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Minority Shareholding and coordinated effects – Note by Austria

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Austria

1. Introduction

1. Minority shareholdings are generally understood as shareholdings that do not confer a majority interest in an undertaking. Austrian law considers shareholdings of more than 25% and less than 50% as minority shareholdings. They are particularly important under Austrian merger control law, as the indirect or direct acquisition of a minority stake in an undertaking already constitutes a merger. Unlike EU merger control law, which requires a lasting change of control, Austrian merger control does not require the acquisition of control for a transaction to qualify as a concentration.

2. This broader approach reflects the recognition of the Austrian Supreme Court acting as the Austrian Supreme Cartel Court that even minority shareholdings may confer considerable economic influence and affect competition between the undertakings concerned (Supreme Cartel Court 17.12.2001, 16 Ok 9/01, *Wolters Kluwer/ Linde*). The Supreme Cartel Court recognised that competition may be weakened even where neither undertaking controls the other. In particular, a minority shareholding of 25% may provide the shareholder with economic influence and create incentives to take the target's commercial interests into account. Such shareholdings may therefore facilitate an alignment of economic interests and potentially weaken competition.

3. This contribution examines the legal framework governing minority shareholdings under Austrian competition law. In a first part it will explain different types of transaction scenarios that may trigger a merger notification obligation. In a second part the paper focuses on coordinated effects arising from minority shareholdings and illustrates this with selected merger cases from the Austrian Federal Competition Authority's (AFCA) enforcement practice.

2. Legal Framework

4. Whether a transaction constitutes a merger within the meaning of § 7 of the Austrian Cartel Act is determined by its objective characteristics, irrespective of the intentions of the parties involved. The transaction must, however, result in a change to the market structure and have a certain degree of permanence. § 7 Cartel Act sets out the different types of transactions that qualify as mergers under Austrian merger control law.

5. A transaction is subject to mandatory notification to the AFCA where both the requirements of one of the scenarios set out in § 7 of the Cartel Act and the applicable turnover thresholds under § 9 of the Cartel Act are met.

6. Notified transactions are subject to merger reviews to determine whether it is likely that they create or strengthen a dominant market position or significantly impede effective competition. If such effects are expected, clearance may still be obtained on the basis of appropriate remedies.

2.1. § 7 (1) (3) Cartel Act - Minority Shareholdings in the Merger Framework

7. Pursuant to § 7 (1) (3) of the Austrian Cartel Act, the direct or indirect acquisition by an undertaking of shares in another undertaking constitutes a concentration if the transaction results in a shareholding reaching or exceeding a shareholding of 25% or 50%.

8. This covers both the acquisition of shares in corporations and the acquisition of partnership interests (*German: Erwerb von Gesellschafterrechten in Personengesellschaften).* In *Kingfisher*, the Austrian Cartel Court held that § 7 (1) (3) of the Austrian Cartel Act also applies to voting rights (Cartel Court, 30.1.2002, 25 Kt 456/01, *Kingfisher*). Accordingly, a concentration may arise even where the shareholding represents less than 25% of the company's share capital, provided that the shares confer more than 25% of the voting rights. The Court emphasised that the decisive consideration is the shareholder's ability to exercise influence over the undertaking, rather than merely the extent of its financial participation.

9. Additionally, the Austrian Cartel Court considered that the elements of a merger can be fulfilled in cases where less than 25% of the equity interest and less than 25% of voting rights in another company are acquired. This may be the case where the acquirer is granted rights that would normally be reserved for a shareholder holding a stake of at least 25%, due to atypical provisions in the undertaking's articles of association (Cartel Court 5.8.2004, 26 Kt 132/04, *Morawa/Grosso*). Such acquisitions may therefore be subject to merger control to prevent circumvention of the statutory notification requirements.

10. § 7 (1) (3) moreover covers the indirect acquisition of shareholdings. Such an acquisition occurs where an undertaking acquires shares in another undertaking that itself holds a shareholding in a third undertaking. However, an indirect acquisition constitutes a concentration within the meaning of § 7 (1) (3) only if the acquirer exercises sufficient influence over the intermediate subsidiaries through which the relevant shareholding thresholds are reached. This requires at least a degree of influence equivalent to that associated with a direct shareholding of 25% or more (Cartel Court, 17.12.2008, 16Ok 12/08, *EPH*).

11. Unlike the EU Merger Regulation, which requires a change of control, Austrian merger control law also covers the acquisition of minority shareholdings without control. Such acquisitions may therefore be subject to notification in Austria even where the turnover thresholds under the EU Merger Regulation are met.

