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Austria Asphalt – Some observations on the European Court of Justice's judgment

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On 7 September 2017, the European Court of Justice issued its preliminary ruling in Case C-248/16 Austria Asphalt. The judgment clarifies that a change from sole to joint control over an existing undertaking is a notifiable concentration under the Merger Regulation only if the resulting joint venture will be a "*full function*" joint venture post-transaction. The judgment in essence follows Advocate General Kokott's Opinion of 27 April 2017.

The question asked by the referring court in *Austria Asphalt* was whether a change from sole control to joint control over an existing undertaking, in circumstances where one of the future jointly controlling shareholders has sole control over the target undertaking pre-transaction, constitutes a notifiable concentration only where the target undertaking performs, on a lasting basis, all the functions of an autonomous economic entity (*i.e.*, where it will be a "*full function*" joint venture) post-transaction.

The Court answered the question in the affirmative, holding that a change from sole to joint control over an existing undertaking was a notifiable concentration "*only if the joint venture created by such a transaction performs on a lasting basis all the functions of an autonomous economic entity*".

The Court's judgment is based on the following principal considerations:

- According to the Court, it cannot be determined based on the wording of Article 3 alone whether a transaction that involves a change of sole to joint control over an existing undertaking is notifiable only if the resulting joint venture is full function (¶¶ 16-19). While such a transaction satisfied the criteria of Article 3(1)(b), it was not clear whether it could also be regarded as the "*creation of a joint venture*" within the meaning of Article 3(4).[1]
- The Merger Regulation's purpose was to ensure that the reorganization of undertakings does not result in lasting damage to competition in the European Union (¶ 21). Therefore, the concept of concentration must be defined to cover operations that bring about a lasting change in the control of the undertakings concerned and thus the structure of the market. Joint ventures must be included within the scope of the Merger Regulation if they perform on a lasting basis all

functions of an autonomous economic entity (¶ 22). Article 3 applies to joint ventures "*only in so far as their creation provokes a lasting effect on the structure of the market*" (¶ 25). A distinction between the "*creation*" of a new undertaking and the "*change of control*" over an existing undertaking was not appropriate, as in both cases the potential impact of the transaction on the market structure depends on whether the joint venture would be active as an autonomous entity on the market (¶ 24). Following a converse interpretation would lead to an unjustified difference in treatment between the creation of a new undertaking, which would constitute a "*concentration*" only if the joint venture was full function post-transaction, and a change of control over an existing undertaking, which would constitute a "*concentration*" irrespective of whether that undertaking continued to be active as an autonomous economic entity (¶ 27).

- The Court considers this interpretation of Article 3 to be consistent with the "*general structure*" of the Merger Regulation. Pursuant to its Article 21(1), the Merger Regulation alone applies to "*concentrations*" within the meaning of Article 3, whereas operations that do not constitute concentrations but that are nonetheless capable of leading to coordination between undertakings in breach of Article 101 TFEU are subject to Regulation 1/2003 (¶¶ 32-33). Treating a change from sole to joint control over an existing undertaking as a "*concentration*" even if the resulting joint venture was not going to be active as an autonomous economic entity would thus be inconsistent with Article 21, as that would extend the scope of the Merger Regulation's preventative control and, at the same time, limit the scope of Regulation 1/2003 (¶ 34).

The clarification of the question at issue, which has given rise to significant uncertainty in practice, not least due to the European Commission's incoherent decisional practice, no doubt is a welcome development. The Court's ruling however calls for several critical observations:

- The Court equates the term "*creation of a joint venture*" with any "*transaction as a result of which an undertaking controlled jointly by at least two other undertakings emerges in the market*" (¶ 28). In the Court's view, the term "*creation of a joint venture*" encompasses (i) the acquisition of joint control over an existing undertaking and (ii) the formation of a new undertaking by two (or more) parties. In essence, the Court interprets Article 3(4) as a restriction of Article 3(1)(b), as it applies the full functionality criterion laid down in Article 3(4) also to changes of control over existing undertakings which fall under Article 3(1)(b).
- This interpretation however is not supported by the wording and structure of Article 3: Article 3(1)(b) only requires that control is acquired over an "*undertaking*", implying that this object of the acquisition is pre-existing, but does not contain any other conditions as regards the object of control (i.e., the target undertaking). Conversely, Article 3(4) speaks of the "*creation of a joint venture*", implying that something new that did not exist before is created, and attaches the requirement that his joint venture must perform on a lasting basis all functions of an autonomous economic entity. By expanding the full function criterion also to Article 3(1)(b), the Court in effect adds a criterion that the legal text itself applies only to a different type operation. If restricting the scope of Article 3(1)(b) were the intention of Article 3(4), it would, and should, be worded differently. Specifically, it would need to state that the creation of a joint venture constitutes a concentration within the meaning of

Article 3(1)(b) "*only*" if the resulting joint venture performs on a lasting basis all the functions of an autonomous economic entity.

- The more plausible interpretation is that Article 3(4) adds a separate type of transaction (*i.e.*, the "*creation of a joint venture*") to the enumerative list of notifiable concentrations in Article 3(1). In other words, absent Article 3(4), the creation of a full function joint venture would **not** be a notifiable concentration at all. Accordingly, Article 3(4) does not restrict, but expands the scope of applicability of Article 3.
- This interpretation would also be consistent with the European Commission's views in the Jurisdictional Notice: First, the Notice clearly considers that a change of control over an existing undertaking is a concentration "*without it being necessary to consider the full-functionality criterion*" (Jurisdictional Notice, ¶ 91).[2] Second, the Notice also explains that Article 3(4) provides "*in addition*" that the creation of a full function joint venture constitutes a concentration within the meaning of the Merger Regulation (¶ 92). It is regrettable that the Court did not at all discuss the Notice or explain why it disagreed with it. Doing so would certainly have increased the judgment's overall persuasiveness.

The Court's position that a change from sole to joint control over an existing undertaking can have an effect on the structure of the market *only* if the target undertaking remains active on the market as a full function joint venture is, to say the least, doubtful (¶ 24):

- After all, if a solely controlled pre-existing undertaking with a market presence comes under the joint control of two or more shareholders, and if that undertaking will not be a full function joint venture post-transaction (*e.g.*, because post-transaction it supplies all its output exclusively to its parents), a competitor will have disappeared from the market. If that is not a change to the structure of the market, what is? That might be different if the target undertaking is not full function even before the transaction (as was the case in *Austria Asphalt*), but the Court does not appear to attribute any significance to that in its judgement.
- Contrary to the Court's view, applying the full function criterion only to the creation of a new undertaking, but not to the change of control over an existing undertaking, would not be discriminatory: On the one hand, if a new jointly controlled undertaking is formed, the structure of competition will indeed be affected only if that undertaking will be active on the market (and thus be a "*full function*" joint venture). On the other hand, if an existing undertaking with a market presence pre-transaction comes under joint control and ceases to be active on the market (*e.g.*, because post-transaction it will supply exclusively its parents), that surely also affects the structure of the market (as noted, the total number of competitors on that market is reduced by one).

