gauchetière Street West
Suite 900
Montréal, QC H3B 5H4
Canada

T: +514 954 2511
F: +514 954 1905
E: nhazan@blg.com
W: www.blg.com

CHINA

Yi Yi Wu
Minter Ellison
Suites 4006-4007, 40th Floor, CITIC Square
1168 Nanjing Road West
Shanghai 200041
China

T: +86 21 2223 1000
F: +86 21 2223 1099
E: yiyi.wu@minterellison.com
W: www.minterellison.com

CZECH REPUBLIC

Barbara Kusak & JUDr Miloš Temel, LLM
Noerr
Na Poříčí 1079/3a
Prague 110 00
Czech Republic

T: +420 233 112 111
F: +420 233 112 112
E: barbara.kusak@noerr.com
W: www.noerr.com

FRANCE

Ferenc Gonter & Aurélien Veil
August & Debouzy
6-8 avenue de Messine
Paris 75008
France

T: +33 1 4561 7984
F: +33 1 4561 5199
E: fgonter@augdeb.com
W: www.august-debouzy.com

GERMANY

Andreas F. Bauer
GSK Stockmann + Kollegen
Karl-Scharnagl-Ring 8
Munich 80539
Germany

T: +49 89 2881 7474
F: +49 89 2881 7444
E: bauer@gsk.de
W: www.gsk.de

GREECE

Christos Gramatidis
Bahas, Gramatidis & Partners
Filellinon 26
Athens 105 58
Greece

T: +30 210 3318170
F: +30 210 3318171
E: ch.gramatidis@bahagram.com
W: www.bahagram.com

HONG KONG

Fred Kinmonth & Geraldine Johns-Putra
Minter Ellison
One Pacific Place
88 Queensway
Hong Kong
Hong Kong SAR

T: +852 2841 6888
F: +852 2810 0235
E: fred.kinmonth@minterellison.com
E: geraldine.johns-putra@minterellison.com
W: www.minterellison.com

HUNGARY

Dr Márton Osztheimer & Dr Emese Simon
Noerr
Fő utca 14-18
1011 Budapest
Hungary

T: +36 1 2240900
F: +36 1 2240495
E: marton.osztheimer@noerr.com
E: emese.simon@noerr.com
W: www.noerr.com

INDONESIA

Eri Raffaera Budiarti, Muhammad Iqsan Sirie & Arini Dyah Septiana
Assegaf Hamzah & Partners
Menara Rajawali 16th Floor
Jalan DR. Ide Anak Agung Gde Agung Lot # 5.1
Kawasan Mega Kuningan,
Jakarta 12950 - Indonesia

T: +(62-21) 2555 7800
T: +(62-21) 2555 7800
F: +(62-21) 2555 7899
W: www.ahp.co.id

IRAN

Dr Tannaz Jourabchi-Eisenhut & Dr Florian Amereller
Amereller Legal Consultants
One Business Bay
Sheikh Zayed Road
P.O. Box 97706
Dubai
United Arab Emirates

T: +971 4 432 3671
F: +971 4 432 3673
E: tje@amereller.com
W: www.amereller.com

IRAQ

Dr Daniel Heintel & Dr Bawar Bammarny
Mena Associates in association with Amereller Legal Consultants
GIC Tower
21, Soliman Abaza St., Mohandessin
Cairo
Egypt

T: +202 3762 62 01
T: +202 3762 62 03
F: +202 3762 6202
T: +49 176 23 61 216 64
T: +964 750 385 2318
T: +964 750 346 04 44
E: heintel@amereller.com
E: bbammarny@amereller.com
W: www.amereller.com

ISRAEL

Doron Stern, Adv
Tulchinsky Stern Marciano Cohen Levitski & Co.
38 Keren Hayesod Street
Jerusalem 9214915
Israel

T: +972 2 651 1919
F: +972 2 651 3133
E: doronds@tslaw.co.il
W: www.tslaw.co.il

ITALY

Avv Gianmatteo Nunziante & Francesco Vitali de Bonda
Nunziante Magrone, Studio Legale Associato
Piazza di Pietra, 26
00186 Rome
Italy

T: +39 06 6951 81
F: +39 06 6951 8333
E: g.nunziante@nmlex.it
E: f.vitalidebonda@nmlex.it
W: www.nunziantemagrone.it

JAPAN

Yuichiro Nukada, Shigeki Tatsuno, Yoichiro Yukimura
Anderson Mori & Tomotsune
Akasaka K-Tower
2-7, Motoakasaka 1-chome
Minato-ku, Tokyo 107-0051
Japan

T: +81 3 6888 1110
F: +81 3 6888 3110
E: yuichiro.nukada@amt-law.com
E: shigeki.tatsuno@amt-law.com
E: yoichiro.yukimura@amt-law.com
W: www.amt-law.com/en/

