

MERGER CONTROL IN AUSTRIA

WHITE PAPER



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INTRODUCTION

Although many European countries have merger control regimes that closely mirror the EU rules, the Austrian merger control regime has significant differences which must be observed.

Part I of this white paper describes the types of concentrations which must be filed with the authorities, based on type and size. Special attention is given to rules applying particularly to the media sector, and the new guidelines for the transaction value threshold. General rules for calculating turnover are also included. Part II discusses the roles of the authorities involved, fees associated with notification, and

sanctions and penalties that may be imposed for e.g. failure to notify. In Part III, the timeline for filing a notification, waiting for assessment by the statutory parties in Phase I, clearance, the possibility of a Phase II investigation and ruling, and the appeals process is outlined, and the consequences of pre-clearance implementation in violation of the standstill obligation are reiterated.



I. NOTIFICATION OBLIGATION

1. CONCENTRATIONS

Under Section 7 of the Austrian Cartel Act 2005 (ACA)¹, the following types of transactions generally qualify as concentrations for purposes of Austrian merger control:

- » asset deals;
- » share deals; if, as a result of the transaction, a shareholding of capital or voting rights reaches the level of 25% or 50%;
- » acquisition of control (de facto or de jure);
- » acquisition of rights in an undertaking by means of a management or a lease agreement;
- » establishment of interlocking directorates of two or more companies at the management or supervisory board level, where at least half of the members of the management or of the supervisory board are identical;
- » creation of a full-function joint venture.

Please note that even if a joint venture does not qualify as full-function joint venture, the parties must still assess whether another type of concentration is realized.

If the target company is an „already-existing undertaking,“ such transactions may constitute an acquisition of shares or voting rights of at least 25% or 50% respectively and/or the acquisition of joint control. This must be assessed on a case-by-case basis.



¹ Bundesgesetz gegen Kartelle und andere Wettbewerbsbeschränkungen, BGBl I Nr 61/2005, as amended most recently by BGBl I Nr 56/2017

I. NOTIFICATION OBLIGATION

2. THRESHOLDS

In Austria, there are two threshold tests for notification: one only based on turnover and one based on the value of the transaction.

2.1. TURNOVER THRESHOLD TEST

The Austrian authorities must be notified of a concentration (which is not subject to a mandatory EU filing) prior to its completion, if in the last completed business year²:

- » the combined **worldwide** turnover of **all undertakings** concerned exceeded **EUR 300 million**;
- » the combined **Austrian** turnover of **all undertakings** concerned exceeded **EUR 30 million**; and
- » the **worldwide** turnover of **at least two of the undertakings** concerned exceeded **EUR 5 million** each.

However, even if these thresholds are met, Austrian notification is not necessary if in the last business year³:

- » the **Austrian** turnover of **only one undertaking** concerned exceeded **EUR 5 million**; and
- » the **combined** worldwide turnover of **all other undertakings** concerned **did not exceed EUR 30 million**.

SPECIAL RULES FOR THE MEDIA SECTOR

When calculating turnover, special rules apply to media undertakings, media service undertakings and media support undertakings.

Media undertakings are companies that manage the content of a medium, as well as its production and distribution, such as newspaper companies and broadcasting companies.

Media service undertakings are editorial support companies, meaning companies that do not provide their content directly to the public, but provide other companies (media undertakings) with content (texts, sound or images), such as news agencies or picture agencies.

Media support undertakings include

- » publishing companies that are not classified as media undertakings,
- » printing and pre-press stage companies (e.g., typesetting and repro companies),
- » companies that procure or arrange advertising orders (e.g., media agencies),
- » companies that take care of the (wholesale) distribution of media (e.g., press wholesalers), and
- » film distribution companies.

Concentrations between parties that are active in the media sector are subject to the following specific rules for calculating relevant turnover:

- » The turnover of media and media service undertakings must be multiplied by 200.
- » The turnover of media support undertakings must be multiplied by 20.

