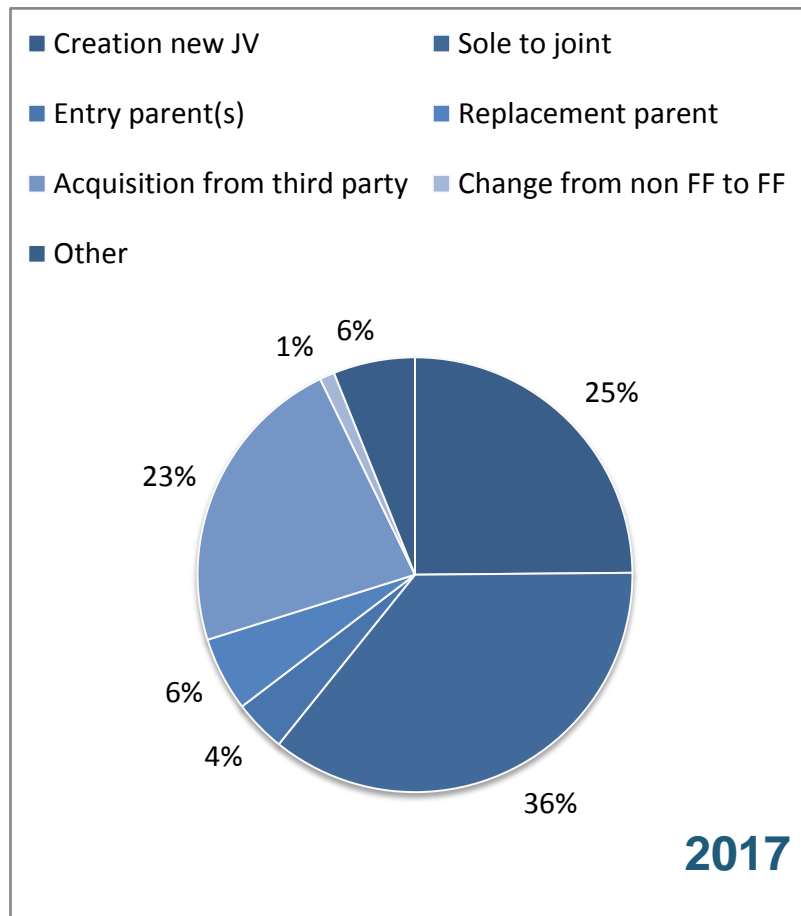
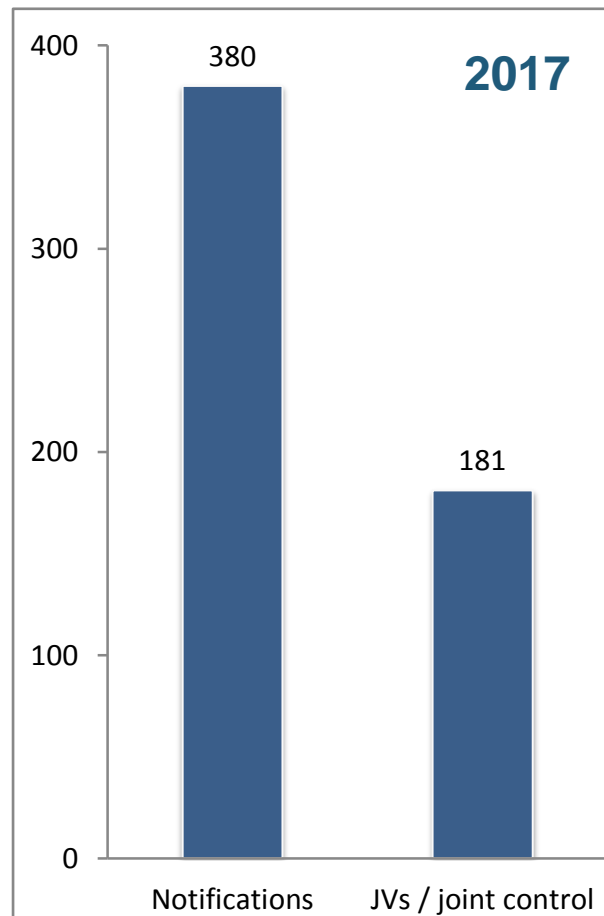


