The Merger Control Review

Ninth Edition

Editor
Ilene Knable Gotts

The Law Reviews

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PREFACE

Pre-merger competition review has advanced significantly since its creation in 1976 in the United States. As this book evidences, today almost all competition authorities have a notification process in place – with most requiring pre-merger notification for transactions that meet certain prescribed minimum thresholds. Additional jurisdictions, most recently in South America, have added pre-merger notification regimes. In our endeavour to keep our readers well informed, we have expanded the jurisdictions covered by this book to include the newer regimes as well. Also, the book now includes chapters devoted to such 'hot' M&A sectors as pharmaceuticals, and high technology and media in key jurisdictions to provide a more in-depth discussion of recent developments. Finally, the book includes a chapter on the economic analysis applied to merger review.

Given the ability of most competition agencies with pre-merger notification laws to delay, and even block, a transaction, it is imperative to take each jurisdiction – small or large, new or mature – seriously. For instance, in 2009, China blocked the Coca-Cola Company's proposed acquisition of China Huiyuan Juice Group Limited and imposed conditions on four mergers involving non-China-domiciled firms. In *Phonak/ReSound* (a merger between a Swiss undertaking and a Danish undertaking, each with a German subsidiary), the German Federal Cartel Office blocked the entire merger, even though less than 10 per cent of each of the undertakings was attributable to Germany. It is, therefore, imperative that counsel for such a transaction develops a comprehensive plan prior to, or immediately upon, execution of an agreement concerning where and when to file notification with competition authorities regarding such a transaction. To this end, this book provides an overview of the process in 36 jurisdictions, as well as a discussion of recent decisions, strategic considerations and likely upcoming developments. Given the number of recent significant M&A transactions involving media, pharma and high-technology companies, we have included chapters that focus on the enforcement trends in these important sectors. In addition, as merger review increasingly includes economic analysis in most, if not all, jurisdictions, we have added a chapter that discusses the various economic tools used to analyse transactions. The intended readership of this book comprises both in-house and outside counsel who may be involved in the competition review of cross-border transactions.

Some common threads in institutional design underlie most of the merger review mandates, although there are some outliers as well as nuances that necessitate careful consideration when advising a client on a particular transaction. Almost all jurisdictions vest exclusive authority to review transactions in one agency. The United States is now the major exception in this regard since China consolidated its three antitrust agencies into one agency this year. Most jurisdictions provide for objective monetary size thresholds (e.g., the turnover of the parties, the size of the transaction) to determine whether a filing is required. Germany has recently amended its law to ensure that it has the opportunity to review transactions in which the parties' turnover do not reach the threshold, but the value of the transaction is significant (e.g., social media, new economy, internet transactions). Please note that the actual monetary threshold levels can vary in specific jurisdictions over time. There are some jurisdictions that still use 'market share' indicia (e.g., Bosnia and Herzegovina, Colombia, Lithuania, Portugal, Spain, Ukraine and the United Kingdom). Most jurisdictions require that both parties have some turnover or nexus to their jurisdiction. However, there are some jurisdictions that take a more expansive view. For instance, in Poland, a notification may be required even though only one of the parties is present and, therefore, there may not be an impact on competition in Poland. Turkey recently issued a decision finding that a joint venture (JV) that produced no effect on Turkish markets was reportable because the JV's products 'could be' imported into Turkey. In Serbia, there similarly is no 'local' effects required. Germany also takes an expansive view by adopting as one of its thresholds a transaction of 'competitively significant influence'. Although a few merger notification jurisdictions remain 'voluntary' (e.g., Australia, Singapore, the United Kingdom and Venezuela), the vast majority impose mandatory notification requirements. Moreover, in Singapore, the transaction parties are to undertake a 'self-assessment' of whether the transaction will meet certain levels, and, if so, should notify the agency to avoid potential challenge by the agency.

Although in most jurisdictions the focus of the competition agency is on competition issues, some jurisdictions have a broader mandate. For instance, the 'public interest' approach in South Africa expressly provides for consideration of employment matters, local enterprises and procurement, and for economic empowerment of the black population and its participation in the company. Many of the remedies imposed in South Africa this year have been in connection with these considerations. Although a number of jurisdictions have separate regulations and processes for addressing foreign entity acquisitions when national security or specific industrial sectors are involved, in Romania, for example, the competition law provides that the government can prohibit a merger if it determines that such merger could have a potential impact on national security.

The potential consequences for failing to file in jurisdictions with mandatory requirements vary. Almost all jurisdictions require that the notification process be concluded prior to completion (e.g., pre-merger, suspensory regimes), rather than permitting the transaction to close as long as notification is made prior to closing. Many of these jurisdictions can impose a significant fine for failure to notify before closing, even where the transaction raises no competition concerns (e.g., Austria, Cyprus, India, the Netherlands, Romania, Spain and Turkey). In France, for instance, the competition authority imposed a €4 million fine on Castel Frères for failure to notify its acquisition of part of the Patriache group. In Ukraine and Romania, the competition authorities have focused their efforts on discovering consummated transactions that had not been notified, and imposing fines on the parties. Chile's antitrust enforcer recommended a fine of US$3.8 million against two meat-packing companies, even though the parties had carved the Chilean business out of the closing.

Some jurisdictions impose strict time frames within which the parties must file their notification. For instance, Cyprus requires filing within one week of signing of the relevant documents and agreements; Serbia provides for 15 days after signing of the agreement; and Hungary, Ireland and Romania have a 30-calendar-day time limit for filing the notification that commences with entering into the agreement. Some jurisdictions that mandate filings within specified periods after execution of the agreement also have the authority to impose fines for 'late' notifications (e.g., Bosnia and Herzegovina, Indonesia, and Serbia). Most jurisdictions also have the ability to impose significant fines for failure to notify or for closing before the end of the waiting period, or both (e.g., Austria, Canada, China, Greece, Portugal, Ukraine and the United States). In Macedonia, the failure to file can result in a misdemeanour and a monetary fine of up to 10 per cent of the worldwide turnover. In Belgium, the competition authority fined a party for late submission of information.

In addition, other jurisdictions have joined the European Commission (EC) and the United States in focusing on interim conduct of the transaction parties, commonly referred to as 'gun jumping'. Brazil, for instance, issued its first gun-jumping fine in 2014 and recently issued guidelines on gun-jumping violations. Since then, Brazil has continued to be very active in investigating and imposing fines for gun-jumping activities. In addition, the sharing of competitively sensitive information prior to approval appears to be considered an element of gun jumping. And the fines that are being imposed has increased. For example, the EC imposed the largest gun-jumping fine ever of €124.5 million against Altice.

