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Joint Venture-Party Legitimised to Lodge Sole Complaint Against ComCo's Prohibition Decision

Marcel Meinhardt (Lenz & Staehelin) · Thursday, August 29th, 2019

In its decision of June 24, 2019, the Federal Supreme Court affirms Ticketcorner Holding AG's sole legitimacy to lodge a complaint against ComCo's prohibition of the merger between its wholly-owned subsidiary Ticketcorner AG and Starticket AG. The Federal Supreme Court thereby clarifies that parties to a joint venture are not obliged to jointly appeal against a prohibition decision of ComCo.

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Background

In January 2017, Ticketcorner Holding AG ("**Ticketcorner Holding**") and Tamedia AG ("**Tamedia**") notified the Competition Commission of their intention to merge their subsidiaries Ticketcorner AG and Starticket AG in a joint venture.

By its order dated May 22, 2017, ComCo prohibited the proposed merger (Article 10 para. 2 of the Cartel Act).

Ticketcorner Holding lodged an appeal with the Federal Administrative Court against the Competition Commission's prohibition decision, whereas Tamedia refrained from raising an appeal.

By decision of May 3, 2018, the Federal Administrative Court dismissed Ticketcorner Holding's appeal on the grounds that Ticketcorner Holding was not entitled to lodge a sole complaint without Tamedia.

Ticketcorner Holding filed an appeal with the Federal Supreme Court against the decision of the Federal Administrative Court.

Decision of the Federal Supreme Court dated June 24, 2019

In its decision of June 24, 2019, the Federal Supreme Court answers the thus far unclarified

question, whether the notifying parties to a merger control proceeding may only jointly appeal a prohibition decision issued by the Competition Commission.

The Federal Supreme Court denies this question and approves Ticketcorner Holding's appeal in its entirety.

Joint reporting obligation does not create an obligation to file a joint appeal

In its considerations, the Federal Supreme Court states that neither the Cartel Act nor the Administrative Procedure Act contain a statutory provision which would oblige the merging parties to submit a joint appeal to the Federal Administrative Court.

According to the Federal Supreme Court, such obligation to lodge a joint appeal can in particular not be inferred from the procedural provisions of merger control law. According to the wording of Article 9 para. 1 of the Cartel Act in connection with Article 9 para. 1 lit. b of the Merger Control Ordinance , mergers are subject to a joint notification obligation. However, this obligation cannot be applied analogously in the appeal proceedings.

Federal Administrative Court misinterprets Article 34 of the Cartel Act

According to the Federal Supreme Court, the Federal Administrative Court's view that the submission of an appeal could not uphold the pending invalidity under civil law of the contract underlying the transaction against the will of one of the parties, because this would involve an unreasonably long restriction of the economic freedom of disposition, is wrong.

The Federal Administrative Court's opinion is based on a misinterpretation of Article 34 of the Cartel Act, which governs the suspension of the effectiveness of proposed mergers under civil law. The Federal Supreme Court clarifies that Article 34 of the Cartel Act has the sole consequence that a proposed merger can only be implemented once the competition authorities no longer have any objections to it under competition law. However, even in the event of a prohibition decision, the merging parties are free to maintain or amend the commitment transaction (*Verpflichtungsgeschäft*). In the present case, it is not established that the parties no longer have an interest in the proposed transaction.

According to the Federal Supreme Court, one can therefore not speak of a pending invalidity of the merger agreement under civil law against the will of one of the parties, and this argument does not preclude the affirmation of an individual right of appeal of Ticketcorner Holding.

No necessary joinder of parties

The Federal Supreme Court further considers that with the notification of the proposed merger, a simple partnership (*einfache Gesellschaft*) between Ticketcorner Holding and Tamedia to realize the merger may have been created. However, this would not necessarily result in the establishment of a necessary joinder of parties in the context of the appeal proceedings before the Federal Administrative Court.

According to the Federal Supreme Court, the decisive factor is rather that legal interests are not required for the question of the legitimacy to lodge an appeal, but that factual interests of Ticketcorner Holding in an individual filing of the appeal are sufficient. Ticketcorner Holding has a practical and current interest in the execution of the merger. According to the Federal Supreme

Court, this interest of Ticketcorner Holding could only be denied if it were established that Tamedia was no longer interested in the merger. This is not the case.

The Federal Supreme Court concludes that Ticketcorner Holding is entitled to solely lodge an appeal against the prohibition decision of the Competition Commission.

The Federal Administrative Court has now been instructed to hear the appeal of Ticketcorner Holding and to make a decision on the matter.

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