

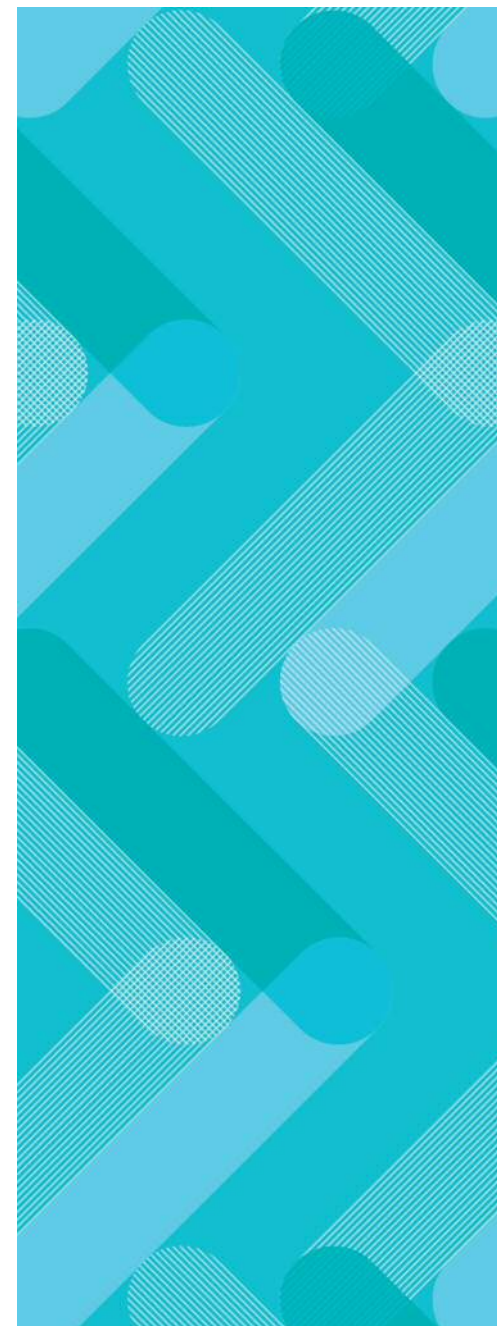
# **CPRC**

## **INTERNATIONAL SYMPOSIUM ON MERGER REVIEW AND BUSINESS ALLIANCE**

### **JOINT VENTURES UNDER THE EUROPEAN MERGER REGULATION**

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# Overview

- Difference between non-full function JVs (under the normal competition rules) and full-function JVs (under the EU merger rules)
- What is a “full-function” JV?
- The recent debate concerning the requirement of full-functionality in transactions involving a joint acquisition of an existing entity
- The judgment in *Austria Asphalt* (Case C-248/16)
- Some views from Brussels/Where are we now?

# Full-function v non full-function JVs

- Joint ventures can be dealt with under the normal competition rules on agreements or under the merger control rules as “concentrations”.
  - *Non-full function*: excluded as such from the EUMR / subject to Articles 101 & 102 TFEU
  - *Full-function*: falls within the EUMR
- Only full-function JVs create a structural change and hence constitute “concentrations”:
  - Recital 20 EUMR: *“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.”*

# Concentration

- Notifiable transactions under the EUMR
  - Deal must be a “concentration”
  - Deal must have “Union dimension”, i.e. parties must meet the EU thresholds
- Article 3(1) EUMR: change of control (possibility of decisive influence) on a lasting basis
  - Merger of two or more previously independent undertakings/parts of undertakings
  - Acquisition by one or more undertakings/persons controlling an undertaking of direct or indirect control of the whole/part of one or more other undertakings
  - Article 3(4) EUMR: creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity

# Full-Functionality

- **A Joint Venture** that performs on a lasting basis all the functions of an autonomous economic entity (**Article 3(4) EUMR**)
- *‘[T]he 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’ (§92, **Consolidated Jurisdictional Notice**)*
- **Full-Function Joint Venture** intended to come as close as possible to resembling an autonomous company active on the market

