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Austria Introduces Significant Changes to its Competition Law

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On 10 September 2021, certain significant changes to Austria's competition law entered into force, although some of the merger control related changes will apply only as of 1 January 2022:

- *Merger control.* The amendments include a revision of Austria's revenue-based merger control threshold, the introduction of the significant lessening of competition test, and a broadening of the scope of potential public interest justifications.
- *Restrictive agreements.* The amendments recognise sustainability considerations as a potential justification of restrictive agreements.
- *Dominance.* The amendments adjust the definition of dominance and relative market power based on criteria relevant to digital markets and confer jurisdiction to the Cartel Court to declare companies active in multi-sided digital markets as dominant.

Merger Control

Revised revenue threshold. A new local revenue limb is added to the existing revenue-based threshold: Each of at least two parties must have had revenues of more than € 1 million in Austria, in addition to their combined revenues in Austria exceeding € 30 million.

The other elements of the existing jurisdictional thresholds remain unchanged:

- The parties' combined worldwide revenues must have exceeded € 300 million and each of at least two parties must have had worldwide revenues of more than € 5 million.
- The existing *de minimis* exemption^[1] and the existing transaction value threshold^[2] are unaffected by the amendments.
- The broad Austrian rules on the determination of the relevant group revenue are not amended either.^[3] Transactions, where the target had revenues of less than € 1 million in Austria, may therefore still exceed the notification thresholds if the target is connected via 25%-shareholdings (even if they are non-controlling) to other

companies that generate revenues in Austria.

The new threshold applies to transactions that close after 31 December 2021:

- Although the law states that the new revenue-based threshold applies to transactions that are “notified” after 31 December 2021, the Competition Authority has clarified in guidance published on its website that it considers the new threshold to apply to transactions that “close” after 31 December 2021.
- Transactions that close until 31 December 2021 remain subject to the current thresholds.

The new threshold is expected to lead to a significant reduction in the number of transactions requiring notification in Austria.^[4]

Significant lessening of competition test. Austria introduces the significant lessening of competition standards for the substantive assessment of mergers. The law retains the existing dominance test as an alternative test. The new test applies to transactions that are notified as of 1 January 2022.

Public interest grounds. Austrian merger control rules enable the Cartel Court to approve transactions that would otherwise significantly lessen competition if (i) the transaction is likely to improve the general conditions of competition to such an extent that the transaction’s negative effects are outweighed or (ii) the transaction is necessary to maintain or improve the parties’ international competitiveness and the transaction is justified based on macroeconomic grounds.

The amendments add a third ground for justification: The Cartel Court can exceptionally approve a transaction that would otherwise significantly lessen competition if (iii) the transaction’s macroeconomic advantages “significantly” outweigh the transaction’s negative effects. Factors that the Court may consider in this assessment include economic growth, innovation, full employment, the increase of overall welfare, or “the fair distribution of income considering appropriate social and environmental standards”.

Filing fee. The filing fee is increased from € 3,500 to € 6,000 (applicable to notifications submitted as of 1 January 2022).

Investment control. The Federal Competition Authority is obliged to forward all merger notifications to the Ministry of the Economy to enable it to verify whether the transaction might be subject also to foreign investment control review.^[5] This rule applies to notifications submitted as of 10 September 2021.

Sustainability and Restrictive Agreements

Under Austrian competition law, a restrictive agreement is exempt from the prohibition of restrictive agreements if (i) the agreement contributes to improving the production or distribution of goods or to promoting technical or economic progress, (ii) allows consumers a fair share of the resulting benefit, (iii) does not impose

disproportionate restrictions, and (iv) does not eliminate competition in respect of a substantial part of the products in question.[6]

The revised competition law expressly acknowledges sustainability considerations as a potential justification for restrictive agreements. It does so by stipulating that consumers are deemed to “*also*” participate in the benefits resulting from the agreement if the agreement “*contributes significantly to an ecologically sustainable or climate-neutral economy*”.

This amendment is to be welcome and is remarkable for two reasons:

- The contribution to a sustainable economy is *in itself* deemed to be a contribution to an improvement of the production or distribution of goods or to technical progress.
- The contribution to sustainability does not need to produce its effects specifically on the affected market.[7]

Digital Markets and Dominance

Criteria for determining dominance. The law adds three illustrative criteria to be taken into account when assessing the existence of a dominant position, i.e., (i) the significance of a company’s intermediation services for other companies’ ability to access upstream or downstream markets, (ii) access to data, and (iii) network effects.

Relative market power in multi-sided digital markets. The existing concept of “relative market power” is expanded to include providers of intermediation services in multi-sided digital markets who will be deemed dominant if their customers depend on access to these intermediation services.

