



Merger Control

2018

Seventh Edition

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Overview of merger control activity during the last 12 months

In 2017, a total of 439 mergers were notified with the Austrian Competition Authorities, i.e. the Federal Competition Authority (“FCA”, “*Bundeswettbewerbshohrde*”) and the Federal Prosecution Attorney (“FPA”, “*Bundeskartellanwalt*”; FCA and FPA together, “Official Parties”). Compared to 2016, the number of notified mergers in Austria increased again. This is remarkable, as already in 2016, the number of notifications (420) substantially increased compared to 2015 (366 notifications). To put these figures into context, reference can be also made to the year 2007 (as the year before the economic crisis), when 342 mergers were notified in Austria.

In 2017, only one out of 439 notified mergers came into phase II: On 2 October 2017, the FCA initiated a phase II in-depth proceeding at the Cartel Court (as published by the FCA only on 24 October 2017) concerning the planned acquisition of CIT Rail Holdings (Europe) S.A.S. (including the French based Nacco-Group) by the German VTG Rail Assets GmbH (for details, see below).

It therefore seems that the Official Parties are currently hesitating to initiate phase II proceedings for the simple reason of not having sufficient information and time to examine the filed transaction within the four-week deadline of phase I (on request of the undertakings concerned, phase I can be extended for an additional period of two weeks).

Further, only in 22 out of 420 filings did the official parties grant a waiver concerning their right to initiate a phase II proceeding. In general, waivers may be granted in case of urgency; if a waiver is granted, clearance can be expected within approximately three weeks after filing (as compared to the usual legal waiting period of four weeks). While in the past it was rather simple to get a waiver granted, the official parties recently have been becoming strict and hesitant in granting such waivers. The request must be therefore very well-reasoned. (Threat of) insolvency is usually accepted as a reason for urgency.

Only with regard to five filings did the parties concerned withdraw their notification. Therefore, based on the 434 notifications effectively filed in Austria in 2017, only one filing was sent into phase II. In other words, only 0.23% of all filings ended up in proceedings in front of the Cartel Court (in its function as the responsible authority with regard to phase II filings). The rest of the notified transactions received clearance in phase I.

New developments in jurisdictional assessment or procedure

On 1 May 2017, significant changes to Austrian competition law entered into force by means of the Cartel and Competition Law Amendment Act 2017 (*Kartell- und Wettbewerbsrech*

tsänderungsgesetz 2017, “KaWeRÄG 2017” / “Amendment”). The changes concern the Cartel Act (*Kartellgesetz*, KartG) and the Competition Act (*Wettbewerbsgesetz*, WettbG).

Concerning merger control, the changes introduced a new transaction value-based notification threshold. Furthermore, the amount of the filing fee for phase I proceedings with the Official Parties was more than doubled.

Transaction value-based notification threshold

By introducing a new notification threshold, which comes in addition to the existing turnover thresholds,¹ the scope of Austrian merger control will be further broadened. It can be therefore expected that the number of merger notifications in Austria will again increase in the future. In general, already before introduction of the new threshold, Austria was (and still is) one of the EU’s jurisdictions with the lowest merger control thresholds (e.g., no second domestic Austrian threshold). Based on the new value-threshold, in particular with regard to multijurisdictional filings, one has to bear in mind in the future that not only the respective turnover figures, but also the transaction value, have to be taken into account (in Germany, the 9th amendment to the Act Against Restrictions of Competition includes a similar provision based on the transaction value (in this case, of €400m)).

The new threshold applies to transactions which are implemented after 1 November 2017. It is based on both the turnover of the undertakings concerned, but also on the value of the transaction. The new threshold aims to cover in particular mergers in the digital area, but also acquisitions of pharmacy undertakings, where the target’s turnover may be (still) low but its value already is of substantial economic importance. The much discussed Facebook/ WhatsApp Merger before the EU Commission (M.7217 Facebook / WhatsApp), where the respective turnover of WhatsApp, of less than €20m, was reflected in a purchase price of €19bn, was also one of the reasons for the Austrian legislator to introduce this new threshold. In this regard, it has to be noted that for media undertakings, which are often active in the digital arena, the special provision for turnover calculation in cases of so-called “media mergers”, namely the application of a multiplying factor (20 times or 200 times the turnover), does not apply in the context of the new notification threshold.

According to this new notification threshold, a concentration will have to be notified to the FCA if:

- the combined worldwide turnover of the undertakings concerned exceeds €300m,
- the combined Austrian turnover of the undertakings exceeds €15m,
- the value of the consideration for the transaction exceeds €200m, and
- the target is active in Austria to a significant extent.

Besides the turnover thresholds concerned (which are, by Austrian standards, far below the previous and in future parallel applicable “traditional” thresholds, *cf* FN 1), the essential criteria are based on the “value of the consideration” on the one side, and the “significant” activity of the target on the other side.