In most jurisdictions, a transaction that does not meet the pre-merger notification thresholds is not subject to review or challenge by the competition authority. In Canada – like the United States – however, the Canadian Competition Bureau can challenge mergers that were not required to be notified under the pre-merger statute. In Korea, Microsoft initially filed a notification with the Korea Fair Trade Commission (KFTC), but when it faced difficulties and delays in Korea the parties restructured the acquisition to render the transaction non-reportable in Korea and consummated the transaction. The KFTC, however, continued its investigation as a post-consummation merger investigation and eventually obtained a consent order.

In almost all jurisdictions, very few transactions undergo a full investigation, although some require that the notification provide detailed information regarding the markets, competitors, competition, suppliers, customers and entry conditions. Most jurisdictions that have filing fees specify a flat fee or state in advance a schedule of fees based upon the size of the transaction; some jurisdictions, however, determine the fee after filing or provide different fees based on the complexity of the transaction. For instance, Cyprus is now considering charging a higher fee for acquisitions that are subjected to a full Phase II investigation.

Most jurisdictions more closely resemble the EC model than the United States model. In these jurisdictions, pre-filing consultations are more common (and even encouraged); parties can offer undertakings during the initial stage to resolve competitive concerns; and there is a set period during the second phase for providing additional information and for the agency to reach a decision. In Japan, however, the Japan Federal Trade Commission (JFTC) announced in June 2011 that it would abolish the prior consultation procedure option. When combined with the inability to 'stop the clock' on the review periods, counsel may find it more challenging in transactions involving multiple filings to avoid the potential for the entry of conflicting remedies or even a prohibition decision at the end of a JFTC review. Some jurisdictions, such as Croatia, are still aligning their threshold criteria and processes with the EC model. Some jurisdictions even within the EC remain that differ procedurally from the EC model. For instance, in Austria, the obligation to file can be triggered if only one of the involved undertakings has sales in Austria, as long as both parties satisfy a minimum global turnover and have a sizeable combined turnover in Austria.

The role of third parties also varies across jurisdictions. In some jurisdictions (e.g., Japan), there is no explicit right of intervention by third parties, but the authorities can choose to allow it on a case-by-case basis. In contrast, in South Africa, registered trade unions or representatives of employees must be provided with a redacted copy of the merger notification from the outset and have the right to participate in merger hearings before the Competition Tribunal: the Tribunal will typically also permit other third parties to participate. Bulgaria has announced a process by which transaction parties even consent to disclosure of their confidential information to third parties. In some jurisdictions (e.g., Australia, the EC and Germany), third parties may file an objection to a clearance decision. In some jurisdictions (including Canada, the EC and the United States), third parties (e.g., competitors) are required to provide information and data if requested by the antitrust authority. In Israel, a third party that did not comply with such a request was recently fined by the authority.

In almost all jurisdictions, once the authority approves the transaction, it cannot later challenge the transaction's legality. The United States is one significant outlier with no bar for subsequent challenge, even decades following the closing, if the transaction is later believed to have substantially lessened competition. Canada, in contrast, provides a more limited time period of one year for challenging a notified transaction (see the recent *CSC/Complete* transaction). Norway is a bit unusual, where the authority has the ability to mandate notification of a transaction for a period of up to three months following the transaction's consummation. In 'voluntary' jurisdictions, such as Australia and Singapore, the competition agency can investigate and challenge unnotified transactions.

It is becoming the norm in large cross-border transactions raising competition concerns for the United States, Canadian, Mexican and EC authorities to work closely together during the investigative stages, and even in determining remedies, minimising the potential of arriving at diverging outcomes. The KFTC has stated that it will engage in even greater cooperation with foreign competition authorities, particularly those of China and Japan, which are similar to Korea in their industrial structure. Regional cooperation among some of the newer agencies has also become more common; for example, the Argentinian authority has worked with Brazil's CADE, which in turn has worked with the Chilean authority. Competition authorities in Bosnia and Herzegovina, Bulgaria, Croatia, Macedonia, Montenegro, Serbia, Slovenia, and Turkey similarly maintain close ties and cooperate on transactions. Taiwan is part of the Asia-Pacific Economic Cooperation Forum, which shares a database. In transactions not requiring filings in multiple European jurisdictions, Member States often keep each other informed during the course of an investigation. In addition, transactions not meeting the EC threshold can nevertheless be referred to the European Commission in appropriate circumstances. The United States has signed cooperation agreements with a number of jurisdictions, including most recently Peru and India. China has 'consulted' with the United States and the EC on some mergers and entered into a cooperation agreement with the United States authorities in 2011.

The impact of such multi-jurisdictional cooperation was very evident this year. For instance, the transaction parties in *Applied Materials/Tokyo Electron* ultimately abandoned the transaction due to the combined objections of several jurisdictions, including the United States, Europe and Korea. In *Office Depot/Staples*, the FTC and the Canadian Competition Bureau cooperated and both jurisdictions brought suits to block the transaction (although the EC had also cooperated on this transaction, it ultimately accepted the undertakings offered by the parties). In the *GE/Alstom* transaction, the United States and the EC coordinated throughout, including at the remedies stage. Additionally, in the *Halliburton/Baker Hughes* transaction, the United States and the EC coordinated their investigations, with the United

States suing to block the transaction while the EC's investigation continued. Also, in *Holcim/Lafarge*, the cooperation between the United States and Canada continued at the remedies stage, where both consents included assets in the other jurisdiction's territory. The United States, Canada and Mexico coordinated closely in the review of the *Continental/Veyance* transaction. In fact, coordination among the jurisdictions in multinational transactions that raise competition issues is becoming the norm.

