



**UiO** • **Institutt for privatrett**  
Det juridiske fakultet

## **The criterion of «full functionality» in EUMR art. 3(4)** **– *Implications and scope of application***

Nordic Academic Network for Competition Law  
Reykjavik, 31 January – 1 February 2019  
Eirik Østerud, University of Oslo



# JUR5310 EU Competition Law (UiO)

## Mock Exam

“The oil&gas group of companies QX and Clam discussed a business plan whereby they were to transfer their respective portfolios of operational fuel stations to a 50:50 owned joint venture company named Clam-X. The joint venture was to independently operate all retail operations for the parent undertakings, and would have the ability to source fuel also from third-parties.”

*Q: Discuss whether the establishment of the joint venture should be considered a concentration under the EUMR*

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# JUR5310 EU Competition Law (UiO)

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*Art. 3(4) EUMR – creation of FF JV*

*Art. 3(1)(b) EUMR – acquisition of joint control of “undertaking(s)”*

*Art. 3(1)(a) EUMR – merger between “undertakings”*

- 1. Introduction**
2. Full-functionality – Merger control implications
3. Full-functionality – Antitrust implications
4. Full-functionality – Austria Asphalt (CJEU 2017)
5. Full-functionality – Scope of application post Austria Asphalt

## Art. 3 EUMR – Definition of concentration

- Art. 3(1)
  - A concentration shall be deemed to arise where a change of control on a lasting basis results from:
    - (a) the merger of two or more previously independent undertakings (...), or
    - (b) the acquisition, by (...) one or more undertakings (...) of direct or indirect control of (...) one or more other undertakings.
- Art. 3(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).

# Austria Asphalt (CJEU 2017)

- “Article 3 [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.”
  - C-248/16, Austria Asphalt v Bundeskartellanwalt

# Questions

- 1) Full-functionality – merger control implications
- 2) Full-functionality – antitrust implications
- 3) Full-functionality – Austria Asphalt (CJEU 2017)
- 4) Full-functionality – scope of application post Austria Asphalt

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# “Undertaking”, “concentration”, & full- “functionality”

- “Undertaking”
  - Economic activity & economic entity
- “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)
  - Mergers between “undertakings”
  - “Undertakings” AoCs over “undertakings”
  - Creation of FFJVs
- Full-functionality - operational vs strategic autonomy (T-282/02)
  - Internal resources
  - External market relations

# Concentration vs full-functionality

- FF-requirement only for JVs not from mergers&AoCs
  - Greenfield JVs & asset transfers (no change of control of existing “undertaking”)
  - Narrow scope of application art. 3 (4) EUMR
  - Broader concept of concentration
- FF-requirement also for (some) mergers&AoCs?
  - Broader scope of application art. 3 (4) EUMR
  - Narrower concept of concentration (some mergers&AoCs not concentrations)

