International Comparative Legal Guides

Merger Control 2021

A practical cross-border insight into merger control issues

17th Edition

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Expert Chapters

1 **Reform or Revolution? The Approach to Assessing Digital Mergers**
David Wirth & Nigel Parr, Ashurst LLP

9 **The Trend Towards Increasing Intervention in UK Merger Control and Cases that Buck the Trend**
Ben Forbes, Felix Hammeke & Mat Hughes, AlixPartners

Q&A Chapters

18 **Albania**
Schoenherr: Srđana Petronijević, Danijel Stevanović & Jelena Obradović

27 **Australia**
MinterEllison: Geoff Carter & Miranda Noble

36 **Austria**
DORDA Rechtsanwälte GmbH: Heinrich Kühnert & Lisa Todeschini

43 **Bosnia & Herzegovina**
Schoenherr: Srđana Petronijević, Danijel Stevanović & Minela Šehović

52 **Brazil**
Pinheiro Neto Advogados: Leonardo Rocha e Silva & José Rubens Battazza Iasbech

60 **Canada**
Blake, Cassels & Graydon LLP: Julie Soloway & Corinne Xu

70 **China**
DeHeng Law Offices: Ding Liang

83 **Croatia**
Schoenherr: Ana Marjančić

92 **European Union**
Sidley Austin LLP: Steve Spinks & Ken Daly

107 **Finland**
Dittmar & Indrenius: Ilkka Leppihalme & Katrin Puolakainen

119 **France**
Ashurst LLP: Christophe Lemaire & Marie Florent

131 **Germany**
BUNTSCHECK Rechtsanwaltsgesellschaft mbH: Dr. Tatjana Mühlbach & Dr. Andreas Boos

141 **Greece**
MSB Associates: Efthymios Bourtzalas

151 **India**
L&L Partners Law Offices: Gurdev Raj Bhatia & Kanika Chaudhary Nayar

162 **Ireland**
Arthur Cox: Richard Ryan & Patrick Horan

172 **Italy**
Portolano Cavallo: Enzo Marasà & Irene Picciano

182 **Japan**
Nagashima Ohno & Tsunematsu: Ryohei Tanaka & Kota Suzuki

191 **Korea**
Shin & Kim LLC: John H. Choi & Sangdon Lee

198 **Mexico**
OLIVARES: Gustavo A. Alcocer & José Miguel Lecumberri Blanco

205 **Montenegro**
Moravčević, Vojnović i Partneri AOD Beograd in cooperation with Schoenherr: Srđana Petronijević, Danijel Stevanović & Zoran Šoljaga

213 **Nigeria**
PUNUKA Attorneys & Solicitors: Anthony Idigbe, Ebelechukwu Enedah & Tobenna Nnamani

223 **North Macedonia**
Schoenherr: Srđana Petronijević, Danijel Stevanović & Jelena Obradović

232 **Norway**
Advokatfirmaet Grette AS: Odd Stemsrud & Marie Braadland

239 **Romania**
MPR Partners | Maravela, Popescu & Asociaţii: Alina Popescu & Magda Grigore

247 **Russia**
ALRUD Law Firm: Vladislav Alifirov, Alexander Artemenko & Dmitry Domnin

254 **Serbia**
Moravčević, Vojnović i Partneri AOD Beograd in cooperation with Schoenherr: Srđana Petronijević, Danijel Stevanović & Jelena Obradović

264 **Singapore**
Drew & Napier LLC: Lim Chong Kin & Dr. Corinne Chew

276 **Slovakia**
URBAN STEINECKER GAŠPEREC BOŠANSKÝ: Ivan Gašperec & Juraj Steinecker

284 **Slovenia**
Zdolšek Attorneys at law: Stojan Zdolšek & Katja Zdolšek

293 **South Africa**
Norton Rose Fulbright South Africa Inc: Rosalind Lake & Julia Sham

Q&A Chapters Continued

304 **Sweden**
Hannes Snellman Attorneys Ltd: Peter Forsberg, David Olander & Johan Holmquist

311 **Switzerland**
Schellenberg Wittmer Ltd: David Mamane & Amalie Wijesundera

320 **Taiwan**
Lee and Li, Attorneys-at-Law: Stephen Wu & Yvonne Hsieh

328 **Turkey**
ELIG Gürkaynak Attorneys-at-Law: Gönenç Gürkaynak & Öznur İnanılır

