

# Gun jumping vs transaction object

- «implementation»  $\cong$  «concentration»
  - C-633/16, EY
- «concentrations have the following characteristics in common: where before the operation there were two distinct undertakings for a given economic activity, there will only be one after it.»
  - T-411/07, Aer Lingus
- Concentration object = «undertaking»

## «undertaking» = «full function undertaking»?

- “the conversion of a non-full-function undertaking into a joint venture cannot be subjected to EU merger control on the basis of Article 3(1)(b) of the Merger Regulation”
- “in order for an operation to constitute a concentration within the meaning of the general definition of that term given in that provision, it must give rise to a lasting change in the control of an *undertaking* or *part of an undertaking*.”
- “the concept of undertaking must be interpreted functionally and encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed.”
- “Since an economic activity is in turn understood to mean any activity consisting in offering goods and services on a given market, joint ventures *without* an autonomous market presence — in other words, without full functionality — are by definition not caught by Article 3(1)(b) of the Merger Regulation.”

AG Kokott, C-248/16, Austria Asphalt

# Implications for NCA's and DG Comp's merger control and gun jumping practices?

- Konkurransetilsynets veiledning om overføring av næringseiendom og begrepet «foretakssammenslutning», 7. september 2005.
  - «Overføring av næringseiendom med tilknyttede leieavtaler vil som et klart utgangspunkt være å anse som en foretakssammenslutning.»
- V2014-3, Norgesgruppen ASA
  - Overtakelse av leiekontrakter til butikklokaler mv utgjør en foretakssammenslutning
- DG Comp (Jurisdictional notice)
  - «The transfer of the client base of a business (...) if this is sufficient to transfer a business with a market turnover.»
  - «A transaction confined to intangible assets such as brands, patents or copyrights may also be considered to be a concentration»
  - Outsourcing transactions: «The situation may be different if the outsourcing service supplier, in addition to taking over a certain activity which was previously provided internally, is transferred the associated assets and/or personnel. A concentration only arises in these circumstances if the assets constitute the whole or part of an undertaking, i.e. a business with access to the market.»

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- V2014 (Kommisjonen) ASA
  - Overtaker av virksomhet i flere lokaler mv utgjør en foretakssammenslutning
- DG Comp (Jurisprudence)
  - «The transfer of the client base, if this is sufficient to transfer a business with a market turnover, is a concentration.»
  - «A transaction confined to intangible assets such as patents or copyrights may also be considered to be a concentration.»
  - Outsourcing transactions: «The situation may be a concentration if a service supplier, in addition to taking over a certain activity, also transfers internally provided assets and/or personnel. Concentration only arises in these circumstances if the assets constitute the whole or part of an undertaking, i.e. a business with access to the market.»

Unless transaction object = (FF) «undertaking»