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Recent Developments in Austrian Antitrust Regulations
The Austrian Merger Clearance Regime in 2022 – an up-to-date overview

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On the occasion of the implementation of the ECN+ directive, the Austrian legislator introduced some important changes to the Austrian merger rules last year, which are applicable to Austrian mergers as of January 1, 2022 ('CCA Amendment 2021'[2]). This article explains the amended Austrian merger clearance regime, focusing inter alia on the turnover thresholds triggering a pre-merger notification duty and the examination by the competent authority of whether a merger is going to get green light. It also highlights practical consequences in light of Austria's direct foreign investment regime, an area of significant practical importance for foreign investment into Austria or with an Austria nexus, which has been interlinked by the CCA Amendment 2021 with the merger clearance process.

1. The 'CCA Amendment 2021'

Austria is member of the European Union. Competition law is one of the core competencies of the European Union, thus the leeway given to its member states is limited. The cornerstones of this European framework are the Articles 101 and 102 of the Treaty on the Functioning of the European Union ('TFEU'), the EC Merger Regulation ('ECMR')[3] and Regulation No 1/2003[4]. This set of basic rules has recently been supplemented by the new ECN+ Directive[5]. The ECN+ Directive aims at aligning the existing decentralized system of competition law enforcement by introducing certain standards for national competition authorities in order to secure effective law enforcement.

Austria, like the other member states, had to implement the ECN+ Directive. No major changes were necessary because Austria's existing legal framework complied in most

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[2] ‚Bundesgesetz, mit dem das Kartellgesetz 2005 und das Wettbewerbsgesetz geändert werden (Kartell- und Wettbewerbsrechts-Änderungsgesetz 2021 – KaWeRÄG 2021)'.
[3] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings.
[4] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.
[5] Directive 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market.

aspects with the framework set forth in the ECN+ Directive. Nonetheless, the Austrian legislator saw the opportunity to amend Austrian competition law rules not only to assure compliance with the ECN+ Directive, but also to amend the Austrian merger clearance rules, the third pillar of antitrust law alongside the prohibition of cartels and the prohibition of abuse of a dominant market position.

Those rules were implemented by means of an amendment to the Cartel Act[6] and the Competition Act[7] ('CCA Amendment 2021') which largely came into force on September 10, 2021. Changes to the merger clearance regime – which will be addressed in this article – apply to mergers notified to the Austrian competition authority after December 31, 2021.

Before discussing the Austrian legal situation, it has to be taken into account that unlike in traditional antitrust law, where European and national rules are typically harmonized and applied alongside each other, there is the so-called 'one-stop-shop principle'[8] in merger control: it is either the national competition authority *or* the European Commission that is responsible for the merger appraisal procedure. Consequently, if a proposed concentration has 'EU-wide significance', it is to be assessed under the ECMR.[9] Only if the conditions for application of the ECMR are not met, e.g. the merger is smaller or/and only significant for the Austrian market, the Austrian regime applies.[10]

2. The Austrian merger clearance regime

2.1. Status quo

Austria's merger control rules are set forth in chapter 3 of the Cartel Act. The Cartel Act defines a merger or concentration as

(1) **the acquisition of an undertaking** or a substantial part of it, especially by way of merger or conversion,

(2) the acquisition of rights in the business of another undertaking by means of **operational lease or business agreements**,

(3) **the direct or indirect acquisition of shares** in an undertaking to reach an ownership interest of exceeding 25% or exceeding 50%,

(4) the **effecting of identity** of at least half of the members of the management bodies or the supervisory boards of two or more undertakings;

(5) any other connection of undertakings which allows one undertaking to exert a **direct or indirect dominant influence** over another undertaking;

(6) **the establishment of a full-function joint venture** that fulfils all functions of an independent economic entity on a lasting basis.[11]

Mergers require a premerger **notification to the Austrian Competition Authority ('ACA')**, the so called *Bundeswettbewerbsbehörde,* which forms – together with the Federal Cartel Attorney, the '*Bundeskartellanwalt*' – the two official parties ('*Amtsparteien'*) that play an important role in the Austrian merger clearance process. Usually, a non-confidential and a confidential version of the premerger notification are