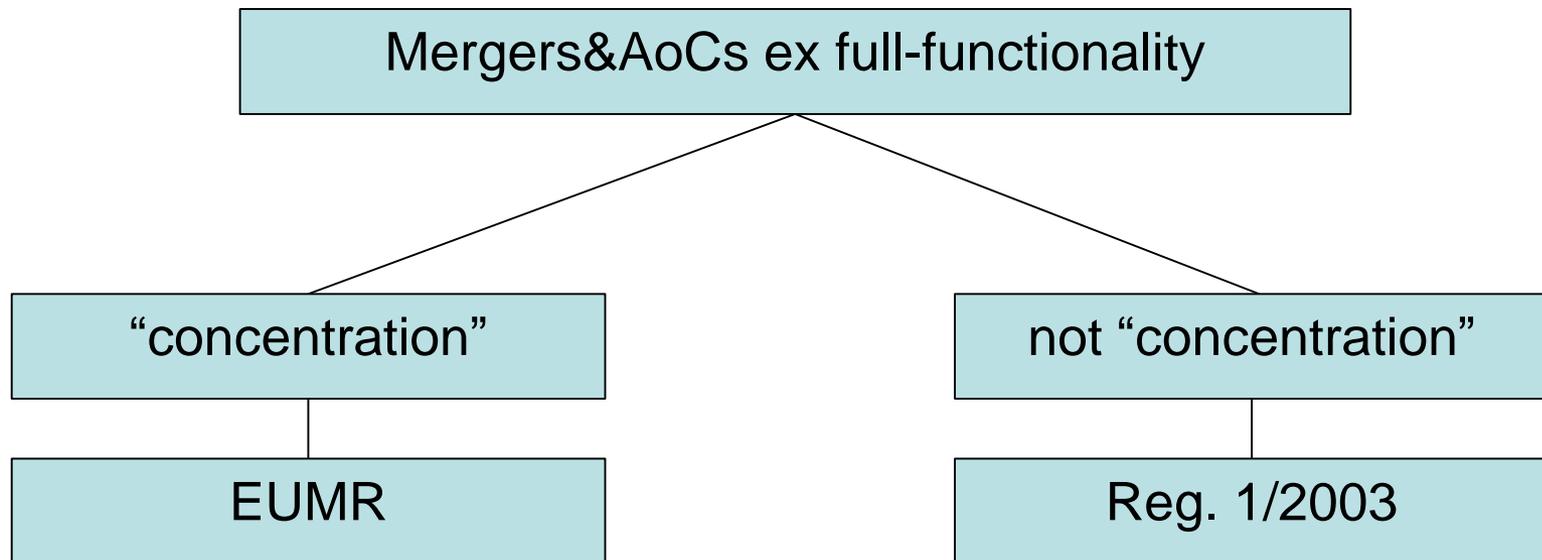
# EUMR vs full-functionality

- Jurisdiction, competence & intervention, EUMR art. 1 and 2
  - “concentrations”
- Notification obligation, EUMR art. 4
  - “concentrations”
- Notification content, FORM CO section 10
  - “In the case of a joint venture, for the purpose of Article 2(4) (...) answer the following (...)”
- Implementation prohibition, EUMR art. 7