### **Disclaimer**

**All views presented are personal  
and do not necessarily reflect the  
official position of the European  
Commission**

# Some stats



2017	All cases	JVs / joint control
Notifications	380	181
Total Interventions	24	2
Remedies	20	1
Remedies phase I	18	1
Remedies phase II	2	0
Prohibitions	2	1
Abandonments phase II	2	0
Intervention rate	6,3	1,1

<b>M.8547 – CELANESE / BLACKSTONE / JV</b>	2018	Abandonment phase II
<b>M.7878 – HEIDELBERGCEMENT / SCHWENK / CEMEX HUNGARY / CEMEX CROATIA</b>	2017	Prohibition
<b>M.8059 – INVESTINDUSTRIAL / BLACK DIAMOND / POLYNT / REICHHOLD</b>	2017	Remedies phase I
<b>M.7978 – VODAFONE / LIBERTY GLOBAL / DUTCH JV</b>	2016	Remedies phase I
<b>M.7758 – 3G ITALY / WIND / JV</b>	2016	Remedies phase II

# Jurisdiction

# Regulatory Framework

## I

(Acts whose publication is obligatory)

**COUNCIL REGULATION (EC) No 139/2004**  
**of 20 January 2004**  
**on the control of concentrations between undertakings**  
**(the EC Merger Regulation)**  
**(Text with EEA relevance)**

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 83 and 308 thereof,

Having regard to the proposal from the Commission <sup>(1)</sup>,

Having regard to the opinion of the European Parliament <sup>(2)</sup>,

Having regard to the opinion of the European Economic and Social Committee <sup>(3)</sup>,

Whereas:

- (1) Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings <sup>(4)</sup> has been substantially amended. Since further amendments are to be made, it should be recast in the interest of clarity.
- (2) For the achievement of the aims of the Treaty, Article 3(1)(g) gives the Community the objective of instituting a system ensuring that competition in the internal market is not distorted. Article 4(1) of the Treaty provides that the activities of the Member States and the Community are to be conducted in accordance with the principle of an open market economy with free competition. These principles are essential for the further development of the internal market.
- (3) The completion of the internal market and of economic and monetary union, the enlargement of the European Union and the lowering of international barriers to trade and investment will continue to result in major corporate reorganisations, particularly in the form of concentrations.

- (4) Such reorganisations are to be welcomed to the extent that they are in line with the requirements of dynamic competition and capable of increasing the competitiveness of European industry, improving the conditions of growth and raising the standard of living in the Community.

- (5) However, it should be ensured that the process of reorganisation does not result in lasting damage to competition: Community law must therefore include provisions governing those concentrations which may significantly impede effective competition in the common market or in a substantial part of it.

- (6) A specific legal instrument is therefore necessary to permit effective control of all concentrations in terms of their effect on the structure of competition in the Community and to be the only instrument applicable to such concentrations. Regulation (EEC) No 4064/89 has allowed a Community policy to develop in this field. In the light of experience, however, that Regulation should now be recast into legislation designed to meet the challenges of a more integrated market and the future enlargement of the European Union. In accordance with the principles of subsidiarity and of proportionality as set out in Article 5 of the Treaty, this Regulation does not go beyond what is necessary in order to achieve the objective of ensuring that competition in the common market is not distorted, in accordance with the principle of an open market economy with free competition.

- (7) Articles 81 and 82, while applicable, according to the case-law of the Court of Justice, to certain concentrations which may prove to be incompatible with the system of undistorted competition envisaged in the Treaty. This Regulation should therefore be based not only on Article 83 but, principally, on Article 308 of the Treaty, under which the Community may give itself the additional powers of action necessary for the attainment of its objectives, and also powers of action with regard to concentrations on the markets for agricultural products listed in Annex I to the Treaty.

<sup>(1)</sup> OJ C 20, 28.1.2003, p. 4.

