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Merger Control
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AUSTRIA

Law and Practice

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1. LEGISLATION AND ENFORCING AUTHORITIES

1.1 Merger Control Legislation

The Austrian Cartel Act of 2005 (as amended) (*Kartellgesetz*, the "Cartel Act") contains the main provisions of Austrian merger control, eg:

- the definition of a notifiable "merger" or "acquisition" (Section 7 of the Cartel Act);
- the turnover thresholds (Section 9 of the Cartel Act); and
- the substantive test for mergers (Section 12 of the Cartel Act).

Additionally, the Austrian Competition Act 2002 (as amended) (*Wettbewerbsgesetz*, the "Competition Act") also refers to merger control matters.

On 23 April 2021, the Austrian government published its draft Cartel and Competition Law Amendment Act of 2021 (the "Draft 2021 Amendment"). After consultation with shareholders, the council of ministers agreed on a final updated version on 16 June 2021 (the "2021 Amendment"). It is expected that the law will come into force in autumn 2021 (the exact date depends on when the Austrian parliament will vote on it).

With regard to merger control, inter alia, a new second national threshold will be introduced; ie, at least two undertakings concerned must achieve a turnover in Austria of EUR1 million respectively, while in total the combined turnover in Austria must still trigger the EUR30 million threshold. Furthermore, a new additional substantive test will be introduced. In the future not only the "creation or strengthening of a dominant position" (as hitherto) but also a "significant impediment of effective competition" (the "SIEC-test") impedes clearance of a notified transaction. See **9.1 Recent Changes or Impending Legislation**.

The Federal Competition Authority (*Bundeswettbewerbsbehörde* or, FCA) provides guidance on its website (also provided in English) concerning basic aspects of merger control practice in Austria, including, eg, defining a merger, threshold values, notification requirements, pre-notification, etc.

The FCA, in co-operation with the German *Bundeskartellamt* (Federal Cartel Office or FCO), also published guidance on its transaction value-based notification threshold, as introduced in 2017 (including an English version).

1.2 Legislation Relating to Particular Sectors

Following the Austrian Investment Control Act (*Investitionskontrollgesetz 2020* or the "ICA 2020"), which entered into force on 25 July 2020 and which is based on EU Regulation (EU) 2019/452, the acquisition of (parts of) undertakings, shares, substantial influence or even assets of undertakings is notifiable.

The FDI-screening proceedings must be applied if the acquirer is based outside the EU, EEA or Switzerland and if the target is (inter alia) an Austrian undertaking (or assets thereof). If the target is active in a highly sensitive sector (as conclusive listed in the ICA, eg, defence equipment and technologies, critical energy infrastructure, water) a "10% plus" acquisition of shares is notifiable; if the target is active in other sensible sectors (as non-conclusively listed in the ICA, eg, energy, information technology, traffic and transport, health, food, etc), any "25% plus" acquisition is notifiable.

Responsible authority for FDI-screening is the Austrian ministry for Digitalization and Economic Affairs. Following the 2021 Amendment, the FCA must forward each merger control notification to the ministry to enable the latter to check whether the FDI-screening applies.

For specific sectors, particular authorities also have to be notified of transactions. For example, with regard to the bank and insurance sector, the Austrian Financial Market Authority (*Finanzmarktaufsichtsbehörde* or FMA), which acts pursuant to the Austrian Financial Market Authority Act (*Finanzmarktaufsichtsbehördengesetz* or FMA-BG), must also be notified.

1.3 Enforcement Authorities

Filings have to be made with the Official Parties (*Amtsparteien*): the FCA and the Federal Cartel Prosecutor (*Bundeskartellanwalt* or FCP). The FCA is an independent body, whereas the FCP is subordinate to the Federal Minister of Justice.

The FCA and/or the FCP are responsible for applying to the Cartel Court (*Kartellgericht*, a special division within the Vienna Court of Appeals, *Oberlandesgericht Wien*) for an in-depth (Phase II) investigation of a notified transaction. The Cartel Court is the only competent authority that is legally entitled to substantively rule on the legality of a notified transaction, eg, by prohibiting it or by granting clearance. Decisions and orders of the Cartel Court can be appealed to the Supreme Cartel Court (*Kartellobergericht*), a special division within the Supreme Court (*Oberster Gerichtshof*).

During the initial (Phase I) investigation of a notified transaction, the Austrian Competition Commission (*Wettbewerbskommission*) is entitled to submit a recommendation to the FCA. During an in-depth (Phase II) proceeding, a number of entities – including the Austrian Chamber of Commerce (*Wirtschaftskammer Österreich*), the Federal Chamber of Labour (*Bundeskammer für Arbeiter und Angestellte*), the President's Conference of the Austrian Chambers of Agriculture (*Präsidentenkonferenz der Landwirtschaftskammern Österreichs*), as well as certain regulators – are entitled to submit observations to the Cartel Court.

2. JURISDICTION

2.1 Notification

If the preconditions for filing are fulfilled (with regard to turnover thresholds, the type of transaction and an effect in Austria), notification prior to closing of the deal is compulsory in Austria, with no exceptions.

2.2 Failure to Notify

Failure to notify a transaction is considered to be an infringement of the prohibition on implementation before clearance. In addition to nullifying the underlying transactional agreements, the Cartel Court, upon request of the FCA and/or the FCP, may impose fines on the undertakings concerned of up to 10% of their consolidated worldwide turnover.

The Supreme Cartel Court has ruled that the failure to notify is often a serious infringement of competition law. In fact, failure to notify has been in the focus of the FCA's practice in recent years. Recent fines have ranged from EUR40,000 to EUR100,000. In June 2021, Facebook agreed to pay EUR9.6 million for not filing its acquisition of US-based GIPHY in 2020.

The Cartel Court is required by law to publish its final decisions in the so-called *Ediktsdatei*, which is a website run by the Austrian Federal Ministry of Constitutional Affairs, Reforms, Deregulation and Justice.

Furthermore, the FCA (also based on a legal obligation) publishes on its website short press releases concerning the Cartel Court's rulings in proceedings involving a failure to notify a transaction. The notice identifies the names of the parties and a description of the transaction involved, as well as the amount of the fine imposed by the Court.

