Into the Grey Zone. What Do We (Don't) Know About Types of Concentrations Between Undertakings Under EU law After *Austria Asphalt*?

by

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Abstract

In *Austria Asphalt*, the Court of Justice issued the first preliminary ruling related to the EU merger control regime. In Advocate General Kokott's words, the Austrian Supreme Court asked the Court of Justice to answer the fundamental question of what constitutes a concentration between undertakings within Article 3 of the EUMR. The Court of Justice held that Article 3 of the 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. Although the ruling was rendered in the context of a specific transaction scenario, the underlying reasoning could shed new light on how to assess transactions that fall between acquisition of control and creation of a joint venture. However, this reasoning is incompliant with the purposes and economic foundations of the EU merger control regime. This can be proven both in relation to the transaction scenario directly covered by the question for a preliminary ruling and, if extrapolated, in relation to other transaction scenarios.

Resumé

Dans l'affaire *Austria Asphalt*, la Cour de justice a rendu le premier arrêt préjudiciel relatif au régime communautaire de contrôle des concentrations. Dans les termes de l'avocat général Kokott, la Cour suprême autrichienne a demandé à la Cour de justice de répondre à la question fondamentale de la définition d'une concentration entre entreprises dans le cadre de l'article 3 du Règlement (CE) No 802/2004. La Cour de justice a jugé que l'article 3 de l'EUMR doit être interprété en ce sens qu'une concentration est réputée survenir lors d'un changement de la forme du contrôle d'une entreprise existante qui ne devient commune que si l'entreprise commune créée par une telle opération remplit de manière durable toutes les fonctions d'une entité économique autonome. Bien que la décision ait été rendue dans le contexte d'un scénario d'opération précis, le raisonnement sous-jacent pourrait jeter un nouvel éclairage sur la façon d'évaluer les opérations qui se situent entre la prise de contrôle et la création d'une co-entreprise. Toutefois, ce raisonnement n'est pas conforme aux objectifs et aux fondements économiques du régime communautaire de contrôle des concentrations. Cela peut être prouvé tant par rapport au scénario de transaction directement couvert par la question préjudicielle que par rapport à d'autres scénarios de transaction.

Key words: concentrations; EU Merger Regulation; full-function undertaking; joint venture; mergers.

JEL: K21

I. Introduction

On 7 September 2017, the Court of Justice of the European Union (hereinafter: CJEU) rendered a preliminary ruling requested by the Austrian Supreme Court. The preliminary question was limited to the assessment of a move from sole to joint control over an existing undertaking under the EU Merger Regulation (hereinafter: EUMR). However, the CJEU's reasoning could also shed new light on how to assess a more broad scope of transactions that fall within the area between acquisition of control and creation of a joint venture.

The subject matter of the paper will be a critical analysis of the judgment and, more broadly, of the rules delineating the scope of application of the EU merger control regime as decided by the CJEU's judgment. The paper will begin with a brief presentation of the facts of the case, the opinion of AG Kokott and the CJEU's judgment. A more in-depth analysis of the judgment and its possible implications will follow.

II. The case

1. Facts of the case

Austria Asphalt (Strabag group) intended to acquire a 50% stake in an asphalt plant (hereinafter: the Target) previously solely controlled by Teerag Asdag AG (Porr group). The Target's output was intended to be delivered to its parent corporate groups both prior to (that is Porr group) and post-transaction (that is Porr and Strabag group).

Austria Asphalt notified the transaction to the Austrian competition authority. The case went to the Austrian Competition Court, which decided that the transaction was within the scope of Article 3(1)(b) of the EUMR and, therefore, the transaction should be notified to the European Commission (EC). Austria Asphalt argued that the relevant provision for assessment of the given transaction was Article 3(4) of the EUMR, according to which only full function joint ventures fall within the scope of the EU merger control regime.

In light of the above, the Austrian Supreme Court decided to ask the CJEU the following question:

> '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?'

