

THE COURT OF JUSTICE OF THE EUROPEAN UNION CLARIFIES RULES ON MERGER CONTROL OF JOINT VENTURES

Introduction

On 7 September 2017, the Court of Justice of the European Union ("CJEU") issued a preliminary ruling clarifying that the establishment of independent joint venture companies is always covered by Council Regulation (EC) no. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation). This applies regardless of whether the transaction concerns a newly established joint venture or the creation of a joint venture of an existing company through change of sole control to joint control.

The case in brief

The preliminary ruling emanated from an Austrian case in which two international construction companies, Strabag SE and Porr AG, wished to set up a joint venture. The joint venture company was established by Strabag acquiring, through the company Austria Asphalt GmbH & Co, 50% of Mürzzuschlag asphalt mixing plant, which was already owned 100% by the Porr Group's company Teerag Asdag AG.

The established joint venture would not act as an independent business seeing as most of the activities of the established joint venture would be delivered to parent companies.

The Austrian court then submitted a preliminary question to the CJEU for the purpose of obtaining clarification on how Article 3 of the EC Merger Regulation should be interpreted, in particular in the event where a joint venture established on the basis of an existing company falls within the scope of the EC Merger Regulation.

In this connection, the Austrian court specifically asked for the interpretation of Article 3(1)(b) and Article 3(4) of the EC Merger Regulation due to an unclear delimitation between the two provisions. The provisions state the following:

- It follows from Article 3(1)(b) that any transaction is subject to a duty of notification provided that the transaction in question leads to one or more undertaking permanently acquiring the direct or indirect control of one or more undertakings.

- It follows from Article 3(4) that the duty of notification only applies if the newly created joint venture permanently functions independently.

The uncertainty relating to the interpretation consisted of the wording "creation" and the Austrian court wanted to clarify whether the obligation of notification only covers new joint venture companies (cf. the use of the word "creation") or if it includes joint ventures established by the change of control of existing companies.

The CJEU Assessment

The CJEU found that only independent joint venture companies are covered by the regulation. In addition, the Court ruled that this applies regardless of whether the establishment of the joint venture occurs when a new company is created or when there is a change of control of an existing company.

The CJEU also stated that a crucial factor in relation to the duty of notification under the EC Merger Regulation is whether the company is to function as an independent business.

The CJEU specifically noted that if the opposite conclusion had been reached, this would have led to a significant extension of the preventive control currently provided by the EC Merger Regulation, which would be inexpedient from an effects-based point of view. The reason for this is that the EC Merger Regulation would then also include transactions which are not suited to affect the market and competition structure in the relevant market. At the same time, it would limit the scope of Council Regulation (EC) no. 1/2003 of 16 December 2002 on the implementation of the competition rules in Articles 81 and 82 of the Treaty (now Articles 101 and 102 TFEU) in that all transactions would then be assessed under the EC Merger Regulation.

Our Comments

The ruling ascertains that the same duty of notification applies to joint ventures, irrespective of whether such joint ventures are newly created or arise due to a change of control in an existing joint venture, provided that the relevant thresholds are met.

In both cases, merger notification is required if the joint venture in question is to act as an independent entity.

In assessing whether a joint venture is an independent entity, the following factors in particular must be taken into account:

- Whether or not the majority of the joint venture's production is delivered to other receivers than its parent companies
- Whether the management of the joint venture is part of the day-to-day operation or the company is merely a function of the owners, including whether the joint venture has its own activities in addition to its relations with the owners
- If the purpose of the creation is to operate a business on a permanent basis

Provided that the above-mentioned items can be confirmed, any given joint venture is likely to be considered independent and thus subject to notification under the merger control rules.

In contrast, cooperation on joint ventures that are not independent will instead be subject to an assessment under Article 101, which regulates anti-competitive agreements, due to the fact that a joint venture may lead to coordination between companies, which, in accordance with Article 101, can be anti-competitive and thus incompatible with the common market.

The ruling confirms the previous understanding of the scope of the EC Merger Regulation which considered the crucial factor for the obligation of notification to be the company's status as independent and not the date of establishment.

The above does not constitute legal counselling and Moalem Weitemeyer Bendtsen does not warrant the accuracy of the information. With the above text, Moalem Weitemeyer Bendtsen has not assumed responsibility of any kind as a consequence of any reader's use of the above as a basis for decision or considerations.

Contacts



[Pernille Nørkær](#), Partner

Tel. +45 33 77 90 40

Mob. +45 30 37 96 40

E-mail pno@mwblaw.dk



[Annika Brochorst](#), Trainee

Tel. +45 33 77 90 21

Mob. +45 30 37 96 21

Email anb@mwblaw.dk