Austria merger control

Produced in partnership with bpv Hügel, Attorneys-at-law

A conversation with Florian Neumayr, co-managing partner specialised in competition and antitrust matters at the Austrian law firm bpv Hügel on key issues on merger control in Austria

NOTE–to see whether notification thresholds in Austria and throughout the world are met, see Where to Notify.

1. Have there been any recent developments regarding the Austrian merger control regime and are any updates/developments expected in the coming year? Are there any other 'hot' merger control issues in Austria?

Triggered by the EU Damages Directive, an amendment to the Austrian Cartel Act (*Kartellgesetz*) and the Austrian Competition Act (*Wettbewerbsgesetz*) was adopted in March 2017. While this focused on the implementation of the said directive, it also introduced changes to the Austrian merger control regime, in particular one of which was quite significant.

The amendment introduced an entirely new notification threshold. Different from the classic thresholds, this new threshold does not only build on turnover but also on transaction value and the target being active in Austria.

According to the relevant Section 9 para 4 of the Cartel Act, concentrations also have to be notified where (cumulatively):

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

The value of transaction threshold was inspired by a similar piece of legislation in Germany. It aims to cover in particular mergers in the digital economy involving successful start-ups which do not (yet) generate revenues exceeding the traditional turnover-based thresholds (and therefore would 'escape' merger control scrutiny). While this is the aim, the transation value threshold applies to all industries. Pursuant to the new notification form that became effective on 1 November 2020, parties must now clearly specify the factual basis for submitting a transaction value based filing.

It is also noted that the threshold set for the value of the transaction is significantly lower than in Germany. Therefore from an international perspective, the Austrian merger control covers transactions which are, for example, still below the German merger control thresholds.

Regarding the terms ‘consideration’ and ‘significant activity in Austria’, the official explanatory remarks (*travaux preparatoires*) contain some additional guidance:

- ‘consideration’ is understood to contain all assets and other services of monetary value (purchase price) which the seller receives from the purchaser in connection with the transaction plus the value of possible liabilities which the purchaser takes over
- the ‘significant activity in Austria’ criterion shall, according to the explanatory remarks, already be fulfilled where a site of the undertaking to be acquired is situated in Austria; if the target has no physical presence in Austria, the criterion can still be met. For the digital industry, the explanatory remarks mention number of monthly active users or the number of unique visits as re relevant to ascertain an Austrian nexus.

In July 2018, the competition authorities of Germany (*Bundeskartellamt*) and Austria (*BWB*) together issued a guidance paper. In this paper (available in German and in English), the authorities further explain how they understand the term ‘consideration’ and when they consider that there is a significant activity in Germany and/or Austria. Most importantly, the first practical experience shows that at least the BWB takes a rather narrow approach, particularly when it comes to the ‘significant activity’ criterion. For example, even the acquisition of a pharmaceutical company having a drug in clinical Phase III testing with some testing taking place in Austria and a view to later market the drug also in Austria did not fulfil the criterion where the main research focus is abroad.

Since the amendment, the notification fee has also slightly increased from €1,500 to €3,500 (Section 10a para 1 of the Competition Act).

By way of a side note, it may be mentioned that the proposal of the Austrian Ministry of Justice, published in 2016, to include in the amendment also a provision to empower the competent authorities to also review antitrust aspects (Section 1 of the Cartel Act or what would be Article 101 TFEU under EU law) within the merger review of a proposed joint venture has not been adopted so far.

Apart from this amendment, a decision by the Cartel Court of Appeals (the court of last instance in the Austrian merger control regime) is particularly noteworthy. As far as can be seen, for the first time a prohibition decision has been confirmed. This is even more remarkable, as the case (with the case no 16 Ok 11/16b *Novomatic*) concerned a highly regulated industry (gambling).

On 1 November 2020, a new notification form went into effect in Austria. Changes to the short-form notification for competitively benign deals are largely non-substantive, though one notable exception is that information regarding joint ventures must also now be provided for non-full-function ventures. Substantive changes to the form include some meaningful expansion of the level of detail required to be provided in a full-form notification for any transaction that crosses certain statutory market share-based thresholds that signal potential competitive concerns. The most notable of these are: (i) additional requests for information about market conditions (including the presence of ‘maverick’ competitors) for transactions that involve a so-called ‘affected market’, and (ii) additional requests for market data, deal documents, and analysis of market conditions (including buyer power, entry, efficiencies, ‘failing firm’, and international competitiveness) that are required for transactions that involve markets subject to a so-called ‘presumption of market dominance’. In addition, the new draft form notification more clearly requests parties to provide a waiver permitting the Austrian authorities to exchange information with other national competition authorities during concurring reviews.