  - “a concentration is implemented only by a transaction which, in whole or in part, in fact or in law, contributes to the change in control of the target undertaking” (C-633/16, EY)
- Fines, EUMR art. 14
  - E.g. case M.7993 - Altice /PT Portugal (EUR 125 mill)

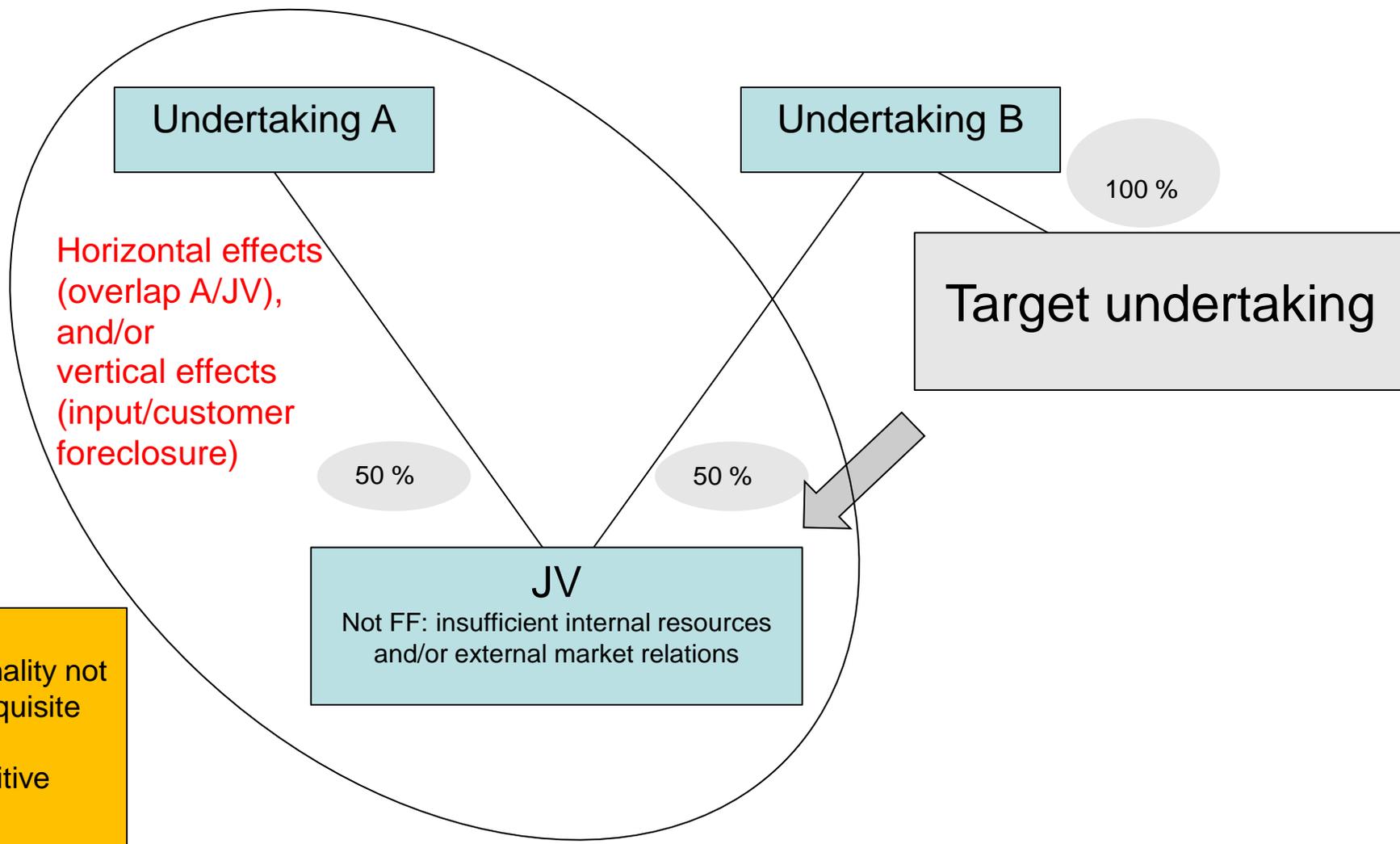
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# Antitrust enforcement competence vs full-functionality