2.3 Types of Transactions

Under Section 7 of the Cartel Act, the following types of transactions are caught by Austrian merger control:

- the acquisition of an undertaking or part of an undertaking;
- the acquisition of rights with regard to the business of other undertakings (such as certain contracts for the lease or management of the business);
- the indirect or direct acquisition of 25% or more, or 50% or more, of the shares or voting rights in an undertaking (independent of the acquisition of control);
- the establishment of cross-directorships, ie, acts which ensure that at least half of the members of the executive board or the supervisory board in two or more undertakings are the same;
- the achievement of a direct or indirect controlling influence over another undertaking; and
- the creation of a joint venture which performs, on a lasting basis, all the functions of an autonomous economic entity.

Some of the above listed transactions (bullet points two, four and five) by definition cover operations which do not involve the transfer of shares or assets. A controlling influence without a transfer of shares or assets might be achieved, for example, by:

- attaching special rights to preferential shares (eg, the minority shareholders' right to appoint more than half of the members of the supervisory board);
- a de facto controlling influence by minority shareholder who are highly likely to achieve a majority at the shareholders' meetings due to the percentage of shareholders in attendance; or
- minority shareholders acting together in exercising their voting rights.

2.4 Definition of "Control"

"Control" is not defined in Austrian competition law.

The Austrian Supreme Cartel Court (Case No 16 Ok 7/07) has confirmed that a controlling influence under the Cartel Act, Section 7 is identical to exercising "decisive influence" within the meaning of Article 3 of Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (EUMR). In the same decision, the Supreme Cartel Court also defined "sole" and "joint" control as follows.

Joint Control

Joint control exists where the controlling shareholders all have the "possibility to influence strategic decisions", eg, where such decisions cannot be taken without the participation of other shareholders. In defining the term "strategic decisions", the Supreme Cartel Court referred to the Commission's Consolidated Jurisdictional Notice No 139/2004 and listed the "budget, the business plan, major investments or the appointment of senior management" as rights which typically confer joint control.

Sole Control

Sole control is achieved if the acquirer is able to influence the strategic competitive behaviour of the target independently. The Supreme Cartel Court again follows the Commission's Jurisdictional Notice (including for cases of negative sole control).

Acquisition of Shares

As discussed in **2.3 Types of Transactions**, the direct or indirect acquisition of 25% or more (or 50% or more) of the shares or voting rights of an undertaking is caught by Austrian merger control, independent of whether control is acquired

or not. In addition, under Austrian case law, the acquisition of even less than 25% of the shares or voting rights in an undertaking is caught by Austrian merger control if the acquirer gets rights which are comparable to minority rights typically attributed to a 25% or more shareholder.

2.5 Jurisdictional Thresholds

According to the "classic threshold" of Section 9(1) of the Cartel Act, the thresholds of Austrian merger control are met if the undertakings concerned achieved the following turnover figures in the previous business year:

- a combined global turnover of more than EUR300 million;
- a combined turnover of more than EUR30 million in Austria; and
- at least two of the relevant undertakings each had a global turnover of more than EUR5 million.

Furthermore, if only one of the undertakings concerned had a turnover of more than EUR5 million in Austria, the global turnover of the other undertaking involved must exceed EUR30 million in order to require merger notification (Cartel Act, Section 9(2)).

With the 2017 Amendment, a new notification threshold was implemented, which supplements the "classic" turnover thresholds described above.

According to this so-called "transaction-value-based" notification threshold (Cartel Act, Section 9(4)), a concentration has to be notified to the FCA if:

- the combined worldwide turnover of the undertakings concerned exceeds EUR300 million;
- the combined Austrian turnover of the undertakings exceeds EUR15 million;
- the value of the consideration for the transaction exceeds EUR200 million; and
- the target is active in Austria to a significant extent.

For mergers which occur in the media sector, a special turnover calculation has to be applied. Depending on the status of the undertakings concerned (eg, newspaper, publisher, etc) the respective turnover must be multiplied by a factor of 200 or 20.

2.6 Calculations of Jurisdictional Thresholds

Classic Threshold

The thresholds of Section 9(1) of the Cartel Act (see **2.5 Jurisdictional Thresholds**) refer to the last business year, are based on turnover (ie, asset value does not factor in) and calculated on the basis of net turnover achieved by ordinary or regular business activity. Foreign turnover must be converted on the basis of official currency exchange rates, eg, the European Central Bank's official exchange rates for the last business year.

Concerning credit institutions, the turnover calculation is based on:

- interest income and similar income;
- income from shares, other equity and non-fixed income securities, income from equity investments and income from investments in affiliates;
- commission income;
- net income from financial transactions; and
- other company income. With regard to insurance companies, turnover is based on premium income (Section 22(2) of the Cartel Act).

Value-of-Transaction Threshold

The transaction value-based notification threshold (Section 9(4) of the Cartel Act) refers to three criteria:

- turnover thresholds;
- the value of the transaction; and
- significant activity by the target in Austria ("domestic activity").

The turnover thresholds are, as with the classic threshold, calculated on the basis of net turnover achieved by ordinary or regular business activity.

The value of the transaction (in euros) is based on "consideration". While the term "consideration" is not legally defined, reference can be made to the explanatory notes to the law. Furthermore, as detailed in **1.1 Merger Control Legislation**, the FCA has published guidance on how to determine the value of a transaction (an English version is available on the FCA's homepage). According to the explanatory notes to the law and the FCA's guidance, "consideration" comprises any value (which means any monetary benefits) that the seller receives from the acquirer in connection with the transaction.

If a new joint venture creating a previously non-existing company is established by several parties that each transfers consideration into the new entity, the sum of those considerations must be used in calculating the value of the transaction.

Satisfying the "domestic activity" requirement

In determining whether the transaction value-based threshold's requirement of "domestic activity" by the target is satisfied, the focus is on current market-related activity. In contrast to Section 9(1) of the Cartel Act (see **2.8 Foreign-to-Foreign Transactions**), domestic activity is generally not measured on the basis of domestic turnover. The above-discussed joint guidance of the FCA and German Bundeskartellamt identifies various criteria to measure activities which may be applied to different sectors and activities.

The measurement should be carried out in line with objective industry standards. For example, in the digital sector, the explanatory notes in Austria refer to user numbers ("monthly active users") or the access frequency of a website ("unique visitors") as examples of possible indicators.

