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(Un)friendly Reminder From The Austrian Cartel Court Of How To Allocate Turnover

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Antitrust lawyers often work under time pressure when assessing the relevant thresholds to determine where a merger filing must be submitted. They usually keep the requests concerning turnover to a minimum, because turnover is generally attributed to where the customer is located. However, if the parties are not familiar with the geographic allocation rules under merger control law, this could lead to trouble. A recent decision in Austria, involving a multinational corporation with a central purchasing organisation, demonstrates that the turnover figures provided by the parties should be reviewed in detail to confirm the geographical allocation. Otherwise, the acquirer could be on the hook for gun-jumping fines.

Decision of the Austrian Cartel Court

In Austria, a concentration that must be notified to the Austrian Federal Competition Authority (“FCA”) may not be implemented prior to receiving clearance. Companies that violate this standstill obligation are subject to fines of up to 10% of the total worldwide turnover generated in the last business year regardless of whether they have intentionally or negligently violated the standstill obligation.

In its recently closed case the Cartel Court imposed a fine of EUR 100,000 for a violation of 6.5 months.[1] In the following, the decision will be discussed in detail. While the amount of the fine is not noteworthy, the circumstances as to why the acquirer did not file in Austria are worth describing more specifically.

The acquirer Eastern Horizon/Prevent Group, an international group that holds shares in various companies in the automotive supply industry, acquired 94% of the shares in Neue Halberg Guss GmbH, which produces cast metal engine parts.

The transaction was notified in Germany on 20 December 2017 and was cleared on 26 January 2017. In February 2018, the Austrian FCA became aware of the transaction, asked the notifying law firm in the German merger control proceedings for information regarding Austria, and opened proceedings before the Austrian Cartel Court. The following points were of interest:

Geographic allocation of turnover for a central purchasing organisation

According to the decision, the law firm had only been informed about target turnover of EUR 2.9 million in Austria, which is why they concluded that the threshold of EUR 30 million turnover in Austria was not met, and therefore no notification was submitted in Austria (the acquirer only generated EUR 21.46 million in Austria in 2017). Due to the requests of the Austrian FCA, the target's turnover figures were reviewed again and it turned out that a turnover of EUR 24.44 million, which was generated by deliveries to Opel's Austrian site, was not correctly geographically allocated to Austria. The entire turnover was allocated to the manufacturer Opel Germany, because Opel's headquarters in Germany negotiated and agreed prices and quantities, received the bills and effected the payment. However, the Cartel Court found that the turnover generated with direct deliveries to the Austrian subsidiary qualified as Austrian turnover according to the Jurisdictional Notice: there was a direct link between the seller and the Austrian subsidiary as the order was directly delivered to the Austrian subsidiary.[2] The Cartel Court therefore confirmed that the turnover generated from deliveries to the Austrian Opel site had to be qualified as domestic turnover, even if the order was issued by the purchasing organisation of a multinational company based abroad.

Therefore, the domestic turnover of the parties in 2017 clearly exceeded the Austrian threshold of EUR 30 million combined turnover[3], which is why the transaction was notifiable.[4] As the transaction was subsequently notified on 12 July 2018 to the Austrian FCA, the standstill obligation was violated for 6.5 months in total.

Culpability of the acquirer

The Cartel Court found that the acquirer had sufficient experience in international mergers and should therefore have determined which member states the target delivered to, as turnover in such a relevant amount (EUR 24.44 million) should have been noticed even in a cursory review of the regions to which deliveries were made.[5]

In its decision, the Cartel Court also underlined that the conduct of a target with which the acquirer has merged is attributable to the acquirer. It is a common situation that the acquirer receives incomplete figures from the target. Even if the target provided incorrect information with regard to Austrian turnover in this case, this was attributable to the acquirer.

According to the decision, the acquirer did not respond to the Austrian FCA's communication for quite some time. The acquirer argued that there had been a strike in the summer of 2018 for 55 days, there were several changes in the target's management, and that the assets had been "frozen" as a result of court proceedings. For these reasons, there had been delays in communication. In the decision it is also mentioned that the operational business of the target has been sold to Gusswerke Saarbrücken GmbH and Gusswerke Leipzig GmbH and that therefore the target company would soon be liquidated.

Since the criteria for calculating the fine must in each case have a link to the infringement – with the exception of the financial performance of the undertaking –, circumstances which have no link to the infringed norm must be disregarded when determining the fine. The Cartel Court therefore found that these post-concentration developments had to be disregarded.

Taking into account the various factors (gravity of the violation, the duration, intent / negligence, ability to pay, etc.) therefore the Cartel Court imposed a fine of EUR 100,000 on the acquirer for violating the standstill obligation during the period from January 26, 2018 to August 10, 2018.

Relevance of the case for practice

This case confirms that violating the standstill obligation is not a trivial infringement and is pursued actively in Austria. The takeaway of this decision is that even if the figures provided are significantly lower than the relevant threshold, it is nevertheless worth examining the Austrian turnover figures in detail in order to avoid a fine. Although the decision was issued by an Austrian court, it is a kind reminder for all competition practitioners in the EU that in certain industries the special rule for central purchasing organisations must not be forgotten.

[1] OLG Vienna as Cartel Court, 13.02.2020, 25 Kt 2/19k.

[2] See European Commission Jurisdictional Notice para 198.

[3] The acquirer generated in 2017 a total worldwide turnover of EUR 550,876,210 and EUR 21.46 million in Austria, while the target generated a total worldwide turnover of EUR 327 million in 2017 and EUR 27.3 million in Austria.

[4] A filing is required in Austria if the combined worldwide turnover of all undertakings concerned exceeded EUR 300 million, the combined Austrian turnover of all undertakings concerned exceeded EUR 30 million, and the worldwide turnover of at least two of the undertakings concerned exceeded EUR 5 million each. Even if these thresholds are met, there is no obligation to file if the Austrian turnover of only one undertaking concerned exceeded EUR 5 million **and** the combined worldwide turnover of all other undertakings concerned did not exceed EUR 30 million (the *de minimis* exception).

[5] In total, the Austrian turnover in 2017 amounted to EUR 27.3 million, representing 8.3% of the target's total turnover.

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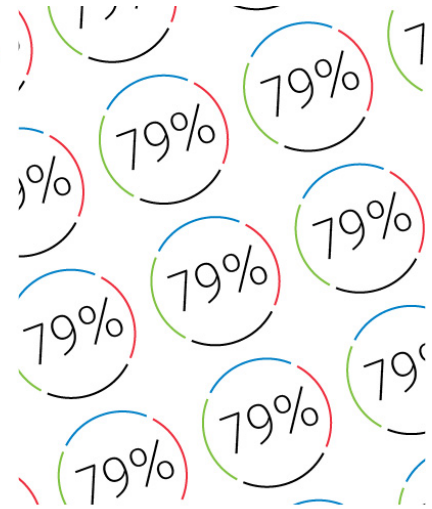
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