GLOBAL LEGAL INSIGHTS

Merger Control

First Edition
Contributing Editors: Nigel Parr & Catherine Hammon
Published by Global Legal Group

CONTENTS

Austria

Astrid Ablasser-Neuhuber & Florian Neumayr
bpv Hügel Rechtsanwälte

Overview of merger control activity during the last twelve months

In the first half of the year 2011, 129 concentrations (transactions coming within the ambit of Austrian merger control) have been notified with the Austrian Federal Competition Agency (*Bundeswettbewerbsbehörde*, the "BWB"). If this trend continues, we will see approximately the same number of notifications as in 2010 (238). In 2009, possibly under the impression of the international financial downturn, there were only 212 notifications (the activities report 2009 by the BWB is not clear as it speaks of 212 notifications in one context and 213 notifications in another; our own research revealed the former figure). This is significantly fewer as compared to the years before: 273 concentrations were notified in 2008 (own research; pursuant to the BWB's respective activities report, it was between 268 and 275) and 340 in 2007 (again, according to own research; pursuant to the BWB's activities report for the second half of 2007, it was 342 notifications).

Besides, the Official Parties have dealt with cases in the context of merger control, which were not strictly speaking notifications, such as requests for guidance on whether or not the effects doctrine (i.e., no duty to notify under certain circumstances even though the turnover thresholds set forth in the Austrian Cartel Act are met) is applicable. For the first half of 2011, there is no figure available yet as to how many such cases the BWB handled. In 2010, the BWB dealt with 22 such cases according to its activities report for 2010. This compares to 25 such cases in 2009, 38 in 2008, and 34 in 2007 (the source are the respective activities reports).

Austrian law distinguishes between phase I and phase II proceedings. Following notification with the BWB, concentrations are reviewed in phase I by both Official Parties (*Amtsparteien*), i.e. the BWB and the Federal Cartel Prosecutor (*Bundeskartellkartellanwalt*, the "FCP"). Phase II proceedings take place before the Cartel Court (*Kartellgericht*, a specialised division of the Court of Appeals Vienna) upon the request of the BWB and/or the FCP. If none of the Official Parties applies for phase II proceedings within four weeks of notification, the merger is regarded as cleared.

Such phase I clearance is, by far, the most common outcome of merger control proceedings in Austria. In recent years (including the first half of 2011), between 75% (2008) and almost 79% (2007) of notified mergers were cleared that way (this and all following figures arrived at on the basis of own research). Only in 2009 were fewer mergers cleared the "normal" way (68%); that year saw a quarter of all mergers being cleared in an expedient manner.

The expedient clearance means that the Official Parties, prior to the expiration of phase I, expressly waive their right to request phase II proceedings. According to best practice, they do so, at the earliest, 14 plus a few days after publication of the fact that the respective merger has been notified. This "waiting period" is explained by the fact that any undertaking that regards its legal or economic interests affected by the merger can, within 14 days as of such publication, submit written observations on the merger to the Official Parties. The few additional days the Official Parties tend to wait before they may issue a waiver is to also allow observations that might have been sent on the last day of this 14-day period (by ordinary mail) to arrive at the offices of the Official Parties. In the years 2007, 2008, 2010 and the first half of 2011, the Official Parties issued waivers in between 14% (2007) and 20% (2008) of the cases.

If a merger raises concerns, the notifying parties can offer, the Official Parties can request and the Cartel Court can impose conditions and/or remedies. Such conditions/remedies can be given both in phase I and phase II. In absolute terms, there are not many clearances subject to conditions (e.g., in the first half of 2011, only three) and approximately as many of them were arrived at during phase I as during phase II proceedings (e.g., both in 2008 and 2009, there were three conditional phase I and three conditional phase II clearances). However, in relative terms, there is a rather high likelihood that phase II proceedings end in a conditional clearance. Between 2007 and 2009, between 37% (2008) and almost 43% (2009) of phase II clearances were subject to conditions; in the first half of 2011, both phase II clearances were subject to conditions (i.e. 100%). 2010 was an exception to this rule, seeing 6 phase II clearances with only one subject to conditions.

From 2007 to today, there has not been any prohibition decision. However, this can also partly be explained by the fact that, in critical cases, either remedies are the solution or notifying parties may withdraw the notification (and abandon the proposed merger).

Between 2007 and the end of June 2011, between 2% (2009) and almost 4% (first half of 2011) of notified mergers ended neither in phase I nor phase II clearance but in some other manner (withdrawal, transferral to the European Commission, etc.); 2008 formed an exception where only two cases (0.7%) ended in such different manner.

New developments in jurisdictional assessment or procedure

In the first half of 2011, and in 2010, no significant new developments occurred in the substantive assessment of notified mergers.

However, the trend to run economic assessments in combination with market inquiries continued. For instance, in a case notified in March 2011 (BWB/Z-1387 *Pfeifer*) concerning the food wholesale market, the BWB checked the proposed market definition using both a SSNIP test and a turnover-distance analysis. The case ended in a conditional clearance in phase II.