Although some jurisdictions have recently raised the size threshold at which filings are mandated, others have broadened the scope of their legislation to include, for instance, partial ownership interests. Some jurisdictions continue to have as their threshold test for pre-merger notification whether there is an 'acquisition of control'. Many of these jurisdictions, however, will include, as a reportable situation, the creation of 'joint control', 'negative (e.g., veto) control' rights to the extent that they may give rise to *de jure* or *de facto* control (e.g., Turkey), or a change from 'joint control' to 'sole control' (e.g., the EC and Lithuania). Minority holdings and concerns over 'creeping acquisitions', in which an industry may consolidate before the agencies become fully aware, have become the focus of many jurisdictions. Some jurisdictions will consider as reviewable acquisitions in which only a 10 per cent or less interest is being acquired (e.g., Serbia for certain financial and insurance mergers), although most jurisdictions have somewhat higher thresholds (e.g., Korea sets the threshold at 15 per cent of a public company and otherwise at 20 per cent of a target; and Japan and Russia at any amount exceeding 20 per cent of the target). Others use, as the benchmark, the impact that the partial shareholding has on competition; Norway, for instance, can challenge a minority shareholding that creates or strengthens a significant restriction on competition. The United Kingdom also focuses on whether the minority shareholder has 'material influence' (i.e., the ability to make or influence commercial policy) over the entity. Several agencies during the past few years have analysed partial ownership acquisitions on a stand-alone basis as well as in connection with JVs (e.g., Canada, China, Cyprus, Finland and Switzerland). Vertical mergers were also a subject of review (and even resulted in some enforcement actions) in a number of jurisdictions (e.g., Belgium, Canada, China, Sweden and Taiwan). Portugal even viewed as an 'acquisition' subject to notification the non-binding transfer of a customer base.

For transactions that raise competition issues, the need to plan and to coordinate among counsel has become particularly acute. Multi-jurisdictional cooperation facilitates the development of cross-border remedies packages that effectively address competitive concerns while permitting the transaction to proceed. The consents adopted by the United States and Canada in the *Holcim/Lafarge* merger exemplify such a cross-border package. As discussed in the 'International Merger Remedies' chapter, it is no longer prudent to focus merely on the larger mature authorities, with the expectation that other jurisdictions will follow their lead or defer to their review. In the current enforcement environment, obtaining the approval of jurisdictions such as Brazil and China can be as important as the approval of the EC or the United States. Moreover, the need to coordinate is particularly acute to the extent that multiple agencies decide to impose conditions on the transaction. Although most jurisdictions indicate that 'structural' remedies are preferable to 'behavioural' conditions, a number of jurisdictions in the past few years have imposed a variety of such behavioural remedies (e.g., China, the EC, France, the Netherlands, Norway, South Africa, Ukraine and the United States). For instance, some recent decisions have included as behavioural remedies pricing, sales tariffs and terms of sale conditions (e.g., Korea, Ukraine and Serbia), employee retrenchment (South Africa) and restrictions on bringing anti-dumping suits (e.g., Mexico).

Many recent decisions have imposed behavioural remedies to strengthen the effectiveness of divestitures (e.g., Canada's decision in the *Loblaw/Shoppers* transaction, China's MOFCOM remedy in *Glencore/Xstrata*, and France's decision in the *Numericable/SFR* transaction). This book should provide a useful starting point in navigating cross-border transactions in the current enforcement environment.

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Wachtell, Lipton, Rosen & Katz
New York
July 2018

Chapter 8

AUSTRIA

Dieter Zandler and Linda Marterer[1]

I INTRODUCTION

The Austrian merger control regime is set out in Part I, Chapter 3 of the Austrian Cartel Act 2005 (KartG). The turnover thresholds that trigger a merger filing requirement in Austria are among the lowest in the European Union. Furthermore, as the domestic turnover threshold is only based on the parties' combined Austrian turnover, it is not required that at least two parties achieved a turnover in Austria in the last financial year under Austrian merger control rules.

In addition, it is also important to note that the Austrian merger control rules contain very specific and sometimes far-reaching provisions concerning the attribution of turnover: In contrast to most other EU jurisdictions, Austrian merger control rules do not only require that the turnover of (directly or indirectly) controlling shareholders and (directly or indirectly) controlled shareholdings is attributed. Rather, Austrian merger control rules normally also require that the turnover of non-controlling shareholders and non-controlling shareholdings with a participation (capital or voting rights) of at least 25 per cent are (fully) taken into account for calculating the turnover of a concerned undertaking.[2] Although this very wide attribution of turnover (which in some cases may lead to nearly indefinite 'chains' for turnover attribution) has to some degree been constricted by the case law,[3] establishing the turnover of the concerned undertakings for purposes of Austrian merger control sometimes requires additional efforts and cannot simply be based on the consolidated group turnover figures.

The scope of Austrian merger control became even wider in 2017 with the entry into force of the Austrian Cartel and Competition Law Amendment Act 2017 (KaWeRÄG 2017), which introduced an additional jurisdictional threshold for concentrations based on the value of consideration ('size of the transaction test').[4]

Altogether, these factors led to a relatively high number of merger filings in Austria.

The institutional structure of competition enforcement in Austria is split between the Federal Competition Authority (FCA) and the Federal Cartel Prosecutor (FCP), (together the Official Parties), and the cartel courts (the Higher Regional Court of Vienna acting as the cartel court (Cartel Court) and the Supreme Court acting as the Supreme Cartel Court

1 Dieter Zandler is a partner and Linda Marterer is an associate at CMS Reich-Rohrwig Hainz Rechtsanwälte GmbH.

2 Cf Section 21 No. 2 KartG in conjunction with Section 7(1) No. 3 KartG.

3 For example, indirect participations of at least 25 per cent normally are only attributed if there is also a controlling influence at the preceding level (OGH 17 December 2001, 16 Ok 9/01).

4 Section 9(4) KartG (in the version of BGBl I No. 56/2017).

(OGH)). Merger notifications in Austria have to be submitted to the FCA and are then assessed by the Official Parties in Phase I. The Official Parties have the exclusive right to request an in-depth (Phase II) review of a notified transaction by the Cartel Court.

Notwithstanding the above aspects, it is important to note that the vast majority of transactions notified in Austria receive merger clearance in Phase I.[5] Since there is no pre-notification requirement and no 'stop-the-clock' principle under Austrian law, merger control clearance for most cases can usually be obtained within the initial four-week review period. Moreover, the Official Parties have introduced a Form CO also providing for a simplified filing (comparable to a Short Form CO under the European Merger Regulation (EUMR)) for merger control cases that do not exceed certain (market share) thresholds.[6]

Although the Official Parties (based on their headcount)[7] are rather 'small' competition authorities or enforcers compared to most of their counterparts in the European Union and at the same time have to deal with a high number of merger filings each year, they typically find a good balance between efficiency when dealing with unproblematic transactions and accuracy when dealing with cases that possibly may harm competition. Therefore, despite its wide scope of application, in practice the Austrian merger control system is working quite well.