When assessing whether the EUR 5 million thresholds are met, the multiplier does not apply.

² Section 9 para 1 ACA | ³Section 9 para 2 ACA

I. NOTIFICATION OBLIGATION

2.2. TRANSACTION VALUE THRESHOLD

On 1 November 2017, a transaction value threshold was introduced into the Austrian merger control regime. Although the intention was to focus on the digital economy, it is clear that the transaction value threshold also applies to other industries. A similar threshold was also introduced in Germany in 2017, and the German Federal Cartel Office (FCO) and the Austrian Federal Competition Authority (FCA) published a guidance paper together regarding the transaction value thresholds in July 2018.

A concentration must be filed prior to its completion, if in the last completed business year⁴:

- » the combined **worldwide** turnover of all undertakings concerned exceeded **EUR 300 million**; and
- » the combined **Austrian** turnover of all undertakings concerned exceeded **EUR 15 million**;

and in addition:

- » the **value of consideration** for the transaction exceeds **EUR 200 million**; and
- » the target company has **substantial operations in Austria**.

CALCULATING THE VALUE OF CONSIDERATION

The value of consideration must be calculated in EUR, and should be distinguished from the purchase price or the company value calculated on the basis of business methods.

Briefly summarized, it encompasses:

- » all assets and other monetary benefits that the seller receives from the buyer in connection with the concentration in question
 - The term „asset“ is to be interpreted in a broad sense and covers:
 - all cash payments,
 - the value of the transfer of voting rights,
 - securities,
 - tangible assets, and
 - intangible assets.
- » future and variable purchase-price components, or considerations that are contingent on certain conditions, such as:
 - earnout clauses, or agreed additional payments to the seller that are conditional on achieving certain turnover or profit targets at a specific point in the future, and
 - licensing fees.
- » payments to the seller for non-competition
- » (interest-bearing) liabilities of the target company that are assumed by the buyer through acquisition.
- » liabilities assumed from the seller, to the extent to which they are assumed.

⁴Section 9 para 4 ACA

I. NOTIFICATION OBLIGATION

DEFINING SUBSTANTIAL OPERATIONS IN AUSTRIA

For the target company to have substantial operations in Austria, their domestic activity must have a local nexus and reach a significant level.

Domestic activity has to be measured on the basis of the market-related activities of the target company. Domestic activity is generally not measured on the basis of domestic turnover (e.g. in the digital sector, „monthly active users“ or „unique visitors“ may be a more relevant indicator). However, domestic turnover could very well be used as a criterion in mature markets that are characterised by tangible sales. In Austria, local nexus can result from the location of the target company. Research and development in Austria may also be a relevant activity. It is important to note that only current domestic activity is relevant. The point of reference is not the financial year preceding the concentration (as it is usually the case when assessing filing obligations), but the target company's activity when the concentration is put into effect.

In addition to having a local nexus, domestic activity

must reach a significant level. Unlike Germany, Austria does not have an absolute threshold. The published explanatory notes state that target companies with „marginal activity“ in Austria are not covered, implying that the threshold is relatively low. In the guidance paper, the FCA states that it will routinely find that there is no significant domestic activity of the target company if their Austrian turnover is **below EUR 500,000**, provided that this adequately reflects their market position and competitive potential. Domestic turnover may not be an adequate indicator of domestic activity if the target company is active in a market that is not characterised by turnover, or its low turnover generated so far does not reflect its competitive potential. In such cases, other criteria must be used to determine whether domestic activity reaches a significant level, such as location, R&D activities, „monthly active users“, „unique visitors“, etc.

Because the rules leave room for interpretation and judgment, each case must be assessed individually.