The law neither defines the term “consideration” nor explains what is meant by the fact that the target must be active on the domestic market “to a significant extent”.

On 14 May 2018, the FCA, in cooperation with the German *Bundeskartellamt* (the German newly introduced threshold based on value is similar to Austria), published draft guidance which is currently subject to public consultation (“draft common guidance”; an English version of the draft is also accessible via the homepage of the FCA).

According to the explanatory notes to the law and the draft common guidance, “consideration” comprises any type of consideration of value that the seller receives from the acquirer in connection with the transaction. E.g., cash, securities, intangible assets, assumption of debt, assets and considerations for non-competition have to be included in calculating the amount of the consideration. Also, future and variable purchase price components have to be taken into account (e.g., earn-out payments, payments that are conditional on milestones agreed and future licence payments).

Concerning “activity of the target” in Austria “to a significant extent”, the draft common guidelines refer to the fact that activity is generally measured on the basis of indicators other than turnover. The explanatory notes and the draft common guidelines state that regard must be had to “recognised key measures used in the respective industry”. As far as the digital economy is concerned, e.g., user numbers, downloads or website visits, may give an indication. With regard to the pharmaceutical industry it could be, e.g., the number of staff engaged in research and development, or the research and development budget. Furthermore, the location of the target company is also a reference point concerning significant domestic activity. Such activity must generally be presumed to exist if the company to be acquired has a site in Austria. However, this factor must also take account of the extent to which the activities at this site have domestic market orientation.

The draft common guidelines itself state that the guidelines do not model every possible case scenario or application-related issue and should be regarded as preliminary. For merging parties, it may therefore still be difficult to assess with certainty whether the relevant merger is subject to Austrian merger control. The FCA is open for (informal) pre-notification talks in order to discuss whether a planned transaction is notifiable in Austria.

If a reportable merger is not notified, fines of up to 10% of the group turnover of the last business year may be imposed.

Increased filing fee

By increasing the amount from €1,500 to €3,500, the filing fee in Austria will be more than doubled (before, the filing fee amounted to €1,500). However, in comparison to other jurisdictions, e.g. Germany, the lump sum fee of €3,500 (independently of the size of the transaction and filing) can still be considered to be moderate.

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

In general, with regard to merger control, the Official Parties do not focus their merger control practice on key industries. Merger notifications, which had been in the special focus of the Official Parties in 2017, and the respective key industries concerned, can be summarised as follows (including, e.g., market definition, etc.):

Rental of railway wagons

As mentioned above, the only phase II merger proceedings initiated in 2017 referred to the business area of rental of railway wagons. On 2 October 2017, the FCA initiated a phase II in-depth proceeding at the Cartel Court (as published by the FCA only on 24 October 2017) concerning VTG Rail Assets’ planned acquisition of CIT Rail Holdings (Europe) S.A.S. (including the French based Nacco-Group).

In substance, following its press release, the FCA challenged the parties’ proposed definition of the relevant market. While the parties claimed that the (former) national railway operators (DB-Cargo, CD Cargo, RCA (ÖBB), SBB) were to be included as market

players in the relevant market for the rental of railway wagons, the FCA was of the opinion that the national operators rent out their wagons to third parties only to a limited extent. A calculation of the FCA, which did not include the capacities of the national operators, came to the conclusion that in the segments “rental of dry cargo wagons” and “rental of tank wagons”, the parties’ market shares exceeded the presumption threshold of 30% according to section 4 (2) clause 1 of the Austrian Cartel Act. Following this approach, the parties would be (rebuttable) dominant in the market for the rental of railway wagons.

The Cartel Court appointed an economic expert, who submitted his opinion in February 2018. In consequence, potential conditions were discussed. A package of requirements developed by the notifying parties was subsequently examined in the context of a supplementary opinion and found to be suitable for eliminating the given competition concerns. Hence, with its decision of 28 March 2018, the Cartel Court granted clearance. The remedies – which are in accordance with the proceedings in Germany – are not published yet (but will be published later). In its press release, the FCA refers to the fact that the acquirer, upfront, agreed to sell approx. 30% of the Nacco business to third parties. The remedies concerned will be monitored by an independent trustee.

Pet food / Animal needs

Concerning the planned acquisition of Tomy’s Zoo GmbH by Fressnapf Handels GmbH, a transaction concerning the business area of pet food / animal needs, the FCA (also based on third parties’ complaints) had concerns regarding the market definition applied. In the FCA’s view, it was likely that Fressnapf would strengthen its market dominance on the relevant market concerned. The parties first applied for an extension of phase I for two weeks. However, the authority’s competition concerns could not be resolved in the extended period of phase I. The FCA initiated a phase II proceeding before the Cartel Court. In consequence, the parties withdrew their planned transaction.