<sup>(2)</sup> Opinion delivered on 9.10.2003 (not yet published in the Official Journal).

<sup>(3)</sup> Opinion delivered on 24.10.2003 (not yet published in the Official Journal).

<sup>(4)</sup> OJ L 395, 30.12.1989, p. 1. Corrected version in OJ L 257, 21.9.1990, p. 13. Regulation as last amended by Regulation (EC) No 1310/97 (OJ L 180, 9.7.1997, p. 1). Corrigendum in OJ L 40, 13.2.1998, p. 17.

## Recital 20

« It is expedient to define the concept of concentration in such a manner as to **cover operations bringing about a lasting change in the control of the undertakings concerned and therefore in the structure of the market.** It is therefore appropriate to include, within the scope of this Regulation, all joint ventures performing on a lasting basis all the functions of an autonomous economic entity. It is moreover appropriate to treat as a single concentration transactions that are closely connected in that they are linked by condition or take the form of a series of transactions in securities taking place within a reasonably short period of time. »



European  
Commission



## I

(Acts whose publication is obligatory)

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of 20 January 2004  
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(the EC Merger Regulation)  
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- (7) Articles 81 and 82, while applicable, according to the case-law of the Court of Justice, to certain concentrations, are not sufficient to control all operations which may prove to be incompatible with the system of undistorted competition envisaged in the Treaty. This Regulation should therefore be based not only on Article 83 but, principally, on Article 308 of the Treaty, under which the Community may give itself the additional powers of action necessary for the attainment of its objectives, and also powers of action with regard to concentrations on the markets for agricultural products listed in Annex I to the Treaty.

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## Definition of concentration

### Article 3(1)(b)

« The acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings. »

### Article 3(4)

« The creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity shall constitute a concentration within the meaning of paragraph 1(b). »



## II

(Information)

## INFORMATION FROM EUROPEAN UNION INSTITUTIONS AND BODIES

## COMMISSION

## Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings

(2008/C 95/01)

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## Object of control

« (24) The Merger Regulation provides in Article 3(1)(b), that the object of control can be one or more, or also parts of, undertakings which constitute legal entities, or the assets of such entities, or only some of these assets. The acquisition of control over assets can only be considered a concentration if those assets constitute the whole or a part of an undertaking, i.e. **a business with a market presence, to which a market turnover can be clearly attributed.** »

## II

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## Joint ventures - Full functionality (1)

« (92) Article 3(4) provides in addition that **the creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity (so called full-function joint ventures) shall constitute a concentration** within the meaning of the Merger Regulation. The full-functionality criterion therefore delineates the application of the Merger Regulation for the creation of joint ventures by the parties, irrespective of whether such a joint venture is created as a 'greenfield operation' or whether the parties contribute assets to the joint venture which they previously owned individually. In these circumstances, the joint venture must fulfill the full-functionality criterion in order to constitute a concentration. »

## II

(Information)

INFORMATION FROM EUROPEAN UNION INSTITUTIONS AND BODIES

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(2008/C 95/01)

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## Joint ventures - Full functionality (2)

« (91) [...] The new acquisition of another undertaking by several jointly controlling undertakings [...] constitutes a concentration under the [EUMR]. As in the case of the acquisition of sole control of an undertaking, such an acquisition of joint control will lead to a structural change in the market even if, according to the plans of the acquiring undertakings, the acquired undertaking would no longer be considered full-function after the transaction (e.g. because it will sell exclusively to the parent undertakings in future). Thus, **a transaction involving several undertakings acquiring joint control** of another undertaking or parts of another undertaking, fulfilling the criteria set out in paragraph 24, **from third parties** will constitute a concentration according to Article 3(1) **without it being necessary to consider the full-functionality criterion.** »

## Two possible jurisdictional tests

The Target constitutes an “undertaking” i.e. a business to which turnover can be clearly attributed

**Article 3(1)(b) EUMR**

**Point 24 Jurisdictional Notice**

**Point 91 Jurisdictional Notice**

The Target will constitute a “full function joint venture” i.e. a joint venture performing on a lasting basis all the functions of an autonomous economic entity

