

Competition - Austria

Competition risks of acquiring companies in insolvency

Contributed by **Preslmayr Attorneys at Law**

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In October 2010 the Supreme Court considered a strange case which produced a strange result.⁽¹⁾ A company that traded in wood went bankrupt. The liquidator sold its assets during the insolvency proceedings by means of asset deals. Two bidders began to fight over the company's assets, to the point where interim measures were sought. The asset sales were notified to the Federal Cartel Authority as mergers. The authority and the federal cartel prosecutor requested full investigations of the mergers before the Cartel Court.

The case came before the Supreme Court, which clarified that even after an entity has ceased to do business, it may remain an 'undertaking' for the purposes of the Cartel Act, since it may transfer a market share of considerable value. Such an entity remains an undertaking as long as there is a reasonable chance that it may resume operations, either independently or through an acquirer. In support of this opinion, the court referred to decisions of Germany's competition regulator⁽²⁾ and to EU case law.⁽³⁾

The court addressed the boundary between the rules on abuse of a dominant position and the provisions on merger control. It confirmed that under Austrian law, the rules on abuse of a dominant position⁽⁴⁾ do not apply to 'concentrations' within the meaning of the act. An increase in market share cannot be regarded as an abuse of a dominant position, except in special circumstances.

With respect to merger control, the decision is ambiguous. It leaves open the possibility that an acquisition of assets from an insolvent company may constitute a merger under Austrian law. However, the court rejected requests for a full investigation by the authority and the federal cartel prosecutor on the same factual basis, stating that no merger could be said to have taken place because the target did not represent a "significant part of an undertaking".⁽⁵⁾

Acquirers in insolvency proceedings cannot assume that an entity which has ceased operations is necessarily exempt from merger control. However, the court's reasoning could be understood to allow for clearance under the 'failing firm' defence.

For further information on this topic please contact [Dieter Hauck](mailto:dieter.hauck@preslmayr.at) or [Esther Hold](mailto:esther.hold@preslmayr.at) at Preslmayr Attorneys at Law by telephone (+43 1 533 16 95), fax (+43 1 535 56 86) or email (hauck@preslmayr.at or hold@preslmayr.at).

Endnotes

⁽¹⁾ Supreme Court as Higher Cartel Court, October 4 2010, 16 Ok 6/10.

⁽²⁾ See *Magna Car Top Systems GmbH/Karmann GmbH* iL (B 9-29320-FA-13/10), *Classen Papier GmbH/Schneider & Söhne GmbH & Co KG* (B 10-86/04) and *Pfleiderer AG/Hornitex* (B 1-20/02).

⁽³⁾ See *ING/Barings* (IV/M 573) and *Otto/Primondo Assets* (M 5721).

⁽⁴⁾ Section 5 of the act.

⁽⁵⁾ Section 7(1) of the act. See Neumayr, "KOG: Kartellrechtliche Aspekte des Erwerbs von Unternehmen(stellen) in der Insolvenz", *Österreichische Zeitschrift für Kartellrecht*, 2011, 31.

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Authors

Dieter Hauck



Esther Hold



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