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Four Common Pitfalls of Austrian Merger Filings

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Austria sees a large number of merger filings—nearly 500 in 2018 alone. And its authorities are very active in fining companies for missed filings, having already brought several proceedings in 2019. One reason for this is that Austrian merger control law requires notifying transactions in some unexpected circumstances. As a result, it would be wise not to rely on the usual rules of thumb which, although useful in screening for filings in other jurisdictions, can cause even sophisticated competition counsel to be led astray in Austria.

Below are four common pitfalls that can cause a missed or late filing in Austria. By knowing how to spot these risks and when to seek out local expertise, in-house and outside counsel can avoid a delayed or missed filing as well as the attendant consequences on deal negotiations or closing—to say nothing of the cost and distraction of defending against a failure-to-file proceeding with the Austrian authorities.

Pitfall #1: Not filing a transaction because it is a foreign-to-foreign deal or because the Target has no turnover in Austria

There is no statutory foreign-to-foreign exemption under Austrian merger control law. At the same time, the notification thresholds for having combined Austrian turnover can be satisfied by the Acquirer alone. So what can seem a tenuous link between the transaction and the domestic market can, contrary to the intuition of even a seasoned competition lawyer, still trigger a filing requirement in Austria.

Although an "effects doctrine" exists to carve out transactions that have no possibility of affecting the domestic market, as a practical matter, it is rarely tested in public proceedings and sparingly endorsed by the Austrian authorities.

The main reason is that the doctrine sets a high bar. In addition to the Target having no turnover in Austria, the doctrine requires that the transaction have no effect on the Austrian market, for example, as a result of its activities in a broader geographic market that encompasses Austria (such as the EEA or an integrated market with Germany) or its expected activities in the domestic market in the near future. These can preclude the application of the effects doctrine and therefore require a filing, even in a foreign-to-foreign transaction or one in which the Target has no turnover in Austria.

Pitfall #2: Forgetting to screen for the transaction-value based threshold

In late 2017, Austria (along with Germany) became an early adopter of a separate notification threshold based on the value of the transaction. By comparison, the EC has not yet adopted such a threshold. Austria's new threshold requires only half the combined domestic turnover of its "classic" turnover-based threshold, but the transaction's value must exceed € 200 million and the Target must be "active in Austria to a significant extent."

Ostensibly, the new threshold was created to capture deals in the digital sector where turnover alone may not be a good indicator of the Target's competitive significance. In reality, as it is agnostic to the sector that the Target operates in, the new threshold captures a host of transactions that could be considered of a more "traditional" variety. So far, there have not been enough filings under the new threshold to allow the Austrian authorities to clearly draw out its contours—in particular on what constitutes the requisite level of significant domestic activity by the Target. A cautious approach means filing "close call" transactions, although pre-notification talks with the authorities and the possibility of withdrawing a notification leave counsel with some options for such deals.

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Pitfall #3: Undervaluing the turnover due to Austria's divergent view on "linked" entities

Under Austrian merger control, all turnover of any entities "linked" upstream or downstream to an "undertaking concerned" (i.e., typically the Acquirer and Target or joint venture) by at least a 25% shareholding or voting interest must be attributed to the undertaking when calculating its turnover for the notification thresholds.

All of the linked entity's turnover—not just a *pro rata* share based on the percentage holding—must be counted. And unlike in Germany (another unique jurisdiction that counts linked entities with a 25% or more interest), this is to be done irrespective of whether a controlling influence is associated with the interest.

The consequence is that the Austrian merger control laws can significantly inflate turnover figures to levels that trigger unexpected filings.

Pitfall #4: Not spotting the less-obvious types of transactions reportable in Austria

Austrian merger control captures three types of transactions that other jurisdictions may not. An acquisition of a mere 25% of shares or voting rights (or rights typical of a 25% stake) must be notified. This can come as a surprise, especially to an Acquirer with an existing shareholding that did not previously require a filing.

In addition to a full-function joint venture (i.e., one performing all the functions of an autonomous business on a lasting basis), a non-full-function JV may also have to be filed. For example, if two parents transfer assets conferring a sufficient market position (e.g., production plants, customer lists, patents) into a newly-formed company, a filing would be required if one or both parents acquire joint control or at least 25% of the shares in the JV.

Causing an overlap of at least half of the managerial or supervisory boards of two companies, in and of itself, triggers a filing.

As these types of transactions often do not have to be filed in major jurisdictions like the EU, they can too-easily be missed when screening for whether a notification is required in Austria.

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