II YEAR IN REVIEW

In 2017, 439 merger cases were notified to the FCA in total (a slight increase of 19 cases or around 4.5 per cent compared to 2016). The large majority of notifications (409) was cleared in Phase I after expiry of the initial four-week review period. In 23 cases the Official Parties have waived their right to request an in-depth (Phase II) review even before the expiry of the four-week review period and in four cases the notifying party or parties have withdrawn the filing. There have been 44 pre-notification meetings with the Official Parties (compared to 28 in 2016).[8]

Only two cases notified in 2017 where subject to an in-depth (Phase II) review by the Cartel Court.[9] One of these cases was cleared subject to commitments[10] while in the other Phase II case, the notification ultimately was withdrawn[11] (some of the major Austrian merger control cases are described below in more detail).

5 Pursuant to the FCA's last annual report (page 30), 99.5 per cent of the merger cases notified with the Official Parties in 2017 were approved in Phase I. The FCA's annual report of 2017 is available at https://www.parlament.gv.at/PAKT/VHG/XXVI/III/III_00142/imfname_693706.pdf (last accessed 15 May 2018).

6 A German version of the filing form/Austrian Form CO is available at https://www.bwb.gv.at/fileadmin/user_upload/Downloads/formulare/Formular%20-%20Formblatt%20f%3Fr%20Zusammenschl%3Fsse.doc (last accessed 9 May 2018).

7 In 2017, the FCA counted 40 employees, including 31 case handlers (three of which were working part time, the others full time) in 2017: See the FCA's annual report of 2017, page 12. The FCP consists of the federal cartel prosecutor and his deputies (according to Section 75(3) KartG at least one deputy must be appointed). Currently one deputy federal cartel prosecutor is appointed. Pursuant to Section 80(1) KartG, the FCP can use the administrative staff of the Cartel Court.

8 See the FCA's annual report of 2017, page 30 et seq.

9 The merger notifications in the cases BWB/Z-3304 (notification withdrawn) and BWB/Z-3250 (clearance subject to commitment) were already notified in 2016: see the FCA's annual report of 2017, page 33 et seq.

10 BWB/Z-3633, FCA's annual report of 2017, page 37.

11 BWB/Z-3560, FCA's annual report of 2017, page 34 et seq.

i Fines for violation of the standstill obligation

It is important to note that the Official Parties are quite active in cases involving a violation of the standstill obligation and regularly request the imposition of fines by the Cartel Court in case of a (possible) infringement for implementing a transaction prior to receiving Austrian merger clearance. The following table lists the fine decisions of the Cartel Court so far rendered in 2017/2018 for violations of the standstill obligation.

Date	Sector	Undertakings	Fine
21 April 2017	Coal	Vulcan Holdings LP; Apollo Management LP	€70,000 (jointly and severally)[1]
21 April 2017	Steel and metal distribution	SWOCTEM GmbH; Dr.-Ing. E.h. Friedhelm Loh	€11,000 (jointly and severally)[2]
5 March 2018	Leather chemicals	Stahl Lux 2; Lederchemikaliengeschäft der Clariant International	€185,000[3]
19 December 2017	Software, IT services, Hardware	Comparex AG; Agile Software BV	€30,000[4]
19 December 2017	Software, IT services	Comparex AG; Datalog Software AG	€40,000[5]

1 Cartel Court 21 April 2017, 128 Kt 2/17.
2 Cartel Court 21 April 2017, 29 Kt 35/16.
3 Cartel Court 5 March 2018, 128 Kt 8/17x.
4 Cartel Court 19 December 2017, 27 Kt 9/17a.
5 Cartel Court 19 December 2017, 128 Kt 10/17s.

In one case, a violation of the standstill obligation was established but no fine was imposed as the acquirer only acted with slight negligence and the consequences of the violation were insignificant (the acquirer did not exercise its voting rights in the target company until receiving merger clearance; in addition, its acquisition of sole control over the target was based on a put-option exercised by the seller, which gave the acquirer only little time to make the required merger filing).[12]

ii Overview of major Austrian merger control cases in 2017

Austria Asphalt v. Bundeskartellanwalt – preliminary ruling by the ECJ

The Austria Asphalt case was the first preliminary reference case decided by the European Court of Justice (ECJ) in connection with the interpretation of the EUMR: Teerag Asdag (part of Porr construction group) as the sole owner of the Mürzzuschlag asphalt plant and Austria Asphalt (part of Strabag construction group) contemplated to form a (50:50) joint venture (JV) that would acquire the asphalt plant.

The transaction was initially notified in Austria in August 2015. After the Official Parties requested an in-depth review of the transaction, the Cartel Court decided that the proposed transaction was a concentration under the EUMR and therefore not subject to Austrian merger control based on the EUMR's 'one-stop-shop' principle, dismissing the application of the Official Parties. Austria Asphalt lodged an appeal against that decision before the OGH. The appeal was accompanied by a letter from the Commission staff (Directorate-General for

12 OGH 7 December 2017, 16 Ok 2/17f (the Cartel Court's decision – which was appealed by the FCA – did not even find an infringement of the standstill obligation: Cartel Court 19 April 2017, 24 Kt 9/16b).

Competition) stating that the transaction does not to appear to fall under the EUMR as the JV presumably lacks full functionality. In the appeal proceedings, the OGH decided to stay its proceedings and referred the questions on the applicability of the EUMR to the ECJ.[13]

In its decision rendered on 7 September 2017, the ECJ held that the Article 3 EUMR 'must be interpreted as meaning that a concentration is deemed to arise upon a change in the form of control of an existing undertaking which, previously exclusive, becomes joint, only if the JV created by such a transaction performs on a lasting basis all the functions of an autonomous economic entity'.[14]

Following the ECJ's preliminary ruling, the OGH decided to set aside the Cartel Court's decision and referred the case back to the Cartel Court as the transaction was not subject to the EUMR and therefore can be reviewed under Austrian merger control rules.[15]