# Criteria for Full-Function Joint Venture

- Criteria set out in Consolidated Jurisdictional Notice (CJN):
  - Must **have sufficient assets, management dedicated to its day-to-day operation, personnel and financial resources**
  - A joint venture is **not full-function** if it only takes over one **specific function** within the parent companies (i.e. limited to R&D or production)
  - Ability to conduct its **own commercial policy**
  - Commercial relationship between the joint venture and its parents: **no over-reliance on parents for purchases/sales**
  - The joint venture must be intended to operate on a **lasting basis**. A joint venture established for a short finite duration (i.e. specific project) is not considered full-function
- Numerous cases involving JVs notified over the years:
  - Newly created joint ventures
  - Acquisition of existing entities/business by two or more parties
  - Extra-EEA JV cases

# Article 3(1) EUMR v Article 3(4) EUMR

- The relationship between Articles 3(1)(b) and 3(4) has been subject to confused (and confusing) interpretation
  - Does 3(4) qualify the general application of 3(1)(b) – i.e., is the full-function criterion relevant to all acquisitions of joint control? OR
  - Does 3(4) carve-out from 3(1)(b) a sub-set of transactions (i.e., “creation” of a joint venture) to which the full-function criterion is solely applicable?
  - Does every acquisition of joint control result in the “creation” of a new JV?
- CJN says:
  - *Article 3(1)(b) provides that a concentration shall be deemed to arise where control is acquired by one or more undertakings of the whole or parts of another undertaking. The new acquisition of another undertaking by several jointly controlling undertakings therefore constitutes a concentration under the Merger Regulation. 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. (Para. 91 CJN – emphasis added)*
  - *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 fulfil the full-functionality criterion in order to constitute a concentration. (Para. 92 CJN)*

# Previous views of DG Competition

- Commission's position has not been clear
  - Informal consultations and practice not always consistent
  - Competition Policy Newsletter (2007)
    - “ ... the joint acquisition of control of another undertaking already falls under Article 3(1)(b). Only the creation of a joint venture by the parties ... falls under Article 3(4) and therefore requires that the joint venture is considered full-function”*
    - “ ... in order to fall under Article 3(1)(b) the target ... must have a current market presence whereas the qualification as “full-function” undertaking requires a more forward-looking assessment ... If joint control of an undertaking is acquired, a concentration (and a structural change in the market) arises even if, for the future, the full-functionality criterion were not to be met as the new parent companies intended to remove the target from the market”*

*Article in Competition Policy Newsletter Number 3 (2007) by Johannes Luebking (at the time Deputy Head of Unit C-5 at the Directorate General for Competition of the European Commission).*



# Acquisition of Joint Control Over an Existing Undertaking / Non-Full Function JV

## Prior to the *Austria Asphalt* case

- Creation of greenfield JVs clearly subject to full functionality criterion
- Outside 'greenfield' scenarios, i.e. acquisition of an existing entity/business: must the Article 3(4) full functionality criterion be met? Or is the test only whether there is a change of control over an “undertaking” even if this “undertaking” is not full-function?
- Lack of clarity in guidance (e.g. para. 91 CJN)
- Inconsistent Commission practice and divergences between practitioners

## CJEU judgment in Case C-248/16 *Austria Asphalt*

- Parent company proposed to sell 50% of wholly owned asphalt plant to third party (→ sole to joint control); plant's output to be sold mostly to parents (→ not full-function, **subject to review in Austria**)
- Dispute as to whether transaction fell within EUMR or Austrian merger control regime → relevance of full functionality criterion key
- *"Article 3... 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"*
- Court reasoning indicates that full-functionality should be a pre-requisite for change of control over JV to fall under the EUMR for all joint ventures

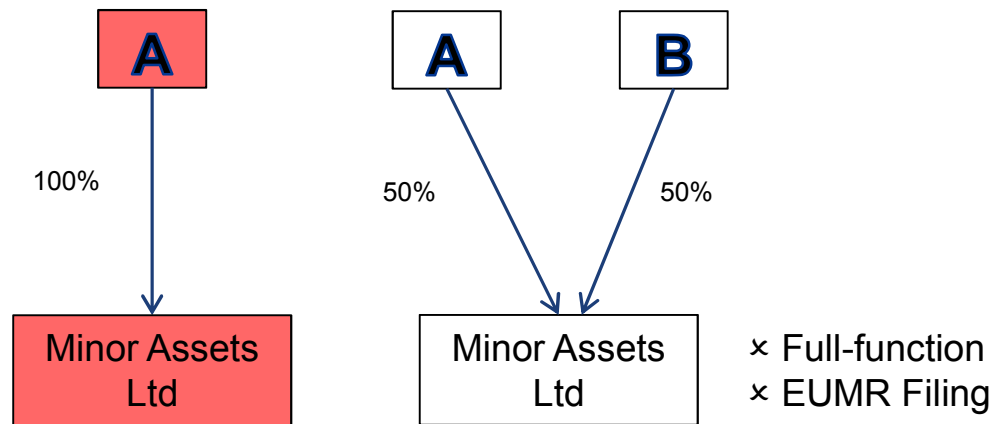
# DG COMP Official on Austria Asphalt Judgment

