



# The Concept of Control and Identification of the Undertakings Concerned in EU Merger Control

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*The views expressed are personal to the speaker*

# What is “Control”

- Wide concept: possibility of exercising "decisive influence" on an undertaking to determine strategic decisions (Art. 3(2))
- “Decisive influence”: power to block actions which determine the strategic commercial behavior of an undertaking (para. 62 JN)

# Acquisition of Control (1)

1. Who acquires control?

2. How is control acquired?

- Acquisition of shares or assets
- On a contractual basis
- Exceptional: control on a de facto basis
  - attendance rate in general meetings
  - strong economic dependence (e.g. very important supply agreements or credits coupled with structural links)

3. Type of control (sole or joint)

4. Object of control

# Object of control

## **Target – Business with market presence and to which turnover can be attributed**

- Whole or parts of one or more undertakings
- Legal entities or assets
- Assets must constitute a business to which a market turnover can be clearly attributed
- Client base, brands or patents can be sufficient, even exclusive licences, if this constitutes a business with a market turnover

NOT: simple outsourcing contracts without asset transfers or if use of assets is limited to provide service to the outsourcing customer

# Joint Control (1)

## **Situations in which joint control may exist:**

- Equality of voting rights or equality of number of members in decision making bodies (50:50 situations)
- veto rights (details below)
- Joint exercise of voting rights (holding company or pooling)
- Exceptionally: commonality of interest (strong mutual dependency)
- No joint control if casting votes unless vote is of limited relevance

# Joint Control (2)

## **Veto rights :**

- Related to strategic decisions on commercial behavior
  - appointment and removal of management
  - budget
  - business plan
  - investments
  - market specific decisions
- Normal protection of minority shareholders not sufficient, *e.g.* dissolution of company, company restructuring operations, capital increases and decreases
- Assessment in overall context

# Lack of sole or joint control

## **Shifting majorities**

### **Example:**

- **3 shareholders (35%, 20%, 45%)**
- **Simple majority voting – any two of the three can team up to win**

# Changes in the Quality of Control

- Concentrations:
  - Entry of new controlling shareholder in a solely controlled undertaking, leading to a change from sole to joint control
  - Entry of new controlling shareholder in a joint venture (one or more additional shareholders or substitution of a controlling shareholder)
  - Reduction in the number of shareholders if this leads to a change from joint to sole control
- No concentration:
  - change from negative to positive (sole) control or vice versa
  - Exit of a controlling shareholder not leading to a change from joint to sole control



# Change of control on lasting basis (1)

- Permanent change of control
- Agreements for a definite period in time with possibility to extend
- Agreements with definite period if period is sufficiently long

## Change of control on lasting basis (2)

- Several operations occurring in succession where the first transaction is only transitory in nature

Different scenarios:

1. Several undertakings jointly acquire the target with the plan to immediately split it up
2. Joint control only for start-up period leading to sole control
3. 'Parking' of a business with an interim buyer (typically a bank)

# JVs - Full-functionality (1)

- MR (full-function) v. Article 101 (non-full-function)
- JV must perform on a lasting basis all functions of an autonomous economic entity:
  - Long duration
  - Independence from parent companies in the long term (relaxed on start-up period, 3 yrs)
  - Own access to/presence on the market
  - Own management dedicated to day-to-day operations
  - Access to sufficient resources (finance, stuff, assets)
- Case-by-case analysis: often finely balanced
  - The devil is in the detail

## JVs - Full-functionality JV (2)

- Long-term:
  - No, if just to construct a piece of infrastructure but no involvement in the operation of infrastructure
  - No, if necessary uncertain 3<sup>rd</sup> party decisions outstanding prior to starting business activity
- Market presence: depends on proportion of goods/services made available to third parties by the JV - considerations:
  - 50% rule (but some cases where 20% sufficient)
  - Start-up period (3 yrs)
  - Arms-length basis deals with parents
  - JV may use outlets of the parents if they act as agents
  - Past accounts/substantiated business plans/general market structure

## JVs - Full-functionality (3)

- Purchasing from parents: depends on proportion of goods/services made available to third parties by the JV - considerations:
  - Start-up period (3 yrs)
  - Little value added to the products/services – closer to joint sales agency?

## JVs - Full-functionality (3)

- In principle, **always** necessary to establish that a JV is “full function”
- **One exception:** undertakings acquiring joint control of another undertaking/assets from third parties
- If JV is not full-function, not notifiable – must be thought of as an **"additional"** criteria for JVs to constitute concentrations

