Competition - Austria

Warning: non-notification may become expensive

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October 17 2013

A group of companies with an Austrian subsidiary held 25.1% in a Hungarian entity. The Hungarian entity had a turnover of under €1 million in Austria, although this represented less than 1% of its global turnover. When considered both globally and in Austria, the group far exceeded the relevant Austrian thresholds for notification.

In 2007 the group increased its share in the Hungarian entity from 25.1% to 50%. Although it met the relevant thresholds, at that time the merger was notified only to the Hungarian Competition Authority. In 2010 the group planned a further increase of its share in the Hungarian entity from 50% to 100%. It duly notified the Austrian Federal Cartel Authority (FCA) and the transaction was cleared under Austrian law. However, immediately thereafter, the FCA moved in the Cartel Court for a fine against the acquiring group for failing to notify it of the 2007 share increase of 24.9%.

In its defence, the acquiring group stated that it was not immediately clear why the FCA had not been notified of the earlier acquisition. Subsequent research in company archives revealed that a law firm had advised it that the Hungarian notification would be sufficient. The group further argued that the earlier merger had had no negative effect and, in any case, it had not intended to violate the law. In a 2011 first instance decision, the Cartel Court imposed a fine of €4,500.

Following an appeal by the FCA, the decision was repealed by the Supreme Court,(1) The court required that it be established whether, based on legal advice, an acquirer may be discharged based on an excusable error in law. In the meantime, the question of whether such an error in law can protect against a competition fine was brought before the European Court of Justice (ECJ) in 2013,(2) which answered in the negative. (3)

After the central question of law was thus clarified, in a second decision the Cartel Court again imposed a fine of €4,500. It also established that the acquiring group had been advised by the Hungarian office of a well-known international law firm that specialised in national and international cartel and merger law. However, the law firm did not request and was not given information on subsidiaries at an international level. Consequently, the necessity to notify in Austria was overlooked. The FCA again appealed the decision and, based on the acquiring group's turnover, requested that a higher fine of almost €5 million be imposed. The FCA argued that violation of the prohibition on implementing a merger before clearance has been received is a severe infringement, and that a group acting internationally should have been aware that the transaction was subject to notification in Austria.

The Supreme Court,(4) explicitly referring to the ECJ decision, dismissed the defence of an excusable error in law, referring to the clear rules of European and national merger control, which it qualified as "basic knowledge of merger law that any entity that implements transnational mergers and such mergers, where the involved entities do have turnovers in different countries, needs to know". Consequently, it was clear that the merger at hand should have been notified in Austria.

Furthermore, the court held that violation of the prohibition on implementing a merger before clearance has been received is a severe infringement that undermines the effectiveness of the relevant law, even if the merger itself is later revealed not to be critical. Furthermore, the target's high market shares and the long wait before notification were held to be aggravating circumstances. The (wrong) advice given by an international law firm was held to be irrelevant, since undertakings active internationally are deemed to have, or at least should have, basic knowledge of European merger law, including the eventual need to issue notifications in several EU member states. The court therefore argued that the acquiring group should have double-checked the legal advice that it had received.

Nevertheless, the infringement was held to be less serious than an illegal cartel or

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abuse of a dominant position. The fine was therefore increased to €100,000 only.

In the absence of a European filing, entities involved in international mergers would be well advised to keep a close eye on national rules for notifications and should take potential fines seriously.

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Endnotes

(1) OGH December 5 2011, 16 Ok 2/11.

(2) June 18 2013, C-681/11.

(3) For further details please see "Error in law cannot protect against competition fine".

(4) OGH June 27, 2013, 16 Ok 2/13.