Other Phase II cases from 2017

Date	Sector	Undertakings	Outcome
Notification: 23 December 2015, final decision: 21 December 2016 (Decisions published on 19 January 2017[1] and 9 June 2017[2])	Casino and slot games	Novomatic AG; Casinos Austrias AG	Prohibition: regulatory provisions (e.g., Austrian Gaming Act) do not exclude the application of competition rules.
Notification: 24 October 2016, final decision: 19 April 2017	Outdoor advertising	Gewista Werbegesellschaft mbH; Ankünder GmbH	Clearance subject to behavioural commitments: non-discriminatory access to advertising spaces of all sorts (especially city lights and poster lights) for national campaigning in the province Styria in appropriate quality and under fair market conditions.[3]
Notification: 30 November 2016, withdrawal: 18 May 2017	Container terminal services	Wiener Hafen und Lager Ausbau- und Vermögensverwaltung GmbH & Co KG; ÖBB Infrastruktur AG; Gemeinschaftsunternehmen (Terminal Wien Freudenau und Terminal Wien Inzersdorf)	Withdrawal of notification.[4]
Notification: 20 July 2017, withdrawal: 27 September 2017	Animal foods and accessories	Fressnapf Handels GmbH; Tomy's Zoo GmbH	Withdrawal of notification.[5]
Notification: 4 September 2017, decision: 28 March 2018	Wagon hiring	VTG Rail Assets GmbH; CIT Rail Holdings SAS	Clearance subject to structural commitments: disposal of certain parts of the target's business to third parties prior to completion of the proposed transaction;[6] the same commitments were made in the German merger control proceedings before the Federal Cartel Office (FCO).[7]

1 OGH 21 December 2016, 16 Ok 11/16b.
2 Cartel Court 26 August 2016, 24 Kt 3 and 4/16.
3 OGH 19 April 2017, 16 Kt 14/16.
4 Cartel Court 8 June 2017, 27 Kt 17/16.
5 BWB/Z-3560, FCA's annual report of 2017, page 34 et seq.
6 BWB/Z-3633, FCA's annual report of 2017, page 37. More detailed information on the commitments will be available after publication of the Cartel Court's decision.
7 See Bundeskartellamt, decision dated 21 March 2018, B 9 – 124/17.

13 OGH 31 March 2016, 16 Ok 1/16g.

14 ECJ, judgment of 7 September 2017, *Austria Asphalt v. Bundeskartellanwalt*, C-248/16, ECLI:EU:C:2017:643.

15 OGH 19 October 2017, 16 Ok 3/17b; in the meantime, Austria Asphalt withdrew its merger filing: Cartel Court 5 December 2017, 128 Kt 9/17v.

Other Phase I cases from 2017

Date	Sector	Undertakings	Outcome
Notification: 9 February 2017	Free-TV and TV advertising	ProSiebenSat.1Pus4 GmbH; ATV Privat TV GmbH; ATV Privat TV GmbH & Co KG	Clearance subject to commitments after pre-notification negotiations with the Official Parties and the media authority KommAustria.[1]
Clearance: 23 February 2018	Aviation	Laudamotion GmbH; Parts of NIKI Luftfahrt GmbH	Clearance without conditions.[2]
1 BWB/Z-3373, FCA's annual report of 2017, page 32 et seq. 2 BWB/Z-3807, FCA's annual report of 2017, page 35 et seq.			

III THE MERGER CONTROL REGIME

i Jurisdiction

The Austrian merger control regime requires a (mandatory) merger filing if the:

a transaction constitutes a concentration pursuant to Section 7 KartG;

b turnover thresholds[16] or the new ('transaction value') thresholds of Section 9(4) KartG are met; and

c transaction has an effect on the domestic (Austrian) market(s).[17]

ii Concept of concentration

Unlike many other European jurisdictions, the Austrian merger control regime is not limited to 'acquisitions of control' and full-function JVs. Rather, the Austrian merger control regime has a distinct definition of the types of transactions that constitute a concentration. A concentration is defined as:[18]

a the acquisition by one undertaking of all, or a substantial part of, the assets of another undertaking, especially by merger or transformation;

b the acquisition of rights by one undertaking in the business of another undertaking by means of a management or lease agreement;

c the direct or indirect acquisition of a participation of at least 25 or 50 per cent (of the capital or voting rights) in one undertaking by another undertaking;

d the establishment of interlocking directorates at the management board or supervisory board level (if at least half of the members of the management board or the supervisory board in two undertakings are identical);

e any other connection between undertakings directly or indirectly conferring one undertaking a decisive influence over another undertaking; or

f the establishment of a full-function JV.

Please note that although Austrian merger control contains a specific provision declaring that the establishment of a full-function JV constitutes a concentration (Section 7(2) KartG), it is currently the prevailing view that this provision does not exclude non-full function JVs from

16 Section 9(1) KartG (with the exemption in Section 9(2) KartG not being applicable).

17 Section 24(2) KartG.

18 Section 7(1) and (2) KartG.

the scope of Austrian merger control. Instead, also the establishment of a non-full function JV may qualify as a concentration if the transaction falls under any of the other types of concentrations set out above.[19]

iii Turnover thresholds

Under Austrian law, a concentration (see above) shall be notified prior to its completion if the following turnover thresholds are met by the concerned undertakings in the last financial year:[20]

a combined worldwide turnover of all undertakings concerned exceeded €300 million;
b combined Austrian turnover of all undertakings concerned exceeded €30 million; and
c the individual worldwide turnover of at least two of the undertakings concerned each exceeded €5 million.

iv Exemptions

Even if the above thresholds are met, no notification has to be made if, in the last financial year:[21]

a only one undertaking concerned achieved a domestic turnover of more than €5 million; and
b the combined aggregate worldwide turnover of the other undertakings concerned was less than €30 million.

v Transaction value threshold

The KaWeRÄG 2017 has introduced a new jurisdictional threshold based on a 'value of consideration' criterion that entered into force on 1 November 2017 and applies in addition to the existing turnover-based thresholds. According to the legislative materials, the new threshold based on the 'value of consideration' shall particularly prevent monopolisation in the field of companies from the digital economy. The legislative rationale behind the new provision is to make acquisitions of companies with low turnovers for which a high purchase price is paid (e.g., due to the value of data collected by such company) subject to merger control rules.[22] A comparable transaction value threshold has also been introduced in Germany (with a transaction value of €400 million; see the Germany chapter) with the Austrian provision closely following the German one. Both the Austrian and the German transaction value thresholds in particular where triggered by the experience with the *Facebook/WhatsApp* transaction that was only reviewed by the EU Commission based on a referral request under Article 4 (5) EUMR.[23]

According to Section 9(4) KartG, concentrations that do not meet the turnover thresholds (set out above) also need to be notified with the FCA when the undertakings concerned achieved a combined aggregate turnover in the last financial year prior to the concentration exceeding €300 million worldwide, of at least €15 million in Austria, the value of consideration for the concentration exceeds €200 million and the target company is active in Austria to a significant extent.

19 Section 7(1) KartG.
20 Section 9(1) KartG.
21 Section 9(2) KartG.
22 ErlRV 1522 BlgNR 25. GP 3.
23 Commission, decision dated 3 October 2014, case COMP/M.7217, Paragraphs 9–12.