Furthermore, in Austria, the location of the target company is also relevant to determining whether it has significant domestic activity in accordance with Section 9(4) of the Cartel Act. Domestic activity must be presumed where the target has a physical presence (eg, subsidiary office) in Austria. However, this must also take account of the extent to which the activities at this site have domestic market orientation.

Market orientation in cases where the user of the service does not pay for it could include:

- non-monetary remuneration by the user (eg, the user provides their data);
- future or alternative monetisation of the use (eg, the user must view revenue-generating advertising or pay to access additional features); or
- research and development of future marketable products or services.

According to the guidance, if turnover adequately reflects the market position and the competitive potential of the target company (usually in mature markets), the FCA will routinely find that there is no domestic activity if the turnover of domestic target companies is below EUR500,000. However, domestic turnover over EUR500,000 does not necessarily establish significant domestic activity, and the whole of the circumstances will be taken into consideration by the authority.

2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds

The relevant turnover is the turnover of the buyer and the target. However, if the seller keeps 25% or more of the shares (and/or direct control) in the target, the seller's turnover must also be included in the target's turnover.

The respective turnover of each undertaking concerned is calculated on a group-wide basis. Austrian law provides for a somewhat extraordinary definition of what constitutes the relevant "group", which deviates from the rules of the EUMR. Under Austrian law, the turnover of all undertakings linked to the parties concerned by direct or indirect control, or by an upstream or downstream shareholding of at least 25%, must be included in full (ie, not on a pro rata basis).

Changes in the business (such as acquisitions or divestments) after closing of the preceding financial year but before implementation of the planned transaction must be reflected in the analysis of whether the relevant thresholds are met.

2.8 Foreign-to-Foreign Transactions

Foreign-to-foreign transactions are subject to merger control in Austria; a local presence is not required. If the target does not achieve any turnover in Austria, but the thresholds are nevertheless still triggered, a filing is required unless the "effects doctrine" applies.

The "effects doctrine" can be invoked in special circumstances to avoid notification in Austria. A precondition is that the target does not achieve any turnover in Austria. In addition, it must be shown that the planned transaction will have no effect on the Austrian market. Effects resulting in an obligation to file could exist, for example, on the basis that the target will be active in Austria in the near future, or that the target, though not active in Austria, is active in a broader geographic market that encompasses Austria (eg, an EU-wide market).

In general, a notification will be required if the market position of the acquirer in Austria is "noticeably" and "directly" strengthened by taking over the target. The FCA has published a guidance paper on the application of the effects doctrine (available on its website).

2.9 Market Share Jurisdictional Threshold

There is no market share threshold in Austrian merger control.

2.10 Joint Ventures

Under Section 7(2) of the Cartel Act, Austrian merger control follows Article 3(4) of the EUMR, according to which "the creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity shall constitute a concentration". Therefore, a joint venture must be newly created, must have sufficient resources to operate independently in a market and must be involved in activities beyond one specific function for the parent companies. Furthermore, the sale/purchase relationship between the joint venture and its parent companies must be limited and the joint venture must be intended to operate on a lasting basis.

However, contrary to the EUMR (which, as made clear in Austria Asphalt GmbH & Co OG v Bundeskartellanwalt, ECLI:EU:C:2017:643, C-248/16, treats as concentrations only full-function joint ventures, whether newly created or converted from an existing undertaking), the creation of a non-full-function joint venture might also trigger an obligation to file in Austria. This is the case if one of the parent companies transfers a "substantial part of an undertaking" into the joint venture. A "substantial part" may include production facilities, customer lists, patents,

etc. In specifying the term "substantial part", the Supreme Cartel Court refers to whether a (potential) market position is, or will be, transferred with the transaction (Case No 16 Ok 8/01).

2.11 Power of Authorities to Investigate a Transaction

If the thresholds of Austrian merger control are not met, the Austrian competition authorities can investigate a transaction based on antitrust criteria according to both Article 101 of the Treaty on the Functioning of the European Union (TFEU) and Section 1 of the Cartel Act. Although precedents are not entirely clear about this, there is also the possibility (though very rare in practice) that a merger which does not meet the turnover thresholds may still qualify as an abuse of dominance under Article 102 of the TFEU and Section 5 of the Cartel Act.

As the legal consequence of not notifying a notifiable transaction is nullification of the underlying agreements, there is no statute of limitations on the authorities' ability to investigate a transaction.

2.12 Requirement for Clearance before Implementation

Completion of a transaction must be suspended until clearance.

As discussed in **2.2 Failure to Notify**, closing a transaction before clearance is subject to penalties of up to 10% of the consolidated turnover of the parties.

The Supreme Cartel Court ruled that a transaction had been implemented upon its registration in the company register, and acceptance of a takeover bid (16 Ok 2/17f (7 December 2017)). The Court also held that a transaction is deemed "implemented" once the acquirer obtains the "opportunity to exercise economic influence," regardless of whether, or when, it actually exercises that influence.

2.13 Penalties for the Implementation of a Transaction before Clearance

As outlined in **2.2 Failure to Notify**, failure to notify and, therefore, implementation prior to receiving clearance, has been the focus of the FCA's practice in recent years, and has led to fines in several cases.

2.14 Exceptions to Suspensive Effect

Austrian merger control, in contrast to EU law (see Article 7(2) EUMR), does not provide any exceptions to the suspensive effect. In general, no such exception applies to failing firms, either.

However, under Section 19 of the Cartel Act, notification is not required for certain types of transactions that are not considered to be an "acquisition" under the meaning of Section 7 of the Cartel Act, such as:

- credit institutions may acquire shares (but not assets) in undertakings, without providing notification of the transaction, if the shares are acquired only for the purpose of resale;
- certain private equity undertakings may acquire shares (but not assets), without providing notification of the transaction, if the accompanying voting rights are exercised only to maintain the full value of those investments and not to determine, directly or indirectly, the competitive conduct of those undertakings; and
- while the first two exceptions are in line with EU law (see Article 3(5)(a) and (c) of the EUMR), the Cartel Act goes further by additionally exempting acquisitions by credit institutions which are made to restructure a financially suffering target or to secure claims towards the target (Section 19(1)(2) of the Cartel Act).