- EUMR art. 21(1): “This Regulation alone shall apply to concentrations as defined in Article 3, and Council Regulation 1/2003 (...) shall not apply (...)”



# Anticompetitive mergers & AoCs ex full-functionality



# Art. 102 vs full-functionality

- Transactional “abuse” (6/72, Continental Can)
- Strengthening vs creation of dominance
- Mergers&AoCs – if not concentrations due to lack of full-functionality - creating dominance - are **not** covered by art. 102

# Art. 101 vs full-functionality

- Mergers&AoCs not the result of coordination (agreements & concerted practices) between undertakings
  - Passive AoCs
  - Acquisitions from physical persons
  - Stock exchange transactions
  - SPAs (buyer and seller), resulting in anti-competitive effects (buyer and target)
- Post-implementation application 101
  - Undertaking=single economic entity
  - Mergers&AoCs: separate undertakings->one undertaking
  - Negative/joint control vs 101
    - Concentration / parent liability / block exemptions / 101
- Mergers&AoCs – if not concentrations due to lack of full-functionality – creating anti-competitive effects – but no coordination between independent undertakings – are **not** covered by art. 101

# Antitrust vs full-functionality

- If full-functionality is an additional requirement for (some) mergers&AoCs to qualify as “concentration”
- Then ex post antitrust (reg. 1/2003), not ex ante merger control (EUMR) enforcement
- But substantive reach shortcomings applying TFEU art. 101 & 102 to anticompetitive mergers&AoCs
- Enforcement “gap”?
  - anti-competitive mergers&AoCs not qualifying as “concentrations” due to post-transaction non-full-functionality
- Step towards pre EUMR (1989)?