**Article 3(4) EUMR**

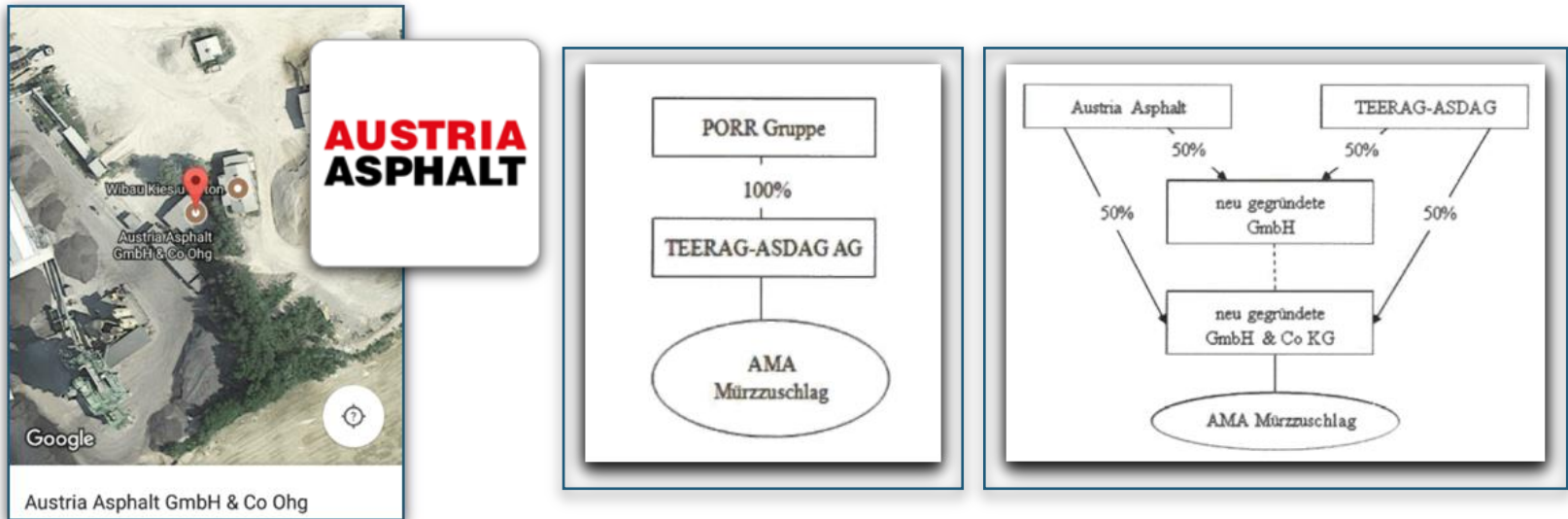
**Point 92 Jurisdictional Notice**





## **The ECJ's Judgment of 7/9/2017 in C-248/16 Austria Asphalt vs Bundeskartellanwalt**

# The facts and the transaction



## The request for a preliminary ruling

*“Must Article 3(1)(b) and (4) of [Regulation No 139/2004] be interpreted as meaning that a move from sole control to joint control of an existing undertaking, in circumstances where the undertaking previously having sole control becomes an undertaking exercising joint control, constitutes a concentration only where the undertaking [the control of which has changed] has on a lasting basis all the functions of an autonomous economic entity?”*

СЪД НА ЕВРОПЕЙСКИЯ СЪЮЗ  
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DEN EUROPEISKE UNIONS DOMSTOL  
GERICHTSHOF DER EUROPÄISCHEN UNION  
EUROOPA LIIDU KOHUS  
ΔΙΚΑΣΤΗΡΙΟ ΤΗΣ ΕΥΡΩΠΑΪΚΗΣ ΕΝΩΣΗΣ  
COURT OF JUSTICE OF THE EUROPEAN UNION  
COUR DE JUSTICE DE L'UNION EUROPÉENNE  
CÚIRT BHREITHÚNAIS AN AONTAIS EORPAIGH  
SUD EUROPSKE UNIE  
CORTE DI GIUSTIZIA DELL'UNIONE EUROPEA



