Clearance rules confuse merging companies

International companies are needlessly applying for Austrian merger clearance, just to be on the safe side. Dr Ferdinand Graf of Graf, Maxl & Pitkowitz explains

Austrian merger clearance procedures provide far-reaching sanctions for non-compliance (such as nullity and penalties). But the rules on their applicability to international mergers are imprecise. This dilemma leads international companies (and quite often their Austrian legal advisers) to apply for merger clearance in Austria, even though the transaction in question is of no or only marginal significance to the Austrian market. In 2002 the merger clearance regime survived the last revision of the Austrian Cartel Act (Kartellgesetz), so this situation is likely to remain. Therefore, it is necessary to come to terms with it.

Austrian Merger Clearance Regulations

In 1999 it was one of the goals of the legislator redrafting the Cartel Act to establish clear rules to distinguish between Austrian mergers, which fall under the clearance requirements, and international mergers, which remain outside the scope of clearance regulations. Under the Cartel Act a (pre-merger) notification of certain corporate combinations (as defined in the Cartel Act) is required, provided the parties to the merger exceed certain turnover thresholds, that is, a combined worldwide turnover of at least €300 million ($361 million), a combined Austrian turnover of at least €15 million and a worldwide turnover in excess of €2 million of at least two of the undertakings concerned. Different thresholds apply to media, bank and insurance businesses. The Cartel Act does not define any additional requirements for its applicability, such as minimum market shares and/or a structural basis in Austria of one or more undertakings concerned.

It soon became clear that the turnover test did not solve the – long-known – problem of the applicability of the Austrian Cartel Act to international mergers. Notorious examples of the inability of the Cartel Act's rules to give clear guidelines are (variations of) the following patterns: (a) a large foreign enterprise with a worldwide turnover in excess of €300 million and sales into Austria of more than €15 million acquires a Spanish enterprise that has a worldwide turnover in excess of €2 million, but no sales into Austria and no structural basis in Austria (a foreign-to-foreign merger); (b) a large Austrian enterprise with a worldwide turnover in excess of €300 million and a turnover in Austria in excess of €15 million, acquires a foreign enterprise with a turnover in excess of €2 million but without any business activity in Austria. Variations of both examples would include the fact that the target is active either in the same or in a different line of business than the acquiring entity.

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Case law

The Cartel Court recognizes that some merger scenarios satisfy the turnover thresholds but still lack the necessary effect on the Austrian market to warrant the applicability of the Austrian merger clearance rules. The approach taken by the Cartel Court can be illustrated by the following cases.

In its decision of October 10 2000, the Cartel Court found that the Cartel Act did not apply to a foreign-to-foreign multiparty merger, involving, among others, Finnish, US and Swedish companies. The turnover thresholds were satisfied by the activities of the acquiring entities alone, both the target and the acquiring entities had sales in excess of €2 million. Neither the acquirer nor the target had a structural basis (a subsidiary or branch office) in Austria. The target's only link to the Austrian market was sales of sample products into Austria. The value of these sales was less than €1,000. The Cartel Court noted that such sales constituted "significantly less" than 1% of the total Austrian market, that the acquirer's Austrian turnover was generated in a different line of business and that no indication was found that – due to the change of ownership – the target's and/or the acquirer's activities in the Austrian market might be greatly increased.

In a further decision of October 10 2000, the Cartel Court found that the proposed acquisition of a Hungarian real estate company by an Austrian investment company was outside the applicability of the Cartel Act. The turnover thresholds set out in the Cartel Act were satisfied by the acquiring entity alone, the target's turnover was in excess of the €2 million *de minimis* threshold. However, as the Hungarian company's activities were strictly limited to the ownership and administration of certain buildings in Hungary and no indication was found that, due to the acquisition, the target might develop (any) activities in Austria, the Cartel Court concluded that there was neither an actual nor potential effect on the Austrian market.