# Different operations involving JVs

Fig. 1

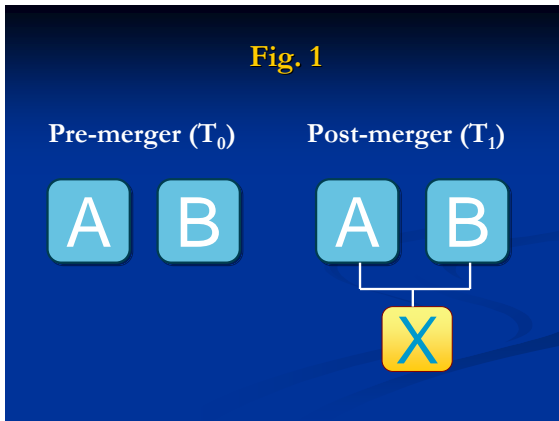


Fig. 2

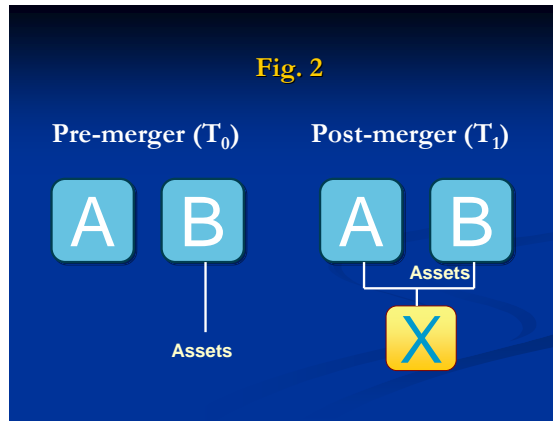


Fig. 3

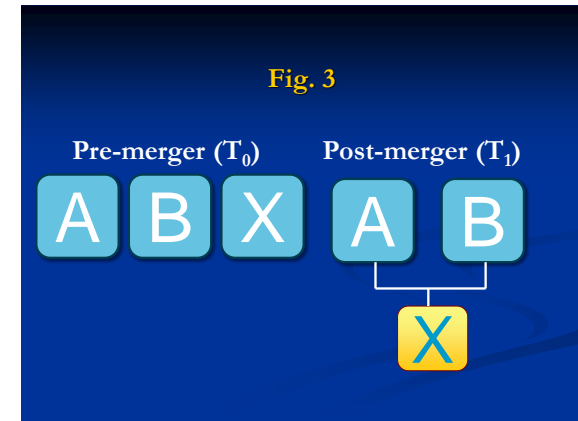


Fig. 4

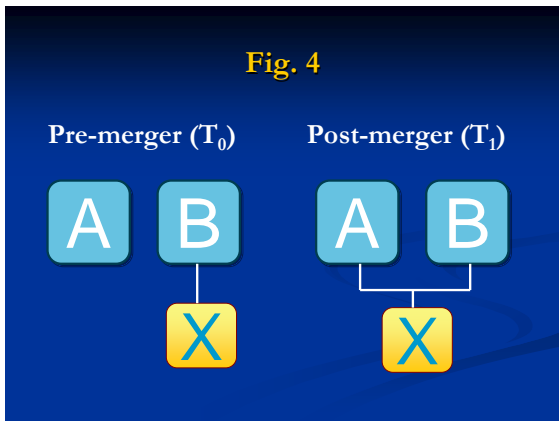
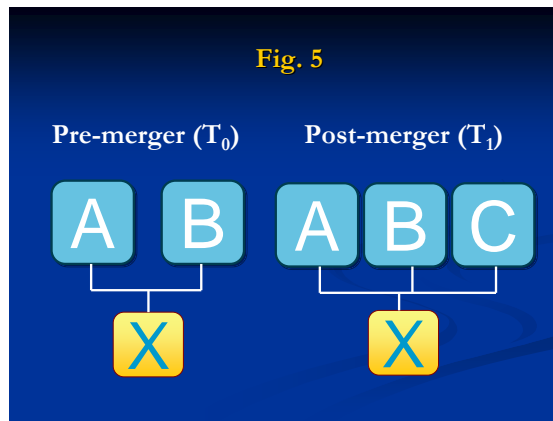


Fig. 5



# Undertakings concerned

Undertakings concerned by a concentration (i.e., those participating in the concentration): general rules:

- Merger: merging entities
- Acquisition of control:
  - Acquiring undertaking(s)
  - Acquired undertaking(s)
- Acquisition of control over JVs:
  - Creation of a JV: only acquiring undertakings
  - Pre-existing business: acquiring undertakings and JV
- Acquisition of control by JV
  - In principle, the JV (particularly, if a ff JV) and the target
  - But: take parents instead of the JV if: (1) JV is a mere vehicle for an acquisition by the parents; (2) elements demonstrate that the parents are the real players behind the operation



# Calculation of Turnover

- Can be complex
- Key rules to remember:
  - Group turnover, not just that of undertaking concerned
  - Audited accounts of preceding year
  - Adjustments in case of major acquisitions or divestments
  - Geographical allocation of turnover
  - Date for establishing jurisdiction - the earlier of:
    - Date of Notification
    - Date of conclusion of agreement, announcement of public bid, acquisition of controlling interest
  - Specific rules in Article 5(3) for banks, insurance undertakings, etc.

# Calculation of Turnover (2)

## Geographic allocation of turnover, Article 5(1):

- Important for Community and Member State turnover
- Place of customer at the time of the transaction
- Difficult issues for services, central buying strategies, etc.