EIROPAS SAVIENĪBAS TIESA  
EUROPOS SĄJUNGOS TEISINGUMO TEISMAS  
AZ EURÓPAI UNIÓ BÍRÓSÁGA  
IL-QORTI TAL-GUSTIZZJA TAL-UNJONI EWROPEA  
HOF VAN JUSTITIE VAN DE EUROPESE UNIE  
TRYBUNAŁ SPRAWIEDLIWOŚCI UNII EUROPEJSKIEJ  
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CURTEA DE JUSTIȚIE A UNIUNII EUROPENE  
SÚDNY DVOR EURÓPSKEJ UNIE  
SODIŠČE EVROPSKE UNIJE  
EUROOPAN UNIONIN TUOMIOISTUIN  
EUROPEISKA UNIONENS DOMSTOL

OPINION OF ADVOCATE GENERAL  
KOKOTT  
delivered on 27 April 2017 <sup>1</sup>

Case C-248/16

Austria Asphalt GmbH & Co OG  
v  
Bundeskartellanwalt

(Request for a preliminary ruling from the Oberster Gerichtshof (Austria))

(Competition — Control of concentrations between undertakings ('merger control') — Article 3 of Regulation (EC) No 139/2004 ('EC Merger Regulation') — Scope *ratione materiae* — Concept of concentration — Transition from sole control to joint control of an undertaking — Change from an Existing non-full-function undertaking to a Community non-full-function undertaking — Division of competences between the European Commission and the national bodies responsible for merger control)

<sup>1</sup> Original language: German.

EN



« The transfer of an existing undertaking or part of an undertaking from sole control by one company to joint control by the self-same company and another company unrelated to it constitutes a concentration within the meaning of Article 3 [EUMR] only where the joint venture resulting from that transaction performs on a lasting basis all of the functions of an autonomous economic entity. »



СЪД НА ЕВРОПЕЙСКИЯ СЪЮЗ  
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SODNI DVŮR EVROPSKÉ UNIE  
DEN EUROPEISKE UNIONES DOMSTOL  
GERICHTSHOF DER EUROPÄISCHEN UNION  
EUROOPA LIIDU KOHUS  
ΑΡΧΑΙΤΗΡΙΟ ΤΗΣ ΕΥΡΩΠΑΪΚΗΣ ΕΝΩΣΕΩΣ  
COURT OF JUSTICE OF THE EUROPEAN UNION  
COUR DE JUSTICE DE L'UNION EUROPÉENNE  
COURT BHREITHÚNAIS AN AONTAIS EORPAIGH  
SUD EUROPSKE UNIE  
CORTE DI GIUSTIZIA DELL'UNIONE EUROPEA



LUXEMBOURG

EIROPAS SAVIENĪBAS TIESA  
EUROPOS SĄJUNGOS TEISINGUMO TEISMAS  
AZ EURÓPAI UNIÓ BÍRÓSÁGA  
IL-QORTI TAL-GUSTIZZJA TAL-UNJONI EWROPEA  
HOF VAN JUSTITIE VAN DE EUROPESE UNIE  
TRYBUNAŁ SPRAWIEDLIWOŚCI UNII EUROPEJSKIEJ  
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CURTEA DE JUSTITIE A UNIUNII EUROPENE  
SÚDNY DVOR EURÓPSKEJ UNIE  
SODIŠČE EVROPSKE UNIE  
EUROOPAN UNIONIN TUOMIOISTUIN  
EIROPESKA UNIJENĀS DOMSTOL

## JUDGMENT OF THE COURT (Fifth Chamber)

7 September 2017 \*

(Reference for a preliminary ruling — Competition — Concentrations between undertakings — Regulation (EC) No 139/2004 — Article 3(1)(b) and (4) — Scope — Definition of ‘concentration’ — Change in the form of control of an existing undertaking which, previously exclusive, becomes joint — Creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity)