2. Under Austrian merger control law, is the control test the same as the EU concept of ‘decisive influence’? If not, how does it differ and what is the position in relation to minority shareholdings?

The control test is practically the same. However, Austrian merger control law also sets out formal thresholds that can be triggered irrespective of whether or not decisive influence is being acquired.

Namely, the following scenarios qualify as concentrations within the meaning of Austrian merger control:

- direct or indirect acquisition of 50% or more shares in another company, regardless of whether this leads to the acquisition also of a controlling influence (for instance, it could be that, under the provisions of a share purchase agreement, the seller retains such rights that still confer sole control to the seller rather than a change of control), and
- direct or indirect acquisition of 25% or more shares in another company (again, regardless of whether this leads also to an acquisition of control).

Notably, also an attempt to circumvent merger control by not acquiring 25% but a stake (and rights) equivalent to (or exceeding) the rights a 'normal' 25% shareholding confers, triggers Austrian merger control as has been confirmed by jurisprudence. Here, the test is clearly not 'decisive influence' but whether or not rights such as a 25% shareholder typically has have been acquired.

3. Are joint ventures caught by the national merger control provisions (including non-structural, cooperative joint ventures)?

Yes, the creation of a joint venture also constitutes a concentration, if, in the case of a creation 'from scratch', it shall perform on a lasting basis all the functions of an autonomous economic entity; ie all full-function joint ventures are caught. The new notification form also makes reference to non full-function joint ventures, though authority practice or further guidance will be needed to clarify the scope of this new, broader provision.

It should further be noted that when there is already an existing business and the joint venture is brought about by subsequent acquisition of (legally or actually) jointly exercised control by a further parent undertaking, the full-function criterion was not considered a pre-condition for Austrian merger control to apply. However, it remains to be seen whether this continues to be the case in light of the Court of Justice's judgment of 7 September 2017 in Case C- 248/16 Austria Asphalt, which held that irrespective of when and how a joint venture is created, it always needs to be full-function in order to trigger the application of merger control rules.

Further, whether the joint venture is non-cooperative or cooperative does not matter. If it is non-structural, however, it will often not be full function.

4. What are the merger control thresholds and would a purely foreign-to-foreign transaction be caught (commenting on any 'effects' doctrine/policy if relevant)?

A concentration within the meaning of Austrian merger control must generally be notified if the turnover achieved by the undertakings concerned within the last business year prior to the transaction fulfilled either of the following cumulative thresholds groups:

- under the turnover thresholds, a notification will be required where:
    - combined worldwide turnover is more than €300m
    - combined turnover in Austria is more than €30m, and
    - worldwide turnover of each of at least two of the undertakings concerned is more than €5m
    - however, in order to limit to a degree the ambit of Austrian merger control, where only one undertaking has significant Austrian turnover, the

Cartel Act provides for the following exemption (ie even if the above thresholds are fulfilled but the following conditions are met, the respective merger is not notifiable): (i) only one undertaking concerned achieved more than €5m within Austria, and (ii) all other undertakings concerned have achieved an aggregate turnover of not more than €30m worldwide. Note–from a practical point of view, there are not many occasions where this exception is actually applicable.

- under the alternative value of transaction threshold, a notification will be required where:
    - the combined worldwide turnover of the undertakings concerned exceeds €300m
    - the combined Austrian turnover exceeds €15m
    - the value of the consideration exceeds €200m, and
    - the target undertaking is to a significant extent active in Austria.

Foreign-to-foreign transactions

Provided that either of these threshold groups are fulfilled, also purely foreign-to-foreign transactions may be caught as well.

Regarding the question of foreign-to-foreign transactions, Section 24, para 2 of the Cartel Act should be noted. This provision is recognition of the effects doctrine in that it stipulates that Austrian competition law only applies if a set of facts has an effect on the Austrian market.

The Official Parties typically take a very strict approach, ie they construe the effects doctrine narrowly. They are regularly of the opinion that the abstract possibility of an effect and a potential impairment of competitive conditions in Austria are sufficient for constituting a domestic effect. This, for instance, would be the case where the relevant market is European wide with Austria being part of this market even though there are no actual sales in Austria.

They take this very strict view despite jurisprudence, which is more lenient. Jurisprudence has defined the following factors as relevant for the absence of a domestic effect: No actual turnover of the target nor sales any time soon in Austria; no Austrian establishment of the target (no subsidiary nor branch office); moreover, no acquisition of resources (patents, know-how, funds), which could significantly increase the market position of the acquirer in Austria.

