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Suspensory Effects of Merger Notifications and Gun Jumping - Note by Austria

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This document reproduces a written contribution from Austria submitted for Item 5 of the 130th OECD Competition committee meeting on 27-28 November 2018.

More documents related to this discussion can be found at

www.oecd.org/daf/competition/gun-jumping-and-suspensory-effects-of-merger-notifications.htm

Please contact Mr. Antonio Capobianco if you have any questions about this document
[E-mail: Antonio.Capobianco@oecd.org]

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Austria

1. Since 2002, the Austrian Federal Competition Authority (FCA) has pursued 35 cases of infringement of the standstill obligation. The overall fines amount to EUR 3,96 Mio.

2. The contribution will first give a very short summary of the applicable national legal framework and then describe the recent practice and case law.

1. The legal framework

3. The Austrian Cartel Act (CA) divides responsibility for merger control between the FCA and the Cartel Court. Mergers are notified to the FCA and the Federal Cartel Prosecutor (FCP). If neither the FCA nor the FCP request a merger control procedure by the Cartel Court within 4 weeks, the merger is cleared in Phase I (§ 11 CA). If a merger control procedure by the Cartel Court is requested, the merger is reviewed by the Cartel Court within a 5 month time limit (Phase II). The merger control procedure is concluded by a clearance decision (which may be conditional on commitments), a prohibition decision or a decision finding that the merger is not subject to the obligation to notify (§ 12 CA).

4. A merger subject to notification may be implemented only after clearance either in Phase I through the lapse of the examination time limit or in Phase II through a decision of the Cartel Court (§ 17 CA). There are no derogations to the standstill-obligation. Any infringement of the standstill obligation under § 17 is to be fined by the Cartel Court (§ 29, para 1, lit a CA).

5. The FCA becomes aware of such infringements when a merger is notified after implementation, when a merger notification contains information on previous mergers which have not been notified, through information submitted by other market participants or through it's own market observations. In the latter cases, the FCA informs the undertakings that it considers the transaction to be subject to the obligation to notify and calls upon them to notify the merger as quickly as possible. In almost all cases, the undertakings concerned have done so immediately.

6. The FCA pursues all cases where it has reasonable grounds for suspecting an infringement of the standstill obligation. Especially when a merger is notified after implementation, the notification will usually already contain all relevant information concerning an infringement without requiring further investigation. In such cases, the FCA has no margin of discretion with regard to the initiation of proceedings and requests the imposition of a fine in all such cases (and not only in particularly serious cases). As the Supreme Cartel Court explicitly held, infringements of the standstill-obligation are not mere "trivial offences" ("Kavaliersdelikt") and should be sanctioned.

7. There is no specific provision with regard to the calculation method for fines for infringements of the standstill obligation. Fines are therefore determined under the general provision of § 30 CA, which lists the gravity and duration of the infringement, the enrichment derived from the infringement, the degree of responsibility and the economic capacity as principal criteria.

2. The decision practice

8. The large majority of cases have been settled[1], since the relevant facts were usually undisputed and the infringing companies mostly merely overlooked and did not contest the obligation to notify the transaction.

9. In two cases, the fines amounted to EUR 1,5 Mio and EUR 750.000, in 7 cases the fines ranged between EUR 100.000 and EUR 200.000 and in the remaining cases the fines ranged from EUR 5.000 to EUR 70.000. Further cases are currently pending or under investigation. The cases leading to fines of EUR 1,5 Mio and EUR 750.000 were cases where the parties knowingly refrained from notifying the respective mergers. The level of the fines shows that only a minority of the infringements are of particular gravity, while the large majority consists of cases where the obligation to notify the merger was merely overlooked due to low turnover in Austria or errors in determining the relevant turnover. Also, in the vast majority of cases, mergers did not give rise to any competitive concerns and have been notified and cleared in other member states.