2. Opinion of AG Kokott

AG Kokott rightly pointed out that the EUMR does not provide a clear answer as to whether the full functionality requirement is applicable only where a new joint venture is created or whether it also applies to a scenario in which an existing undertaking is changed into a joint venture.[1] Therefore, AG Kokott referred to the purpose, context and drafting history of relevant provisions of the EUMR.

According to recital 20 of the EUMR, all full function joint ventures fall within the scope of the EU merger control regime and there is no distinction between newly created undertakings and existing undertakings moving from sole to joint control exercised by two undertakings. Since the general purpose of the EU merger control regime is to cover significant changes in the structure of the market, it applies only to changes of control over undertakings active, or planning to be active, on the market.

AG Kokott also rejected an EC suggestion that the conversion of a non-full-function undertaking into a joint venture can be subject to EU merger control on the basis of Article 3(1)(b) of the EUMR. This is because an acquisition of control is subject to notification only if it relates to an undertaking or a part of an undertaking, that is, units conducting economic activity understood as activity consisting in offering goods and services on a given market. Therefore, AG Kokott seems to argue that since non-full-function joint ventures are not active on the market, they are not undertakings at all and hence they are not caught by Article 3(1)(b).

AG Kokott indicated that the *ex ante* merger control regime envisaged in the EUMR relates to changes in the structure of the market and *ex post* control governed by Regulation 1/2003 relates to undertakings' behaviour on the market (coordination or collusion).[2] The dividing line between the two is the definition of concentration.[3] In view of that, full-functionality of a joint venture brings about a lasting change to the structure of the market. On the other hand, in the case of a non-full-function joint venture, there will at most

[1] Opinion of Advocate General Kokott delivered on 27 April 2017 in Case C-248/16, *Austria Asphalt GmbH & Co OG v Bundeskartellanwalt*, ECLI:EU:C:2017:322, para. 24 and paras. 27–43.

[2] *Ibidem*, para. 36.

[3] *Ibidem*, para. 37.

be a need to deal with any coordination by the two parent companies of their behaviour on the market as part of their collaboration within the joint venture. Therefore, the former should be governed by the EUMR, while the latter should be within the scope of Regulation 1/2003.[4]

With respect to the EUMR drafting history, AG Kokott noted that cooperation between undertakings which, although leading to the creation of a joint venture, absent the joint venture's market presence, has never been subject to the EU merger control regime.[5]

Taking into account the above, AG Kokott recommended the CJEU to answer that the move from sole to joint control is subject to EU merger control regime only if the Target is fully functional.

3. Judgment of the CJEU

The CJEU answered that a change of control over an existing undertaking which, previously exclusively controlled, becomes jointly controlled, is subject to the EU merger control regime only if the joint venture created by such a transaction is fully functional. The CJEU agreed that the wording does not give a clear answer to the question asked by the Austrian Supreme Court, so there is a need to refer to the purpose and general structure of the law.

The CJEU agreed with AG Kokott's opinion that recitals to the EUMR do not draw a distinction between newly created undertakings and existing undertakings in which control is changed from sole to joint.[6] In the CJEU's view this is because the effects on the structure of the market – control of which is the purpose of the EUMR – depends on the actual emergence of a joint venture on the market (that is, only when a joint venture is fully functional).[7]

According to the CJEU, the constituent element of the concept of concentration under Article 3(1)(b) of the EUMR is not the creation of an undertaking, but a change in control of an undertaking.[8] In the CJEU's view, a converse interpretation would lead to an unjustified difference in treatment between, on the one hand, newly created undertakings which would be subject to notification only if fully functional, and, on the other, existing undertakings

[4] *Ibidem*, para. 38.

[5] *Ibidem*, para. 43.

[6] Judgment of 7 September 2017, Case C-248/16 *Austria Asphalt GmbH & Co OG v Bundeskartellanwalt*, ECLI:EU:C:2017:643, para. 23.

[7] *Ibidem*, para. 24.

