Assessment of joint ventures in EU merger review

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Joint ventures

- Article 3, paragraph 1, b) EUMR: acquisition of sole or **joint control over an undertaking:**

(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, paragraph 4 of EUMR:

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).

Full-functionality test

- Governs the application of the EUMR to the creation of a JV

- Delimits the scope of application of the EUMR vs Article 101 TFEU (but assessment of spill-over effects in parent's activities under Article 101 TFEU)

→ JV must perform on a lasting basis the functions of an autonomous economic entity

Assessment of full-functionality

3 main criteria:

1. Sufficient resources to operate independently
2. Own market presence
3. Long-term activity

Full-functionality: sufficient resources

Does the JV have:

- Dedicated management?
- Finance, staff, assets, etc.?

Check dependency with parent companies: Ok if parents second employees for start-up period or at arm's length basis

Full-functionality: sufficient resources

Commission's practice:

✓3-4 staff for start-up period; 10-12 employees after (sufficient depending on nature of activities and market)

✓Most of the JV's staff seconded by its parent companies. Unclear whether JV would recruit its own employees or obtain staff via third parties

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Full-functionality: market presence

- Activities beyond one specific function for its parents
  - Must have own access to market
  - Not FF if only limited to R&D, production or distribution for parent companies
- JV must play active role on the market. Check % of sales/purchases made to/from parents and third parties:
  - Ok if start-up period (3 years)
  - 50% rule (but some cases where 20% sufficient)
  - JV must deal with parents at arm's length

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Full-functionality: market presence

- Commission's practice:

✓ Ok if only 15% sales to third parties but fees charged by the JV fixed by another autonomous entity or the JV itself; clear incentives to compete for third party

✗ JV limited to fulfilling regulatory obligations

✗ JV limited to acquire, hold, and gradually dispose of a portfolio of real estate assets

Full-functionality: long-term

- JV must be intended to operate on a lasting basis
- Not long lasting if:
  - Established for a short finite duration (i.e. if just to build a piece of infrastructure but no involvement in the operation of infrastructure)
  - Necessary uncertain 3rd party decisions outstanding prior to starting business activity (i.e. award of a licence from Administration)

Full-functionality: long-term

- Commission's practice:
  - ✓ 8, 10, 15 years have been considered sufficiently long
  - ✓ 5 years? depending on sector (IT/digital/media could be considered sufficiently long

Example of full-function JV

- M.8251-Bite/ Tele2 / Telia Lietuva / JV: Creation of new JV between two Lithuanian MNOs: JV active in retail provision of **mobile payment services** in Lithuania
- Assessment of full-functionality:
  - ✓ Sufficient resources: dedicated management, staff, finance and assets (including technical infrastructure and software solutions and license from Bank of Lithuania)
  - ✓ Own presence on market as retail payment services provider (parent companies not active in this sector)
  - ✓ Limited purchases (<5%) from and sales to parent companies
  - ✓ Established for an indefinite period of time

Full-functionality: when to assess it?

- In principle, always necessary to establish that a JV is full-function (Article 3(4) EUMR):

> 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).

- **One exception**: acquisition of joint control over an undertaking **from third parties**

> (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.

Austria Asphalt judgment (2017)

- First reference for a preliminary ruling on EU merger control
- Court ruling: in cases where an **undertaking, previously exclusive, becomes joint,** a concentration only arises if the JV created by such a transaction **is full-function**