I. NOTIFICATION OBLIGATION

2.3. GENERAL RULES FOR CALCULATING TURNOVER

The turnover of an undertaking concerned includes the turnover of the **whole group of companies** to which the undertaking belongs. The ACA's definition of a „group of companies“ includes the **entire** turnover of all entities that are linked with an undertaking concerned as defined in Section 7 ACA (see I.1 above). **Even minority interests of 25% voting rights or capital must be taken into account when defining the group of companies.** This is different from the pertinent rules of the European Merger Control Regulation (EUMR)⁵. Consequently, proper definition of the group of companies entails a careful, case-by-case assessment.

The amounts to be included when calculating turnover should correspond with the „**ordinary activities**“ of the undertakings concerned in the normal course of business in the preceding financial year. Any adjustment of figures from the most recently audited accounts to reflect relevant changes in the business, such as acquisitions or divestments, would follow rules similar to those applied under the EUMR.

The ACA thresholds require undertakings to determine how much of their revenue can be geographically allocated to Austria. The **location of the revenue** is determined by the place where competition with alternative suppliers takes place for the products or services offered by the undertaking concerned. In most cases, this will be the place where the customer is located.

There are specific rules for **banks and insurance companies** on calculating turnover which are similar to the EUMR provisions.

If a concentration falls within the scope of the EUMR, the „one-stop-shop“ principle applies and no extra filing is required in Austria. However, **if the transaction qualifies as a media concentration, a parallel notification in Austria is required.** In such a case, the Austrian competition authorities only materially assess the potential impact of the proposed concentration on media plurality.



Any transaction meeting the thresholds set out in Section 9 ACA (discussed in 2.1 and 2.2 above) must be notified to the authorities, regardless of its impact on the relevant market(s). The ACA applies, even if the activities of the undertakings concerned do not overlap or the transaction does not raise any material issues.

There is an open debate about whether and to what extent a concentration meeting the thresholds of the Austrian merger control regime may not need to be filed if the concentration has no, or only limited, impact on the Austrian market (known as the „**effects doctrine**“). No general rule can be applied in this respect, and a case-by-case analysis is required. The FCA applies the effects doctrine very restrictively and tends to limit its application to very exceptional cases. According to the Austrian Supreme Cartel Court, there is some room to apply the effects doctrine even if the thresholds are met. The FCA recommends to contact the FCA in case of questions regarding the possible lack of effects on the Austrian market of a certain transaction. In 2018, the FCA announced its intention to update the effects doctrine guidelines.

⁵ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ 2004 L 24/1

II. FUNDAMENTALS

1. AUTHORITIES

FEDERAL COMPETITION AUTHORITY

(Bundeswettbewerbsbehörde – FCA)

Any merger notification falling within the scope of the ACA must be filed directly with the FCA. Notifications must be submitted in hard copy and during the office hours of the FCA – an electronic submission is not possible. Upon receipt of a notification, the FCA must forward two copies to the Federal Cartel Prosecutor and must publish a summary of the notified transaction on its website (www.bwb.gv.at). Within the statutory waiting period of four weeks (Phase I), the FCA must carry out a preliminary assessment of the proposed transaction in order to decide whether to clear the merger or to initiate Phase II proceedings at the Cartel Court.

FEDERAL CARTEL PROSECUTOR

(Bundeskartellanwalt – FCP)

The FCP represents the public interest in competition matters before the Cartel Court and is formally part of the Federal Ministry of Justice. Like the FCA, the FCP is a statutory party, and has the right to request the initiation of Phase II proceedings in merger control cases.

COMPETITION COMMISSION

(Wettbewerbskommission)

The Competition Commission is an advisory board of the FCA. In merger control proceedings, the Competition Commission has the right to submit recommendations to the FCA.

CARTEL COURT

(Kartellgericht)

The Cartel Court is located at the High Court of Appeals in Vienna. The Cartel Court is only involved in merger control proceedings if one of the statutory parties (FCA or FCP) requests that they conduct an in-depth review of a concentration (Phase II). The Austrian Supreme Court, acting as the Supreme Cartel Court (Kartellobergericht), rules on merger control appeals from the Cartel Court as the court of last instance.