As discussed, the Supreme Cartel Court ruled that acceptance of a takeover bid is considered to be an implementation of a transaction (which requires immediate notification). Therefore, the authorities' former practice with regard to public bids of accepting the completion of acquisition of shares prior to clearance as long as the acquirer did not actually exercise influence in the target no longer seems applicable.

2.15 Circumstances Where Implementation before Clearance is Permitted

The Austrian authorities do not have the statutory authority to grant derogations from the bar on closing a transaction prior to clearance. And the debate in legal writing as to whether under Austrian law the parties may close the transaction prior to clearance, as long as the acquired control is not exercised, is not valid anymore due to the discussed judgment of the Supreme Cartel Court which held that the mere acquisition of the possibility to exercise control is to be considered as an act of implementation.

In special cases, it is possible to implement transactions outside of Austria while the transaction in Austria (eg, concerning an Austrian subsidiary) is suspended pending clearance (ie, so-called "hold separate" agreements). However, carve-outs of the Austrian branch of a business might be difficult to be applied in practice, as the target's Austrian operations typically are considered not sufficiently autonomous as a standalone business so as to be carved out.

3. PROCEDURE: NOTIFICATION TO CLEARANCE

3.1 Deadlines for Notification

There are no deadlines for notification in Austria. As outlined, completion before clearance is not allowed. With regard to fines for failure to notify, see **2.2 Failure to Notify** and **2.13 Penalties for the Implementation of a Transaction before Clearance**.

3.2 Type of Agreement Required Prior to Notification

A written binding agreement or letter of intent is not necessary for notification. Instead, it is sufficient that the parties intend to implement the transaction; eg, the parties agree (in writing or orally) on the core elements of the transaction and the envisaged timetable.

3.3 Filing Fees

The filing fee in Austria is EUR3,500, which is a fixed rate, regardless of the size of the transaction (or the turnover of the parties to the concentration). The filing fee must be irrevocably transferred to the FCA account before the filing is transmitted (if payment is not made before filing, the review period will start running only once the filing fee has been received by the FCA).

3.4 Parties Responsible for Filing

According to the Cartel Act, "the parties to the concentration" are entitled to file. The Cartel Act does not define this term; however, it seems to be accepted that "parties to the concentration" covers the acquirer and the target company, but not the seller.

3.5 Information Included in a Filing

Based on the standard form published by the FCA, the following core information is requested for purposes of Austrian merger control:

- a description of the notification; eg, whether the transaction is a transfer of shares or assets, or whether it is an acquisition of sole or joint control;
- information on the undertakings concerned; eg, register numbers and contact persons;

- information on the ownership structure and the shareholdings, as well as the turnover figures (worldwide, EU and Austria); and
- information on the relevant market; eg, the relevant product/service market(s) where the target is active and/or all markets where there is a horizontal or vertical relationship; data for the last business year must be provided with regard to the total size of the relevant market, as well as the market shares of the parties concerned and a list of main competitors.

Additional Information

If there is an "affected market" (see **3.11 Accelerated Procedure**), more detailed information is requested, including the following:

- a list of all the shareholdings acquired by the undertakings concerned in the affected markets;
- a description of prior business relationships between the undertakings concerned;
- market data for the last three years (compared to only the last business year in a short-form notification);
- information concerning the relevant supply markets, including the five largest independent suppliers; and
- information on the five major independent customers.

If a presumption of dominance pursuant to Section 4(2) or (2a) of the Cartel Act is fulfilled (eg, combined market share of at least 30%), information on possible countervailing factors such as buyer power, market entries, efficiencies, existence of a restructuring merger must be provided.

Documents submitted should include the organisation charts of the undertakings concerned, annual reports, and the basis and sources (eg, economic statistics) for the calculation of the market data provided (listed above). Transaction documents are not required (but may be requested). If the transaction results in an affected market, business plans are additionally required.

The Cartel Court has ruled that the filing and attachments must be submitted in German. In practice, English attachments are often accepted (eg, with regard to annual reports).

A written power of attorney is not required for filing a transaction in Austria.

3.6 Penalties/Consequences of Incomplete Notification

The FCA and the FCP do not have the power to declare the notification incomplete. Only in an application to the Cartel Court for a Phase II proceeding can they request an order that the notification be completed. If the parties concerned do not adhere to such an order (which must be issued within one month of the Official Parties' respective request), the notification will be rejected by the Cartel Court.

In practice, the Official Parties try to obtain missing information during Phase I (which runs for four weeks). In complex cases, it might be useful to initiate pre-notification talks (see **3.9 Pre-notification Discussions with Authorities**) with the Official Parties to gather feedback concerning the completeness of a notification upfront.

Under the Cartel Act, no fines can be imposed for submission of an incomplete notification as long as the incompleteness does not result in inaccurate or misleading information being provided to the authorities (see **3.7 Penalties/Consequences of Inaccurate or Misleading Information**). However, the Cartel Court may impose ex post measures on the undertakings concerned if the non-prohibition of the concentration or the waiver of a request for a Phase II

proceeding was based on incorrect or incomplete information from the parties.

3.7 Penalties/Consequences of Inaccurate or Misleading Information

If the notifying party supplied inaccurate or misleading information in the filing, the Cartel Court, upon request of the FCA and/or the FCP, can impose fines on the undertakings concerned of up to 1% of their consolidated worldwide turnover.

Fines that have been applied in practice include the following.

In 2016, a fine of EUR50,000 was imposed on grosso holding GmBH, as it was not diclosed in the filing that two out of the three CEO's of grosso holding GmbH (as acquirer in the filed transaction) were also CEO's of an important competitor.

In 2018, a fine of EUR212,000 was imposed on REWE International AG. When acquiring supermarkets from the insolvent Zielpunkt GmbH, REWE International AG agreed with the FCA in the respective merger control proceeding to close a Billa branch, which was near one of the supermarkets acquired from Zielpunkt GmbH. However, REWE did not inform the authorities that it had specific plans to open a new Billa supermarket close by.

3.8 Review Process

The total duration of formal merger control proceedings (Phase I and Phase II) may amount to up to seven and a half months.

Phase I takes four weeks, calculated from the date of submission. On request of the notifying party, Phase I can be extended to a total of six weeks.