- In *Austria Asphalt*, the Court highlighted that EUMR applies to transactions that may have an impact on the structure of the market. Following this train of thought, four scenarios can be established:
  - First scenario, the creation of a greenfield JV falls within Article 3(4) EUMR, and requires full-functionality
  - Second scenario, where one of the parent companies contributes assets to the JV, full-functionality needs to be taken into account
  - Third scenario, replacement of a parent in a JV or addition of a parent - as long as one of the initial parent companies remains in the JV after the transaction, full-functionality is required
  - Fourth scenario, not addressed by *Austria Asphalt*, concerns the situation where the previous owner no longer controls the JV after the transaction. Two conflicting possibilities :
    - Full-functionality is required in order to be covered by the EUMR
    - Following the judgment rationale, since these cases have an impact on the economic structure of the market, they should be covered by the EUMR, without the necessity to meet the full-functionality criteria (see also Para. 91 CJN)

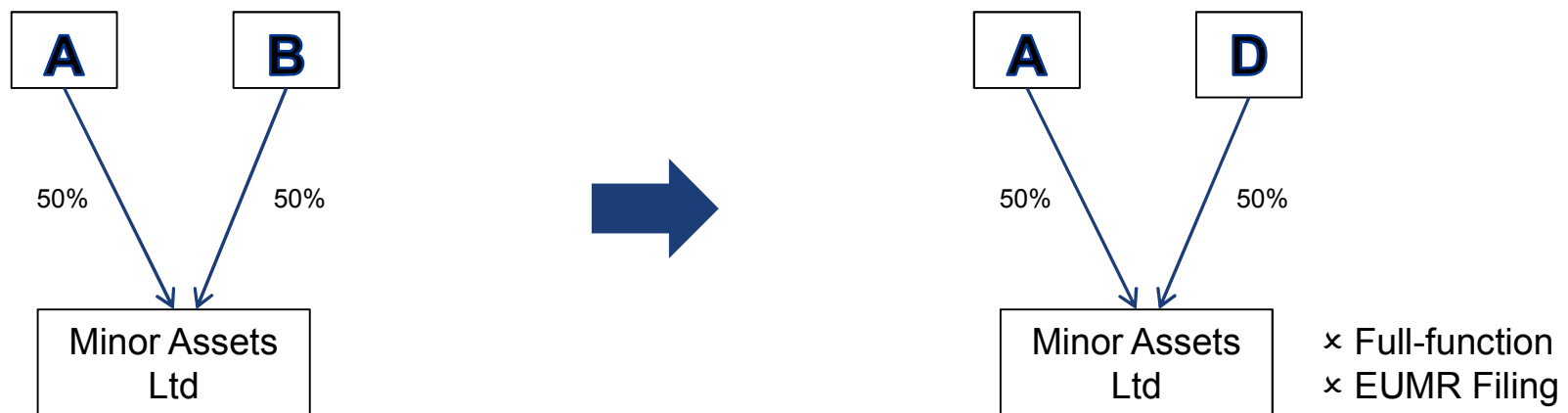
*Views expressed by the Head of Unit for coordination of merger policy at a conference in Brussels co-organised by and reported in Concurrences on 21 February 2018*

# Scenarios

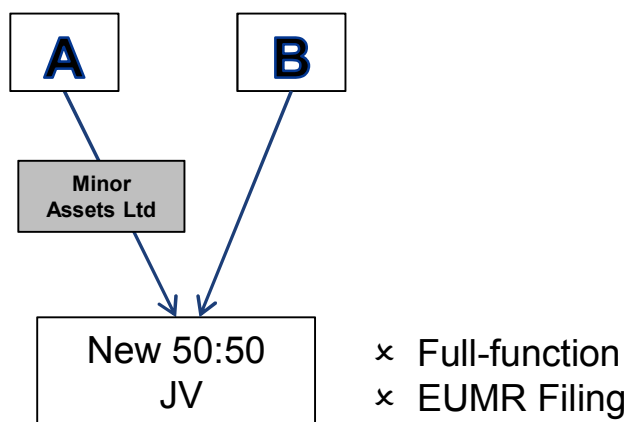
## *Austria Asphalt - Acquisition of joint control over existing undertaking*