Several merger cases concerned debated questions such as whether a successive acquisition of up to 100% can be notified as the acquisition of 100% from the outset (BWB/Z-1138 *Air Berlin*) or whether the acquisition of 24% plus certain rights may qualify as a notifiable concentration (investigation triggered by BWB/Z-1138 *Air Berlin*).

Further, the Cartel Court of Appeals (*Kartellobergericht*, i.e. the Austrian Supreme Court) clarified some questions. For instance, the court made it clear that even undertakings (and parts thereof) closed in insolvency proceedings can qualify as (parts of) undertakings within the meaning of Austrian merger control (i.e. their acquisition triggers a filing obligation above the thresholds) if their re-opening – even only after acquisition by a new investor – is not improbable (decision of Oct 4, 2010, 16 Ok 6/10).

Upon the initiative of the BWB, a cooperation between the competition authorities of Austria, the Baltic States, Bulgaria, Croatia, Hungary, Poland, Romania, Slovakia, Slovenia, and Switzerland, the so-called "Marchfeld Forum", became operational in March 2010. A database allows participating competition authorities to see whether an undertaking has notified a merger with one of them. Further, the current consultation of DG Competition, regarding the collaboration of national competition authorities in merger cases (until May 27, 2011, interested parties could submit observations), may trigger some changes, be it only an intensified information exchange between competition authorities throughout the EEA. This in turn may make it more likely that when a merger is notified in one European country, but not in Austria, that the BWB and/or the FCP also (i) learn about a merger and (ii) if they consider it to come within the ambit of Austrian merger control, can investigate it.

In this context, it can also be mentioned that, upon application by the BWB, the Cartel Court recently handed down a fine for a belated notification (decision of April 7, 2010, 25 Kt 1/10). While the fine was small (EUR 5,000), this was due to the facts of the case; the Cartel Court found that the merger did not give rise to competition concerns, there were arguments that the effects doctrine applied (i.e. the involved undertakings had their corporate seats in Germany and not Austria) and, moreover, there were further mitigating circumstances (*inter alia*, the undertaking concerned helped in clarifying the facts of the case).

Key industry sectors reviewed, and approach adopted, to market definition, barriers to entry, nature of international competition, etc.

A sector that has for some time now been under close and special review by the BWB is motor fuels. Already in July 2008, the BWB issued its first interim-report on specific issues in the motor fuels sector. The BWB undertook several further investigations, such as of the specific situations in Salzburg and of motorway petrol stations, and published respective reports. In July 2010, it published a report on its Platts price assessments, which is available on the BWB's homepage (www.bwb.gv.at) in English. In its most recent report on the sector (published in April 2011), the BWB looks at the structure of the market on all the various levels (upstream, midstream and downstream). Last but not least, the BWB publishes a monthly newsletter on the price developments.

Older sector enquiries concerned the food retail, gas and electricity markets. The latter was followed by a report on green electricity (*Ökostrom*) in June 2010.

Mergers in these areas are typically closely looked at by the BWB, such as the concentration BWB/Z-1318 *M-Preis* notified in December 2010 concerning the food retail sector, which was only cleared in phase II proceedings.

In food wholesale, the merger BWB/Z-1387 *Pfeifer* triggered a close analysis of the market definition (see also "New developments in jurisdictional assessment or procedure" above) that even led, as far as can be seen for the first time, to a publication on the BWB's homepage on how the market in a certain sector will be defined in the future merger cases. Pursuant to that publication, the relevant product market is to be separated in a pick up wholesale (*Abholgroßhandel*) for smaller retailers and a delivery wholesale (*Zustellgroßhandel*) for bigger retailers. The geographic scope of the pick up wholesale was found by the BWB to be 30km around the relevant place of business and 100km regarding the delivery wholesale.

Key economic appraisal techniques applied

The BWB has several people who are professional macro or micro economists; the BWB has also formed an organisational department (*Stabseinheit*) focused on economic questions.

The BWB employs all sorts of economic analysis (see also "new developments in jurisdictional assessment or procedure" above). Already in 2006, the BWB had commissioned a study on the economic techniques to delineate the relevant market and apply the Herfindahl-Hirschman index. Further, it can be mentioned in this context that, where a merger concerns sectors subject to specific regulation (e.g. telecoms), the BWB closely collaborates with the experts from the sector regulators.

In phase II proceedings, the appointment of a court (economic) expert to analyse the competitive impact of the merger in question is the rule rather than the exception (unless remedies are offered and accepted by the Official Parties at an early stage).

Approach to remedies (i) to avoid second stage investigation and (ii) following second stage investigation

As elaborated above (see "Overview of merger control activity during the last 12 months"), approximately as many remedies were offered or requested during phase I as during phase II proceedings in the recent past.

Many different remedies have been offered, accepted or imposed. They may roughly be categorised as either structural or behavioural in nature or as a mixture of the two, what maybe called hybrid.