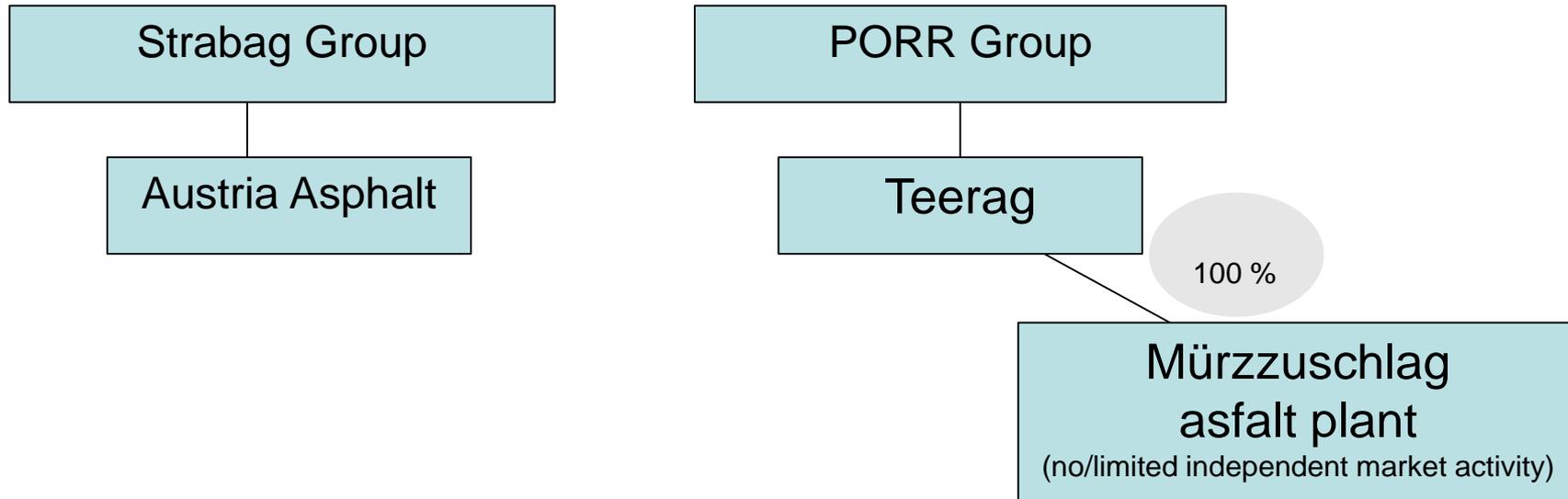
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# **DG Comp and NCA**

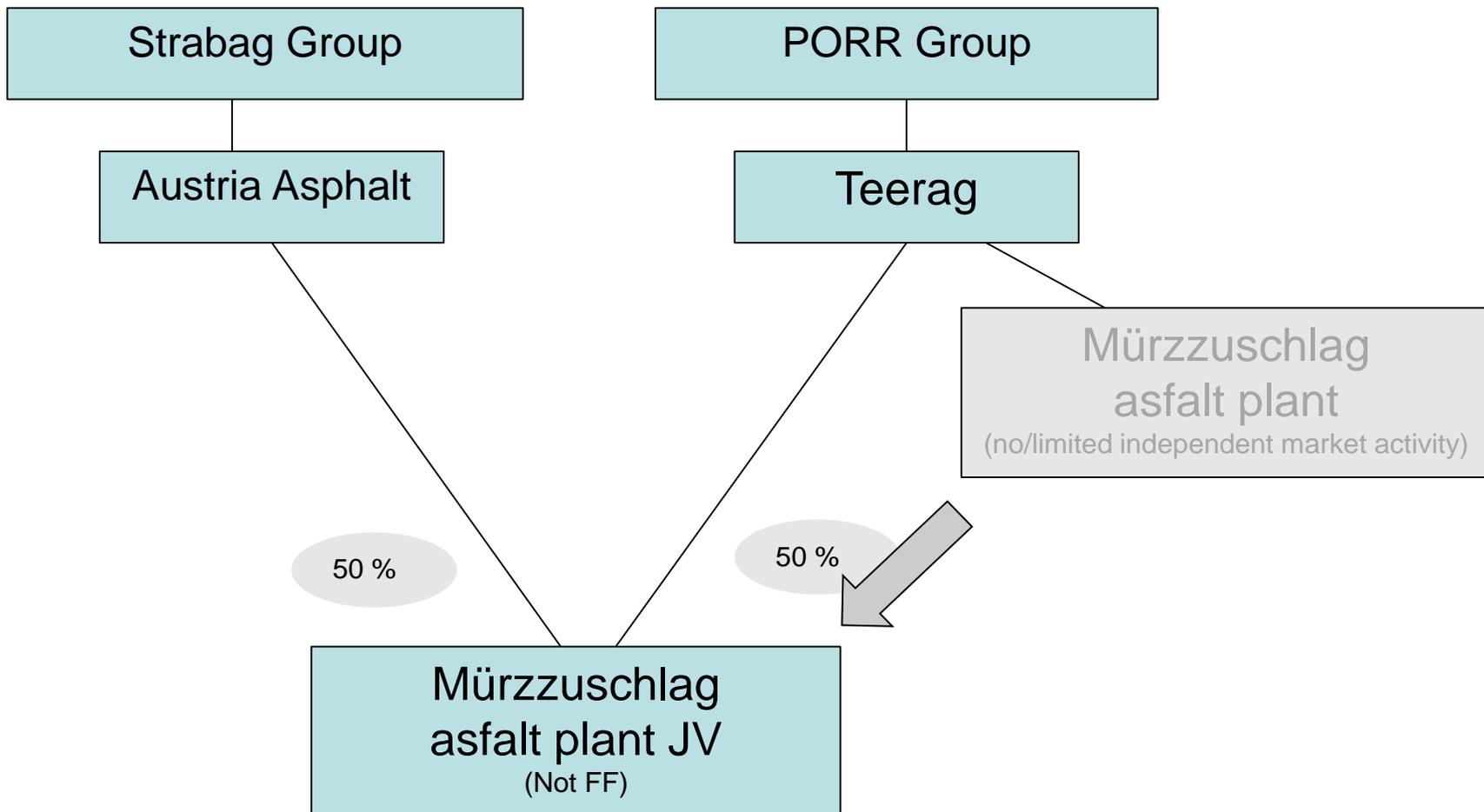
## **full-functionality policy pre-2017**

