

A blessing in disguise?

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Introduction

Section 17 of the Cartel Act seems clear in that a merger requiring notification may be implemented only after clearance, which will be achieved if:

- the Federal Cartel Authority and the federal cartel prosecutor (herein, the 'official parties') waive their right to move for a full investigation in the court;
- the official parties fail to file such a motion within the deadline provided by law; or
- the court rules in favour of implementation.

However, to date, the law contains no definition of 'implementation'. There has been much debate in doctrine regarding whether implementation should be defined broadly as the mere possibility of influencing the target's behaviour, or more narrowly as the actual exercise of such influence. The Cartel Court's case law has followed the narrower definition. However, a recent Supreme Court decision has clarified the matter and reached a different conclusion.⁽¹⁾

Supreme Court ruling

Following extensive discussions regarding Austrian and EU literature on merger control, the Supreme Court has clearly stated that the mere possibility of influencing a target's competitive behaviour is sufficient to be regarded as implementation of a merger.

The court also referred to previous versions of the Austrian law and the objective of the prohibition to implement, which is that effective merger control will be guaranteed and not compromised by circumstances which would be difficult or impossible to reverse at a later date. Further, the court held that Austrian law should be construed in accordance with European law.

Although the Supreme Court's ruling has broadened the definition of 'implementation', the defendant in the case at hand was able to avoid a fine. This is because, although the Supreme Court found that an infringement had occurred, it did not find the defendant's actions to be punishable.⁽²⁾ The court can waive a fine if:

- the perpetrator's fault and the consequences of the action are insignificant; and
- there is no need to impose a fine in order to prevent the perpetrator or others from committing the same infringement.

The Supreme Court had to consider a unique case in which:

- an old takeover offer was surprisingly accepted more than one year later;
- the meeting of thresholds was difficult to establish; and
- the merger was voluntarily notified only weeks after the infringing actions, while the purchaser carefully avoided taking actions of control.

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Finally, the official parties identified no competitive difficulties with the (economically insignificant) merger, nor any identifiable consequences of the late notification.

Comment

Enterprises contemplating or effecting a notifiable merger in Austria should consider the recently introduced consideration threshold (for further information please see "[Fixing the WhatsApp gap?](#)") and the prohibition on implementation. In order to get away with gun jumping, parties will have to be extraordinarily lucky.

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Endnotes

(1) Supreme Court, December 7 2017, 16 Ok 2/17f.

(2) Making reference by analogy to (an earlier) Section 42 of the Criminal Code and (presently) Section 191 of the Criminal Procedural Code.

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