336 **United Kingdom**
Ashurst LLP: Nigel Parr, Duncan Liddell & Alexi Dimitriou

355 **USA**
Sidley Austin LLP: James W. Lowe & Elizabeth Chen

364 **Vietnam**
LNT & Partners: Dr. Nguyen Anh Tuan, Tran Hai Thinh & Tran Hoang My

373 **Zambia**
AMW & Co. Legal Practitioners: Nakasamba Banda-Chanda, Namaala Liebenthal & Victoria Dean

380 **Zimbabwe**
AnesuBryan & David: Patrick Jonhera, Itai Chirume & Bright Machekana

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1 Relevant Authorities and Legislation

1.1 Who is/are the relevant merger authority(ies)?

Austrian merger control is characterised by a somewhat complex institutional structure, with several authorities having parallel and subsequent jurisdiction.

The Federal Competition Authority (*Bundeswettbewerbsbehörde*, "**FCA**") is an independent federal authority. The FCA is headed by the Director General for Competition, who is appointed by the Austrian government but is not subject to instructions.

The FCA shares jurisdiction in phase I investigations with the Federal Cartel Prosecutor (*Bundeskartellanwalt*, "**FCP**"), who reports to the Minister of Justice. Together, the FCA and the FCP are referred to as the "Official Parties". Unlike the FCA, the FCP does not have investigatory powers. Both the FCA and the FCP, however, may initiate phase II investigations by applying for an in-depth investigation by the Cartel Court.

The Cartel Court (*Kartellgericht*, "**CC**") is part of the Higher Regional Court of Vienna and is the ultimate decision-maker in competition cases (including phase II merger control decisions).

The Competition Commission (*Wettbewerbskommission*) is an advisory body. It may issue recommendations to the FCA on whether to apply for an in-depth investigation. While these recommendations are not binding, the FCA is required to provide reasons if it does not follow a recommendation.

1.2 What is the merger legislation?

Austrian merger legislation is laid down in the Cartel Act 2005 (*Kartellgesetz*, "**CA**") and the Competition Act *(Wettbewerbsgesetz*, "**CompA**").

In addition, the FCA has published positions and guidance on a number of questions, which are available on its website (https://www.bwb.gv.at).

1.3 Is there any other relevant legislation for foreign mergers?

Austria recently introduced new foreign investment rules, which are laid down in the Investment Control Act. Under the new rules, certain acquisitions by persons who are not nationals of a Member State of the European Economic Area ("**EEA**") or of Switzerland require prior approval by the Minister of the Economy. The approval requirement applies to direct or indirect acquisitions of an interest of 25% or more in undertakings active in certain critical sectors (utilities, tech, supply of critical resources). For particularly sensitive areas, the threshold is lowered to 10%. The Minister of the Economy may prohibit the transaction if it is capable of giving rise to a threat to public security or public order.

1.4 Is there any other relevant legislation for mergers in particular sectors?

The CA lays down sector-specific rules for media mergers, which are also assessed as to their impact on media diversity.

Further regulatory approval requirements exist, e.g., in the banking, insurance, air transport and gaming sectors. Austrian media law also lays down restrictions on cross-ownership of various types of media.

1.5 Is there any other relevant legislation for mergers which might not be in the national interest?

Austria recently introduced new, stricter rules governing investment by non-EEA (or Swiss) nationals. Please see question 1.3 above.

2 Transactions Caught by Merger Control Legislation

2.1 Which types of transaction are caught – in particular, what constitutes a "merger" and how is the concept of "control" defined?

Section 7 CA defines six types of transactions which constitute a concentration:

- acquisition of an undertaking or a substantial part thereof;
- acquisition of rights in an undertaking by operational management or operational lease agreements;
- direct or indirect acquisition of shares of an undertaking if the shareholding reaches or exceeds 25% or 50%;
- establishment of cross-directorships, if at least half of the members of the executive board or the supervisory board of two or more undertakings are identical;
- acquisition of a direct or indirect controlling influence over another undertaking; and
- creation of a full-function joint venture.

In practice, the majority of mergers notified to the FCA consist of the acquisition of a 25%/50% shareholding or the acquisition of a controlling interest.