[8] *Ibidem*, para. 26.

which would be covered by the EUMR irrespective of whether, once the transaction is completed, they were fully functional.[9]

Therefore, Article 3(4) must be interpreted as referring to the creation of a joint venture, that is, a transaction as a result of which an undertaking controlled jointly by at least two other undertakings emerges in the market, irrespective of whether that undertaking, now jointly controlled, existed prior to the transaction.[10]

The CJEU also noted that the opposite interpretation would be contrary to Article 21(1) of the EUMR, because it would effectively extend the scope of *ex ante* control over transactions which lack the ability to have an effect on the structure of the market in question, and, at the same time, it would limit the scope of Regulation 1/2003.[11]

III. Analysis of the judgment and the subject matter

1. Introduction. Foundations of EU merger control regime

The economic foundations of merger control regimes in general are based on the SCP paradigm (structure-conduct-performance) that was developed in the 1950s (Lindsay and Berridge, 2012). According to this paradigm, the market environment has a direct impact on market structure (the number of units active on the supply and demand side of the market, barriers to entry, cost structures, product differentiation, etc.). Consequently, market structure directly influences a firm's economic conduct (in terms of pricing and output decisions, advertising and product differentiation, research and development, collusion, etc.). This in turn affects market performance (consumer welfare, total welfare, efficiency and firm profitability). Although this paradigm has been subject to criticism in economics, the idea that market structure impacts market performance remains useful (Lindsay and Berridge, 2012).

In economics, there is no single definition of market structure, but in general the concept of market structure (or market form) describes the state of the market with respect to competition (Satija, 2009). The main *differentia specifica* between different model market structures (monopoly, oligopoly or perfect competition) is, *inter alia*, the number of firms active on the market

[9] *Ibidem*, para. 27.
[10] *Ibidem*, para. 28.
[11] *Ibidem*, para. 34.

and their market power.[12] The rule of thumb is that the greater the number of independent firms active on the market (each having more or less equal market power), the less there is of a risk of anti-competitive practices occurring. Thus, merger control should cover actions that lead to a concentration of market power or, in other words, to a move on the spectrum between monopoly and competitive market structures.

However, firms may gain market power and, therefore, change the market structure via external or internal growth strategies. Internal growth strategies focus, for example, on achieving a technological advancement, growth in financial resources or strategic advantages obtained through expansion of a distribution network (Rosenthal and Thomas, 2015). Such growth strategies are presumptively based on efficiencies and they are in compliance with the mechanism of competition (ICN, 2017, p. 1). If such growth strategies push some firms out of the market, it is presumably because these firms are not as efficient and competitive as others. In such a case, the decision to push competitors out of the market is made by consumers via a competitive mechanism, which is considered a socially desirable outcome.

On the other hand, external (inorganic) growth strategies are focused on increasing output or business reach with the aid of resources and capabilities that are not internally developed by the economic unit itself, but obtained through concentration of previously independent units, that is, M&A transactions (Rosenthal and Thomas, 2015). Mergers may generate efficiencies, but they may also create or enhance market power (Lindsay and Berridge, 2012). One of the reasons why firms engage in mergers is to create a state of the market that enables them to increase their profit at the expense of competition. Such growth strategies may therefore undermine the competitive mechanism.

The law seems to deal with this problem by identifying external growth strategies with corporate reorganizations. Both the preamble of the Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings (hereinafter: Regulation 4064/89) and recital 3 of the EUMR specify that concentrations subject to notification are particular forms of corporate reorganizations. In this context, the legal concept of corporation (or rather corporate group/single economic unit) is tantamount to the economic concept of the firm. In other words, the decisive influence standard used to define a single economic unit under EU law (see for instance, Moisejevas and Urbonas, 2017) and the concept of hierarchy used to define what constitutes

[12] In simplified terms, the fewer firms active on the market, the greater the market share (and market power) of each firm. Of course, there are exceptions to this rule and e.g., highly concentrated markets (i.e. markets in which there are few market players) may be contestable if there are no barriers to entry or exit, limiting the incumbent firms' ability to raise their prices above competitive levels, and consequently limiting their market power.

the firm (Coase, 1937; Williamson, 2012), and, consequently, structure of the market, are opposite sides of the same coin.