In Case C-248/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Oberster Gerichtshof (Supreme Court, Austria), made by decision of 31 March 2016, received at the Court on 2 May 2016, in the proceedings

**Austria Asphalt GmbH & Co OG**

v

**Bundeskartellanwalt,**

THE COURT (Fifth Chamber),

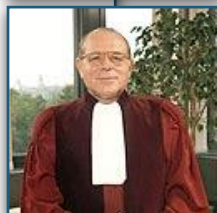
composed of J.L. da Cruz Vilaça, President of the Chamber, A. Tizzano (Rapporteur), Vice-President of the Court, A. Borg Barthet, E. Levits and F. Biltgen, Judges,

Advocate General: J. Kokott,

Registrar: X. Lopez Bancalari, Administrator,

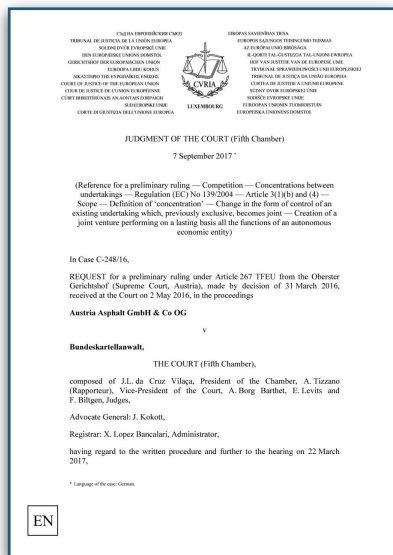
having regard to the written procedure and further to the hearing on 22 March 2017,

\* Language of the case: German.



« Article 3 [EUMR] must be interpreted as meaning that a concentration is deemed to arise upon a change in the form of control of an existing undertaking which, previously exclusive, becomes joint, only if the joint venture created by such a transaction performs on a lasting basis all the functions of an autonomous economic entity »

EN



(18) Consequently, it cannot be determined from the wording of Article 3 of the regulation alone whether a concentration, within the meaning of that regulation, is deemed to arise as a result of a transaction by which the sole control of an existing undertaking becomes joint when the joint venture resulting from such a transaction does not perform all the functions of an autonomous economic entity. [...]

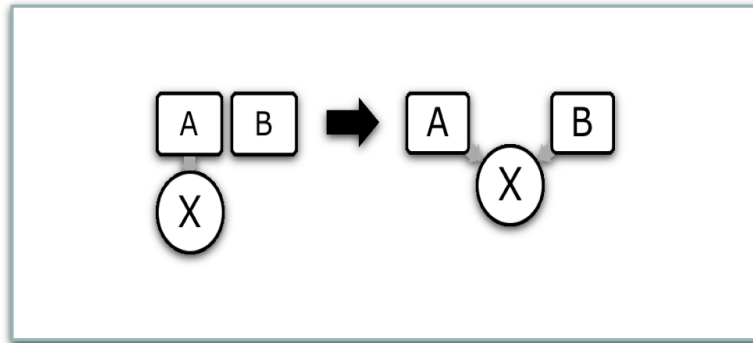
(20) When a textual interpretation of a provision of EU law does not permit its precise scope to be assessed, the provision in question must be interpreted by reference to its purpose and general structure [...].

(21) As regards the objectives pursued by Regulation No 139/2004, it appears from recitals 5 and 6 thereof that the regulation seeks to ensure that the process of reorganisation of undertakings does not result in lasting damage to competition in the internal market or in a substantial part of it and permitting effective control of all concentrations in terms of their effect on the structure of competition in the European Union. Accordingly, that regulation should apply to significant structural changes the impact of which on the market goes beyond the national borders of any one Member State.

