

Client Briefing

November 2017

Austria Asphalt: ECJ clarifies the application of the EU Merger Regulation to joint ventures

KEY CONTACTS



RICHARD RYAN
PARTNER, HEAD OF COMPETITION AND
REGULATED MARKETS
+353 1 920 1240
richard.ryan@arthurcox.com



FLORENCE LORIC
PARTNER
+353 1 920 1149
florence.loric@arthurcox.com



PATRICK HORAN
ASSOCIATE
+353 1 920 1063
patrick.horan@arthurcox.com

The European Court of Justice (“ECJ”) has recently handed down a rare judgment on the interpretation of the EU Merger Regulation (“EUMR”).¹ The case of *Austria Asphalt*² concerns the concept of “full function” joint ventures, which has applications at both an EU law level for transactions notifiable to the European Commission under the EUMR, and in Member States such as Ireland which adopt the concept of full functionality in their national merger control rules. In its judgment, the ECJ held that the creation of a joint venture between two or more undertakings, using an entity which was previously controlled solely by one parent, is not subject to notification under the EUMR where the joint venture itself is not “full function”, i.e. an autonomous economic entity on the market.

The ECJ’s decision is relevant to companies engaged in joint ventures, as the decision clarifies the circumstances in which such arrangements have to be notified for competition approval.

BACKGROUND

The *Austria Asphalt* case arose from a request to the ECJ for a preliminary ruling on the interpretation of Article 3 of the EUMR. The merger in question involved the acquisition by Austria Asphalt GmbH & Co OG (“**Austria Asphalt**”) of a 50% interest in the Murzzuschlag asphalt plant, which was wholly-owned by Teerag Asdag AG (“**Teerag**”). As a result of the transaction, Austria Asphalt would acquire joint control of the asphalt plant, but crucially the majority of the production from the asphalt plant was supplied to Teerag prior to the transaction, and would be supplied to its parents jointly following the transaction. Therefore, it was unlikely to be an autonomous economic entity on the market and therefore not a full function joint venture.

While the parties received informal comfort during discussions with the European Commission that the transaction would not be full function (and thus not notifiable under the EUMR), the Austrian competition authorities disagreed and considered

This document contains a general summary of developments and is not a complete or definitive statement of the law. Specific legal advice should be obtained where appropriate.

¹ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings.

² Case C-248/16 *Austria Asphalt GmbH & Co OG v. Bundeskartellanwalt*, 7 September 2017, EU:C:2017:322.

that transaction was a “concentration” for the purposes of Article 3 of the EUMR.³ On appeal, the Austrian Supreme Court referred the matter to the ECJ, asking whether the effect of Article 3 of the EUMR is that a notifiable concentration is deemed to arise following a change from sole to joint control over an existing undertaking, only if the resulting joint venture is itself full function, i.e. that it performs “*on a lasting basis all the functions of an autonomous economic entity*”.

THE ECJ'S JUDGMENT

The ECJ found that the wording of Article 3 of the EUMR is unclear on the referred question. Article 3(1)(b) states that a concentration is to be deemed to arise where “*a change of control on a lasting basis results from the acquisition, by one or more undertakings, of direct or indirect control of the whole or parts of one or more other undertakings*”. However, Article 3(4) states that the creation of a joint venture is a concentration within the meaning Article 3(1)(b) where that undertaking performs “*on a lasting basis all of the functions of an*

autonomous economic entity”. In the *Austrian Asphalt* case, the transaction concerned the acquisition of joint control (on a lasting basis) by Austria Asphalt of an existing undertaking (i.e. the Murzzuschlag asphalt plant), but did not involve the creation of a joint venture with an autonomous market presence. As such, it was not clear whether Article 3(1)(b) or Article 3(4) prevailed in the circumstances.

The ECJ held that, as a textual interpretation of Article 3 did not provide a clear-cut answer, it should be interpreted by reference to its purpose and general structure. The Court held that the objectives of the EUMR are to ensure that the process of corporate reorganisation does not result in lasting damage to competition. Recital 20 of the EUMR notes that it is appropriate to include within the scope of the merger control rules all full function joint ventures. According to the ECJ, a distinction based on whether or not the entity existed prior to the creation of the joint venture could lead to an unjustified difference in treatment, and a different interpretation of Article 3 could compromise the overall legislative context intended by the legislator.

CONCLUSION

The ECJ's judgment is somewhat unexpected, but does now clarify the application of Article 3 of the EUMR to joint ventures. The ECJ ultimately ruled that the EUMR only applies to the creation of full function joint ventures whose formation provokes a “*lasting effect on the structure of the market*”. What this means in practice is that where a joint venture is formed but is not an autonomous economic entity distinct from its parents, its formation will not fall within the application of the EUMR. This is the case whether it is formed as a new entity or from an existing subsidiary.

It will be interesting to see whether the CCPC (which has typically followed the EU approach to such issues) and the Irish courts adopt a similar approach and considers that Irish merger control rules only apply to full function joint ventures, i.e. where the JV is an autonomous entity on the market.

For further information, please contact a member of the Competition and Regulated Markets Group.

³ The transaction was subject to review in Austria as, under Austrian national competition law, certain non-full function joint ventures are also notifiable. The question as to whether the transaction constituted a concentration under the EUMR arose in the context of this review, following the intervention of the Bundeskartellanwalt (Federal Cartel Prosecutor).

arthurcox.com

Dublin

+353 1 920 1000
dublin@arthurcox.com

Belfast

+44 28 9023 0007
reception@arthurcoxni.com

London

+44 207 832 0200
london@arthurcox.com

New York

+1 212 782 3294
newyork@arthurcox.com

Silicon Valley

+1 650 943 2330
siliconvalley@arthurcox.com