The initial attempts at the European level to create a merger control regime suggest that corporate reorganizations leading to a change to market structure – in particular decreasing the number of independent market players – has been at the heart of the concept of concentration. In this context, it must be noted that the roots of the merger control regime within the European Economic Community (ancestor of the EU) can be traced back to 1960s. In 1966, the EC Commission published Memorandum on the Problem of Industrial Concentration in the Common Market concluding that Article 85 of the EEC Treaty prohibiting restrictive agreements (and concerted practices) governing market behaviour was not applicable to concentrations. According to the Memorandum, the concept of concentration covered situations where 'several firms are brought together under a single economic management at the expense of their economic independence' (as cited in: Banks, 1987, p. 258).

The Commission's efforts to create a specific regime dedicated to the control of concentrations have finally borne fruit in the late 1980s when Regulation 4064/89 was adopted. The preamble of Regulation 4064/89 may serve as another confirmation that the purpose of the EU merger control regime from its beginning was to focus on structural aspects of business activity, as opposed to instruments concerning behavioural aspects (that is, prohibition of restrictive agreements and abuse of dominant position) that were already in the competition policy toolbox. According to the recitals of the Regulation, it 'should apply to significant structural changes'. Furthermore, 'it is appropriate to define the concept of concentration in such a manner as to cover only operations bringing about a durable change in the structure of the undertakings concerned'.

However, Regulation 4064/89 and the EUMR specified that notification to the European Commission is required only for certain types of structural operations (concentrations). In particular, a notifiable concentration arose where a change of control on a lasting basis resulted from (i) the merger of two or more previously independent undertakings or parts of undertakings (Article 3(1)(a) of Regulation 4064/89 and Article 3(1)(a) of the EUMR) or (ii) 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(1)(b) of Regulation 4064/89 and Article 3(1)(b) of the EUMR). Since the adoption of Regulation 4064/89, the EU merger control regime has aimed to cover structural operations (concentrations), while purely behavioural

practices remained subject to the prohibition of anticompetitive agreements and abuse of a dominant position.

Against this background, the creation of a joint venture has always been a type of transaction that was hard to classify. Regulation 4064/89 tried to resolve this problem by stipulating that only joint ventures that performed on a lasting basis all the functions of an autonomous economic entity and that did not lead to coordination of the competitive behaviour of undertakings would fall under the scope of the merger control regime. This created separate rules for concentrative joint ventures, which were subject to the merger control regime, and cooperative joint ventures, which were subject to the prohibition of anticompetitive practices and abuse of a dominant position. The distinction was criticized, *inter alia*, because it did not provide quick and predictable outcomes (Hawk, 1991; Hawk and Huser, 1993; Kirkbride and Xiong, 1998; Askola, 2012). In order to increase legal certainty, the European Commission issued several subsequent notices.[13] Later on, Regulation 4064/89 was amended[14], and it was followed by a new notice issued by the European Commission.[15] Consequently, the concentrative-cooperative dichotomy used for jurisdictional purposes was replaced with the rule according to which all full-function joint ventures were covered by the notification requirement.

The jurisdictional test based on the concept of full-functionality continued to exist under the EUMR[16], which replaced Regulation 4064/89, and the corresponding new notice.[17] According to Article 3(4) of the EUMR 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 Article 3(1)(b) of the EUMR. The EUMR also contained recitals highlighting the role of the structure of the market in defining the scope of the notification requirement. These include, in particular, recital 8 stating that provisions of the EUMR 'should apply to significant structural changes' and

[13] Notice regarding the concentrative and co-operative operations under Council Regulation (EEC) No. 4064/89 of 21 December 1989 on the control of concentrations between undertakings, OJ L 395, 30.12.1989, p. 1–12; Notice on the distinction between concentrative and co-operative join ventures under Council Regulation (EEC) No. 4064/89 of 21 December 1989, on the control of concentrations between undertakings, OJ C 385, 31.12.1994, p. 1–5.