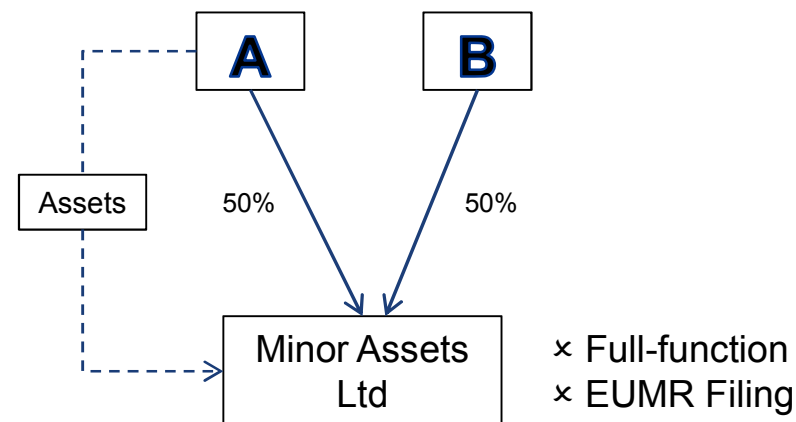
## *Replacement of parent in JV*



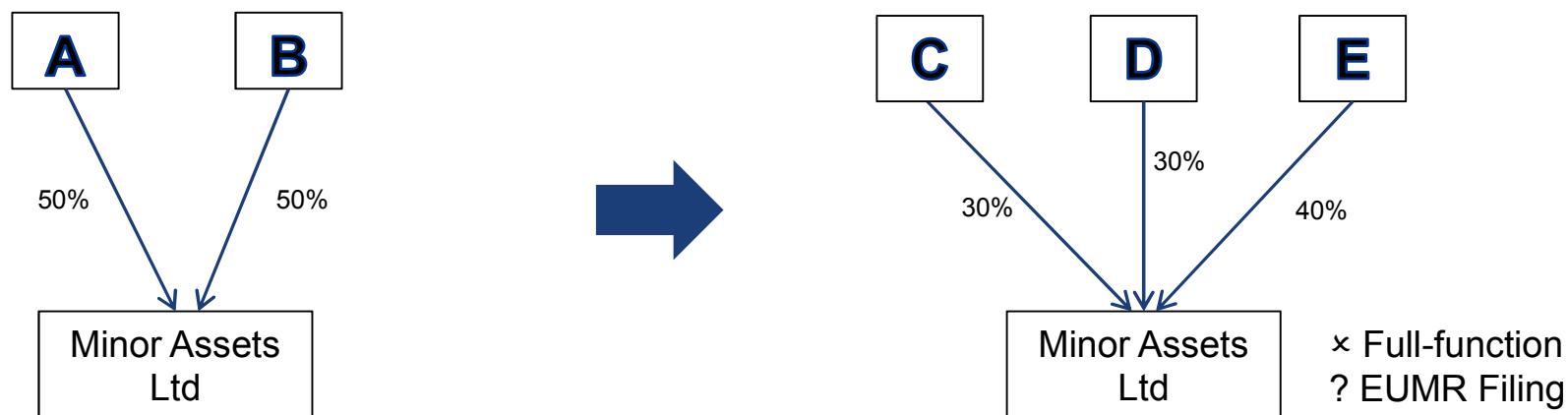
### Creation of a new joint venture



### Parent contributes assets to the JV



### Acquisition of joint control from third parties



## Conclusion – what does this mean in practice?

- Check **control** by reviewing agreements and understanding functioning of company
- Check **full-functionality** via assessment of scope/functioning of JV, interviews of business, review of agreements
- If acquisition of an **existing undertaking**, take into account *Austria Asphalt*, DG Comp's views and whole context
- Check **thresholds** (can be done first as possibly faster way to exclude)
- Often no EU filing because non-full function. In those cases often China and South Korea filing is triggered. In the EU possibly in Germany, Austria, Poland (but check effects exemptions)
- When non-full function, also check whether any competition issues under Article 101 TFEU

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