Phase II takes up to five months, calculated from the date when the application of the FCA and/or the FCP for an in-depth examination is received by the Cartel Court. On request of the notifying party, Phase II can be extended to a total of six months.

In addition, decisions of the Cartel Court may be appealed to the Supreme Cartel Court, which must decide the appeal within two months, calculated from the date when the court file is received by the Supreme Cartel Court. Since under Austrian law the standstill obligation ceases to apply only once clearance has become final, a challenge by the FCA or the FCP to a clearance decision by the Cartel Court can thus lead to an additional delay.

3.9 Pre-notification Discussions with Authorities

The FCA and the FCP do not expect to be consulted prior to each and every merger filing. Pre-notification talks, however, are recommended if there are doubts as to whether filing is necessary, if the merger is very complex, or if the merger could result in high market shares. Initiation of pre-notification talks is not published on the FCA's website.

3.10 Requests for Information during Review Process

It is quite common that, during a Phase I investigation of a transaction that involves meaningful competitive overlaps, the FCA and/or the FCP will send requests for information to the parties concerned. The Official Parties also might initiate market investigations and thereby include third parties in the process. For example, for Google's acquisition of Looker in 2019, the FCA carried out an in-depth examination of the notified concentration and conducted extensive surveys of the parties involved within a Phase I review.

The FCA also conducted a market survey of Looker's competitors.

Information Requests and the Review Period

Information requests do not suspend the review period, nor do the Austrian authorities have the power to order an extension ("stop the clock") unilaterally. Extension of Phase I is only possible on request of the parties concerned, although receiving requests for information might cause the parties to apply for an extension of Phase I in the hopes of avoiding a Phase II proceeding.

The extent of the requests for information very much depends on the peculiarities of the given case. However, in general, in Phase I, information requests do not tend to be overly data-heavy, as the review deadline is too short for the authorities to perform a sophisticated economic analysis. However, in Phase II, the parties may be required to provide a significant volume of data to the Cartel Court.

If the Official Parties do not receive sufficient information in Phase I, they might initiate a Phase II proceeding before the Cartel Court.

3.11 Accelerated Procedure

A short-form notification is available if there are no affected markets; eg, if after implementation of the transaction the combined horizontal market shares do not reach 15% or if one of the undertakings concerned does not have a market share of 25% or more in vertically overlapping markets. Clearance in Phase I may be expedited by obtaining waivers from both the FCA and the FCP of their right to initiate Phase II proceedings.

Waivers are not issued automatically, but only upon request by the notifying party. The authorities have wide discretion as to whether to grant a waiver and they will typically only do so if the case does not give rise to competition concerns. Furthermore, the notifying party has to demonstrate that there is an urgent need for the transaction to be cleared early.

In 2020, the Official Parties granted a waiver concerning their right to initiate a Phase II proceeding in 27 out of 428 filings (a higher rate than in the previous year). While in the past it was rather simple to get a waiver granted, the Official Parties are strict and hesitant in granting such waivers. The request must be therefore well-reasoned. Threat of insolvency is usually accepted as a reason for urgency.

4. SUBSTANCE OF THE REVIEW

4.1 Substantive Test

Austrian merger control uses the dominance test: a transaction will be prohibited if it creates or strengthens a dominant position. Nevertheless, the Cartel Court must clear the transaction if it gives rise to improvements in the competitive conditions that outweigh its detrimental effects, or if it is indispensable to the international competitiveness of the parties and justifiable in the interest of the national economy.

While in theory the threshold for intervention is higher under the dominance test than in legal systems using the "significant lessening of competition" test (or the like), Austrian law provides for very low statutory thresholds at which the existence of a dominant position will be presumed (rebuttably). In particular, an undertaking will be presumed to hold a dominant position if its market share is 30% or more. Similarly, low thresholds exist for the existence of collective dominance.

While the Austrian authorities are required to investigate the case ex officio and may not simply prohibit a case based on the statutory thresh-

olds, these presumptions do have an impact on which cases are referred to Phase II.

4.2 Markets Affected by a Transaction

The Austrian authorities will look at the market in which the target is active. Of special interest are markets in which both parties to the transaction are active (horizontal overlaps). Markets that are vertically linked (where, for example, one party is a supplier and the other party is a customer) also have to be identified in the recommended notification form.

There is no de minimis rule, but competitive concerns are unlikely where the use of the short-form notification is possible; ie, where there is no affected market (as outlined in **3.11 Accelerated Procedure**, an affected market exists if the combined horizontal market share reaches 15% or more, or if one of the parties concerned has a market share of at least 25% in a vertically overlapping market).

4.3 Reliance on Case Law

The Austrian authorities also refer to the decisional practice of other competition authorities, in particular with regard to market definition. The most important points of reference for the Austrian authorities are the European Commission and the German Federal Cartel Office.

4.4 Competition Concerns

The dominance test (and the expected additional SIEC-test) applies to all types of mergers; eg, horizontal, vertical and conglomerate transactions. In investigating these transactions, the authorities may rely on both unilateral and coordinated effects. In practice, the focus has mostly been on horizontal cases that have given rise to high market shares, and on vertical and conglomerate foreclosure issues. Recent decisions also reveal an increasing emphasis on closeness of competition.

4.5 Economic Efficiencies

To date, efficiencies have not featured prominently in Austrian practice. However, the Cartel Act explicitly provides for efficiencies to be taken into account. Given the increased attention granted to efficiencies in recent practice at an EU level, efficiencies may also become more important in Austria in the future.

4.6 Non-competition Issues

The Austrian Cartel Act provides for a competitiveness defence: a transaction giving rise to dominance is to be cleared if it is to be expected that it will also improve conditions of competition which outweigh the disadvantages of market dominance, or if the transaction is necessary to maintain or improve the international competitiveness of the undertakings concerned and is economically justified. However, in spite of this explicit statutory provision, non-competition considerations such as industrial or employment policy do not play a factual role in Austrian merger control proceedings. Furthermore, the Draft 2021 Amendment foresees some new exceptions of non-competition issues (see **9.1 Recent Changes or Impending Legislation**).

In the case of a media merger, Austrian merger control also protects media diversity.