[6] ‚Bundesgesetz gegen Kartelle und andere Wettbewerbsbeschränkungen (Kartellgesetz 2005 – KartG 2005)'.
[7] ‚Bundesgesetz über die Einrichtung einer Bundeswettbewerbsbehörde (Wettbewerbsgesetz – WettbG)'.
[8] Article 21 (2) and (3) of the ECMR.
[9] The mergers and concentrations subject to European merger control are defined in Article 3 of the ECMR. The scope required for a merger or concentration to be considered as having a community dimension is set out in Article 1 of the ECMR.
[10] It is possible that in special situations a national case may be referred to be dealt with by the Commission, while, on the other hand, the Commission may refer an EC case to a national competition authority (Article 4 ECMR).
[11] Section 7 (1) of the Cartel Act.

filed; the non-confidential version may e.g. be used by the ACA as a basis for questionnaires sent to competitors for their comments on the proposed merger.

A notification is only required if the **undertakings concerned in the merger** reach certain turnover thresholds. For purposes of this turnover test not only the acquiring entity and the target are to be taken into account but also other undertakings that are connected to either of the two undertakings in a manner as described in Section 7 (1) of the Cartel Act. Thus, – speaking somewhat simplified – the total group turnover[12] of target and acquiring entity is relevant. The seller's (and seller's group) turnover is added if it continuous to hold a relevant interest in target (e.g. a shareholding in excess of 25%[13]). In practice, group financial statements are a good basis for determining turnover, however, this is not always good enough as they sometimes include participations shown 'at equity', in which case turnover of undertakings consolidated at equity might need to be added to the consolidated group turnover shown in the group financial statements[14].

The 'undertakings concerned'[15] are entitled to **file the notification** and inspect the relevant merger file. A short note on the intended merger will be published by the ACA on its webpage (www.bwb.gv.at) and any undertaking whose legal or economic interests are affected by the merger may make a written comment to the ACA or the Federal Cartel Attorney. The comments of such intervening undertakings may be acted on by the ACA or the Federal Cartel Attorney, but the intervening undertaking has no procedural standing (or a right to request a certain action by the official parties).

If a proposed merger triggers the filing requirements it is up to the official parties to decide whether to challenge the merger before the Cartel Court who holds exclusive jurisdiction to decide to clear or to prohibit a merger.

2.2. The examination of the merger

The CCA Amendment 2021 altered the test whether a merger is going to get green light. Until December 31, 2021 the Cartel Act only provided for a **dominance test**; a merger had to be prohibited if it was to be expected that it will create or strengthen a dominant position, referring in principle to the general market dominance provision of Section 4 of the Cartel Act.

Prior to the amendment, this provision covered both cases of absolute and relative market dominance, the latter referring to undertakings with a dominant market position only in relation to its purchasers or suppliers, typically if they depend on maintaining business relations in order to avoid serious economic disadvantages. These cases have now, following the CCA Amendment 2021, been placed in a (separate) Section 4a of the Cartel Act[16] and thus are no longer covered by the reference to the general market dominance provision, which in principle is a welcomed clarification.

One of the more significant changes resulting from the CCA Amendment 2021, at least at first glance, is that the Cartel Act now provides for a second test criterion; the merger is also to be blocked if it is to be expected that it causes **significant impediment of effective**

[12] Intra group turnover is always excluded.

[13] If a target holds a 25% plus shareholding in another undertaking those undertaking's total turnover (not only 25%) will be added for purposes of determining whether the turnover threshold is met.

[14] There is an abundance of legal literature and case law on who is an 'undertaking concerned'; to go into details would exceed the scope of this article. To give an example: if an acquiring entity holds a direct minority interest (e.g. 30%) in another undertaking (Undertaking B); the turnover of Undertaking B will always be added. If, on the other hand, such minority interest in Undertaking B was to be held only indirectly the court would inquire whether the acquiring entity can exert a controlling influence on Undertaking B.

[15] The Cartel Act does not define who is entitled to file, it only refers to the 'undertakings concerned'; such is (always) the acquirer and – most commentators will agree – also the target; whether also the selling undertaking is entitled to file is unclear, the dominant view is that it is not.

