



European Commission

Competition

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Control test under the EU Merger Regulation

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Outline

- Enforcement Architecture in the EU
- Requirements for EU jurisdiction
- Concept of Concentration
- Acquisition of control
- Interrelated transactions
- Sole control v. Joint control
- Full-function Joint Ventures



Enforcement Architecture in the EU

- Work sharing between EU and EU Member States
 - "One-stop-shop"
 - "Better placed authority"
- Allocation based on assumed effects of mergers
 - Cross-border effects: Commission in Brussels
 - National / local effects: national authorities
- Thresholds determine case allocation (turnover)
- Re-allocation mechanisms provide flexibility
- Obligation to notify prior to implementation
- Standstill clause (suspension of concentrations)



Reference texts (jurisdictional issues)

- Merger Regulation 139/2004 (Articles 1, 3 and 5)
- Consolidated Jurisdictional Notice (2008)
 - notion of concentration
 - full-function joint ventures
 - undertakings concerned
 - calculation of turnover
- Jurisprudence EU Court



Requirements for EU jurisdiction

- Concentration (Article 3 EUMR)
 - Merger
 - Acquisition of control
 - Full-function joint ventures
- Having a Community dimension (Article 1 EUMR)
 - Depends on turnover generated by the undertakings concerned by the concentration and its geographical allocation
- Triggering event (when to notify?)



Concept of Concentration

- Concentration
 - Article 3 EUMR: Operations bringing about a lasting change in the control of the undertakings concerned
 - Recital 20 EUMR: and therefore in the structure of the market
- Types of concentrations
 - Mergers between independent undertakings
 - Acquisition of sole or joint control of an undertaking
 - Including creation of full-function joint ventures



Acquisition of Control

- Who acquires control?
 - One or more undertakings or persons already controlling at least one undertaking
- Target: business with market presence and to which turnover can be attributed
- Possibility of exercising decisive influence on an undertaking (even without intention of the parties)
 - By any means, on a *de iure* or *de facto* basis



Means of acquiring control

- Acquisition of shares or assets
- Control on a contractual basis
 - Long term organizational contracts concerning management and resources / pooling arrangements
- Control on a *de facto* basis
 - Minority shareholdings if attendance rate in general meeting allows for stable voting majority
 - Strong economic dependence



Change of control on lasting basis

- Permanent change of control
 - Agreements for a definite period in time with possibility to extend or if period is sufficiently long
- Several operations occurring in succession where the first transaction is only transitory in nature
 - Joint acquisitions but split-up of assets / start-up periods / parking transactions



Interrelated transactions

- Several interdependent transactions but a single concentration
- Transactions linked by condition or series of acquisitions in securities
- Staggered transactions:
 - Several transactions taking place within a two-year period between the same undertakings
 - Take them into account for calculation of turnover



Sole Control

- Power to determine strategic decisions
- Acquisition of majority of voting rights
- Qualified minority:
 - Legal basis: specific rights attached to the shares
 - De facto basis: stable majority of votes in the shareholders' meeting and prospective analysis
 - Contractual right to determine the business policy of the company



Joint Control

- Power to block strategic decisions (deadlock situation)
 - Need for a common understanding in determining the commercial policy of the JV
- Factors:
 - 50:50 situations (voting rights / representation)
 - veto rights / common exercise of voting rights
 - casting votes



Veto rights

- Source:
 - Statutes / shareholders' agreement
- Related to strategic decisions on commercial behaviour:
 - Appointment and removal of management / budget / business plan / investments / market specific decisions
- Normal protection of minority shareholders not sufficient



Negative Sole Control

- Veto rights for strategic decisions, without the possibility to impose such decisions
- Situations:
 - One shareholder holds 50%, remaining 50% are held by two or more minority shareholders;
 - Statutes require a quorum for strategic decisions which confer a veto right only upon one minority shareholder
 - Similar assessment as if jointly controlling shareholders



Changes in the quality of control

- Change from sole to joint control or vice versa
- Entry of new controlling shareholder in a joint venture
 - One or more additional shareholders
 - Substitution of a controlling shareholder
- Reduction in the number of shareholders
- Change from negative to positive (sole) control or vice versa



No concentration if control acquired...

- By credit, financial institutions or insurance companies
 - Holding securities on a temporary basis (<1 year)
 - Limited in exercise of voting rights
- By insolvency receiver
- By financial holding companies exercising voting rights only to protect full investment



Full-function Joint Ventures

- The full-functionality test...
 - ... governs the application of the EUMR to the creation of a joint venture
 - ... delineates the scope of application of the EUMR with regard to that of Article 101 EC [but: spill-over effects under Article 2(4) EUMR]
- Full-functionality test:
 - JV must perform on a lasting basis all functions of an autonomous economic entity
 - Not only auxiliary to the parents' business: not ff if JV fulfills only one specific function (e.g. limited to R&D or production)



Assessment of Full-functionality

- Does the JV have...
 - dedicated management ?
 - sufficient resources for its business activities (finance, staff, assets) ?
- Supply relationships and full-functionality
 - Sales from JV to parents
 - Outsourcing agreements
 - Purchases from parents
- Operation on a lasting basis