2.2. Substantive assessment of mergers

12. In principle, all forms of concentrations of undertakings covered by the statutory merger definition in §7 Cartel Act may affect the market position of the undertakings concerned. The statutory merger categories therefore serve to bring potentially problematic transactions within the scope of merger control. Once notified, mergers are then assessed to determine whether the merger is likely to create or strengthen a dominant position, or to significantly impede effective competition.

13. In assessing concentrations involving minority shareholdings, it is therefore necessary to examine the degree of influence conferred by the transaction in order to determine whether the concentration should be prohibited. Without the opportunity to exercise influence, it is inconceivable that the merger may affect the market position of the undertakings concerned. Such opportunities may arise, in particular, where a minority shareholding is accompanied by additional information, participation or control rights granted through specific provisions in the company's articles of association or other contractual arrangements. In conducting this assessment, the AFCA relies on evidence such as public commercial registers, articles of association, shareholders' agreements and other supporting documents required to be submitted with the merger notification.

14. If the creation or strengthening of a dominant position, or a significant impediment to effective competition is expected, approval can still be granted through remedies. An illustrative example is the merger between Morawa and Mediaprint, concerning the

establishment of a joint venture in which Morawa was to hold 75.1% and Mediaprint a minority shareholding of 24.9% (Cartel Court 5.8.2004, 26 Kt 132/04, *Morawa/Grosso*). As explained above, the transaction was subject to merger control scrutiny despite the shareholding remaining below the 25% threshold, due to atypical provisions in the articles of association granting the acquirer additional shareholder rights. The Austrian Cartel Court cleared the merger subject to certain restrictions intended to limit Mediaprint's influence over the joint venture. In particular, Mediaprint was prohibited from obtaining additional shareholder rights through special provisions in the company's articles of association that would extend its influence beyond its minority shareholding. Moreover, Mediaprint was not permitted to participate in Morawa Grosso's operational decision-making or gain access to commercially sensitive information concerning other publishers, including their business data and contractual terms.

2.3. Minority Shareholdings in Media Mergers

15. Minority shareholdings of at least 25% are in addition also relevant for determining whether a transaction that already constitutes a concentration under § 7 Cartel Act qualifies as a media merger pursuant to § 8 Cartel Act. Media mergers are subject to additional scrutiny with regard to their potential effects on media plurality. Accordingly, the Cartel Court may prohibit a merger if it can be expected to impair media plurality.

16. The particular importance of safeguarding media plurality is illustrated by the *Raiffeisen-Holding Niederösterreich-Wien Beteiligungs GmbH / Niederösterreichisches Pressehaus Druck- und Verlagsgesellschaft m.b.H.* case. The transaction involved an increase in Raiffeisen-Holding's shareholding in Niederösterreichisches Pressehaus (NÖP) from 20% to up to 28.6%. The concentration was permitted subject to commitments aimed at protecting media plurality. These included a limitation of the shareholding to a maximum of 28.6%, restriction to a single seat at NÖP's supervisory board, a prohibition on combining the parties' advertising sales activities, and safeguards ensuring editorial independence.

17. Media mergers that are notifiable to the European Commission under the EUMR must additionally be notified in Austria, so as to enable the AFCA and the Austrian Federal Cartel Prosecutor to examine a possible impairment of media plurality.

2.4. Additional relevant merger instances under §7 of the Austrian Cartel Act

2.4.1. § 7 (1) (4) Cartel Act – Staff overlaps as merger scenario

18. Pursuant to § 7 (1) (4) of the Austrian Cartel Act, a concentration is deemed to arise where staff overlaps exist between at least half of the members of the management bodies or supervisory boards of two or more undertakings. This provision aims to prevent the risk that structural links between the management or supervisory bodies of otherwise independent undertakings may facilitate the coordination of their competitive conduct. The undertakings concerned are the respective companies whose management or supervisory bodies overlap.

19. The provision establishes a formal criterion based on overlapping membership, meaning that a concentration may arise irrespective of whether the overlapping management or supervisory board memberships actually result in coordinated market behaviour.

20. The Austrian Cartel Court has addressed failures to notify concentrations arising from overlapping membership in management or supervisory bodies in several decisions,

including *Ankerbrot* (OLG Wien, 27 January 2015, 27 Kt 65/14), *Lagardère Travel Retail* (OLG Wien, 14 December 2018, 27 Kt 4/18t), and *Erne Group* (OLG Wien, 24 January 2019, 26 Kt 3/18p).

2.4.2. § 7 (1) (5) Cartel Act – Other links involving controlling influence

21. This provision constitutes a catch-all clause. Pursuant to it, a concentration also arises from any other links between undertakings that enable one undertaking to exercise, directly or indirectly, a controlling influence over another undertaking.