[16] Pursuant to the new Section 4a of the Cartel Act a company is also deemed to be dominant if it has a superior market position in relation to its customers or suppliers ('market dominance in a vertical relationship').

competition. The so called SIEC test is widely applied in other member states and by the European Commission (e.g. was introduced in Germany already in 2013). The reason why the EU departed from the narrower requirement of 'only' a dominant position as early as 2004, is – according to the ECMR recitals[17] – its duty to ensure effective competition within the EU and therefore act against *any* significant impediment. The SIEC test is mainly intended to cover so-called 'gap-cases', concerning competition restrictions resulting from non-coordinated conduct by undertakings, that do not have a dominant position in the respective market[18].

It, however, has to be noted that Austria's Cartel Act operates under a broad presumption of dominance[19]. Commentators have pointed out that therefore, it is not likely that the introduction of the SIEC test will cause a significant change in how Austria applies its merger rules. Some emphasize that, to date, it has barely been shown in any national merger proceedings that the previously applicable market dominance test would not be flexible enough and that a possible loophole in the Cartel Act would therefore arise. In addition, unlike Germany and most of the other member states, the Austrian legislator did not abolish or downgrade the dominance test; from now on, **both tests, the dominance and the SIEC test, are to be applied in parallel**. Satisfaction of either of the two tests will suffice to give the authority the power to block the merger. It remains to be seen if and how the examination process will change in practice. Nevertheless, formal alignment with the EU and other members states has certainly to be welcomed.

Even if either of the two tests is satisfied, the go ahead must still be given (i.e. the concentration must not be blocked), if it is to be expected that as a result of the merger, **improvements in competitive conditions** will occur, which outweigh the disadvantages of market dominance or the impediment of competition. Permission must be given, if the national economic benefits outweigh the negative effects of the merger. The legislative history refers inter alia to growth, innovation and full employment as well as an increase in prosperity, sustainable improvement of the quality of life of citizens, securing employment, income growth and fair income distribution, taking into account appropriate social and environmental standards. Clearance for a merger based on this justification will not be administered by a political body (like a federal minister) but by the Cartel Court. Commentators debate how the Cartel Court will check the prerequisites for this justification and whether the competition commission ('*Wettbewerbskommission*')[20] which is an advisory body established with the ACA with inter alia members of the Austrian social parties may be involved.

2.3. The Turnover thresholds

2.3.1. Until December 31, 2021.

Until December 31, 2021 notification was mandatory if in the last business year preceding the transaction the undertakings concerned had a combined turnover of (1) more than EUR

[17] Recital 5 of the ECMR.

[18] *Reidlinger/Hartung*, Das österreichische Kartellrecht[3] (2016), page 179 et.seq.; *Gruber*, Das KaWeRÄG 2021 – Erster Teil: Kartellgesetz, ÖZK 2021, page 126

[19] Section 4 (1) of the Cartel Act deems an undertaking as dominant if it – as supplier or purchaser - is exposed to no or only insignificant competition, or holds a predominant market position in relation to its competitors; in this regard, particular attention shall be paid to the undertaking's financial strength, its relations to other undertakings, its opportunities to access supply and sales markets as well as other circumstances that restrict market entry for other undertakings. According to Section 4 (1a) two or more undertakings are deemed dominant if no substantial competition exists between them and if they, in their entirety, fulfil the conditions laid down in Section 4 (1) of the Cartel Act. Finally, Section 4 (3) deems an undertaking that – as supplier or purchaser on the relevant market - has a market share of at least 30%, or a market share of more than 5% and is exposed to competition by not more than two undertakings, or has a market share of more than 5% and is one of the four biggest undertakings on this market, which together have a market share of at least 80%, as dominant unless it can prove that it is not (reversal of burden of proof).

[20] Established under Section 16 of the Competition Act.

