Family business and group privilege

27 February 2020 | Contributed by Preslmayr Attorneys at Law

AUTHOR

Dieter Hauck

Introduction

As is generally known, EU cartel legislation (Article 101 of the Treaty on the Functioning of the European Union (TFEU)) and Austrian cartel law (Section 1 of the Cartel Act) prohibit agreements between undertakings, decisions of associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competitions (ie, cartels).

The cartel prohibition applies to activities between independent undertakings; however, it does not apply to activities between a controlling and a controlled undertaking, as such a subsidiary would not enjoy economic independence. This concept is referred to as 'single economic entity' (also referred to as the antitrust group privilege), which such a 'family' of undertakings may enjoy. The privilege is that even agreements restricting competition are not prohibited or illegal between undertakings inside such single economic entities.

The concept has been repeatedly adjudicated by the European courts and is expressly stated in the Austrian Cartel Act. Further, this (rebuttable) presumption has been clearly confirmed in cases where a parent company holds (almost) 100% of the shares in a subsidiary. More generally, such a single economic entity is present if the subsidiary, despite being a separate legal entity, cannot autonomously determine its market activities. It is deemed to be enough if the parent company has a significant influence on the business policy of the subsidiary.

In a recent decision, the Austrian Supreme Court elaborated in detail on the single economic entity concept (although the case mainly dealt with questions of corporate law).**(1)**

Decision

Competition law was used in the case to challenge the validity of shareholder decisions. In particular, the Supreme Court reviewed the question of whether such a concept would also apply in relation to a jointly controlled undertaking. The court concluded that even a jointly controlled undertaking may form a single undertaking with each of its parent companies and the mere 'negative' nature of the parent control would not preclude such findings, as even a minority share could allow a parent company to determine the subsidiary's market behaviour.

In the case at hand, the two parent companies held 32% and 68% of shares, respectively. However, the Supreme Court also put restrictions on the application of the single economic entity concept. Such effects are confined to those aspects that are effectively covered by the joint influence of parent companies. The concept would not apply to such elements where the jointly controlled undertaking retains a sphere of independent market decisions.

In the case at hand, the Supreme Court rejected the applicability of the single economic entity concept and found Article 101 of the TFEU generally applicable. However, after discussing the relationship between merger control and cartel law, the court concluded that the exercise of corporate rights by a jointly controlled undertaking parent is not subject to Article 101 of the TFEU, as they are inherent to the structural control between the parent companies and the jointly controlled undertaking. Consequently, they are not affected by the cartel prohibition.

While the Supreme Court has indicated that the concept of the single economic entity may also apply to jointly controlled undertakings, it has limited this ruling to apply to only such aspects that effectively confer joint or negative control. Where a jointly controlled undertaking can autonomously decide its market behaviour, the relationship between the jointly controlled undertaking and the parent companies is still subject to Article 101 of the TFEU.

Comment

In December 2019 the Federal Competition Authority (FCA) published a guidance paper on the applicability of the single economic entity. Interestingly, the FCA's opinion deviated from the (later) Supreme Court decision. The FCA explicitly stated that a mere negative control would be insufficient to create a single economic entity and further concluded that, as sole control is necessary, only one parent company of a jointly controlled undertaking can benefit from the privilege. It will be a challenge for legal advisers to consolidate the FCA's and the Supreme Court's diverging positions.

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

Endnotes

(1) OGH 19.12.2019, 6 Ob 105/19p.