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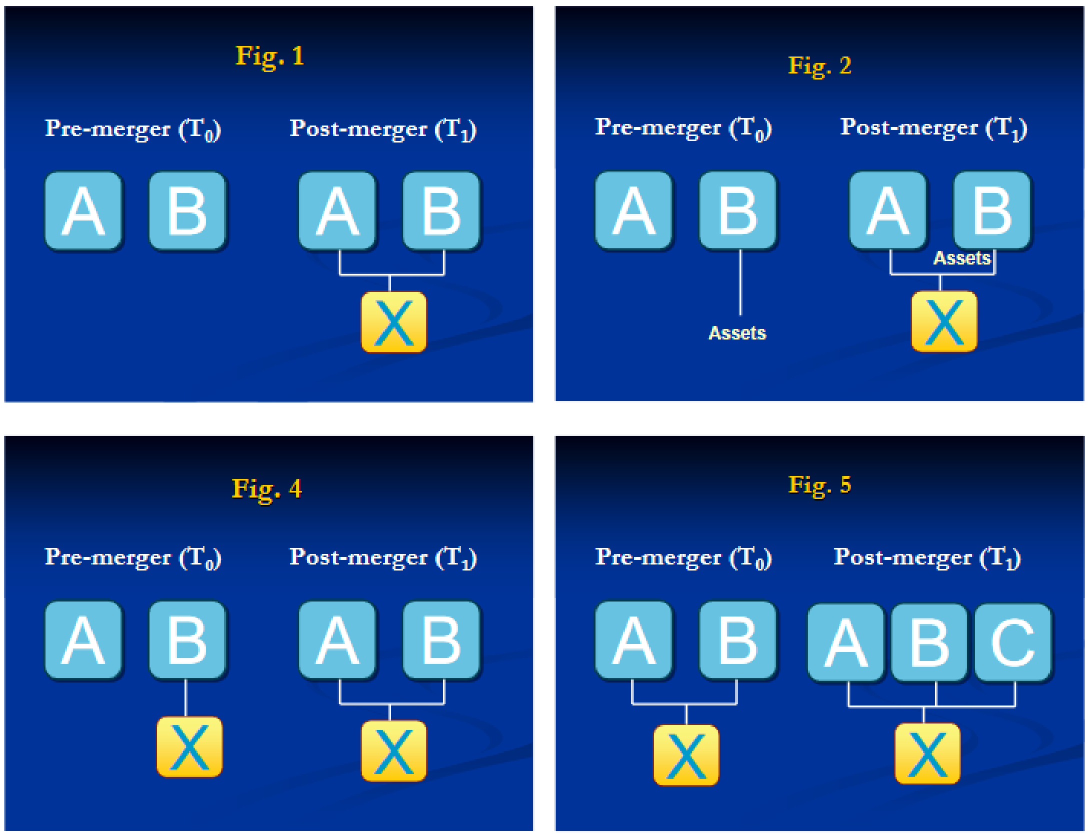
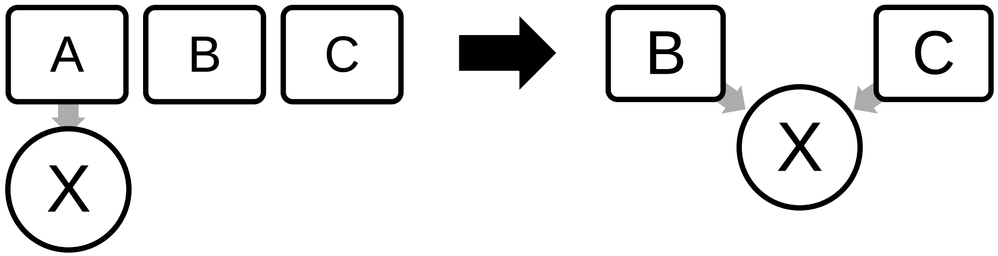
Different transactions involving JVs



Assessment of full-functionality is required

Different transactions involving JVs

- Acquisition of joint control from third party: full-functionality NOT required



Competitive assessment of JVs

- Double test under the EUMR:

  - **Article 2(4) EUMR**: assessment of whether the creation of the JV gives rise to a Significant Impediment to Effective Competition (SIEC test)

  - **Additional susbtantive test for JVs (Article 2(5) EUMR)**: assessment under Article 101 TFEU of **spill-over effects** or risk of coordination of parent companies in upstream or neighboring markets

Competitive assessment of JVs

A

Assessment under Article 101 TFEU of risk of coordination between parent companies

B

JV

SIEC test: assessment of whether the creation of the JV gives rise to a Significant Impediment to Effective Competition

Competitive assessment of JVs

- M.8251-Bite/ Tele2 / Telia Lietuva / JV: Creation of JV between two Lithuanian MNOs: active in retail provision of mobile payment services in Lithuania
- Competitive assessment in 3 levels:
  - JV's market: **retail provision of payment services in Lithuania**
  - **Vertical/conglomerate relationships between parent companies and JV:** ability/incentive to foreclose rival mobile payment providers?
  - **Assessment of spill-over effects**: risk of coordination of parent companies in upstream or neighboring markets?

M.8251-Bite / Tele2 / Telia Lietuva / JV

- ✓ **Market for retail provision of payment services in Lithuania**: nascent market, new player, minor overlap between the JV's activities and the parents' potential activities in this market→ pro-competitive effects
- ✓ **Non-horizontal effects on market for mobile payment services in Lithuania:**
  - Parent companies: market share >30% in certain services which are important inputs for the provision of mobile payment services (i.e. secure storage, mobile authentication)
  - **No ability/incentive to foreclose** rival mobile payment providers: presence of alternative means for competitors of the JV to securely store information and to authenticate users
- ✓ **Assessment of spill-over effects**: coordination unlikely
  - Confidentiality agreement not to exchange commercially sensitive information via the JV
  - JV's activities limited compared to the main markets of the parent companies: lack of sufficiently strong incentives

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Questions?