## Attribution of turnover, Article 5(4):

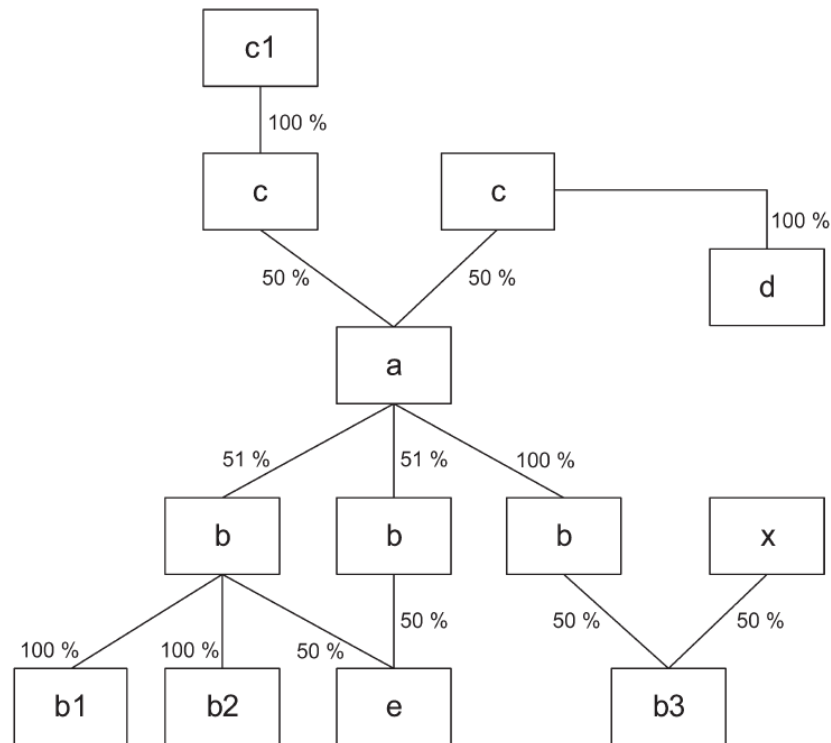
- Identification of undertakings whose turnover is taken into account in cases of Groups:
  - Starting from undertaking concerned
  - Attribution of turnover of parents, subsidiaries, sister companies
  - Not necessarily the same as control under Article 5(3)

# Article 5(4) Merger Regulation

The aggregate turnover of an undertaking concerned shall be calculated by adding together the respective turnovers of:

- a) the undertaking concerned;
- b) those undertakings in which the undertaking concerned, directly or indirectly:
  - i. owns more than half the capital or business assets, or
  - ii. has the power to exercise more than half the voting rights, or
  - iii. has the power to appoint more than half the members of the supervisory board, the administrative board or bodies legally representing the undertakings, or
  - iv. has the right to manage the undertakings' affairs;
- c) those undertakings which have in the undertaking concerned the rights or powers listed in (b);
- d) those undertakings in which an undertaking as referred to in (c) has the rights or powers listed in (b);
- e) those undertakings in which two or more undertakings as referred to in (a) to (d) jointly have the rights or powers listed in (b)

# § 178 JN: graphic example



# Case 1 – sole or joint control?

Microsoft and Nokia decide to buy Apple. They establish a joint venture vehicle which will hold 100% of Apple's shares. Microsoft will own 60% and Nokia 40% of the JV. Microsoft will have the right to appoint the first new CEO of Apple and then that right rotates. Decisions are taken by simple majority except for the budget and business plan which requires a 75% majority. In case of deadlock, a long arbitration procedure is envisaged following which, if no agreement can be found, Microsoft has the right to buy Nokia's shares.

## Case 2

Microsoft and Nokia decide to buy Apple. They establish a joint venture vehicle which makes the acquisition of Apple's shares. The joint venture agreement provides that Microsoft will then purchase from the JV the computer business of Apple whilst Nokia will take the mobile phone business.

Where is the concentration?

## Case 3

Google acquires a 40% shareholding in a public company called Cloud Computing, Inc. It has no veto rights or any other voting agreement with other shareholders. The rest of the shareholders are widely dispersed. Could Google have sole or joint control over Cloud Computing? How would we find out?

## Case 4

1. Peugeot and Renault decide to establish a joint venture into which they will both put their spare parts manufacturing businesses. They will have joint control over the new entity. The entity will only sell spare parts to the parents. Is this transaction a concentration under the MR?
2. 3 years later the parent companies decide that the JV will also start selling to third parties and the business plans show that they expect 30% of the JVs business to be from third party sales. What happens, if anything?



## Case 5

Muscle Plc and Proper Ltd conclude an agreement on 5.5.2012 to buy Clean Ltd (each taking a 50% shareholding with no special rights). They are not sure whether the transaction is notifiable to the Commission.

- Muscle is a publicly traded company on the stock exchange. Its financial year ends on 31.12. In 2011, it has WW t/o EUR 2,300 million and EEA EUR 500 million. It also divested a subsidiary in January 2012 (WW and EEA t/o = EUR 100 million)
- Proper is the subsidiary of Extra Proper Plc. It has WW t/o of 2,000 million in 2011 but no EEA t/o. It however acquired a small company with EEA t/o of 50 million in March 2012.
- Clean Ltd is only active in the EEA and had a group turnover of EUR 500 million in 2011.

Is the transaction notifiable – do you need some further information?