The notion of control under the EU Merger Regulation

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Key principles of EU merger control

- ***Ex ante*** **mandatory notification & standstill obligation**

- **Turnover thresholds:**
  - Criteria for notification
  - Work sharing between EU and EU Member States: one stop shop & better placed authority

- **Strict legal deadlines**

- **Competition-based assessment criteria**

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Reference texts for jurisdictional issues

- Merger Regulation 139/2004 (Articles 1, 3 and 5)
- Consolidated Jurisdictional Notice of 2008 (“CJN”)
- Case practice and case-law of EU Courts

Requirements for EU jurisdiction

- **Concentration** (Article 3 EUMR)
  - Merger
  - Acquisition of control
  - Full-function joint ventures

- **EU dimension**: turnover thresholds

- **Triggering event** (when to notify?)

Concept of concentration

- **Concentration** (recital 20, Art. 3 EUMR):
  - Change of control over an undertaking
  - On a lasting basis

- **Types of concentrations**:
  - Merger between independent undertakings
  - Acquisitions of sole or joint control of an undertaking (including creation of full-function JVs)

If no concentration, Article 101 TFEU may be applicable

Notion of control

What is “Control”

- Possibility of exercising "decisive influence" on an undertaking (Art. 3(2) EUMR)
- “Decisive influence” to determine the **strategic** commercial behavior of an undertaking:
  - Either alone (sole control)
  - Or jointly with other shareholders (joint control)
- Strategic decisions: business plan, budget, investments, appointment of management

Acquisition of control: parties involved

- **Who acquires control?**
  - One or more undertakings
  - Physical persons that already control at least one undertaking

- **Target:** business with a market presence to which turnover can be attributed

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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

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 meetings allows stable voting majority
  - Strong economic dependence

Types of control: sole control

- One undertaking alone can exercise decisive influence on an undertaking if it enjoys the power to determine strategic commercial decisions:
  - Acquisition of **majority of the voting rights**, either de jure or de facto (positive sole control)
  - **Qualified minority**: it alone can veto strategic commercial decisions without being in a position to impose such decisions on its own ("negative sole control")

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Negative sole control

- A, B and C acquire 50%, 25% and 25% over target company
- Board of directors of target composed of 4 members:
  - A: 2 members
  - B: 1 member
  - C: 1 member
- Adoption of strategic decisions:
  - 75% at shareholders' meetings or
  - Approval by ¾ of board members

A cannot adopt alone the strategic decisions but has the ability to block them with its 50% shareholding

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De facto sole control

- Minority shareholding but stable voting majority is highly likely (prospective analysis)
- Example: IF P&C / TOPDANMARK (2013)
  - Insurance sector
  - IF P&C has gradually increased its shareholding in TopDanmark (up to 26.51% of voting rights)
  - Dispersed shareholding structure
  - IF P&C only industrial shareholder
  - Past attendance rates: with 26.51% IF P&C would have achieved a majority at each of the 7 most recent general meetings

Joint control

- Two or more undertakings have the **power to block strategic decisions** (deadlock situation): need for agreement to determine commercial policy of the JV
- When?
  - 50:50: equality of voting rights or equality of number of members in decision making bodies
  - Veto rights (details below)
  - Joint exercise of voting rights (holding company or pooling agreement)
  - Exceptionally: commonality of interest (strong mutual dependency between shareholders)
- No joint control if casting votes (unless of limited relevance)

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Joint control: 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

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No control: shifting majorities

- 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
  - Replacement of a controlling shareholder
  - Reduction in the number of controlling shareholders if this leads to a change from joint to sole control (reduction from 2 to 1 shareholders)
- **No concentration:**
  - Change from negative to positive (sole) control or vice versa
  - Change from *de facto* control to *de iure* control
  - Reduction in number of controlling shareholders if the JV remain jointly ontrolled (example: reduction from 3 to 2 shareholders)

Change of control on lasting basis

- **Permanent change of control:**
  - OK: agreements for a definite period in time with possibility to extend
  - OK: agreements with definite period 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

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