4.7 Special Consideration for Joint Ventures

In Austria, contrary to the EUMR, the creation of a non-full function joint venture may qualify as a notifiable transaction if one or both parents transfers assets into the joint venture such that the formation of the joint venture qualifies as an "acquisition of an undertaking or part of an undertaking" (which is a reportable transaction under Austrian merger control rules, see **2.3 Types of Transactions**).

In substance, like all other reportable transactions, joint ventures are subject to the domi-

nance test (and the upcoming additional SIEC-test). In addition to the concentrative effects of the merger, any co-ordination between the parent companies that is directly related and necessary to the implementation of the merger is to be assessed in the course of the merger proceedings under the dominance test. Any co-ordination between the parent companies that is not directly related and necessary to the implementation of the merger is deemed beyond the coordinative effects resulting from the structural change brought about by the merger and therefore is assessed under the antitrust rules (and not the merger control rules).

5. DECISION: PROHIBITIONS AND REMEDIES

5.1 Authorities' Ability to Prohibit or Interfere with Transactions

In Phase I, the Official Parties cannot prohibit a transaction. In Phase II, only the Cartel Court may prohibit a transaction if it creates or strengthens a dominant position (as discussed above). However, prohibition decisions in Austria are very rare (see **5.8 Prohibitions and Remedies for Foreign-to-Foreign Transactions**).

In addition, the Cartel Court may clear transactions subject to conditions or obligations; eg, asset divestitures.

Appointing an Economic Expert Witness

In practice, the Cartel Court appoints an economic expert witness in the early stages of Phase II. The economic analysis is then largely carried out by the expert witness, whose report is of considerable importance to the outcome of the proceedings. If the expert concludes that the transaction would give rise to the creation or strengthening of a dominant position, the parties may offer remedies to the Cartel Court to obtain clearance.

However, in practice, it is much more common for remedies to be offered to the FCA and the FCP (on the basis of which they refrain from requesting an in-depth review of the transaction by the Cartel Court or, if Phase II has already been opened, withdraw their request(s)).

5.2 Parties' Ability to Negotiate Remedies

The parties may offer remedies to the FCA and the FCP to convince them in Phase I, not to refer a case to Phase II or to withdraw their Phase II request(s), or in Phase II, in order to withdraw their Phase II request(s). In addition, Phase II remedies may be offered directly to the Cartel Court to obtain conditional clearance; however, in practice, negotiations with the FCA and the FCP are much more common.

While only remedies accepted by the Cartel Court result in a formal (conditional) clearance decision, "informal" remedies entered into with the FCA and the FCP to avoid Phase II or to obtain withdrawal of a Phase II request also have a binding effect. An undertaking that fails to comply with such remedies is deemed to have violated the standstill obligation, which may result in substantial fines.

5.3 Legal Standard

There is no specific legal standard that remedies must meet. Similarly to the European Commission, the Austrian authorities will assess whether the remedies proposed are suitable to address the specific competition concern(s) at issue.

Precedents, in very general terms, define remedies as an order requiring the merging companies to act, tolerate or refrain from doing something. Remedies must ensure that the merger does not create or strengthen a dominant posi-

tion. If this requirement is achieved by remedies, the merger cannot be prohibited.

In accepting remedies, the authorities do, however, have wide discretion.

Modifying Remedies

As demonstrated in a 2019 decision regarding a 2015 merger of two brewers (Brau Union/VKB), the Cartel Court may modify a remedy that was previously put in place to clear a merger if necessary to account for later developments in the market. In that case, certain obligations imposed on the merging brewers to run their operations independently had not had the expected pro-competitive effect on the market, and so the Cartel Court terminated the obligations at an earlier point in time than it had previously ordered as a condition for clearing the merger.

Also remedies exclusively agreed on with the FCA and the FCP can be modified based on changes of the competitive circumstances (see the merger of Axel Springer/Media Impact).

5.4 Typical Remedies

Structural and Behavioural Remedies

Compared to authorities such as the European Commission, the Austrian authorities are more willing to consider not only structural, but also behavioural remedies. For example, in the acquisition of joint control of Fresenius Medical Care (FMC) over D.Med Consulting (DMC) in 2019, FMC offered remedies to prevent, on the one hand, ongoing projects by DMC for FMC's competitors from being slowed down or hampered and, on the other hand, that in DMC's future projects FMC would gain an undue competitive advantage from sensitive competitive information. By creating respective organisational "Chinese walls", FMC committed to take reasonable measures to ensure that the FMC members of the DMC Management Board neither directly nor indirectly will receive sensitive competitive information.

A similar "Chinese Wall" remedy was agreed on in FUJIFILM/Hitachi. (2021); Fujifilm committed itself to an ongoing and long-term supply to a manufacturer and to implement mechanisms to ensure that the trade secrets of this competitor are kept confidential and not disclosed to the respective acquired business fom Hitachi.

Concerning Recticel's acquisition of FoamPartner in 2021, the merging parties were closest competitors with regard to technical foam. As a change of supplier in the area of technical foams is associated with a longer preparation time. remedies were imposed to ensure the continued supply of Austrian customers by the notifying parties. The remedies were agreed on for a period of three years in order to give customers and competitors sufficient time to make any necessary adjustments to the sources of supply or to initiate any necessary product developments.

In Brau Union/Fohrenburger (2020) remedies, inter alia, encompassed monitoring of discount campaigns in food retailing for the next three years.

In addition, access remedies are relatively frequent. Concerning the acquisition of assets of DHL Austria by Austrian Post, remedies included, inter alia, access remedies whereby Austrian Post agreed for a period of ten years to offer to conclude a contract with every logistics company with parcels for delivery to Austrian recipients. A monitoring trustee was established to conduct ongoing review.

"Hold Separate" Remedies

Austrian merger practice also utilises "hold separate" remedies that are not tied to divestitures. Such remedies typically involve the purchaser agreeing not to integrate parts of the acquired

business with its own activities for a number of years. Similarly, purchasers sometimes commit to continue to supply certain products in Austria, eg, in 2019 caterer Transgourmet took over its competitor Gastro Profi and agreed on remedies for a period of three years. The remedies obliged the companies:

- continue operating the target's site;
- maintain the separate marketing presence and distributions of Transgourmet and Gastro Profi, including a separate pricing and promotion policy; and
- ensure that Transgourmet's own brands were not sold through Gastro Profi.