- DG Comp
- Norwegian Competition Authority
- Other NCAs

# Austria Asphalt (CJEU 2017)



# Austria Asphalt (CJEU 2017)



“Concentration”?  
Only if fully-functional?

# Oberster Gerichtshof's question to CJEU

## AG Kokott

- “Must Article 3(1)(b) and Article 3(4) of Regulation (EC) No 139/2004 be interpreted to mean 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 controlled undertaking** has on a lasting basis all the functions of an autonomous entity?” (para 17)

## CJEU

- “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?” (para 14)

# Oberster Gerichtshof's question to CJEU

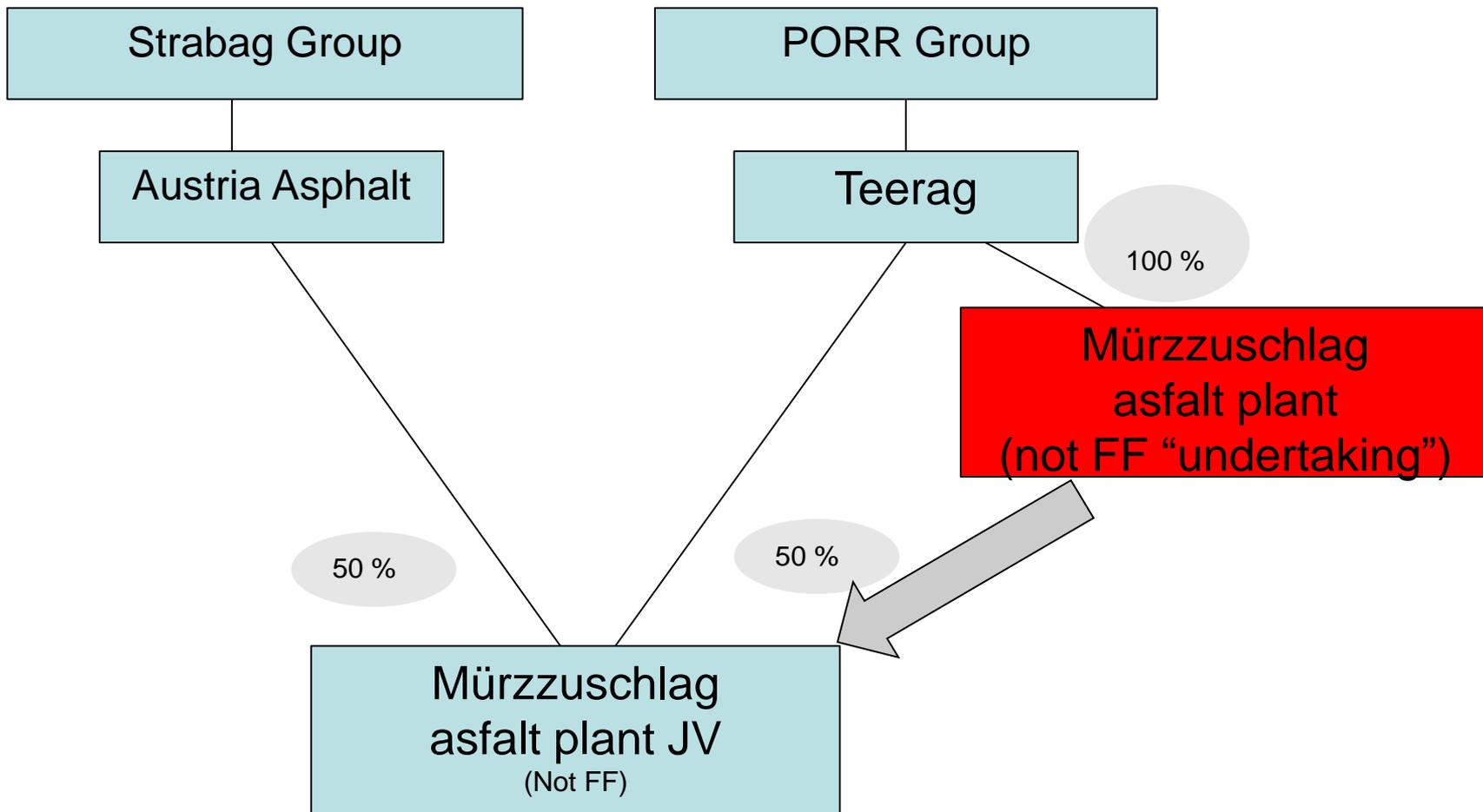
## AG Kokott

- “the present request concerns Article 3(1)(b) and Article 3(4) of the Merger Regulation, the point at issue being whether (...) **undertakings such as that in Mürzzuschlag, which, although they cannot be regarded as full-function undertakings because they have no autonomous presence on the market**, are nevertheless subject to the EU merger control regime **in the event that third parties acquire an interest in them.**” (para 3)

## CJEU

- “the referring court asks, in essence, whether Article 3(1)(b) and (4) of Regulation No 139/2004 must be interpreted to the effect that a concentration is deemed to be created following a change in the form of control of an **existing undertaking** which, previously exclusive, becomes joint, only if **the joint venture resulting from such a transaction performs on a lasting basis all the functions of an autonomous economic entity.**” (para 15)