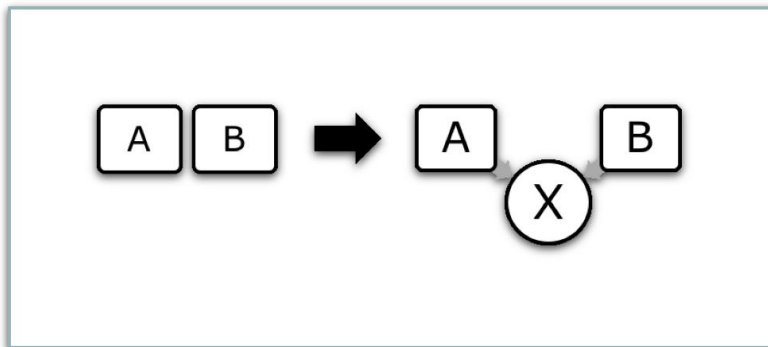
(22) Therefore, as is apparent from recital 20 of the regulation, the concept of concentration must be defined in such a manner as to cover operations bringing about a lasting change in the control of the undertakings concerned and therefore in the structure of the market. Thus, as regards joint ventures, these must be included within the ambit of the regulation if they perform on a lasting basis all the functions of an autonomous economic entity.

# **Different constellation of cases involving acquisition of control / joint ventures**

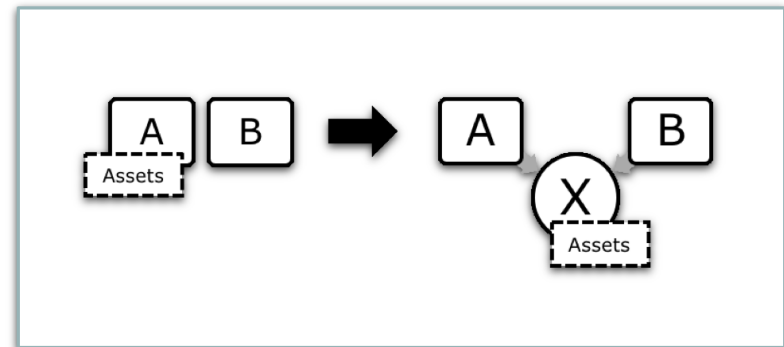
**Sole to joint control  
(previous owner remains as parent)**



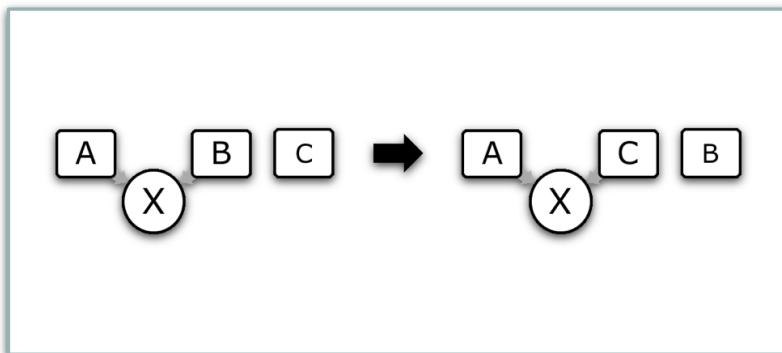
**Creation of a  
greenfield JV**



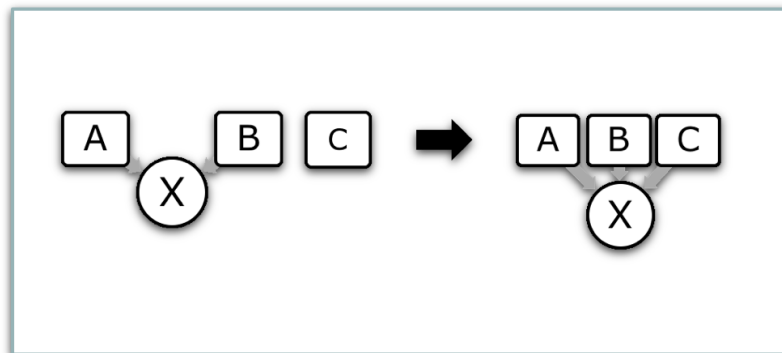
**Creation of a JV with  
contribution of assets**



### Replacement of a parent in a JV



### Addition of a parent to a JV



### Acquisition of joint control from third parties (previous owner does not remain as a parent)