However, structural remedies are also used. In 2018, VTG Rail Assets acquired CIT Rail Holdings (as the sole shareholder of Nacco SAS). To alleviate the increase in market share that the acquisition would have resulted in, VTG Rail Assets agreed to sell approximately 30% of the Nacco business to third parties upfront (the same remedies were also agreed on in the respective merger proceedings conducted by the German Federal Cartel Office). In Brau Union/Fohrenburger (2020), Brau Union agreed not to buy or lease any new restaurants in Vorarlberg and breweries based in Austria for the next five years. In eBay/Adevinta (2021) the parties agreed, inter alia, to reduce its acquired 100% share of Adevinta into a (maximum) 33% share within 18 months after closing.

Media Diversity

Lastly, Austrian merger control also protects media diversity. Therefore, remedies might be required in order to guarantee media diversity (eg, by requiring that editorial teams or marketing teams of merging newspapers have to work independently for a certain period after the merger).

5.5 Negotiating Remedies with Authorities

There is no procedural regime for discussing remedies with the Official Parties, nor are there any strict deadlines. However, if the parties want to consider offering remedies in Phase I, these should be offered relatively early in the process, given the short time available to the authorities (a maximum of six weeks). For example, in the acquisition of certain assets from the logistics network of DHL Austria (a subsidiary of Deutsche Post AG) by Austrian Post, detailed remedies were negotiated and agreed on within an extended pre-notification period and by extending Phase I to six weeks.

In Phase II, more time is available for discussing remedies.

Negotiating and Proposing Remedies

There is no standard approach for discussing remedies with the Official Parties. In practice, parties often try to negotiate remedies in the early stage of Phase II to prevent significant delays to the closing of the transaction.

The authorities can, in theory, also propose remedies. The Cartel Court has complete and final discretion in what remedies to impose, and in the absence of an agreement between the parties, it may impose whatever remedies it deems appropriate. The Cartel Court can even clear a transaction subject to "conditions and obligations", meaning that remedies can effectively be imposed on the parties.

In practice, however, remedies are usually based on a proposal by the parties.

5.6 Conditions and Timing for Divestitures

The Austrian authorities typically do not make completion of the transaction conditional on compliance with the remedies. However, noth-

ing prevents the Official Parties from requiring an upfront buyer or fix-it-first solution if the circumstances of the case warrant such action. See, eg, VTG Rail Assets' indirect acquisition of Nacco SAS, whereby VTG Rail Assets agreed to sell upfront approximately 30% of the Nacco business to third parties (see **5.4 Typical Remedies**).

Failure to comply fully with remedies is subject to fines of up to 10% of consolidated turnover. This applies irrespective of whether the remedies were imposed by means of a formal conditional clearance decision adopted by the Cartel Court, or entered into informally with the FCA and the FCP. In addition, failure to comply with obligations imposed by a formal conditional clearance decision may result in the imposition of appropriate remedial measures by the Cartel Court.

5.7 Issuance of Decisions

Formal decisions are very much the exception under Austrian law. Phase I cases are cleared by expiry of the statutory deadline or waivers issued by the FCA and the FCP, and the authorities do not publish a decision or otherwise make the bases for their decision publicly known. Phase II cases are usually resolved by withdrawal of the FCA's and/or the FCP's Phase II request(s).

Such withdrawals are often based on remedies agreed on between the parties and the FCA or FCP. The FCA publishes short summaries of remedies cases, as well as the text of the remedies, on its website.

Only cases going through a full Phase II examination (or the very unlikely case in which the Cartel Court, on its own initiative, clears a transaction subject to "conditions and obligations") are subject to a formal decision by the Cartel Court. Such decisions are published in an online database.

5.8 Prohibitions and Remedies for Foreign-to-Foreign Transactions

Given that merger cases are ultimately decided by the Cartel Court (unless there is an appeal to the Supreme Cartel Court), the authorities challenging a merger (the FCA and/or the FCP) have an incentive to resolve cases with remedies, as this gives them some control over the outcome of the proceedings. This results in a very low number of prohibition decisions in Austria, while remedies are fairly common. Failing an agreement on remedies, transactions are typically abandoned by the parties.

For example, from 2017-19, not a single notified transaction has been prohibited by the Cartel Court.

Foreign-to-foreign mergers do not receive any different legal treatment. As a matter of fact, the Austrian filing thresholds capture a significant number of transactions that have little impact on the Austrian market. Such transactions are typically cleared in Phase I without detailed examination by the authorities. By contrast, the authorities do not hesitate to investigate fully foreign-to-foreign transactions that may have a significant impact on Austrian consumers and have also required remedies in foreign-to-foreign transactions; eg, in the above-mentioned foreign-to-foreign acquisitions, VTG Rail Assets/CIT Rail Holdings (see **5.4 Typical Remedies** and **5.6 Conditions and Timing for Divestitures**) and FMC or DMC (see **5.4 Typical Remedies**).

6. ANCILLARY RESTRAINTS AND RELATED TRANSACTIONS

6.1 Clearance Decisions and Separate Notifications

Merger control clearances also cover ancillary restraints to the extent that they are directly related to, and necessary for, the implementation of the transaction. No separate notification is required (or indeed possible) for such arrangements. As experience in Austria is scarce, the European Commission's Ancillary Restraints Notice provides some guidance on what types of restraints may be considered ancillary and thus covered by the clearance.

For example, in the acquisition of certain assets from the logistics network of DHL Austria (a subsidiary of Deutsche Post) by Austrian Post, the FCA explicitly stated that merger control clearance did not constitute a decision on the permissibility of a cooperation arrangement between ÖPAG and Deutsche Post in connection with the notified acquisition.

7. THIRD-PARTY RIGHTS, CONFIDENTIALITY AND CROSS-BORDER CO-OPERATION

7.1 Third-Party Rights

Third parties are entitled to submit their observations to the authorities, both in Phase I and in Phase II, but they do not have any further procedural rights and do not receive party status. In particular, third parties are not granted access to the file. Also the seller is considered to be a third party (unless they do not keep 25% or more of the shares or voting rights of the target).