# AG Kokott: Target NOT a (FF) undertaking

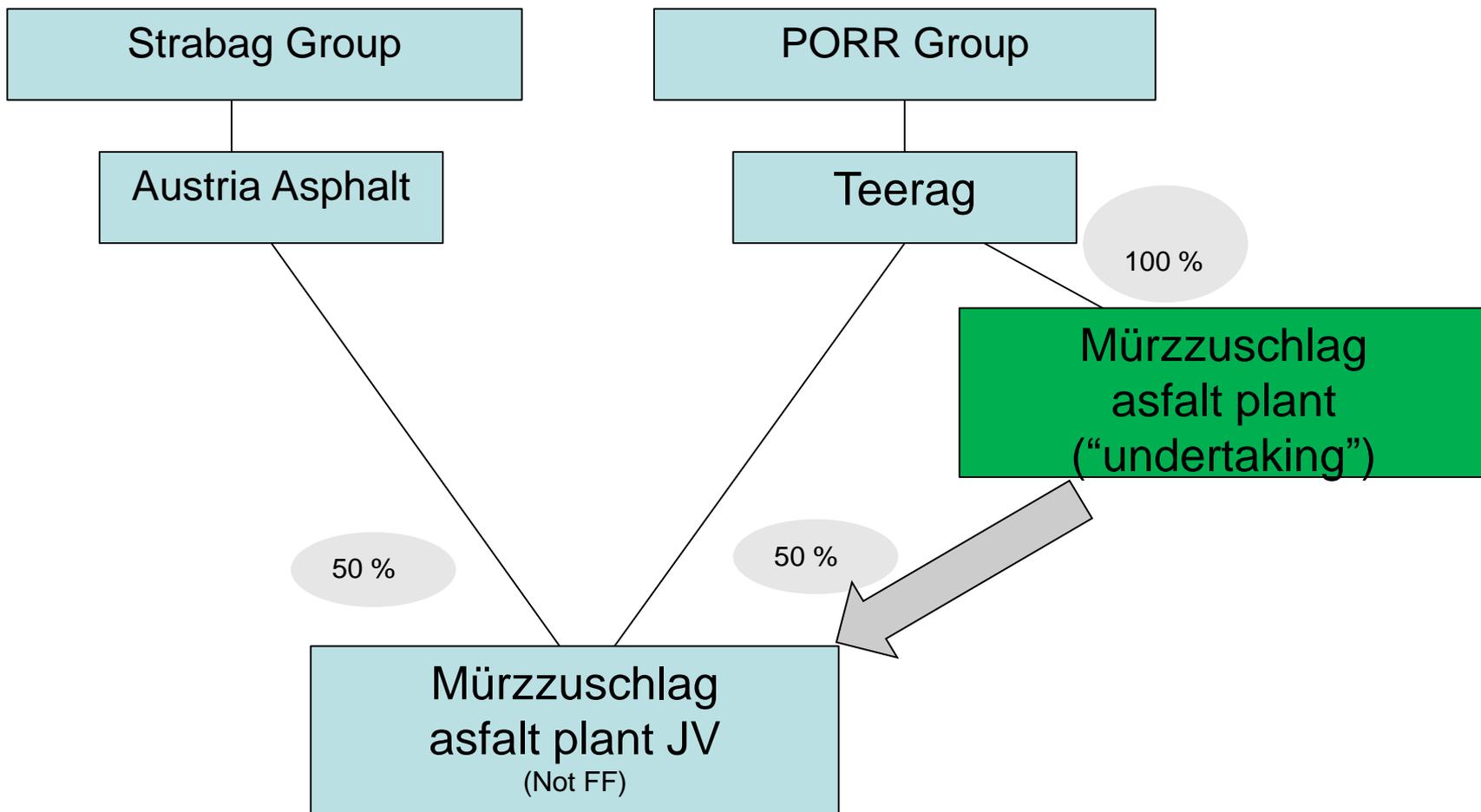


“Concentration?”

Only if JV will be fully-functional?

EUMR art. 3 (1) (b) vs art. 3 (4)

# CJEU: Target an undertaking



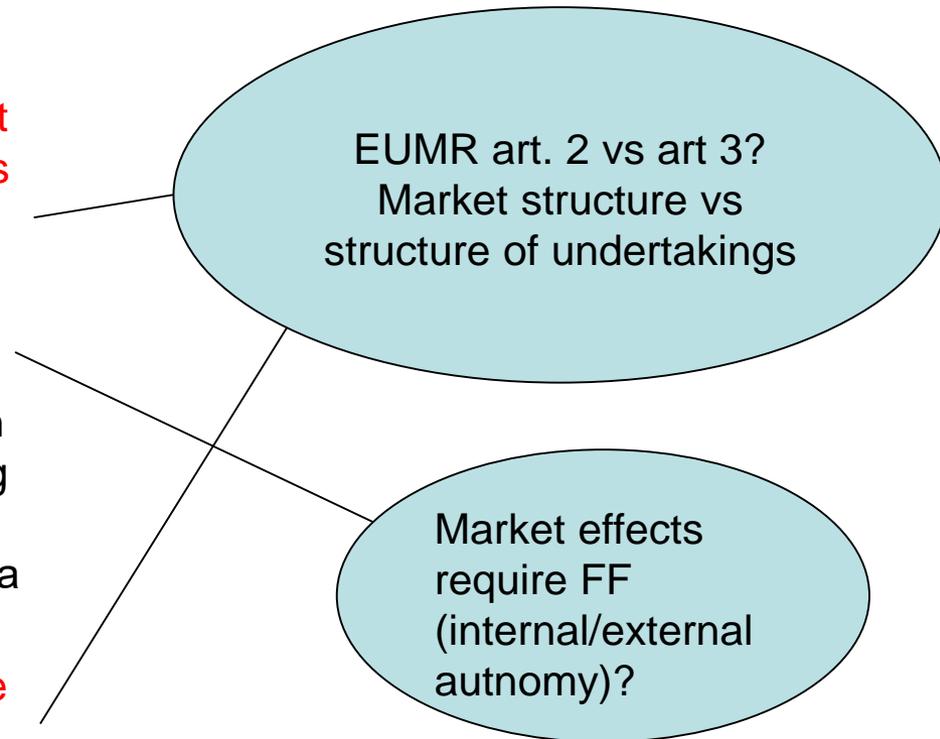
“Concentration?”