300 million worldwide, (2) more than EUR 30 million on the Austrian market, and (3) at least two of the undertakings concerned more than EUR 5 million each worldwide.[21]

The practical problem with these turnover thresholds was that it triggered notification requirements for mergers that had no real nexus to Austria.[22] If, for example, an Italian enterprise with a – stand-alone – worldwide turnover in excess of EUR 300 million, and an Austrian turnover in excess of EUR 30 million acquired a Slovenian enterprise with a worldwide turnover of EUR 40 million and sales into Austria of EUR 0.5 million notification was required though it was obvious that there would be no impact on the Austrian market. The legislator believed that the EUR 30 million Austrian turnover threshold sufficed to identify (international) mergers that had such an Austrian nexus that a filing requirement was appropriate. As the above example shows, it did not.

This problem could also not be counteracted by the so-called 'effects doctrine[23]', according to which the whole Cartel Act only applies to facts that have an effect on the Austrian market. This principle, which was already recognized in case law before its incorporation into the Cartel Act in 2005[24], is no clear guideline: who is to say what the Cartel Court might finally find as being a sufficient effect to justify the application of the Act? In practice, this resulted in international mergers quite often being notified to the ACA out of sheer caution, in order to not risk an infringement of the notification requirement and the harsh consequence of nullity resulting therefrom. Apart from the legal fees and internal costs involved in a notification process, most of all, this procedure was very time-consuming for all parties involved.

It is not surprising that Austria – in light of its size and economy – received an unusual large number of merger filings. Summed up, what was lacking was a second threshold that made sure that at least two of the undertakings concerned had a relevant Austrian nexus.

2.3.2. From January 1, 2022 on.

This missing additional threshold was introduced by the CCA Amendment 2021, which provided that – in order to trigger the notification requirement – the undertakings concerned must not only have a combined turnover of more than EUR 30 million on the Austrian market but must also meet another threshold: at least two undertakings must have an Austrian turnover in excess of EUR 1 million.

Thus, in the above example, no filing would be necessary as the Slovenian group had no Austrian turnover in excess of EUR 1 million.

The express aim of this modification was to reduce the work load of the ACA. According to the legislative history, the competition authority received 425 merger notifications in 2020; 187 thereof would not have been required had the CCA Amendment 2021 already been enacted[25]. The new regime will significantly reduce the burden on many international mergers with only a loose Austrian nexus. The stricter turnover threshold will do away

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[21] Section 9 (1) of the Cartel Act; special rules for computation of the turnover thresholds apply to mergers of media undertakings and in case of banks and insurance companies.

[22] Since 2005, there is an exemption clause aiming to exclude mergers without a domestic dimension from the notification requirement, according to which - despite reaching the abovementioned turnover thresholds – a notification need not be filed if (i) only **one** of the undertakings concerned has a turnover of more than EUR 5 million in Austria and (ii) the combined total worldwide turnover **of the other** undertakings concerned does not exceed EUR 30 million. This, however, did not suffice to exclude many mergers with a very limited Austrian nexus to fall under the notification requirements.

[23] *Reidlinger/Hartung*, Das österreichische Kartellrecht[3] (2016), page 168.

[24] Section 24 (2) of the Cartel Act states that the Cartel Act is only applicable in the event that specific circumstances affect the domestic market, irrespective of whether these circumstances arose domestically or abroad.

[25] At the same time as the expected reduction in applications, the flat-rate notification fee payable to the ACA has gone up, jumping from EUR 3 500 to of EUR 6 000. The legislator obviously wanted to compensate the budget for the loss of cases under the CCA Amendment 2021.

with the practice of filing notifications of international mergers to the ACA just to be on the safe side and is expected to reduce time and costs.

2.4. Special rules for mergers in the digital industry

There is another aspect of the Austrian merger clearance regime that has not been changed by the CCA Amendment 2021 but which needs to be pointed out to international players. Austria recognized that an undertaking's position on the Austrian market was not necessarily linked to its Austrian turnover. Therefore, in addition to the turnover-based thresholds, a new (alternative) threshold which mainly focusses on the value of a transaction has been enacted in 2017. A notification is also required if (1) the undertakings concerned exceed the EUR 300 million world-wide turnover, (2) reach an Austrian turnover in excess of EUR 15 million, (3) the consideration of the merger is more than EUR 200 million and (4) the undertaking to be acquired is active to a large extent on the domestic market.[26]

This provision is aimed at players in the digital industry, like valuable startups and (potentially) new digital economy giants, whose enterprise value is often based on their collected data rather than their turnover. Even if these undertakings often offer little more than a promise for a bright future, they still attract significant (foreign) investments and – indicated by the often disproportionately high purchase price – have a high significance under competition law.