MEXICO

Luis Fernando González Nieves, Fernando Eraña and Ximena Armengol Silenzi
SOLCARGO
Corporativo Citi Center,
Av. Insurgentes Sur 1602,
Piso 11, Oficina 1102,
Col. Credito Constructor,
03940, Mexico City,
Mexico

T: +5255 50620050
F: +5255 50620051
E: luis.gonzalez@solcargo.com.mx
E: fernando.erana@solcargo.com.mx
E: ximena.armengol@solcargo.com.mx
W: www.solcargo.com.mx

MONGOLIA

Elisabeth Ellis & Sundarya Tumurbaatar
Minter Ellison
Suite 612 Level 6 Central Tower
Great Chinggis Khaan Square 2
SBD-8
Ulaanbaatar 14200
Mongolia

T: +976 7700 7780
F: +976 7700 7781
E: elisabeth.ellis@minterellison.com
W: www.minterellison.com

THE NETHERLANDS

Jan Willem van Rooij and Tyshanti de Jonge
Loyens & Loeff NV
Blaak 31
Rotterdam 3011 GA
The Netherlands

T: +31 010 224 6552
F: +31 010 224 6183
E: jan.willem.van.rooij@loyensloeff.com
E: tyshanti.de.jonge@loyensloeff.com
W: www.loyensloeff.com

PORTUGAL

Afonso Barroso
Abreu & Marques e Associados
Rua Filipe Folque, 2 - 4º
1069-121 Lisboa

T: +351 21 330 7110
T: +351 21 330 7119
F: +351 21 330 7114
E: afonso.barroso@amsa.pt
W: www.amsa.pt

ROMANIA

Mihai Măcelaru & Sandra Popescu
S.P.R.L. Menzer & Bachmann - Noerr
Str. General Constantin
Budişteanu nr. 28 C, sector 1
010775 Bucharest
Romania

T: +40 21 3125888
F: +40 21 3125889
E: mihai.macelaru@noerr.com
W: www.noerr.com

RUSSIAN FEDERATION

Hannes Lubitzsch, LLM
Noerr
1-ya Brestskaya ul. 29
125047 Moscow
Russian Federation

T: +7 495 799 56 96
F: +7 495 799 56 97
E: hannes.lubitzsch@noerr.com
W: www.noerr.com

SLOVAK REPUBLIC

JUDr Pavol Rak PHD & Tomáš Záborský, LLM
Noerr
Palisády 29/A
AC DIPLOMAT
Bratislava 811 06
Slovak Republic

T: +421 259 101 010
F: +421 259 101 011
E: pavol.rak@noerr.com
E: tomas.zaborsky@noerr.com
W: www.noerr.com

SLOVENIA

Pavle Pensa
Jadek & Pensa
Tavcarjeva 6
Ljubljana 1000
Slovenia

T: +386 1 234 25 20
F: +386 1 234 25 32
E: pavle.pensa@jadek-pensa.si
W: www.jadek-pensa.si

SOUTH AFRICA

Charles Ancer and Emma Forbes
Norton Rose Fulbright South Africa Inc
15 Alice Lane
Sandton
Gauteng 2196
South Africa

T: +27 11 685 8946
F: +27 11 301 3294
E: charles.ancer@nortonrosefulbright.com
E: emma.forbes@nortonrosefulbright.com
W: www.nortonrosefulbright.com

SOUTH KOREA

Thomas Pinansky & Ki Tai Park
Barun Law LLC
Barun Law Building
92 gil 7, Teheran-ro
Gangnam-gu
Seoul 135-846
Korea

T: +82-2-3479-7517
F: +82-2-538-3533
E: tom.pinansky@barunlaw.com
E: kitai.park@barunlaw.com
W: www.barunlaw.com

SPAIN

Jordi Casas Thió
Roca Junyent
Aribau, 198 1ª planta
08036 Barcelona
Spain

T: +34 93 241 92 00
F: +34 93 414 50 30
E: j.casas@rocajunyent.com
W: www.rocajunyent.com

TURKEY

Isil Baytok and Emir Ali Baser
B+B Law Firm
Cumhuriyet Cad. No. 147/7 Harbiye
Istanbul 34373
Turkey

T: +90 (212) 219 16 30
F: +90 (212) 219 16 32
E: ibaytok@bb-legal.com
E: dyenidogan@bb-legal.com
W: www.bb-legal.com

UK: ENGLAND & WALES

Caroline Newsholme & Patrick Groves
Nabarro LLP
125 London Wall
London EC2Y 5AL
United Kingdom

T: +44(0) 20 7524 6000
F: +44(0) 20 7524 6524
E: c.newsholme@nabarro.com
E: p.groves@nabarro.com
W: www.nabarro.com

UNITED STATES

Joseph J Dehner
Frost Brown Todd LLC
3300 Great American Tower
301 East Fourth Street
Cincinnati
Ohio 45202
United States

T: +513-651-6949
F: +513-651-6981
E: jdehner@fbtlaw.com
W: www.frostbrowntodd.com