Notably in a merger case relating to the banking industry, the Austrian Cartel Court of Appeal (16 Ok 49/05) overturned a decision by the Cartel Court that had—based on the Official Parties' strict approach to the effects doctrine—found that an Austrian bank's acquisition of foreign targets active only abroad had to be notified because of possible effects in Austria. Following an appeal by the purchaser, the Cartel Court of Appeals held that the acquisition of targets being only active on (distinct) foreign markets does not significantly influence conditions on the domestic Austrian market.

Given that the Official Parties still take a very strict view to foreign-to-foreign mergers, it is often better to apply in doubt for merger clearance and to request that the Official Parties waive their right of an in-depth analysis, which they are often prepared to do, if there are minimal effects in Austria (rather, than living with the risk that the Official Parties take actions arguing a case of what is often called gun-jumping).

To see whether thresholds in Austria are met, see Where to Notify.

Media mergers

There are special rules for media concentrations designed to preserve media diversity. In transaction involving a media company or a media service (*Mediendienst*), the turnover has to be multiplied by 200 (for purposes of ascertaining whether or not the €300m and €30m thresholds are met). A multiplier of only (but still) 20 applies with regard to companies providing auxiliary services for media companies (*Medienhilfsunternehmen*).

According to the 'one stop shop principle, mergers having an EU dimension only have to be notified to the European Commission but not to the Austrian authorities. Again, special rules for media concentrations apply as they have to be notified to both, the European Commission and the Austrian Federal Competition Agency (*Bundeswettbewerbsbehörde—BWB*). As the treatment of media concentrations shall ensure media diversity, a media transaction may also be prohibited if otherwise the media diversity would be impaired.

5. Are there any specific issues parties should be aware of when compiling and calculating the relevant turnover for applying the jurisdictional thresholds?

The parties should be aware that in addition to the undertakings directly involved in the transaction, as a matter of principle, also the turnover of all undertakings that are (directly or indirectly) linked to these undertakings in a way that, if newly established, would trigger merger control, is to be taken into account for the calculation of the relevant turnover thresholds. Given that also minority shareholdings (namely, 25%) can establish a sufficient link to trigger merger control, turnover information from consolidated balance sheets does not necessarily reflect the (potentially larger) relevant turnover for purposes of Austrian merger control.

6. Where the jurisdictional thresholds are met, is notification mandatory and must closing be suspended pending clearance?

Relevant transactions exceeding the above mentioned thresholds without benefiting from an exemption have to be cleared (ie also notified) prior to implementation. Any implementation without clearance will be qualified as gun-jumping and may trigger fines (see question 10 below) and the transaction can also be declared void.

7. Is there any discretion to review transactions that fall below the notification thresholds?

The Austrian authorities are not competent to review transactions that do not meet the thresholds. Of course, if they involve antitrust (rather than merger control) issues, the authorities might take on a respective case by opening what at the EU level would be proceedings for (potential) infringement of Article 101 or Article 102 TFEU.

8. Is it possible to close the deal globally prior to local clearance?

If the business related to the Austrian market can effectively be separated from the rest of the transaction, it is possible to close the deal globally prior to a clearance decision in Austria. However, this is very difficult to structure in practice.

9. Is there a deadline for filing a notifiable transaction and what is the timetable thereafter for review by the BWB?

The notification to the BWB is not subject to any deadlines (ie there is no certain period of time within which the notification must be submitted), but the undertakings are barred from implementing the deal prior to clearance (see above). Hence, it is in the parties' interest not to wait too long with the notification. It is also worth mentioning that it is not necessary that the deal has already been signed prior to notification. Rather, it is sufficient that the parties have specific intent to actually implement the notified merger.

Once notified, the BWB forwards copies of the notification (and any exhibits thereto) to the Federal Cartel Prosecutor (*Bundeskartellanwalt*), together with the BWB referred to as the Official Parties, and publishes the fact that a certain transaction has been notified on its webpage. It is required to include in the notification certain details identifying the acquirer and target for this publication.

In Phase I of the investigation procedure, the Official Parties assess the concentration and decide whether or not they will lodge an application for in-depth review (Phase II) with the Austrian Cartel Court. Since the amendment of 2013, Phase I, which normally lasts four weeks, can be extended to six weeks. The idea was to give the stake holders in Phase I more time to resolve any issue that may prevent clearance—ie that there be, if applied for, more time to discuss possible commitments. Phase II lasts up to five months; again, the amendment of 2013 brought a possibility to have Phase II extended (by one further month). The deadline starts to run the day after notification; for example, if the notification is filed on a Monday, the last day the official parties can ask for Phase II is again Monday, four weeks later.