On July 11 2003 the Cartel Court rejected the notification of the acquisition of a small bank in Bosnia Herzegovina by Austria's largest bank on the grounds that the Cartel Act did not apply. The turnover thresholds were satisfied by the sales of the Austrian bank; the foreign bank had sales in excess of €2 million, but none in Austria. The Cartel Court was satisfied that the change of ownership would not lead to activities of the target in Austria and concluded that the merger had no impact on the Austrian market. The Cartel Court argued: "Mergers consumed outside of Austria fall under the Cartel Act if, on the one hand, the turnover thresholds are satisfied and, on the other hand, the merger has at least a potential effect within Austria; the abstract possibility of such effect or of a negative impact on the conditions of competition in Austria suffice. No effect on the Austrian market can be found in the proposed merger, as the target [the Bosnian bank] was not active in Austria, did not plan to become active in the future and did not provide resources to the acquiring Austrian bank that could (noticeably) increase its current position on the Austrian market."

Lastly, the inapplicability of the Austrian Cartel Act cannot be derived from the fact that the target has no structural basis (a subsidiary or branch office) in Austria. This test was used to a certain extent before the latest

revisions of the Cartel Act. However, if the target has a structural basis in Austria and if the turnover thresholds are satisfied, it is highly unlikely that the Cartel Court would rule inapplicability of the Cartel Act due to a lack of effect on the Austrian market.

Considerations

When faced with the challenge to advise clients on whether to notify the merger or simply go forward without notification, several issues must be considered.

Under section 42a of the Cartel Act, the consummation of a merger in violation of the notification requirement is prohibited and sanctioned with a penalty of €10,000, or up to 10% of the violator's turnover. There is also a nullity sanction imposed on contracts violating the merger notification/clearance requirement. The nullity sanction has no clear-cut criteria; the courts have not yet addressed the issue. However, it seems safe to assume that the nullity sanction will only extend to Austria and contracts, agreements that could have an – actual or potential – anti-competitive effect on the Austrian market.

A short-form merger notification will be published in the *Austrian Official Journal* (*Amtsblatt der Wiener Zeitung*), which means that the fact that the merger has been notified will be publicly known. Competitors can inform the authorities of any concerns, though no party rights (for example, the right to take part in the proceedings or right to request an investigation of the merger) are vested upon competitors. Data submitted to the Cartel Court and the public parties, notably market information, will not be accessible to competitors, though leaks of such information are not unheard of.

A merger notified under the Cartel Act will usually be cleared within five to seven weeks from the day of notification. This is because only the two public parties, the Federal Competition Authority (Bundeswettbewerbsbehörde) and the Public Prosecutor in Cartel Matters (Bundeskartellanwalt) can request an investigation of the merger by the Cartel Court. This request has to be lodged within four weeks from receipt of the notification by the public parties. Though the public parties can waive their right to request an investigation and so shorten the four-week waiting period, it is the usual practice of the public parties to simply let the four-week period lapse if they see no anti-competitive effect (as defined in greater detail in the Cartel Act). An international merger with no or little effect on the Austrian market will, in all likelihood, be cleared within no more than seven weeks after the notification is filed.

The filing procedure used to be less of a burden on the parties: before the latest revision of the Cartel Act in 2002, the information required by the Cartel Court and the public parties was – at least in practice – limited. However, in 2002 the newly established Federal Competition Authority issued a new Form for Merger Notifications (*Formblatt für die Anmeldung von Zusammenschlüssen*, available both in English and in German at the website of the Bundeswettbewerbsbehörde www.bwb.gv.at). Under the new form, detailed information (for example, statistics on market shares and market analysis) is required, which may pose an administrative and financial burden on the parties.

Section 8a of the Cartel Act provides for the parties' right to petition to the Cartel Court to give a binding opinion on whether a proposed corporate combination has to be notified under the Cartel Act. However, the Cartel Court's decision is not subject to the tight time limits of the merger clearance procedures and may take longer than the (usually expected) five to seven weeks for merger clearance.

Consequences

On one hand, there are no speedy means available to obtain binding guidance on whether an international merger must be cleared under the Austrian Cartel Act, and, on the other hand, there is the threat of (potentially) far-reaching sanctions in the case of non-compliance. Most companies faced with this situation will not risk that the considerable efforts invested in an international merger will to a certain extent be jeopardized by failing to file a merger notification in Austria. Only in clearly defined circumstances, where the target has neither a structural basis in Austria nor any sales into Austria, will the option of non-filing be risk free. In all other situations there remains at least a small risk that a court, if asked to review the matter, could find that – due to at least a potential effect on the Austrian market – a merger notification would have been required.

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