While structural measures (e.g. selling-on several of the acquired super market stores) are, for example, in the recent publication following the merger BWB/Z-1387 *Pfeifer*, said by the BWB to be apt to remedy competition concerns, the other types of remedies are more common.

In the years 2007 to 2009 and the first half of 2011, either approx 17% (2008 and 2009) or 33% (2007 and the first half of 2011) of all remedies were structural in nature. In 2010, there were no structural remedies. In 2009 and 2010 most remedies were behavioural ones, namely 67% in 2009 and 100% in 2010. In the other recent years, hybrid remedies were most common. Such remedies ranged from an obligation not to manage nor influence the management of some own-production facilities (BWB/Z-862) to a prohibition to do further acquisitions in certain geographic areas (BWB/Z-1387).

See further "Key policy developments" below.

Key policy developments

In this context, it can be mentioned that, in May 2010, the BWB resolved to review all clearances under conditions to see whether the respective obligations and/or prohibitions were complied with as well as whether the remedies were effective in tackling the indentified competitive concerns. In a first phase, the BWB has focused on 12 remedies.

See further "Reform proposals" below.

Reform proposals

In 2010, the Social Partners (*Sozialpartner*), comprising of, in particular, the interest groups Austrian Federation of Trade Unions (*Österreichischer Gewerkschaftsbund*), Austrian Economic Chamber (*Wirtschaftskammer Österreich*), Federal Chamber of Labour (*Bundesarbeitskammer*), and Austrian Chamber of Agriculture (*Landwirtschaftskammer Österreich*), presented a study entitled "Future of Competition Policy in Austria" ("*Zukunft der Wettbewerbspolitik in Österreich*").

In this study, the Social Partners suggest a number of amendments to the current Austrian merger control regime. *Inter alia*, they propose to introduce a provision pursuant to which also the acquisition of appreciable competitive influence (*wettbewerblich erheblicher Einfluss*) shall constitute a concentration. Further, they are in favour of a ministerial approval (*Ministererlaubnis*), pursuant to which even a merger that would pose several competition concerns can be cleared by the competent minister if there are other overriding political reasons for such clearance. On the other hand, a much debated increase of the current turnover thresholds (in order to make fewer concentrations notifiable in Austria) did not find the support of the Social Partners. To the contrary, they suggest the introduction of further multiplication rules (*Multiplikatorregelungen*), pursuant to which concentrations in certain sensitive sectors (the study mentions cinemas, pharmacies, and asphalt mixing plants) are caught by merger control, even though the turnover of the undertakings concerned is rather low.

There are now working groups that further evaluate the mentioned proposals and it will have to be seen which of them may become law.

Acknowledgment

The authors are grateful to Georg Galoppi, who helped in the preparation of this chapter.

Astrid Ablasser-Neuhuber
Tel: +43 1 260 50 205 / Email: astrid.ablasser@bpv-huegel.com

Astrid, head of the competition law practice group, has been involved in almost all important cases in Austria in the last years.

She has been practising EU competition law in Vienna/Brussels since 1998, has profound expertise in national and European antitrust and merger control law and represents clients in antitrust and merger cases before the Austrian and European competition authorities and before the European courts. Before joining bpv Hügel Rechtsanwälte, she worked with several antitrust authorities (European Commission/Merger Task Force, Brussels; legal assistant to the president of the Austrian Cartel Court, Vienna) as well as in the competition department of Linklaters, London.

She is a member of the board of Studienvereinigung Kartellrecht and president of the Competition Law Commission of the UIA. Other functions include being a member of the board of the Austrian Federation for the Protection of Intellectual Property (ÖV) and an international rapporteur of the International League of Competition Law (LIDC).

Florian Neumayr
Tel: +43 1 260 50 206 / Email: florian.neumayr@bpv-huegel.com

Florian is vice-head of bpv Hügel Rechtsanwälte's competition and procurement law practice groups. He advises on all aspects of Austrian and EU anti-trust, abuse of market dominance, merger control and procurement law. A special focus of his is litigation and, in particular, defence against private enforcement. He has a considerable track record in representing national and international clients before Austrian as well as European courts and authorities.

Following law school and an LL.M. in international commercial law, Florian earned a PhD in procurement law. He is a regular speaker at seminars and conferences, the content of several of which he has been responsible for. He has authored numerous publications. Florian is honorary fellow of the Centre for International Legal Studies and an active member of the Austrian bar, the Association of Competition Lawyers (*Studienvereinigung Kartellrecht*), the Spanish Austrian Laywers' Association, UIA and LIDC. He has been highly regarded in numerous national and international rankings.

bpv Hügel Rechtsanwälte

ARES-Tower, Donau-City-Straße 11, 1220 Vienna, Austria
Tel: +43 1 260 50 0 / Fax: +43 1 260 50 133 / URL: http://www.bpv-huegel.com

Strategic partners:

www.globallegalinsights.com