Only if JV will be fully-functional?

EUMR art. 3 (1) (b) vs art. 3 (4)

# CJEU

- “the creation of a joint venture must be assessed by the Commission as regards its effects on the structure of the market, the realisation of such effects depends on the actual emergence of a [FF] joint venture into the market, that is to say, of an undertaking performing on a lasting basis all the functions of an autonomous economic entity.” (para 24)
- “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.”



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# Full functionality vs mergers&AoCs

## Post Austria Asphalt

Transaction type	EUMR art. 3(4) Full-functionality requirement?	Argument
JV – “greenfield” and asset transfers	FF, art. 3(4)	Undisputed
JV – sole to joint control over existing undertaking, where sole controller retains joint control (+ sole to joint mergers)	FF, art. 3 (4)?	Covered by the CJEU’s conclusion (premise from Oberster Gerichtshof’s question)
JVs – all sole to joint control over existing undertaking (+ sole to joint mergers)	FF, art. 3 (4)?	Covered by the CJEU’s conclusion
JVs – all joint control over existing undertaking (incl. no to joint control) (+ sole to joint mergers?)	FF, art. 3 (4)?	Not covered by the CJEU’s conclusion – but why distinguish?
Acquisitions of sole control	FF, art. 3 (4)?	Not covered by the CJEU’s conclusion – but why distinguish?
All AoCs&mergers	FF, art. 3 (4)?	Not covered by the CJEU’s conclusion – but why distinguish?

# DG Comp Merger Brief Dec 2018

- Following the Court's judgment in Austria Asphalt, and on the basis of the foregoing considerations, we consider that the full functionality criterion enshrined in Article 3(4) EUMR applies to the following main types of acquisitions of joint control/transactions involving joint ventures in order to assess whether they result in a notifiable concentration:
  - creation of a greenfield joint venture,
  - creation of a joint venture to which (one or several of) the parents contribute assets that they previously controlled individually
  - acquisition of joint control over an undertaking which was previously solely controlled by an undertaking, which remains as a controlling shareholder
  - addition to or replacement of a controlling shareholder in a joint control scenario.
- Conversely, it is arguably not necessary to assess whether the jointly controlled undertaking will be full-function post transaction in a situation of acquisition of joint control from a third party (or third parties).

# The Austria Asphalt Paradox

- Strong consolidation between previously separate undertakings  
- not a “concentration”
- Looser consolidation, where the target undertaking retains operational autonomy (full functionality) – “concentration”

# Still a case for a narrow FF scope of application post Austria Asphalt?

- Underlying facts of the case
  - Mürzzuschlag asphalt plant not a (FF) “undertaking” pre-transaction
- AG Kokott vs CJEU
  - Target is not (FF) undertaking vs target is an undertaking
- Unclear FF scope of application if extended to (some) mergers&AoCs
- System orientation – enforcement “gap”
  - A broader FF scope of application, narrows the concept of concentration, broadens the scope of reg. 1, but not all anti-competitive transactions can be adequately addressed by antitrust (102/101)
- But, what about the wording of the CJEU’s ruling?

**Thank you!**