[14] Council Regulation (EC) No. 1310/97 of 30 June 1997 amending Regulation (EEC) No. 4064/89 on the control of concentrations between undertakings, OJ L 180, 9.7.1997, p. 1–6.

[15] Commission notice on the concept of full-function joint ventures under Council Regulation (EEC) No. 4064/89 on the control of concentrations between undertakings, OJ C 66, 2.3.1998, p. 1–4.

[16] Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.1.2004, p. 1–22.

[17] Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ C 95, 16.4.2008, p. 1–48.

recital 20 stating that '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.'[18]

It must be noted that impact on the market structure has not always been coherently considered as a decisive factor when taking into account whether a transaction constitutes a notifiable concentration, in particular where it was difficult to sufficiently define the transactions in question for the purposes of mandatory *ex-ante* notification.[19] However, even in such instances, the role of market structure for the delineation of the scope of the notification requirement has not been rejected.

In light of the above, the concept of market structure has only an indirect impact on the scope of the notification requirement under Article 3 of the EUMR as it may be considered an additional factor that should be taken into consideration during the interpretation of the concept of concentration, for example under Article 3(4) of the EUMR. Such interpretation is consistent with the CJEU's approach presented in the analyzed judgment.[20]

The EUMR does not provide a legal definition of what constitutes market structure. Neither the CJEU nor AG Kokott delivered a comprehensive definition of this concept. Nonetheless, based on the judgment and the opinion, market structure seems to be considered as solely the number of undertakings offering goods or services on a given market. The above conclusion may be inferred from the fact that, in the context of the creation of a joint venture, the CJEU notes that '(…) as regards its effects on the structure of the market, the realization of such effects depends on the actual emergence of a joint venture into the market (…)'.[21] Further, AG Kokott states that 'if an establishment does not have an autonomous presence on the market, it follows that any

[18] As a side note, the market structure is not only considered as a part of the process of defining the scope of the application of the merger control regime, but it is also taken into account within substantive assessment of mergers. This has been suggested in recitals to Regulation No. 4064/89 and the EUMR (which specified that it is necessary 'to permit effective control of all concentrations' in terms of 'their effect on the structure of competition') and confirmed in Art. 2(1)(a) of the Regulation No. 4064/89 and Art. 2(1)(a) of EUMR (which specified that 'the structure of all the markets concerned' is also one of the factors taken into account within the substantive assessment of concentration).

[19] European Commission, Green Paper on the Review of Council Regulation (EEC) No. 4064/89, Brussels, 11.12.2001COM(2001) 745 final, para. 101,

[20] Case C-248/16 *Austria Asphalt GmbH & Co OG v Bundeskartellanwalt*, paras. 21–22 and 24–25. In particular, in para. 25, the CJEU states that 'Article 3 of the regulation therefore concerns joint ventures only in so far as their creation provokes a lasting effect on the structure of the market'.

[21] Case C-248/16 *Austria Asphalt GmbH & Co OG v Bundeskartellanwalt*, para. 24.

change in the control structure of that establishment cannot have the effect of changing the structure of the market'.[22]

At first glance, it may seem that this approach is not completely without merit. As presented above, the number of undertakings active on the market seems to be a good proxy of what market structure means in economic terms. The number of market participants clearly differs in different model market structures (monopoly, oligopoly, perfect competition) and simplified classification of different market structures via the number of market participants is also used in economics textbooks (see e.g., Mankiw, 2011).

However, the crucial element of the above model market structures is that market players have market shares, translating into market power, that are specific to this model market structure. For example, a given market in which many undertakings operate may still be considered as oligopoly, if only a few of these market players gain a large proportion of the market share. The fact that many other small players also operate on this market is not relevant, because their impact on the competitive environment is negligible.