The new transaction value threshold contains a number of new legal terms which will require clarification by the case law (in particular the terms 'value of consideration' and 'significance of domestic activities'). In order to assist undertakings with filing requirements, the FCA and the FCO recently have published a draft of a joint guidance paper on the application of the new transaction value threshold (Guidance).[24]

According to the Guidance, the concept of 'value of consideration' includes all forms of cash payments, securities, unlisted securities or shares, other assets (real estate, tangible assets, current assets), intangible assets (licences, usage rights, rights to the company's name and trademark rights, etc.) and considerations for a non-compete undertaking that are offered to the seller in return for the acquisition of the target company. In addition, also the liabilities of the target company and the seller that are assumed by the buyer form part of the value of consideration.[25] In the view of the FCA and the FCO, the inclusion of liabilities, however, only applies for interest-bearing liabilities.[26] Although the new threshold has some similarities with the US 'size-of-transaction' test, the Austrian 'value of consideration' test does not require that the value of assets or voting rights already held by the acquirer prior to the transaction are aggregated to the value of the assets or voting rights subject to the concentration.[27]

The local nexus requirement ('significance of domestic activities') shall exclude marginal activities of the target from Austrian merger control. However, on the basis of the legislative materials, having a location of the target company in Austria is already considered a significant domestic activity. Furthermore, the factors indicating a significant domestic activity will depend on the particular industry (e.g., the number of 'monthly active user' or 'unique visits' in the digital economy).[28] According to the Guidance, also the Austrian turnover may be used as a benchmark.[29]

vi Media concentrations

A concentration qualifies as media concentration[30] if at least two undertakings concerned can be qualified as:

a media undertakings[31] or media service companies;[32]

24 See FCA and FCO, Joint Guidance on Transaction Value Thresholds for Mandatory Pre-merger Notification of Concentrations, is available at https://www.bwb.gv.at/fileadmin/user_upload/PDFs/Leitfaden/20180709_Leitfaden_Transaktionsschwellen_final.pdf (last accessed 17 July 2018).

25 According to the Guidance (Paragraph 50), this also applies to liabilities of the target company which are not (directly) assumed by the acquirer (e.g. in cases of a share deal where the acquirer does not assume the target's liabilities). Please note that this interpretation is not necessarily supported by the wording of the new provision and could make the calculation of the 'value of consideration' for share deals more difficult.

26 See Guidance, Paragraph 50 et seq.

27 Guidance, Paragraph 13.

28 ErlRV 1522 BlgNR 25. GP 3.

29 See Guidance, Paragraphs 77 et seqq.

30 Section 8(1) and (3) KartG.

31 Media undertakings are defined in Section 1(1) No. 6 Austrian Media Act 1981 (MedG) as undertakings (1) supplying or providing the content of a medium and (2) providing or arranging its production and dissemination or, in case of an electronic medium, its broadcast, accessibility or dissemination.

32 Media service companies are defined in Section 1(1) No. 7 MedG as undertakings recurrently providing media undertakings with contributions in word, print, sound or image.

b media support undertakings (i.e., publisher, printing houses, undertakings that procure advertising orders, undertakings that procure the distribution of media on a large scale, film distributors);[33] or

c undertakings holding an (aggregate) direct or indirect participation of at least 25 per cent in a media undertaking, media service company or media support undertaking; or

d one undertaking concerned can be qualified as media undertaking, media service company or media support undertaking; and one or more media undertakings, media service companies or media support undertakings directly or indirectly hold an (aggregate) participation of at least 25 per cent in another undertaking concerned.

The turnover thresholds (see above) also apply to media concentrations with the difference that the turnovers of media undertakings and media service companies are multiplied with 200 and the turnovers of media support undertakings are multiplied with 20 for calculating the 'combined' (worldwide and domestic) turnover.[34]

If a media concentration has to be notified under the EUMR, the transaction nevertheless may require an Austrian media merger control notification if the turnover thresholds for media concentrations are met[35] (cumulative judicial competence as provided for in Article 21(4) EUMR). In such case, the substantive assessment under Austrian law is limited to assessing whether the concentration limits media plurality or diversity (see Section III.ix, below).[36]

vii Consequences for completion without merger clearance

In addition to fines, the main legal consequence for infringing the obligation of not implementing a merger without prior clearance is that the agreement implementing the concentration is invalid. Although there is no specific case law on whether a subsequent notification may cure such invalidity, it is common practice to also file for merger clearance in cases where a filing obligation initially has been ignored. According to the unanimous opinion expressed in legal writing, an agreement implementing a concentration prior to the expiration of the standstill obligation is (only) provisionally invalid as long as merger clearance has not been obtained. Thus, once the transaction receives clearance, the agreement implementing the concentration (which was initially invalid as it violated the standstill obligation) will become legally effective with retroactive effect.[37]

Furthermore, the Cartel Court may:

a order measures to terminate the implementation of an unlawful concentration (only in case clearance has not been obtained subsequently);[38]

b declare that a concentration was implemented contrary to the standstill obligation (in case clearance has subsequently been obtained);[39]

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33 Section 8(2) KartG.

34 Section 9(3) KartG in conjunction with Section 9(1) No. 1 and 2 and (2) No. 2 KartG.

35 See for example most recently Comcast Corporation's contemplated acquisition of Sky, which was notified under the EUMR with the European Commission (case number M.8861) and – as media concentration – with the FCA (case number BWB/Z-3915); Reidlinger/Hartung, Das österreichische Kartellrecht³ (2014), page 173 et seq; Urlesberger in Petsche/Urlesberger/Vartian (eds), Kartellgesetz (2016), Vor Section 7 KartG Paragraph 41.

