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Who has jurisdiction between EU Merger Regulation and national cartel law? Please wait!



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Facts

In August 2015 a concentration was notified with the Federal Competition Authority (FCA). The target was an asphalt mixing plant owned by an international construction group, which was to be operated together with another international construction group. For this purpose, a joint venture was created which acquired the target and in which both construction groups exercised joint and equal control. In accordance with the Cartel Act, the federal cartel prosecutor filed the request for examination on time. The request for examination was rejected by the Vienna Higher Regional Court. The applicant brought the case to the Supreme Court, as the Higher Cartel Court.

Issues

The Supreme Court considered whether this special concentration had to be assessed in accordance with the EU Merger Regulation (139/2004/EC) **(1)** or national cartel law. The Supreme Court ultimately submitted this question to the European Court of Justice (ECJ). **(2)**

According to the applicant, Article 3(1)(b) of the EU Merger Regulation requires not only a change of control, but also a full-function joint venture, pursuant to Article 3(4) therein. However, the target produced asphalt primary for the two owners and only insignificantly for third-party buyers. Hence, the applicant argued that the joint venture was not 'created' under the definition of a 'new establishment' and Article 3(4) of the regulation – which substantiates Article 3(1)(b) – but rather remained an existing undertaking which would not perform on a lasting basis the functions of an autonomous economic entity. Therefore, the EU regulation was inapplicable and the concentration was subject to local law.

The Cartel Court agreed with the applicant's opinion that the target was not and would not be a full-function undertaking, but did not see Article 3(4) of the regulation as a substantiation of

Article 3(1)(b) therein. This was because – independent from the criteria of full operability – the thresholds set out in Article 1 of the regulation were met and thus, pursuant to Article 3(1)(b), the concentration had to be notified with the European Commission.

Remarkably, the Directorate General of the Competition Commission declared that the regulation was inapplicable to this case and therefore that no obligation to notify the merger according to the regulation existed.

Hence, the question became how to interpret 'creation' in regard to a joint venture. It is unclear whether the creation of a joint venture due to subsequent participation of one or more undertakings and a change from sole to joint control should be considered a joint venture pursuant to Article 3(4) of the regulation and thus fulfil the full-function requirement. In other words, is 'creation' defined solely as original foundation or does the definition include transformation? The regulation itself contains no definition of 'joint venture' and doctrine is inconsistent; hence, the Supreme Court submitted this question to the ECJ for a preliminary ruling.

National effects of preliminary ruling procedure

Due to accelerated merger control procedures which seek to finalise mergers on time, Austrian authorities and courts are bound by tight deadlines to review a prohibition of a merger.

According to Section 11(1) of the act, the FCA and the federal cartel prosecutor are entitled to request examination of a concentration by the Cartel Court within four weeks of notification (six weeks if applied for). A waiver or inactivity during this period results in approval of the concentration. Accordingly, pursuant to Section 14(1) of the act, the Cartel Court must decide if a concentration is prohibited within five months (six months if applied for). After this deadline, the proceedings must be closed. Pursuant to Section 14(2) of the act, the Supreme Court, as the Higher Cartel Court, must rule on appeals within two months. In short, the entire merger control procedure must take no longer than nine-and-a-half months.

However, the two-month deadline imposed on the Higher Cartel Court does not apply to the case at hand, due to the need to review the case under European law. Hence, the national appeal proceedings have been suspended until the ECJ issues its preliminary ruling.

Comment

The average duration for the ECJ to issue a preliminary ruling was 15.3 months in 2015. **(3)** In the case at hand, it took almost seven months to reach a decision on the referral (March 31 2016). Hence, with some luck, the merging parties may receive a decision regarding whether they can start jointly producing tarmac for their own group purposes 22 months after signing.

While an answer to this question is necessary, the interest in quick merger proceedings must also be considered. The case at hand is special, because according to the Cartel Act, a concentration is deemed to be permitted if examination is not requested or if the court does not issue its decision in timely manner. However, a negative conflict of jurisdiction, where neither authority seems to assume jurisdiction, may lead to an increase in the length of the procedure by at least two years.

For further information on this topic please contact Dieter Hauck or Christian Kern at Preslmayr Attorneys at Law by telephone (+431 533 16 95) or email (hauck@preslmayr.at or kern@preslmayr.at). The Preslmayr Attorneys at Law website can be accessed at www.preslmayr.at.

Endnotes

(1) Council Regulation 139/2004 of January 20 2004 on the control of concentrations between undertakings.

(2) OGH 31.3.2016, 16Ok1/16g.

(3) http://curia.europa.eu/jcms/upload/docs/application/pdf/2016-04/rapport_annuel_2015_activite_judiciaire_de.pdf.

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