Therefore, it can be argued that the CJEU's position is an oversimplification of the economic foundations of the EUMR. On the other hand, one may argue that the fact that addressees of the obligation to notify a concentration to a competition authority should be easily aware of that obligation speaks in favour of the CJEU's reasoning. Defining the boundary between what is and what is not a notifiable transaction requires a balancing process between fulfilling the economic purpose of merger control and clarity of the law. Defining a concentration has a purely jurisdictional function so the necessity to provide clear cut rules is more important when compared to substantive analysis of a concentration, where a more nuanced economic analysis may play a greater role.[23]

There is a self-evident need to provide clear cut jurisdictional rules. However, the CJEU's position leads to an imbalance between the economic purpose of the EUMR and the clarity of the law. A proper balance should take into account at least each undertaking's market position vis-à-vis its competitors, reflected in the form of market shares, and possibly other elements as well such as internal production capacity. On the other hand, it is clear that some elements which, from the economics point of view, could be considered as constituting market structure (for example, passive minority shareholding not amounting to control) clearly do not fit the existing definition of concentration. These elements can be analysed as part of a substantive assessment in merger

[22] Opinion of Advocate General Kokott delivered on 27 April 2017 in case C-248/16, *Austria Asphalt GmbH & Co OG v Bundeskartellanwalt*, para. 31.

[23] The importance of legal safety in the context of defining concentration is considered e.g. in Hawk, 1991; Morais, 2013; McDermott Will & Emery Report, 2018.

control, but they should not constitute a legal concept of market structure for jurisdictional purposes.[24] To sum up, following the judgment it is still unclear how to understand the concept of market structure under the EUMR and more comprehensive guidance on that matter would be welcome.

2. Which transactions involving joint ventures may impact market structure?

The next step in the analysis is to consider which transactions involving joint ventures may impact the structure of the market. As part of the analysis, insight might be gleaned from answering the following questions:

(a) Does the jointly controlled unit (joint venture) exist prior to the transaction? Or is it a 'newly created' unit?
(b) Is the jointly controlled unit (joint venture) fully functional:
  (b1) pre-transaction?
  (b2) post-transaction?

The answers to these three questions impact the assessment of whether the transaction might have an effect on the structure of the market. These questions give rise to several scenarios, as presented in Table 1 below.

Table 1. Scenarios of transactions consisting of the creation of a jointly controlled unit

Scenario no.	(a) Does the unit exist pre-transaction?	(b) Is the unit fully functional:	
		(b1) pre-transaction?	(b2) post-transaction?
1.A.	No	N/A	Yes
1.B.		N/A	No
2.A.	Yes	Yes	Yes
2.B.		Yes	No
2.C.		No	Yes
2.D.		No	No

Source: Own research.

Although the Austrian Supreme Court's preliminary question relates directly only to a specific scenario, that is, a transaction resulting in a move from sole to joint control over an existing non-full-function undertaking (scenario 2.D as per table above), the CJEU in its judgment gave some more general guidance

[24] See e.g. European Commission decision of 13 July 2005, COMP/M.3653 – *Siemens/VA Tech*.

on how to define the concepts of acquisition of control (Article 3(1)(b) of the EUMR) and creation of a joint venture (Article 3(4) of the EUMR).

In my view an approach that is more compliant with the EU merger control regime's purpose is to interpret Article 3(1)(b) and Article 3(4) of the EUMR in such a way that Article 3(1)(b) of the EUMR (if applied alone) would cover only changes of control between existing undertakings (scenarios 2.A-D. in Table 1) while Article 3(4) of the EUMR would refer only to the creation of a new economic unit (new market player – scenario 1.A–B. in Table 1). According to this interpretation, the dividing line between acquisition of control and creation of a joint venture would be delineated by the prior existence of the Target.[25]

This interpretation was, however, expressly rejected by the CJEU. In the CJEU's view, it would lead to an 'unjustified difference in treatment' between newly created undertakings (to which the full-functionality criterion would apply) and existing undertakings (to which the full-functionality criterion would not apply).[26] Therefore, according to the CJEU, the prior existence of the undertaking is meaningless[27] and the decisive factor is 'the actual emergence of a joint venture into the market'.[28]

3. Critical analysis of the CJEU's position on the boundary between Article 3(1)(b) (acquisition of control) and Article 3(4) of the EUMR (creation of a joint venture)