II. FUNDAMENTALS

2. FEES

Prior to filing the notification, a filing fee of **EUR 3,500** for **Phase I** must be paid in cash to the bank account of the FCA. The original payment confirmation must be submitted together with the notification in order to start the Phase I assessment period. For **Phase II**, a fee of **up to EUR 34,000** will be due, depending on the complexity of the proceeding and the financial capacity of the notifying parties.

3. SANCTIONS & PENALTIES FOR FAILURE TO NOTIFY, OR CLOSING BEFORE CLEARANCE

If an undertaking intentionally or negligently submits incorrect or misleading information in the notification, the Cartel Court may impose a fine of up to 1% of the previous business year's total worldwide turnover upon the request of a statutory party.

Companies that implement the concentration before receiving clearance are subject to fines for violating the standstill obligation. At the request of one of the statutory parties, the Cartel Court may impose on each undertaking that has intentionally or negligently violated the **standstill obligation** a fine of up to 10% of the total worldwide turnover generated in the last business year. Moreover, agreements infringing the standstill obligation are null and void under Austrian civil law, unless the concentration is subsequently cleared.

As an ultimate consequence, the Cartel Court may order that the undertakings concerned take measures to diminish or eliminate the effects of the concentration. The Cartel Court must consider the principle of proportionality when ordering such measures.

So far, the fines imposed for breaching the standstill obligation in Austria have amounted to between EUR 1,000 and EUR 1,500,000. The average fine imposed in the last five years amounted to approx. EUR 47,000. However, in many cases the violation was detected after only a few

months. Since the duration of the violation is an important factor for the calculation of the fine, the average fine must be cautiously interpreted.

In 2017, the Cartel Court imposed a fine on a company that had violated the standstill obligation in a case concerning a European target with no Austrian turnover. However, the transaction involved a market that was at least EEA-wide. The violation lasted 4.5 years. Nevertheless, a fine of only EUR 30,000 was imposed. One of the main reasons for this low fine, despite the duration of the violation, was that the acquirer had taken the initiative to report the violation to the FCA. In its decision, the Cartel Court noted that internationally active companies should be familiar with the principles of European merger-control law.

Austrian merger control rules should be checked when assessing the potential filing obligations of a transaction, even if the target does not generate any turnover in Austria. As mentioned in I.2.1 above, the threshold test does not require a minimum Austrian turnover from more than one undertaking concerned.

III. TIMING

1. FILING DEADLINE

The ACA does not provide for an obligation to file a notification within a specific time frame. However, the transaction must not be implemented before clearance. It is in particular not necessary to wait until the transaction has been signed in order to file a notification with the FCA.

2. CLEARANCE DEADLINE

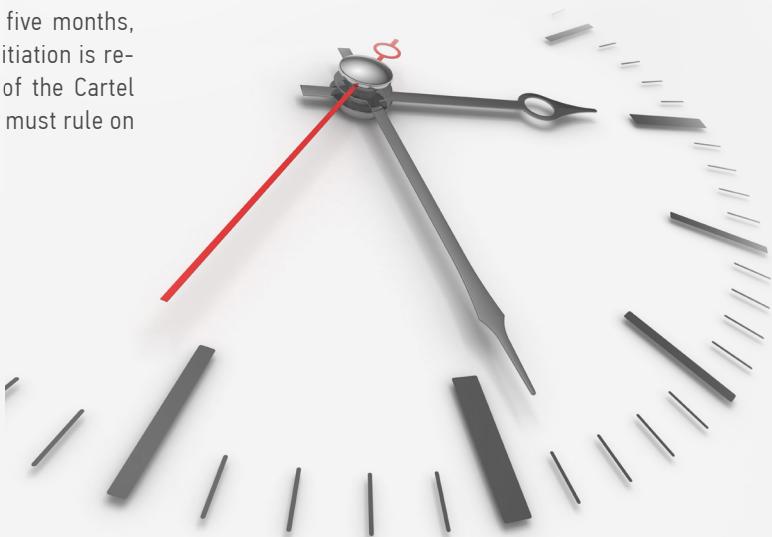
After the notification has been filed, the Phase I four-week waiting period begins. Within these four weeks, the statutory parties can assess the case and apply for a Phase II in-depth investigation at the Cartel Court; otherwise, the statutory parties will send written notice to the notifying party, letting them know the transaction has been cleared in Phase I.