Gambling

In the gambling sector, the FCA scrutinised in detail the planned acquisition of sole control of Casinos Austria AG by SAZKA Group a.s., Czech Republic (SAZKA). The FCA considered the following markets to be relevant in examining this transaction: (i) casinos; (ii) lottery gambling; (iii) gambling machines; (iv) sports betting; and (v) online gambling. Acquirer and target are active in these markets. However, geographically, the markets were defined nationally or even more narrowly in scope. The acquirer, SAZKA – being so far active outside Austria only – was therefore considered as not being active on the relevant markets in Austria. Hence, there was no overlap; the planned transaction did not result in the creation or strengthening of a dominant position. The transaction (also based on pre-notification talks) therefore received clearance already in phase I.

Ski lifts / Skiing areas

Also in 2017, concerning the sector for ski lifts / skiing areas, Bergbahnen AG Wagrein (BB Wagrein) and Fremdenverkehrs GmbH (FVG) acquired all shares in Bergbahnen Flachau Ges.m.b.H (BB Flachau). FVG and BB Wagrein are part of the Raiffeisenverband Salzburg eGen-Group (RVS). RVS also holds shares in Alpendorf Bergbahnen AG (Alpendorf BB), a skiing area next to Wagrein and Flachau. Furthermore, all undertakings concerned are part of the Ski Amade association, which sets prices for multi-day tickets throughout the entire region. Again, based on pre-notification talks and remedies agreed on, the planned transaction received clearance in phase I. The remedies became binding as a result of the clearance of the merger. The undertakings thereby agreed to offer new types of ski cards. These different types include, e.g., a weekend family ticket collectively for BB Flachau,

BB Wagrein and BB Alpendorf, and various variants of one-day tickets for families valid in different skiing areas. The tickets will be considerably discounted compared to the tariffs currently being paid for the same services. The FCA expects that the new products (and the respective discounts granted) will both increase consumers' freedom of choice and reduce price pressure, especially to the benefit of families.

Container terminals and related services

Concerning a planned transaction concerning the planned cooperation between Wiener Hafen (Port of Vienna) and ÖBB-Infrastruktur (a subsidiary of the Austrian railway operator) with regard to container terminals and related services, the FCA, already in 2016, initiated an examination of the merger, in proceedings before the Cartel Court, on the basis of extensive objections to the information provided by the merger applicants. After obtaining a judicial expert opinion and a supplementary report, the applicants withdrew the merger application in May 2017.

Free TV and TV advertising segment

Concerning the free TV and TV advertising segment, the German media group ProSiebenSat.1Puls 4 GmbH (which already acquired the Austrian private TV channel Puls4 before) intended and notified its planned acquisition of the Austrian private TV media group, ATV. The parties initiated at an early stage pre-notification talks with the Official Parties. The latter hereby examined in detail the possible effects of the proposed merger on competition in the affected markets and the impact on diversity of opinion and media in Austria. In the course of the pre-notification talks, remedies were negotiated, which were subjected to an extensive market test in phase I of the filing procedure. In total, ten companies sent statements on the published conditions and the merger filed within the 14-day deadline. This extensive feedback was reviewed and analysed by the FCA.

As a result, based on the concerns expressed in the feedback, despite the considerable need for ATV to restructure, a strict tightening of the originally submitted conditions was agreed. In particular, the remedies agreed upon concern the free TV advertising market: they ensure that ATV can still be booked independently for spots, and that a direct customer has the right to use an independent discount scale (i.e., any rebates to be granted by ATV to advertisers will be exclusively based on advertising times on ATV). In consequence, advertisers are not obliged to book a whole package of advertising spots with the acquirer group and its several TV channels but can focus their activity on ATV. ATV will furthermore only slightly increase its advertising time over the full-year average compared to the previous year, in order to strictly limit the possibility for the acquiring group to compete on the market with predatory competition. At the same time, the FCA considered that a further tightening of conditions in the area of the advertising market would jeopardise the necessary remediation of ATV, and thus its very existence. ATV has been posting constant and high operating losses for several years.

Concerning TV broadcasting, the remedies – in order to uphold media diversity – encompass an obligation on ATV to broadcast news also at the weekend. This has a positive effect on ensuring an independent ATV editorial team and office. Furthermore, the continued existence of ATV's HD free satellite coverage was ensured until the end of 2020.

Grocery retail

Within the grocery retail segment, concerning a planned acquisition of a closed-down site of the insolvent Zielpunkt GmbH by Lidl Österreich GmbH, the acquirer withdrew its notification after assessment that the acquisition concerned was not notifiable in Austria.

The press release of the FCA does not disclose whether this assessment was based on an in-house analysis or talks with the FCA itself.