Declaration of digital companies as dominant. The Cartel Court will be able to declare companies active in multi-sided digital markets as dominant at the request of the Federal Competition Authority and other regulatory agencies (but not at the request of competitors or other parties). Such a declaration of dominance would have indicative value for potential subsequent proceedings for alleged abuse of dominance, which it is intended to make more expedient and efficient (even though this may be a questionable expectation in practice considering the fast-changing nature of digital markets).

A company that was declared dominant can request the Cartel Court to declare that the dominant position no longer exists if the relevant factual circumstances that were the basis for the declaration of dominance have changed.

[1] A transaction that otherwise meets the revenue-based thresholds is not notifiable if only one party had revenues of more than € 5 million in Austria and all other parties’ combined worldwide revenues did not exceed € 30 million.

[2] A transaction that does not meet the revenue-based thresholds is notifiable if the parties' combined worldwide revenues exceeded € 300 million, the parties' Austrian revenues exceeded € 15 million, the transaction value is more than € 200 million, and the target has significant market-related activities in Austria. This threshold can be met in circumstances where the target has zero revenues in Austria, provided its non-revenue generating activities in Austria are "significant".

[3] Revenues of companies that are connected via non-controlling 25%-shareholdings are relevant in full for jurisdictional purposes. Transactions, where the target itself has Austrian revenues of less than € 1 million, might therefore exceed the new threshold if the target is connected via 25%-shareholdings to other companies that generate revenues in Austria.

[4] The Austrian Competition Authority estimates the number of notifiable transactions to decrease by more than 40%. Based on this estimate, the number of notified transactions in 2020 would have been around 240 instead of 429.

[5] Under the Austrian Investment Control Act 2020, the Ministry of the Economy can initiate proceedings *ex officio* if it considers that a transaction that would require an investment control notification was not notified to the Ministry.

[6] These conditions correspond to the conditions in Article 101(3) TFEU.

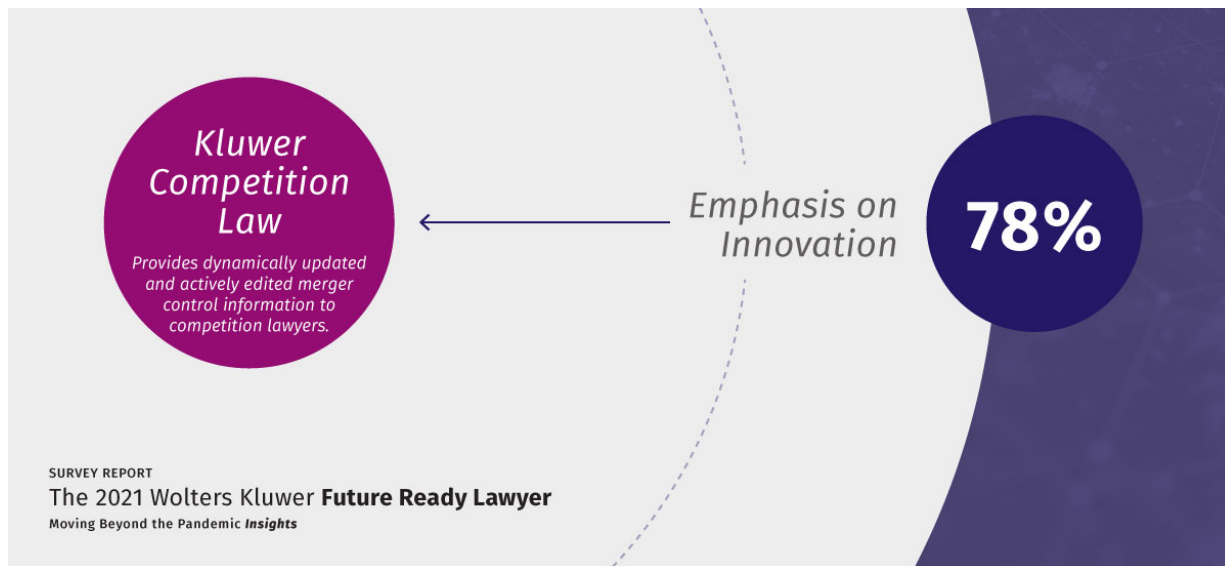
[7] The amended Austrian law thus goes beyond current EU law which recognises the benefits flowing from restrictive agreements in principle only "within the confines of each relevant market", except if the efficiencies materialise in "related markets" provided the consumers affected by the restriction and benefiting from the efficiency gains "are substantially the same". See the European Commission's Guidelines on Article 81(3) [TFEU] [now Article 101(3) TFEU], OJ 2004 C 101/97, para. 43 and the case law cited.

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This entry was posted on Monday, September 20th, 2021 at 3:30 pm and is filed under Source: OECD“>Abuse of dominance, Austria, Digital markets, Source: UNCTAD

“>Dominance, Exemptions, Foreign direct investment, Foreign investment, Jurisdiction, Merger control, Merger Thresholds, Relative Market Power, Sustainability, Turnover thresholds

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