36 Section 13 KartG.

37 Urlesberger in Petsche/Urlesberger/Vartian (eds), Kartellgesetz (2016), Section 17 KartG Paragraph 31.

38 Section 26 KartG.

39 Section 28 KartG; this requires a legitimate interest of the party requesting the declaration.

c impose a fine of up to 10 per cent of the worldwide (group) turnover achieved in the last financial year against an undertaking violating the standstill obligation; and
d impose a change of the corporate structure of the concerned undertakings (e.g., forced unwinding) if other alternative measures are not equally effective or are more burdensome for the concerned undertakings.[40]

In addition, culpable violations of the standstill obligation may allow injured parties to claim damages before civil courts under general civil law rules (the special provisions of the KartG governing private antitrust damage actions normally do not apply for such cases).[41]

Please note that the Official Parties actively pursue infringements of the standstill obligation and regularly request the imposition of fines. Fines for violation of the standstill obligation are regularly imposed by the Cartel Court even in cases where the concerned undertakings voluntarily disclosed the infringement to the Official Parties after a short period (e.g., in the context of a subsequent filing) and the (subsequent) substantive review of the concentration proved to be unproblematic (see Section II.i above).

viii Procedure

The Austrian merger control regime does not provide for a filing deadline or a pre-notification requirement. A notification can be filed as soon as the parties have agreed on the structure and timing of the transaction and intend to implement the proposed transaction within reasonable time.[42] However, notifications must be submitted before the implementation of the transaction, as transactions subject to merger control must not be implemented before merger clearance (standstill obligation).

Every concerned undertaking is entitled to submit a merger notification to the FCA[43] (i.e., not only the acquirer but also the target undertaking[44] and (based on the case law) even the seller[45]). There are no specific form requirements for merger filings with the exception that the notification has to be executed in four copies and has to include the information pursuant to Section 10 (1) KartG.[46] The Official Parties have published a Form CO (comparable to the Form/Short Form CO under the EUMR) which is intended to facilitate the swift review of a merger notification.[47] Although the use of this filing form is not mandatory, it is common practice to follow the structure of the Form CO when making merger filings in Austria.

40 Section 26 KartG.
41 Cf Section 37b No. 1 KartG.
42 OGH 23 June 1997, 16 Ok 4/97.
43 Section 10(1) first sentence KartG.
44 OGH 12 October 2016, 16 Ok 9/16h.
45 Cf OGH 23 June 1997, 16 Ok 6, 7, 8/97; Cartel Court 24 November 2008, 26 Kt 10/08, 26 Kt 11/08. Similar Hoffer, *Kartellgesetz* (2007), Section 10 page 158 et seq; Reidlinger/Hartung, *Das österreichische Kartellrecht* (2014), page 191 hold the view that the seller is not entitled to directly make a merger filing.
46 The notification must in particular include (1) the corporate structure of the undertakings concerned and its connected undertakings, (2) their turnover in the last financial year, (3) the market shares of the undertakings concerned in each relevant market, (4) information on the general market conditions and (5) in case of a media concentration information on all factors that may have negative effects on media plurality or diversity. In addition, a notification shall include information on all factors that may give rise to the creation or strengthening of a dominant market position.
47 See footnote 6.

Initial four-week (Phase I) review

The initial four-week review period will commence on the day the notification is received by the FCA provided that the notifying party has also paid the merger filing fee (currently €3,500)[48] and the merger filing fee has been credited to the FCA's account.[49] After the receipt of the filing, the FCA has to publish the fact that the notification was made including its date and a short summary of the proposed transaction (including the names of the parties; nature of the concentration and business segment concerned) on its website.[50] This publication triggers a two-week period allowing interested third parties to provide comments to the Official Parties with respect to the proposed transaction.[51]

Unlike in many other countries, the Austrian merger control system does not have a 'stop-the-clock' mechanism in case the Official Parties request additional information[52] or if a remedy proposal is submitted. However, the notifying party may request an extension of the initial four week Phase I review period to six weeks.[53]

The Official Parties have the exclusive right to request an in-depth (Phase II) review by the Cartel Court. If neither of the Official Parties requests the initiation of an in-depth review within the initial four- (or, if extended, six-) week review period, the transaction subject to notification is cleared upon expiry of the review period. The Official Parties have to inform the applicant of the fact that they did not initiate an in-depth review.[54]

Prior to the expiry of the initial review period, the Official Parties can waive their right to request an in-depth (Phase II) review, thereby allowing an early merger clearance prior to the expiry of the initial review period. In practice, an early clearance is only possible if the following prerequisites are met:

a Expiry of the two-week period allowing an interested third party to provide comments with respect to the notified transaction;

b the Official Parties were able to complete the substantive assessment of the notified concentration (and the assessment has not raised any concerns that – in the view of an Official Party – warrant an in-depth review by the Cartel Court); and

48 Section 10a(1) Austrian Competition Act (WettbG). In the KaWeRÄG 2017, the filing fee for notifications made as of 25 April 2017 has been increased to €3,500 (from previously €1,500).

49 Cf Section 10a(2) WettbG and the information on the FCA's website: https://www.bwb.gv.at/Zusammenschluesse/Seiten/default.aspx#Vergebuehrung (last accessed 23 May 2018).

50 Section 10(3) No. 2 KartG in conjunction with Section 10b WettbG.

51 Section 10(4) KartG.

52 In case the Official Parties hold the view that they require further information for the assessment of a notified concentration and such information is not provided to them in time to complete the assessment within the initial review period, they may request an in-depth review of the notified concentration (cf https://www.bwb.gv.at/recht_publikationen/standpunkte/mangelhafteunvollstaendige_anmeldung_eines_zusammenschlus/ (last accessed 24 May 2018)). In case a merger notification does not contain the information required pursuant to Section 10(1) (and (2) in case of a media concentration) KartG, the presiding judge of the Cartel Court may order *ex officio* or upon request by an Official Party in the application for in-depth review (within one month) the notifying party to supplement the merger notification. In case the notifying party does not comply with such order, the merger notification can be rejected. Furthermore, a request for supplementing the merger notification from the Cartel Court will 'stop-the-clock' until the supplemented merger notification has been received (see Section 43 KartG).

53 Section 11(1a) KartG.

54 Section 11(4) KartG.

c the notifying party has provided legitimate grounds why an expedited clearance is required (e.g., in the case of financial difficulties of the target company requiring a quick completion or refinancing).[55]

The notifying party or parties may propose commitments to the Official Parties aimed at preventing the initiation of an in-depth review before the Cartel Court.[56]

In-depth (Phase II) review by the Cartel Court

If at least one of the Official Parties requests an in-depth review, the Cartel Court will review the notified transaction. The Cartel Court must adopt its decision within five months after the receipt of the (first) request. If requested by the notifying party, this review period can be extended to six months.[57] If the Cartel Court does not adopt a decision within the five- (or, if extended, six-) month review period, the concentration cannot be prohibited and the Cartel Court has to terminate the review proceedings[58] (with the termination decision effecting a clearance of the transaction[59]).