Seeds and plant-protection products

Also concerning BASF SE's (Deutschland) withdrawn notification concerning acquisition of sole control of certain assets of Bayer AG concerning seeds and plant-protection products, no details were disclosed. It is therefore unclear whether this planned transaction is now covered by the currently ongoing merger notification, M.8851 BASF / BAYER DIVESTMENT BUSINESS which is before the European Commission.

Key economic appraisal techniques applied, e.g. as regards unilateral effects and co-ordinated effects, and the assessment of vertical and conglomerate mergers

In its publications in 2017, the FCA did not refer to the economic standards as mentioned. Concerning the above mentioned SAZKA / Casinos Austria AG transaction (see above), based on the information published, the fact that the acquirer SAZKA is also active in the gambling sector (however, outside Austria and therefore in a neighbouring market, i.e., a market where Casinos Austrian AG is active as the target), did not result in competition concerns.

In general, the dominance test, as included in Austrian merger control, applies to all kinds of mergers, i.e., horizontal, vertical and conglomerate transactions. In investigating these transactions, the authorities may rely on both unilateral and co-ordinated effects.

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

In case the Official Parties – contrary to the Cartel Court in phase II proceedings – cannot agree on remedies which result in a formal (conditional) clearance decision, “informal” remedies entered into with the FCA and the FCP to avoid phase II, do happen in practice. The Official Parties – based on the remedies agreed – withdraw their right to initiate phase II proceedings on the condition that the remedies will be fulfilled. Such “informal” remedies also have binding effect. An undertaking which fails to comply with such remedies is deemed to have violated the standstill obligation, which may result in substantial fines.

In phase II, the Cartel Court may prohibit a transaction, provided that it creates or strengthens a dominant position. In addition, the Cartel Court may clear transactions based on conditions or obligations. In practice, the Cartel Court regularly appoints an economic expert early into phase II. The economic analysis is then largely carried out by the expert witness, whose report is of considerable importance to the outcome of the proceedings. If the expert concludes that the transaction would give rise to the creation or strengthening of a dominant position, the parties may still offer remedies to the Cartel Court.

However, in practice, remedies offered to the FCA and the FCP are also much more common in phase II. If the Official Parties agree on the remedies, their request to initiate a phase II proceeding will be withdrawn. The Cartel Court then has to close its proceedings, with the effect that the transaction concerned is deemed to be cleared. Phase II remedies agreed with the Official Parties to obtain withdrawal of a phase II request have a binding effect. Again, an undertaking which fails to comply with such remedies is deemed to have violated the standstill obligation.

Compared to authorities such as the European Commission, the Austrian authorities are more willing to consider not only structural, but also behavioural remedies. Access remedies are relatively frequent.

Key policy developments

See above, the Cartel and Competition Law Amendment Act 2017 (*Kartell- und Wettbewerbsrechtsänderungsgesetz 2017*, “KaWeRÄG 2017” / “Amendment”) concerning the Cartel Act (*Kartellgesetz*, KartG) and the Competition Act (*Wettbewerbsgesetz*, WettbG) entered into force on 1 May 2017.

As a side note, it can be noted that the FCA hired five new case-handlers at the end of 2017. In total, the FCA’s team of case-handlers now consists of 34 case-handlers and its Director General, Dr Theodor Thanner.

Reform proposals

In recent years, there have been discussions whether the FCA should be competent to decide on merger control applications in general and – particularly – on remedies (so far, it is the Cartel Court only and not the FCA which can actively rule on merger control notifications). However, as outlined above, in practice, filed transactions already get clearance granted in phase I based on remedies negotiated between the FCA and the undertakings concerned.

Furthermore, as outlined above, as Austria has one of the lowest national merger control thresholds, it is also regularly discussed whether to increase the existing (domestic) turnover thresholds (e.g., by introducing a second national threshold) in order to limit the number of transactions that are notifiable. Furthermore, Austria also still follows the “creation or strengthening of a dominant position” as a substantive test. Critics have requested to change to the SIEC test (as applied under the EUMR and, e.g., in Germany).

However, as a substantial reform of Austrian competition law only entered into force in 2017, there are no actual reform proposals which are likely to be implemented in the near future.

* * *

Endnote

1. According to Section 9(1) of the Cartel Act, the thresholds of Austrian merger control are met if the undertakings concerned achieved the following cumulative turnover figures in the previous business year: a) a combined global turnover of more than €300 million; b) a combined turnover of more than €30 million in Austria; and c) at least two of the relevant undertakings each had a global turnover of more than €5 million. Furthermore, when only one of the undertakings concerned had a turnover of more than €5 million in Austria, the global turnover of the other undertaking involved must exceed €30 million in order to require merger notification (Cartel Act, Section 9(2)).



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Astrid, head of bvp's competition law practice group, has been involved in numerous important cases in Austria and in Brussels/Luxembourg in the last few years. She has been practising EC 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 Hügel & Partner (now bvp Hügel), 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.

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