As regards the above, the CJEU's judgment has a number of shortcomings. First and foremost, contrary to the CJEU's statement, the difference between newly created joint ventures and existing undertakings is justified and the assessment of the full-functionality criterion post-transaction makes sense only if applied to new economic units. This is because change to the structure of the market (understood as at least the number of units offering goods or services on the market) resulting from the creation of a new economic unit occurs only if the unit will have a significant presence on the market post-transaction. With respect to such units, analyzing the Target's pre-transaction situation does

[25] By a newly created unit (a unit that existed prior the transaction), I mean not only a unit that did not formally exist (e.g. that was not registered in the relevant commercial register) but also a unit that has existed but there will be a material change to the scope of its activity as a consequence of the transaction. In other words, I apply a material, not a formal, criterion of what is 'new'.

[26] Case C-248/16, *Austria Asphalt GmbH & Co OG v Bundeskartellanwalt*, para. 27.

[27] *Ibidem*, para. 28.

[28] *Ibidem*, para. 24.

not make sense, because of its prior non-existence. For the same reason, the creation of a new joint venture and acquisition of control over an undertaking are also treated differently in terms of calculation of turnover for the purposes of assessment of the community dimension.[29]

On the other hand, when existing undertakings are concerned, a change to the structure of the market may also occur if the economic unit will not be active on the market post-transaction. For example, in scenario 2.B. the transaction would lead to pushing an active market participant out of the market. Although this seems to have an obvious impact on the structure of the market, the CJEU's judgment excludes such transactions from the scope of EU merger control, because it does not lead to the emergence of a new market player (Mayr, 2017).

The discrepancy between the impact of the transaction on the number of units active on the market as a result of the transaction and the CJEU's approach with respect to possible scenarios was summarized in Table 2 below.

Table 2. Impact of the transaction on the number of units active on the market as a result of the transaction and its assessment under the CJEU's Austria Asphalt criteria

Scenario no.	Impact of the transaction in terms of number of units active on the market	Based on the criteria provided by CJEU, is it subject to a notification?	Is the CJEU's approach coherent with the EUMR's aim to control changes in market structure defined as only the number of units active on the market?
1.A.	+1 unit on the market	Yes	Yes
1.B.	No change in number of units active on the market	No	Yes
2.A.	Possibly -1 unit on the market	Yes	Yes
2.B.	Possibly -1 unit on the market	No	No
2.C.	Possibly +1 unit on the market	Yes	Yes
2.D.	No change in number of units active on the market	No	Yes

Source: Own research.

[29] See European Commission, Consolidated Jurisdictional Notice, paras. 139–140.

4. Critical analysis of the presented proposal of the boundary between Article 3(1)(b) (acquisition of control) and Article 3(4) (creation of a joint venture) of the EUMR

Furthermore, it must be analyzed whether the interpretation of Article 3(1)(b) and Article 3(4) of the EUMR that is endorsed by the author of this paper (that is, that Article 3(4) refers only to newly created undertakings while Article 3(1)(b), if applied alone, covers only existing undertakings) could lead to imposing an obligation to notify transactions that involve acquisition of control over non-full-function undertakings (as in the *Austria Asphalt* case).

In light of AG Kokott's opinion, the above transaction would seem not to fall within the scope of acquisition of control over an undertaking or part of an undertaking under Article 3(1)(b) EUMR, because the non-full-function entity does not fall within the scope of the term 'undertaking'. It is noteworthy that AG Kokott seems to equate lack of full functionality of the joint venture with its complete absence from the market. To this end, she indicates that non-full-function joint ventures do not pursue economic activity, understood as offering goods and services on the market, which translates into not being an 'undertaking'.