The Cartel Court may adopt a clearance decision subject to commitments if the transaction otherwise would not fulfil the clearance requirements.[60] An implementation of a concentration having received merger clearance only subject to commitments without adhering to such commitments is considered a violation of the standstill obligation.[61] Furthermore, the violation of a commitments decision after implementing a concentration or obtaining a clearance decision on the basis of incomplete or incorrect statements allows the Cartel Court to impose proportionate post-merger remedies on the undertakings concerned.[62]

A prohibition decision will be issued if the Cartel Court considers that the concentration leads to the creation or strengthening of a dominant market position unless the grounds for a justification set out in Section 12(2) KartG apply.[63]

Furthermore, the Cartel Court may reject an application for in-depth review (e.g., because it was lodged after the expiry of the initial review period or because the notified transaction does not qualify as a (notifiable) concentration under Austrian merger control rules).[64]

55 Cf https://www.bwb.gv.at/recht_publikationen/standpunkte/abgabe_von_pruefungsverzichten/ (last accessed 24 May 2018).

56 Section 17(2) second sentence first alternative KartG.

57 Section 14(1) second sentence KartG.

58 Section 14(1) third sentence KartG.

59 Section 17(1) third case KartG.

60 According to the prevailing view, a clearance subject to commitments requires the approval of the notifying party or parties. The notifying party or parties may also propose commitments to the Official Parties in Phase II aimed at the Official Parties withdrawing their request for an in-depth review (Section 17(2) second sentence second alternative KartG).

61 Section 17(2) first case KartG.

62 Section 16 KartG.

63 According to Section 12(2) KartG, a clearance shall be granted notwithstanding the creation or strengthening of a dominant position if the concentration (1) leads to competitive benefits outweighing the disadvantages of dominance or (2) is required to maintain or strengthen the competitiveness of the concerned undertakings on an international level and is justified by national economic considerations. The last prohibition decision was rendered by the Cartel Court in the *Novomatic/Casinos Austria* case (see table in Section II.ii – Other Phase II cases from 2017, footnotes 1 and 2).

64 Section 12(1) No. 1 KartG; see also footnote 61 on the treatment of merger filings that do not contain the information required by law.

A final decision of the Cartel Court can be appealed with the OGH. The deadline for lodging an appeal is four weeks.[65] The OGH has to render its decision within two months of the receipt of the files from the Cartel Court.[66] In case the matter is referred back to the Cartel Court, it is likely that the Cartel Court again will have five month to adopt a new decision.[67] Especially in case of transactions that are likely to raise substantive issues that may have to be analysed in an in-depth (Phase II) review, the above deadlines should be kept in mind for the overall time required until clearance of the transaction can be expected.

ix Substantive assessment

While the EUMR uses the significant impediment of effective competition (SIEC) test, (see EU chapter), Austrian merger control still applies a dominance test. A concentration shall be cleared if it does not lead to the creation or strengthening of a dominant market position. As regards media concentrations, the assessment – in addition to the dominance test – is based on whether the concentration has negative effects on media plurality or diversity.[68]

An undertaking is considered dominant if it (1) is not subject to any or only insignificant competition or (2) holds a 'superior market position' in comparison to all other competitors.[69] Two or more undertakings are considered to hold collective dominance if there is no significant competition between them and (1) they are not subject to any or only insignificant competition or (2) together hold a 'superior market position' in comparison to all other competitors.[70]

During in-depth review (Phase II) proceedings before the Cartel Court, (independent) court appointed experts play a significant role when defining the relevant markets and providing a competitive analysis as regards the effects of a notified transaction. Therefore, the substantive assessment of a merger often will be based to a significant extent on the findings of such expert, which are often used as the basis for the Cartel Court's decision.

Please note that the KartG contains rebuttable presumptions of (single or collective) dominance in case certain market share thresholds are exceeded.[71]

IV OTHER STRATEGIC CONSIDERATIONS

The FCA is a member of the European Competition Network and the International Competition Network. The Official Parties cooperate closely with other competition authorities, particularly with the German FCO.[72] If a transaction has to be filed in multiple jurisdictions, the concerned undertakings should ensure to provide consistent information in their respective filings.

65 Section 49(2) KartG.

66 Section 14(2) KartG.

67 OGH 17 December 2001, 16 Ok 9/01 (please note that this decision was still made under the old Austrian Cartel Act 1988).

68 Section 13 KartG.

69 Section 4(1) KartG.

70 Section 4(1a) KartG.

71 Section 2(2) and (2a) KartG containing the various thresholds triggering a (rebuttable) presumption of dominance. In these cases, the onus is on the concerned undertakings to proof that they do not hold a dominant market position.

72 For example, in connection with the commitments imposed in the *VTG/CIT* transaction (see table in Section II.ii – Other Phase II cases from 2017, footnote 6 et seq.).

Under Austrian merger control law, pre-notification negotiations with the Official Parties are not mandatory and, although possible, not very common.[73] However, in complex cases where it is likely that the Official Parties raise competition concerns, pre-notification discussion can be very useful to avoid extensive and cost-intensive in-depth reviews before the Cartel Court.

Since the initiation of an in-depth (Phase II) review leads to a change of the 'decision-making' body, the review process basically is restarted with the notifying party or parties and the Official Parties becoming parties of the Cartel Court proceedings. Please note that court appointed experts play a significant role in merger control proceedings before the Cartel Court, especially in connection with the definition of the relevant market and regarding the competitive analysis of a notified transaction.

V OUTLOOK & CONCLUSIONS

The Austrian merger control regime already had a broad scope of application before the new 'size of the transaction' threshold introduced by the KaWeRäG 2017 entered into force on 1 November 2017. The introduction of this additional (transaction-value-based) threshold for merger notifications is likely to further increase the number of merger control filings in Austria.

Notwithstanding the recently published Guidance,[74] there will remain some uncertainties concerning the scope of application of the new threshold. Moreover, despite its legislative rationale, the new threshold does not only concern companies operating in the field of the digital economy. Rather, experience has already shown that transactions where the new threshold triggered a notification obligation often involved companies from the real estate sector and other traditional industries where the target companies achieved high profits in relation to their turnover.

It will be interesting to see how the Official Parties and the Cartel Court will interpret the new jurisdictional threshold and, ultimately, whether its implementation will have the desired legislative effect.

73 In 2017, there were 44 pre-notification meetings with the Official Parties (see footnote 8). A recent example for a case where pre-notification discussions with the Official Parties allowed a clearance subject to commitments already in Phase I was ProSiebenSat.1Puls 4's takeover of ATV (see table in Section II.ii – Other Phase I cases from 2017, footnote 1).

74 See footnote 24.

Appendix 1

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