

Fixing the WhatsApp gap?

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Key points

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Key points

This update addresses the following key points:

- The Cartel Act Amendment Law 2017 implemented the EU Cartel Damages Directive (2014/104).
- The law contains a new consideration threshold – as compared to the turnover thresholds also in place – of €200 million, combined with a test that the target must perform a "significant amount of activities in Austria".
- This may cause more mergers to be caught by the Austrian merger control system and creates some ambiguity.

Overview

The Cartel Damages Directive was implemented in Austria by a bill that entered into force on May 1 2017. The 2017 law⁽¹⁾ significantly amended Austrian cartel law, primarily facilitating the private enforcement of cartel damages for consumers and enterprises alike.

In relation to merger control, a new consideration threshold will be introduced in Austria as of November 1 2017. It will be effective for mergers implemented after this date, meaning that transactions may require checks and notification even before this date. Although the legislature wants to take account of the digitalisation of the economy, the new threshold applies without considering the area of activity of the undertakings party to the transaction.

International experience – especially in the digital market (as well as pharmaceutical transactions) – has shown that in some cases, small but innovative start-up companies have been purchased by much larger, well-established businesses without triggering merger control thresholds because the start-up companies often have few or no sales. However, even small businesses may have a high market potential and a significant economic importance to buyers, as was demonstrated by the Facebook/WhatsApp transaction.

EU policy

WhatsApp was bought in 2014 by Facebook for \$19 billion.⁽²⁾ Although the transaction did not have a 'union' dimension within the meaning of Articles 1(2) or 1(3) of the EU Merger Regulation, the parties applied to the European Commission on the basis that the transaction could be reviewed under the national competition laws of three member states, according to Article 4(5) of the EU Merger Regulation.

Two main issues were identified which required clarification in relation to assessing whether a value of transaction threshold should be included as a criterion for merger control: the value itself and the

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territorial nexus. While such clarification was accepted to be a complex exercise, it was paramount in order to avoid a proliferation of multi-jurisdictional filings, as it was seen counterproductive if, for example, the adoption of value thresholds led to the need for notification of transactions in one or more member states and at the EU level.

Austrian policy

The new Austrian threshold system will now catch transaction below that threshold. For that, a subsidiary test with four elements has been introduced:

- The parties must have a joint global turnover of €300 million.
- The parties must have a joint Austrian turnover of €15 million.
- The value of the consideration for the transaction must be more than €200 million.
- The target must be active in Austria to a significant extent.⁽³⁾

In introducing the consideration test, Austria closely followed Germany and preceded possible similar activities in the European Union. In the Austrian national consultation process, the legislature was urged to wait for EU-level cases before overturning the traditional system of turnover thresholds. While Austria and Germany are at the forefront in Europe in this respect, the United States has a similar concept in relation to a 'size of transaction' test.

The Austrian €200 million consideration threshold is significantly lower than the German (€400 million) and US (approximately €300 million) thresholds. The Austrian legislature has likely considered the relative size of the Austrian economy in fixing this threshold.⁽⁴⁾ However, contrary to Germany, the Austrian legislature did not include an explicit legal definition of the crucial term 'value of consideration' in the law. Instead, the exact wording of the German law is repeated in the preparatory materials for the Austrian law:

"the consideration consists of all assets and other benefits in kind, which seller receives from purchaser in connection with the merger (purchase price), in addition to the value of possible liabilities accepted by the purchaser."

The criterion of significant activity in Austria follows the principle of international law that a country may only regulate, review and decide matters having a sufficient relationship to the territory (local nexus). To determine the nexus, two questions need to be answered:

- How can activities be attributed to the Austrian territory?
- What is a 'significant extent'?

In the absence of a specific Austrian statutory provision concerning the attribution of turnover, reference is made to European law and practice. Consequently, in relation to the rendering of services or the sale of goods, turnover is attributed according to the domicile or residence of the customer, meaning the place where the service is actually rendered or the goods are delivered.⁽⁵⁾ Similar criteria apply for the geographic attribution of activities. With digital services, the actual location where the customer uses the services will be relevant and not the position of any server. In terms of the attribution, it is irrelevant whether the activity is free of charge, since such activities are also market related.

Comment

At present, the Austrian merger control regime is based on a system of turnover thresholds. Following German legislation and anticipating possible new legislation by the European Union, the new Cartel Act introduces a consideration threshold for which, at least in Europe, there is no practical experience. Due to vague criteria in the law, it is expected that more transactions than envisioned by the legislature will be caught by the new regime or at least notified by careful parties and lawyers. Austrian – and German – authorities will have to develop a respective body of case law to give more certainty to undertakings.

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Endnotes

(1) Federal law amending the Cartel Act 2005, the Competition Act and the Act to Improve Local Supply and Competitive Conditions, *Federal Law Gazette I/56* of April 24 2017.

(2) European Commission decision of October 3 2014, COMP/M.7217 – *Facebook/WhatsApp*.

(3) *Matousek/Weiss/Gassler, Zusammenschlusskontrolle – Neuer Transaktionswerttest*, *ecolex* 2017, 388 ff.

(4) Austria is about one-tenth the size of Germany.

(5) Commission consolidated jurisdictional notice under Council Regulation 139/2004/EC on the control of concentrations between undertakings, Rec 195.

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