In this context the criterion requiring 'an activity to a large extent on the domestic market' was introduced; intended to exempt companies with only 'minor activities in Austria' from the provision. The factors for domestic activity depend, for example, on the recognized measures of the respective industry; in the digital sector, the number of users ('Monthly Active User') or the access frequency of a website ('unique visits').[27] In practice, the exact meaning of the broad term has not been clear to this day.

3. Foreign direct investment into Austria

The CCA Amendment 2021 also linked two aspects of (foreign) investment control under Austrian law, merger clearance and foreign ownership, one aimed at preserving a functioning market the other on restricting foreign influence in certain key areas.

In Austria, direct foreign investment has been a rather dormant sector for many years. In light of the pan-European awakening regarding Chinese investments, Austria beefed up its regime. Austria recently introduced the new Austrian Investment Control Act ('ICA')[28]. It implements the requirements under the FDI-Screening-Regulation[29]. Under the ICA, certain acquisitions require prior approval by the minister of economy – such approvals are independent of merger control, these are parallel and independent control regimes. The ICA only applies to foreign direct investments by a non-EU, non-EEA and non-Swiss person or legal entity in Austrian undertakings active in a critical sector as listed in an annex to the ICA[30].

Foreign direct investment as defined by the ICA includes the acquisition of (a) an Austrian undertaking or (b) voting interests in such undertaking (10%, 25% and 50% of the voting rights) or (c) a controlling interest in such an undertaking or (d) substantial assets of such an undertaking. The Austrian target must be active in certain areas in order to trigger ICA.

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[26] Section 9 (4) of the Austrian Cartel Act.

[27] Legal history of Section 9 (4) of the Austrian Cartel Act.

[28] ‚Bundesgesetz über die Kontrolle von ausländischen Direktinvestitionen (Investitionskontrollgesetz – InvKG)'.

[29] Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union

[30] There is a de minimis exemption for small enterprises with fewer than 10 employees and an annual turnover or an annual balance sheet total of less that EUR 2 million.

The ICA addresses (i) highly sensitive areas, such as defense technology, critical energy or digital infrastructure (in particular 5G), water, systems that enable data sovereignty of Austria or also for the time being research and development of drugs, vaccines and medical devices and personal protective equipment and inter alia (ii) other general critical infrastructure such as traffic and transportation, food, telecommunication and information. In case of such an acquisition, an application for authorization to the Austrian minister of economy is mandatory. In case a transaction subject to ICA control becomes known to the Austrian target and no approval request has been filed or no approval has been granted it is obliged to notify the minister of economy thereof. Any transaction breaching the ICA is null and void and may lead to criminal liability.

To marriage the two regimes – merger control and foreign investment control – the CCA Amendment 2021 provided for a new Section 10 (6) of the Competition Act, which mandates that the Austrian minister for economics receives a copy of each merger filing, thus enabling the ICA authority to check whether a merger notification might also trigger ICA approval. Thus, from now on ICA compliance will be part of the merger control regime. The international investor should be aware that such link with the merger control regime does not mean that ICA only applies to investments that reach the merger control turnover thresholds; these thresholds do not apply to the ICA regime.[31]

4. Summary

To summarize, the CCA Amendment 2021 introduced clearer guidelines for foreign investors, as the grey area regarding the need to file in Austria has been reduced by the introduction of the second EUR 1 million turnover threshold. At the same time, we expect that the special merger rules aiming at catching acquisitions in the digital area and the strict rules of the Austrian ICA will mandate even higher scrutiny in regard of filing requirements in Austria.

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Graf Isola was founded in 1994 and is one of the leading independent Austrian commercial law firms with offices in Vienna and Graz. The full-service firm advises in all fields of

[31] It has to be noted that the ICA not only governs direct investment but also **indirect** investment; the ICA may, thus, also apply if voting rights in an indirect non-Austrian shareholder of an Austrian business change.

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