22. According to the Austrian Supreme Cartel Court, controlling influence exists where an undertaking is able to assert its own competitive interests in another undertaking with regard to decisions that are decisive for the latter's market position and competitive conduct. This includes, in particular, the ability to determine the target's key commercial and competitive strategies, such as decisions concerning investments, production and distribution (Supreme Cartel Court, 4 April 2005, 16 Ok 4/05). Controlling influence encompasses not only the ability to determine strategic decisions (positive control), but also the ability to block such decisions (negative control).

23. The provision also encompasses joint control. Accordingly, a concentration may arise even where the acquisition of a shareholding does not meet the thresholds under § 7 (1) (3) Cartel Act, provided that the acquirer obtains joint control through rights granted under corporate or shareholder agreements. In particular, a minority shareholder may exercise joint control where it holds veto rights over decisions determining the undertaking's strategic commercial conduct, provided that these rights go beyond the ordinary statutory protections afforded to minority shareholders. Such veto rights typically concern the annual budget, the business plan, major investments or the appointment of senior management.

3. Minority Shareholdings and Coordinated Effects

24. Under Austrian competition law, non-controlling minority shareholdings may give rise to concerns under § 1 Cartel Act where they facilitate anti-competitive coordination between the shareholder and the target undertaking. Consequently, agreements or concerted practices remain subject to the cartel prohibition.

25. The risk of coordination is particularly pronounced in the case of horizontal minority shareholdings, where the shareholder and the target undertaking operate in the same market. Such shareholdings may facilitate exchanges of commercially sensitive information, particularly through shareholder information rights, representation on corporate bodies or other contractual arrangements. Furthermore, the financial interest in a competitor may reduce the shareholder's incentive to compete aggressively with the target undertaking.

26. The potential for anti-competitive coordination arising from non-controlling minority shareholdings was subject in the *Messezentrum Salzburg/EAFINITY/Design Center Linz* case. In 2024, Messezentrum Salzburg GmbH (MZS) notified the acquisition of EAFINITY. Through the acquisition MZS would also indirectly acquire a non-controlling minority shareholding in Design Center Linz. MZS and Design Center Linz were direct competitors in the market for exhibition centers. The minority shareholding was accompanied by approval, information and control rights vis-à-vis Design Center Linz, which raised competition concerns. The AFCA and Federal Cartel Prosecutor identified the risk that MSZ could gain access to commercially sensitive information concerning a direct competitor. Such access could increase market transparency and facilitate coordination

between the undertakings. To address these concerns, MZS made binding commitments, including to waive the approval, information and control rights associated with its minority shareholding and to refrain from appointing representatives to the advisory board of Design Center Linz.

27. Although the case was assessed under merger control rather than under the cartel prohibition pursuant to § 1 Cartel Act, it illustrates how minority shareholdings between competitors may create structural opportunities for anti-competitive coordination, particularly through access to commercially sensitive information.

28. The Austrian waste management cartel case involving FCC Austria Abfall Service AG (*FCC*) and the Huber Transport KG (*Huber*) illustrates that minority shareholdings do not exclude the application of the cartel prohibition under § 1 Cartel Act. FCC owned a minority shareholding of 49% in Huber but did not exercise a controlling influence over it and both undertakings determined their market conduct independently. The proceedings revealed coordination between FCC and Huber as part of the Austria-wide waste management cartel infringing § 1 Cartel Act and Art 101 TFEU. It consisted of price fixing, market allocation and information exchange focused on public and private waste management tenders. The case confirms that even at a 49% shareholding, well above the 25% threshold of § 7(1)(3) Cartel Act, both undertakings remain competitors when the minority shareholder lacks controlling influence. Therefore, their coordination falls under § 1 Cartel Act. The Cartel Court also expressly rejected the applicability of the single economic entity doctrine in this case.

29. Accordingly, the decisive question under § 1 Cartel Act is whether the minority shareholder and the target undertaking remain independent economic entities and engage in anti-competitive coordination. While the structural risks associated with a minority shareholding may be addressed through merger control, agreements or concerted practices restricting competition beyond those structural effects remain subject to the cartel prohibition.

3.1. Minority shareholdings and the Concept of a Single Economic Entity

30. The cartel prohibition does not apply to agreements within a single economic entity. Moreover, a minority shareholding does not constitute a single economic entity as such. Additional legal or economic means of control are required. The Austrian Supreme Court clarified that the concept of a single economic entity may also apply to minority shareholdings concerning jointly controlled undertakings (Supreme Cartel Court 19.12.2019, 6 Ob 105/19p, *dm*). This is the case where the shareholder holds rights going beyond those normally granted to minority shareholders. Notably, negative control may suffice to establish joint control if a minority shareholder can block strategically important decisions, such as major investments.