10. The last contentious proceedings took place in 2013 and 2017. In 2013, the proceedings resulted in a decision by the Supreme Cartel Court imposing a fine of EUR 100.000 (16 Ok 2/13). Previously, the Cartel Court had imposed a fine of EUR 4.500. The FCA appealed the decision, requesting the imposition of a higher fine and asking for guidance on the different elements to be taken into account in the calculation of the fine. In its decision, the Supreme Cartel Court stated that an undertaking acting at an international level can be expected to know the fundamental principles of European merger control law, which include the relevance of international and national turnover for determining whether a transaction needs to be notified. Therefore, the undertaking should have been aware that a proper examination of the obligation to notify could not have taken place if the consulting law firm did not request relevant turnover figures. Furthermore, the Court held that the imposition of a "quasi symbolic" fine was not sufficient and that the fine should reach an appreciable level that expresses that the failure to notify a merger is not a mere "trivial offence". However, the amount of the fine should not be determined simply by reference to overall global turnover and should take into account that the obligation to notify is only a formal requirement. Such an infringement should therefore be sanctioned more mildly than violations of § 1 or 5 of the CA (corresponding to Art 101 and 102 TFEU), i.e. anticompetitive behaviour.

11. In a recent decision 2017, the Supreme Cartel Court confirmed the decision by the Cartel Court not to impose a fine (16 Ok 2/17). The case concerned a minority shareholder's purchase offer for shares which had been made with view to financial difficulties of the majority shareholder. When the offer was made, turnover thresholds were not met and the purchase would therefore not have been subject to the obligation to notify. One year later, the majority shareholder unexpectedly decided to accept the offer, whereupon the change of shareholdings was registered in the commercial register (which only has a declaratory function in Austria). The purchasing shareholder paid the purchase price, but no further steps for implementation of the transfer of shares were taken. There was no meeting of shareholders, no shareholder's resolutions and no notification of the purchase to third parties. Before the closing of the transaction, the parties agreed that it

[1] See the FCA's position on settlements: https://www.bwb.gv.at/fileadmin/user_upload/PDFs/PDFs3/BWB_Settlements_english.pdf

should first be examined whether the transaction may be subject to the obligation to notify due to the undertaking's recently increased turnover. Thereafter, the parties notified the transaction to the FCA and waited until the transaction was cleared.

12. After the merger was cleared, the FCA requested the imposition of a fine for infringement of the standstill obligation through the registry of the change of shareholdings in the commercial register before clearance of the transaction. The Cartel Court rejected the FCA's submission. On appeal, the Supreme Cartel Court confirmed the Cartel Courts decision. It held that while the parties would have been under an obligation to notify the merger as soon as the purchase offer was accepted, their behaviour did not constitute punishable conduct for the following reasons: When the purchase offer was made, the transaction did not meet the turnover thresholds and was therefore not subject to the obligation to notify. The subsequent acceptance and registration with the company registry was carried out very suddenly, which only left the purchaser a very short delay to react. As a result, the transaction was only notified 6 weeks after the seller was informed of the acceptance of the purchase offer and 2 weeks after the registration in the company register. Thereafter the purchaser voluntarily refrained from exercising any influence over the target company. The merger had such negligible competitive relevance that it was readily cleared. Under these circumstances, the negligence of the notifying party was extremely minor and had no appreciable negative consequences. Thus, the Court did not consider the imposition of a fine necessary.

3. Conclusions and Outlook

13. Overall, there is an increase of notifications of mergers implemented without clearance by parties themselves without prior investigations by the FCA, which mainly seems to be due to an increased awareness of undertakings about the importance of merger control. The inclusion of minority acquisitions that do not lead to an acquisition of legal or de-facto control clearly increases the risk of parties overlooking the obligation to notify, in particular when turnover in Austria is negligible. Still, this clearly formulated provision has already been in force for many years and undertakings are expected to be aware of such core provisions of merger control.

14. The decision practice shows that the courts consider infringements of the standstill obligation a serious offence that should generally be sanctioned even in case of minor negligence, but not in cases of extremely negligible gravity.

15. The FCA has not yet dealt with cases involving pre-merger exchange of confidential information. Such conduct would be qualified as an anti-competitive agreement (or concerted practice) and thus constitute a more serious offence.