Decisions by the Cartel Court concluding Phase II may be appealed to the Austrian Supreme Court sitting as the Cartel Court of Appeals. In that case, what may be called the Phase III proceedings must be resolved by a decision by the Cartel Court of Appeals within two months (as of having received the complete docket).

Upon reasoned request by the notifying parties, the Official Parties may also issue an early clearance by means of a so called 'waiver' (to request Phase II proceedings). This effectively shortens the review proceedings by about ten days, to a minimum of approximately two weeks and three days. However, it is more common for the Official Parties to wait for the elapse of Phase I (whereby the merger is automatically cleared).

10. Who is responsible for filing a notifiable transaction (noting also whether there is a specific form/document used and an applicable filing fee)?

Any of the undertakings concerned can notify the merger (Section 10, para 1 of the Cartel Act). In practice, the purchaser typically performs this task. There is also a statement by the BWB, based on a non-public decision by the Cartel Court, that they do not consider the vendor to liable if no notification was made. It is advisable that the transaction documents establish an obligation on all involved parties to collaborate (in particular, regarding the compilation of necessary data). The Cartel Act only stipulates in rather general terms what kind of information notifications of concentrations have to contain.

In 2003, the Official Parties issued a form for the notification of mergers. Although not legally binding, it is highly recommended to use this form in order to avoid incomplete notifications. The filing fee amounts to €3,500 (new Section 10a of the Competition Act).

Account should also be taken of the fact that, in Phase II proceedings, the Cartel Court issues an order requiring the notifying parties to pay up to an additional €34,000 (depending on the duration and complexity of the proceedings; Section 50 of the Cartel Act).

On 1 November 2020, a new notification form issued by the BWB went into effect, the notable changes having been detailed above.

11. Please comment on the penalties for failing to notify or suspend transactions pending clearance and the Official Parties' record/stance in terms of pursuing parties for failing to notify relevant transactions (commenting, if relevant, on any statute of limitations regarding sanctions for infringements of the applicable law).

Failing to notify and to suspend transactions pending clearance can lead to the imposition of substantial fines pursuant to section 29 of the Cartel Act.

The law provides for fines of up to 10% of the consolidated group turnover. In assessing fines, the Cartel Court is required to take account of the gravity and duration of the infringement, the enrichment accrued by the infringement, and the culpability and economic capability of the infringer. The Cartel Court has a wide level of discretion in assessing and weighing these criteria. However, it must not go beyond what the Official Parties have asked for.

There is some practice in Austria of imposing fines for missing a mandatory clearance (gun-jumping). The highest fine imposed so far amounted to (in absolute terms) €1.5m, in a case involving the acquisition of a foreign target without Austrian sales by an Austrian acquirer (*Lenzing* case). Based on publicly available data, this amount corresponded to less than 1% of the acquirer's worldwide (approximately €620m) turnover and Austrian (20% of worldwide) turnover. At the time, the violation was regarded as serious, as the transaction gave rise to a monopoly on a market for certain cellulose fibres. Other fines have ranged between €2,500 (for each of two undertakings involved) and €640,000; however, little can be inferred from these amounts.

It may also be noted that in 2013, the Cartel Court of Appeals (16 Ok 2/13) raised an initial fine of €4,500 imposed by the Cartel Court on two logistics undertakings up to €100,000. It held that gun-jumping is generally to be qualified as a serious infringement because the effectiveness of the rules on merger control and notification would be undermined even if the merger did not give rise to competitive concerns. The fine would have to be appreciable in order to show that gun-jumping is not a trivial offense in Austria.

Section 33 of the Cartel Act stipulates that an application for the imposition of a fine in accordance with the Cartel Act may only be brought within five years from the termination of the infringement. Thus, this statute of limitation also applies to fines for failing to notify a merger.

12. Are there any other 'stakeholders' other than the Official Parties (for example, any 'sector regulators' who might have concurrent powers)?

Apart from the BWB and the Federal Cartel Prosecutor, there are some bodies which are relevant by virtue of the fact that they have representation in the Cartel Court and can nominate someone to sit on the Competition Commission. These bodies are commonly called the 'Social Partners'. The main bodies are the Austrian Federal Economic Chamber (undertakings established in Austria are members) and the Austrian Chamber of Labour (a trade union organisation)–each of whom assign one lay judge to the Cartel Court. These bodies can also submit opinions in proceedings before the Cartel Court. In practice, this rarely happens.

Moreover, there are sector regulators (in telecoms and energy, for instance) who are regularly consulted when there is a merger in the respective sectors.

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