In exceptional cases which, on first assessment, have no material impact on the Austrian market, it is possible to file a request with the statutory parties to reduce the normal four-week waiting period. In practice, the statutory parties will not grant a waiver of their right to initiate Phase II proceedings or reduce the statutory waiting period until at least 17 days after the summary of the notification has been published on the FCA website.

The Phase II waiting period can last up to five months, starting from the day the first request for initiation is received by the Cartel Court. If the decision of the Cartel Court is appealed, the Supreme Cartel Court must rule on it within two months.

Under the ACA, the notifying party may apply to extend Phase I and/or Phase II, by two weeks or one month, respectively.

The standstill obligation applies to any transaction falling within the scope of the ACA, and undertakings that implement the concentration before clearance are subject to fines. As stated above, any agreements violating the standstill obligation are null and void under Austrian civil law. It is not possible to request a derogation from the standstill obligation.



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WHO WE ARE

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MERGER CONTROL

We advise and represent clients in **merger control proceedings** before the **Austrian Federal Competition Authority (FCA)**, the **Austrian Cartel Court**, and the **European Commission**. In addition, we regularly coordinate **multi-jurisdictional filings**, especially in the **CEE-region**.

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We represent companies in **cartel** and **abuse proceedings** before the **Austrian Cartel Court**, the **Austrian Supreme Cartel Court**, the **European Commission**, and **European courts**. In the scope of our work, we coordinate **leniency applications** and **summary applications** to national competition authorities within and outside of the EU.

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In the past few years we have set up **individualized compliance programs** for clients and have conducted numerous

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Working with clients on matters of **private enforcement** has become an increasingly important area of our practice in recent years. The representation may begin as early as the time when the client is considering applying for leniency, and can continue all the way through a **civil claim for damages** caused by a **cartel violation**.

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ABOUT THE AUTHORS



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„All the assets I would seek for in competition law.“
Chambers Europe 2018

„Impressive, smart and strategic“ practice head Dieter Thalhammer „sees the big picture.“
Legal500 2017

Dieter Thalhammer is a partner in our Vienna office and head of the competition law practice group. Dieter is one of the leading Austrian experts in national and European competition law and represents national and international clients in merger control proceedings, cartel, and abuse of dominance cases, as well as in cartel damages proceedings (private enforcement). He also has extensive experience conducting internal investigations and implementing antitrust compliance programs.

Under his guidance, our competition law practice group has grown into one of the leading teams in Austria. Dieter represents clients from diverse industries such as transport, automotive, media, energy, postal services, telecommunications, chemical, real estate, finance, health care, food, and electronic engineering. His recent accomplishments include representing a transport company in cartel proceedings before the European Commission. Dieter holds law degrees from the University of Vienna (Dr iur, Mag iur) and Saarland University (LLM Eur).

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JUDITH FELDNER

„Very good and client-oriented.“
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„She is fantastic, extremely skilled, very open and easy-going and she has exceptionally good relationships with clients.“
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Judith Feldner is a partner in our Vienna office and a member of our competition law practice group. The precautionary side of her practice involves regularly providing dawn raid trainings, implementing antitrust compliance programs, and conducting internal investigations (including e-discovery measures) for clients. She also works on cartel cases and coordinates leniency applications before the European Commission and the national competition authorities. Additionally, she handles merger control proceedings, particularly coordinating multi-jurisdictional filings and structuring joint ventures.

Judith holds a law degree from the University of Graz (Mag iur) and has also studied at the Universitat Autònoma de Barcelona. After her studies, she worked at the University of Graz as a university assistant in the Department of European Law.

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