The above argument seems to be wrong for at least the following reasons. Firstly, it must be noted that a joint venture may be considered a non-full-function entity even if it offers goods and services on the market. According to the EC's Consolidated Jurisdictional Notice, when assessing a joint venture's full functionality one must take into account the proportion between sales of goods and services to third parties and to parent companies.[30] Therefore, if a joint venture makes sales on the market it does not automatically mean that it is outside of the scope of the concept of non-full-function joint venture. It can be a non-full-function entity if its sales are not significant when compared to its total sales. Secondly, if a joint venture is non-full-function, it does not mean that it could not be considered as a part of a single economic unit consisting of that joint venture and its parents.[31] Therefore, acquisition of such a joint venture could fall within the scope of Article 3(1)(b) of the EUMR.

Nevertheless, does acquisition of joint control over a non-full-function undertaking have any impact on the structure of the market? This depends on the understanding of the structure of the market. Under a narrow interpretation of the structure of the market, according to which the market structure is determined only by the number of undertakings – acquisition of control over a non-full-function undertaking is meaningless.

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[30] European Commission, Consolidated Jurisdictional Notice, paras. 98–99.

[31] For a further analysis regarding the single economic unit in the context of joint control see: Jones, 2012.

However, under a broader possible interpretation of the structure of the market (understanding market structure as not only the number of undertakings active on the market but also, for instance, their relative market power, production capacity etc.), it may be argued that acquisition of such an undertaking has at least a potential impact on market structure. For example, let us assume that the non-full-function undertaking has a valuable input which is necessary to be competitive on the market (for instance a factory), but this undertaking is not directly active in the market (for example it sells all its production to its parent company, which then sells it on the market). In such case, the relationship between acquisition of assets and impact on the market structure is more indirect, but it can lead, for instance, to foreclosure of the competitors of the undertakings participating in the transaction. Thus, the above example clearly shows that acquisition of joint control over a non-full-function undertaking that existed prior to the concentration may have an impact on the competitive structure of the market. In light of the above, again, the full-functionality requirement should be applicable only to new undertakings.

The CJEU's judgment may also create an unjustified different regime for transactions that involve change from sole to joint control over an existing undertaking when (x) the undertaking acquiring joint control joins a previously solely controlling parent company and (y) the undertakings acquire joint control over a company that was previously controlled by a third party. In the CJEU's view, scenario (x) is considered not a mere acquisition of control (that is, a transaction to which only Article 3(1)(b) applies) but as the creation of a joint venture (that is, a transaction to which both Article 3(1)(b) and Article 3(4) of the EUMR apply). Therefore, the full-functionality criterion applies to such transactions. On the other hand, although the concept of the creation of a joint venture presented by the CJEU is very broad, it seems not to cover situations as in scenario (y) (Reiss, 2017).

Table 3. Scenarios of transactions consisting of acquisition of joint control over the Target

Scenario no.	Pre-transaction	Post-transaction	Based on the criteria provided by the CJEU, is it subject to notification?
X	A solely controls Target	A and B jointly control Target	Yes, if Target is fully functional (Article 3(1)(b) and Article 3(4) of the EUMR apply)
Y	C solely controls Target	A and B jointly control Target	Yes, irrespective of whether Target is fully functional (only Article 3(1)(b) the EUMR apply)

Source: Own research; Reiss, 2017.

However, although the CJEU's judgment seems to create such different regimes for similar transactions, it does not provide any arguments that may justify this difference. There is probably no good reason for such differentiation.[32] Taking into account the above, both scenarios should be analysed under the same standard, namely as an acquisition of control to which Article 3(4) of the EUMR does not apply.

IV. Summary

The area between acquisition of control under Article 3(1)(b) of the EUMR and creation of a joint venture under Article 3(4) of the EUMR has been, until the *Austria Asphalt* case, a grey zone. Does it remain so after the judgment? The judgment was directly related to the specific scenario raised in the preliminary question, that is, the move from sole to joint control over an existing non-full-function entity. Therefore, it left open many questions regarding the assessment of the transaction under the EUMR. However, the CJEU's reasoning included in the judgment could be extrapolated to other transaction scenarios as presented above. Nevertheless, as was presented in the paper, the CJEU's reasoning has many shortcomings and is incompliant with the purposes and economic foundations of the EU merger control regime. Therefore, it seems that the CJEU's position may need to be revised in the future.

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