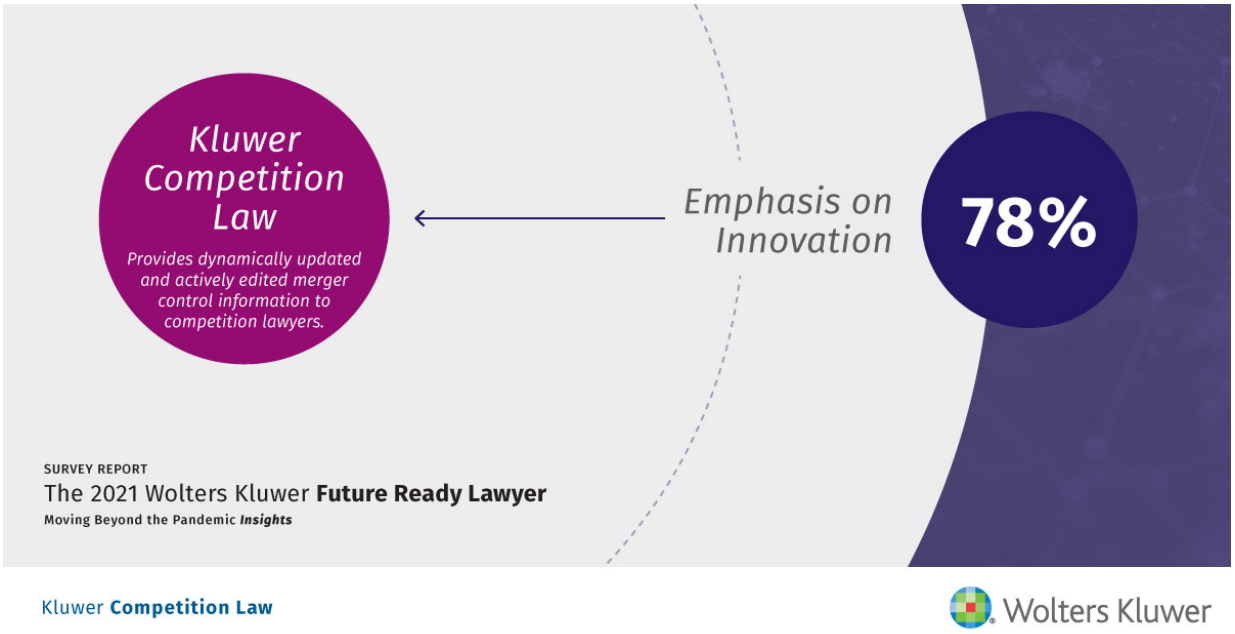
Finally, it is not clear how Article 21 of the Merger Regulation and Regulation 1/2003 can possibly be relevant for the delineation of Article 3(1)(b) and Article 3(4):

- The Court correctly opines that extending the scope of application of the Merger Regulation would limit the scope of Regulation 1/2003 (on account of Article 21 of the Merger Regulation, pursuant to which "*concentrations*" are assessed only under the Merger Regulation and not under Regulation 1/2003). The reverse obviously is

true as well, *i.e.*, extending the scope of Regulation 1/2003 reduces the scope of the Merger Regulation. But why should Regulation 1/2003 prevail? Because the Merger Regulation cannot limit the reach of Treaty law (Article 101 TFEU)? Possibly, but the Court does not explain and only juxtaposes two Regulations (*i.e.*, the Merger Regulation and Regulation 1/2003), but not the Merger Regulation and the Treaty.

- Using the Court's own logic, its ruling limits the scope of the Merger Regulation's "*one-stop shop*"-principle (similarly enshrined in Article 21), because, following *Austria Asphalt*, certain transactions that are capable of affecting the structure of competition no longer fall within the scope of the Merger Regulation (although, as is argued here, they should). Following *Austria Asphalt*, such transactions may be caught by merger control rules in Member States that either apply a broader notion of notifiable transaction than the Merger Regulation.[3] or that do not apply the full function criterion to acquisitions of control over *existing* undertakings.[4]

The more plausible interpretation of Article 3 would have been that Article 3(1)(b) applies to all transactions involving the change of control over an *existing* undertaking with a market presence,[5] while Article 3(4) applies to all transactions involving the creation of a jointly controlled *new* undertaking (*i.e.*, transactions not involving a change of control over an existing undertaking with a market presence). The full function criterion would thus only apply to transactions consisting in the creation of a new jointly controlled undertaking where that undertaking did not exist before.



References[+]

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