

ECJ sends deal back to national court

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The European Court of Justice yesterday ruled that a merger between two asphalt companies fell within the remit of Austrian national courts because the joint venture in question does not function autonomously.

The judgment comes after Advocate General Juliane Kokott criticised the European commission in April for flip-flopping over whether the Austrian case fell within the remit of EU merger regulation.

Kokott said in April that while the case “may at first sight seem highly technical”, it has practical significance that “cannot be underestimated” for EU law.

Two international construction giants, Porr and Strabag, sought to form a joint venture that would see Austria Asphalt, a subsidiary of Strabag, acquire a 50% stake in the Murzzuschlag asphalt plant previously owned by Porr’s company Terrag Asdag. Austria Asphalt notified the Austrian authority of the deal in August 2015.

The competition authority referred the case to Austria’s cartel prosecutor, who then applied to Austria’s competition court to review the case. The court decided that because of its turnover, the joint venture was a concentration with an EU dimension - and that it fell outside the remit of Austrian competition law.

However, turnovers alone do not mean the European commission has exclusive jurisdiction over merger cases. For a joint venture to fall within the remit of EU law, the deal in question has to pass the full functionality test, to show it performs “on a lasting basis all the functions of an autonomous economic entity” and brings about a change in market structure.

In its appeal to the country’s Supreme Court, Austria Asphalt argued that under the proposed joint venture, the Murzzuschlag plant would service only its parent companies rather than other companies in the market, so the current market structure would remain intact.

Following this appeal, the Supreme Court referred the case to the European Court of Justice to gain clarity on whether the full functionality test should be applied to joint ventures where a company acquires joint control of an existing entity, such as the Murzzuschlag plant, that was formerly under sole ownership.

The ECJ yesterday ruled that the full functionality test does apply to joint ventures involving an acquisition of pre-existing entities - and therefore Austria Asphalt is also subject to the full functionality test to determine whether it qualifies as a concentration under EU law.

With the jurisdictional question now settled, the case will return to Austria's national courts to rule on the substance of the case.

Andreas Zellhofer at Eisenberger & Herzog in Vienna said it was "clear" that the joint venture "did not have the prerequisites of a fully functioning enterprise" because the Murzzuschlage plant only served its parent companies.

Florian Neumayr, a partner at BPV Hügel Rechtsanwälte in Vienna, noted the Supreme Court's question hinged on whether the test should apply only to cases where companies form a joint venture "from scratch", or whether it applies to ventures that acquire shares in a pre-existing entity.

Neumayr said the case had helped "tremendously" in clarifying when joint ventures have to be notified to the European commission. Where "you'd usually expect a European case to clarify European law... it was an Austrian case that triggered the clarification of this question on a European level".

Strabag declined to comment. Porr did not respond to a request for comment.