In Phase II of merger proceedings (as in any proceedings before the Cartel Court), access to the file is subject to the parties' consent. In the context of damage claims following on from a cartel infringement, this rule has been found to be in violation of EU law by the ECJ in the Donau Chemie case. The most recent amendment to the Cartel Act (2017) did not change the basic rule that access to the Cartel Court's file is subject to the parties' consent and only introduced new rights for damage claimants to request the disclosure of documents in damage proceedings.

7.2 Contacting Third Parties

In more complex cases, it is quite common for the authorities to contact third parties such as competitors, customers and suppliers. Usually, they do this on the basis of written questionnaires in which they "test" the information provided in the notification (in particular, regarding market definition and the market position of the parties and competitors). It is also common that remedies offered by the parties are "market tested" in this way.

Concerning Adevinta's planned acquisition of the online classifieds business of eBay (and, in return, eBay Inc. re-acquisition of a non-controlling minority stake in Adevinta) in 2021, the FCA carried out a market survey with a sample of users of Ebay.at and other competing platforms.

7.3 Confidentiality

The fact of the notification is published on the FCA's website. While third parties are not granted access to the file, it is common for the notifying parties to submit a non-confidential version of the notification. This version is not published, but may be used by the FCA; eg, for the purpose of information requests addressed to third parties.

7.4 Co-operation with Other Jurisdictions

Austria is a member of the EU and, as such, the FCA co-operates routinely with its counterparts

in other EU and European Economic Area member states. These authorities share with each other basic information on notifications received and may co-operate more closely on a case-by-case basis. In 2019, the FCA (in accordance with other NCAs) submitted one request for referral to the European Commission pursuant to Article 22 of the EC Merger Regulation (Synthes/Medos International/Topaz Investment AS).

In practice, the FCA co-operates most often with the German Bundeskartellamt.

Authorities of EU member states must seek a waiver from the parties to share confidential information. In its adapted form (introduced in 2020), the FCA now explicitly ask for the parties' waiver allowing the official parties to exchange confidential information with other relevant competition authorities, in particular if affected markets are involved.

8. APPEALS AND JUDICIAL REVIEW

8.1 Access to Appeal and Judicial Review

Final decisions by the Cartel Court may be appealed to the Supreme Cartel Court (a division of the Austrian Supreme Court) by the parties to the transaction, and by the FCA and/or the FCP.

8.2 Typical Timeline for Appeals

Appeals against final decisions by the Cartel Court must be brought within four weeks of the decision. The other parties to the proceedings may then file a response to the appeal within four weeks. The Supreme Cartel Court then has two months from receipt of the file in which to decide the appeal.

Note that an appeal by the FCA and/or the FCP against a clearance decision extends the standstill obligation beyond the deadlines discussed above, as the parties may close the transaction only once the clearance has become final.

Appeal rests on points of law only (and only "serious doubts" as to the correctness of the decisive facts on which the decision of the Cartel Court is based), which makes it difficult to challenge the Cartel Court's decisions, as merger cases usually turn on the facts. With a view to this, and to the low number of formal decisions in merger cases in Austria, appeals are quite rare in practice and those that are brought are, typically, not successful.

8.3 Ability of Third Parties to Appeal Clearance Decisions

Only the parties to the transaction as well as the FCA and the FCP have the right to appeal the Cartel Court's decisions (note that the FCA and FCP have party status automatically even if they are not the applicant).

9. RECENT DEVELOPMENTS

9.1 Recent Changes or Impending Legislation

The mentioned 2021 Amendment foresees three essential changes with regard to merger control.

Additional National Threshold

In future, according to the updated "classic threshold" of Section 9(1) of the Cartel Act (for the current "classic threshold" see **2.5 Jurisdictional Thresholds**), a second national threshold will be introduced, ie, the thresholds of Austrian merger control are met if the undertakings concerned achieved the following turnover figures in the previous business year:

- a combined global turnover of more than EUR300 million;

- a combined turnover of more than EUR30 million in Austria, of which at least two companies more than EUR1 million each; and
- at least two of the relevant undertakings each had a global turnover of more than EUR5 million.

Additional Tests of Substance

The most significant change refers to an additional test in substance. A concentration will be prohibited, if it is to be expected that:

- the concentration creates or strengthens a dominant position; or
- effective competition will otherwise be significantly impeded.

It is generally considered useful for the SIEC-Test to be adopted in Austria. The Draft 2021 Amendment has been criticised for not taking over the exact wording of the EUMR ("A concentration which would not significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared compatible with the common market"). In order to rely on case law of the EU Commission and the EU Courts, such exact "copy and paste" would have been useful. However, the final 2021 Amendment followed a different wording to the Draft 2021 Amendment.

Competitiveness Defences

The second change re merger control concerns an additional competitiveness defence in case a transaction gives rise to dominance or a significant impediment of competition. Currently, defences can be applied concerning transactions where it is to be expected that it will also improve conditions of competition which outweigh the disadvantages of market dominance, or if the transaction is necessary to maintain or improve the international competitiveness of the undertakings concerned and is economically justified (see **4.6 Non-competition Issues**). In the future, such defence can be additionally applied if (generally) the economic advantages significantly outweigh the disadvantages of the merger.

9.2 Recent Enforcement Record

In 2020, a total of 428 mergers were notified with the FCA and FPA. Compared to 2019 (when there were 495 notifications), the number of notified mergers in Austria decreased.

Concerning these 428 merger notifications, only in two cases a Phase II proceeding was initiated, ie, 426 mergers received clearance or were withdrawn within Phase I.

9.3 Current Competition Concerns

Besides substantive changes in merger control (see **9.1 Recent Changes or Impending Legislation**), the above mentioned 2021 Amendment foresees also a reporting obligation of the (independent) FCA to the ministry "Digital and economic affairs". Furthermore, following the Draft 2021 Amendment, the FCA will not be allowed to issue opinions on general questions of economic policy anymore, but only on issues concerning competition policy. In the past, the FCA, on its own initiative, issued various opinions concerning merger control and its practice in Austria. These opinions also concerned merger control (eg, concerning effects doctrine, market definition, etc) and were very helpful in practice. It will have to be seen if the changes of FCA's task areas will affect the FCA's practice in future (though, the final 2021 Amendment is far less limiting on the FCA's powers than the Draft 2021 Amendment).

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