31. In the case at hand, a shareholder holding 32% of the shares was able to block investments exceeding 2% of the previous year's gross turnover, as such decisions required a three-quarter majority. This form of negative control was sufficient to qualify as joint control even though it did not confer decisive influence on management and operational business.

32. The CJEU established in Akzo Nobel that a single economic entity exists when a parent company exercises decisive influence over the market conduct of its subsidiary. Consequently, a joint venture may form an economic unit with each of its parent companies if they can exercise decisive control over it. Nevertheless, the single economic entity privilege did not apply in the case of *dm* because the joint venture's management retained an independent sphere of action in its day-to-day business, free from shareholder's

instructions. Furthermore, the Supreme Cartel Court clarified that the exercise of structural shareholder rights – such as blocking the annual investment plan exceeding 2% of the previous year's turnover –remained generally outside the scope of the cartel prohibition. Conversely, this means that where the concerned undertaking retains autonomy over its ordinary business operations, the cartel prohibition remains applicable.

4. Minority Shareholdings in relation to Common Ownership and Cross-Shareholdings

33. The AFCA has also considered the potential anti-competitive effects of minority shareholdings in the context of common ownership and cross-shareholdings between competitors.

34. The AFCA addressed cross-shareholdings in the context of its sector inquiry into the electricity and gas markets together with the Austrian sector regulator e-control (2025). In the recommendations, they called for the elimination of cross-shareholdings between regional energy suppliers to strengthen competition in the Austrian energy market. It was highlighted that the extensive network of direct and indirect shareholdings between energy suppliers, including non-controlling minority shareholdings, may weaken incentives to compete on prices and facilitate tacit or explicit coordination between market participants. To address these concerns, certain measures were proposed for policy makers to take into account: Caps on minority stakes between energy suppliers in Austria (e.g., a maximum of 5 percent, unless full unbundling occurs), prohibition on cross-shareholdings and transparency requirements regarding ownership structures including the annual disclosure of all direct and indirect shareholdings.

35. The AFCA also addressed common ownership during the consultation process for the Austrian Cartel and Competition Law Amendment Act 2021 (KaWeRÄG 2021). It highlighted the potential anti-competitive effects of non-controlling minority shareholdings. In particular, the AFCA pointed out that cross-shareholdings between competitors may create unilateral incentives to increase prices, as the undertakings concerned also benefit from their competitors' profits. Similarly, in cases of common ownership, where investors hold minority shareholdings in several competing undertakings within the same market, investors may have incentives to reduce competition between these undertakings in order to maximise their aggregate profits In light of this, the AFCA suggested clarifying in the explanatory notes of the draft accompanying the introduction of the SIEC test that the acquisition of a non-controlling minority shareholding may significantly impede effective competition even where the acquirer obtains little or no influence over the target undertaking. This may particularly be the case where the acquisition creates appreciable anti-competitive effects through unilateral (non-coordinated) incentives to reduce mutual competitive pressure following the transaction. The AFCA emphasised that such effects should be taken into account in the substantive merger control assessment, irrespective of whether the minority shareholding confers significant influence over the target undertaking.

5. Conclusion

36. Austrian competition law provides a comparatively broad framework for the assessment of minority shareholdings. The acquisition of a shareholding of at least 25% may already trigger merger control under § 7 (1) (3) Cartel Act. Additional concentration scenarios, including overlapping management or supervisory bodies and other links conferring controlling influence, further extend the scope of Austrian merger control.

37. The Austrian framework thus recognises that minority shareholdings may affect competition even in the absence of control over the target undertaking. Such effects may arise from the alignment of economic interests, access to commercially sensitive information or reduced incentives to compete. These potential anti-competitive effects may be taken into account in the substantive merger control assessment, including through the assessment of unilateral and coordinated effects.

38. Beyond merger control, minority shareholdings may also raise concerns under § 1 Cartel Act when they facilitate anti-competitive coordination between undertakings. In particular, information exchanges and agreements concerning competitive conduct may fall within the scope of the cartel prohibition where the undertakings remain economically independent. The mere existence of a minority shareholding does not establish a single economic entity and therefore does not, in itself, preclude the application of § 1 Cartel Act.

39. In its competition advocacy work aimed at informing policymakers, the AFCA has also highlighted the potential anti-competitive effects of minority shareholdings in the context of common ownership and cross-shareholdings, particularly with regard to their potential to reduce competitive pressure between undertakings.