The CA does not define a concept of "controlling influence". In practice, the Austrian Courts follow the definition provided

in the EC Merger Regulation (Regulation (EC) No 139/2004, "**EUMR**"). Accordingly, "control" consists of the possibility of exercising decisive influence over an undertaking.

2.2 Can the acquisition of a minority shareholding amount to a "merger"?

Austrian merger control also extends to the acquisition of non-controlling shareholdings, provided that at least 25% of the capital or voting rights of another undertaking are acquired. Furthermore, pursuant to case law, circumventions of the 25% threshold also come within the scope of merger control. A circumvention may exist, e.g., if the acquirer stays (slightly) below the 25% threshold but concludes a shareholders' agreement pursuant to which he enjoys a position at least equivalent to that of a 25% shareholder in terms of economic interest and influence.

2.3 Are joint ventures subject to merger control?

The creation of a full-function joint venture constitutes a concentration pursuant to section 7 para 2 CA. "Full-function" in this regard means that the joint venture performs on a lasting basis all the functions of an autonomous economic entity.

Pursuant to case law, section 7 para 2 CA only applies to greenfield joint ventures. By contrast, the contribution of existing activities falls to be assessed under the rules on share or asset deals. These provisions require that the target must be an undertaking or a substantial part thereof; full-functionality is not required. Hence the contribution, by two press distribution firms, of their respective logistics operations to a joint venture was considered to constitute a merger, even though the operations in question were mostly for captive use and therefore did not meet the full-functionality criterion.

2.4 What are the jurisdictional thresholds for application of merger control?

A merger has to be notified if based on the last financial year, the following cumulative criteria are met:

- the combined worldwide turnover of all undertakings concerned exceeds EUR 300 million;
- the combined Austrian turnover of all undertakings concerned exceeds EUR 30 million; and
- the individual worldwide turnover of at least two undertakings concerned exceeds EUR 5 million (*de minimis* threshold).

Even if the above thresholds are met, no notification will be required if only one of the undertakings concerned had an Austria turnover exceeding EUR 5 million, and the combined worldwide turnover of all other undertakings concerned did not exceed EUR 30 million.

For the purpose of calculating turnover, the revenues of all entities which are linked with an undertaking concerned in a manner which would constitute a concentration (please see question 2.1 above) have to be taken into account. This means that, in particular, the revenues of entities linked to the undertaking concerned by a 25% shareholding have to be attributed in full, even if that shareholding is non-controlling. Special rules apply regarding turnover calculation in the banking, insurance, and media sectors. For media mergers, certain multipliers must be applied to the revenues in order to assess jurisdiction: the revenues of media undertakings and media services have to be multiplied by 200; and the revenues of media support undertakings by 20. These multipliers do not apply to the *de minimis* threshold.

Transactions which do not meet the above requirements may nonetheless be notifiable under the alternative transaction-value threshold. This threshold is meant to capture acquisitions of targets which do not have high turnover yet, but exhibit significant competitive potential. Its cumulative requirements are:

- the combined worldwide turnover of all undertakings concerned exceeds EUR 300 million;
- the combined Austrian turnover of all undertakings concerned exceeds EUR 15 million;
- the value of consideration exceeds EUR 200 million; and
- the target has significant operations in Austria.

In August 2018, the FCA and the German Federal Cartel Office published a joint guidance which provides assistance in interpreting these requirements.

Pursuant to the guidance, the consideration value includes all cash, assets and other monetary contributions received by the seller, as well as liabilities assumed by the purchaser. In addition, the FCA considers that interest-bearing liabilities of the target in a share deal should also be included. These liabilities, therefore, have to be added to the purchase price in order to determine the value of the consideration.

The requirement of significant domestic operations means that the target must have market-oriented activities in Austria. In addition to current sales activities, activities aimed at market entry will also be deemed to be market-oriented. Research and development ("**R&D**") activities may also be sufficient if the research results are marketable and likely to be marketed in Austria.

Furthermore, the operations have to be significant. If the turnover of the target adequately reflects its market position and competitive potential, domestic revenues of less than EUR 0.5 million will not be regarded as significant. If by contrast the target's turnover is not an adequate indicator of its position and potential, the significance of the target's activities will be assessed based on industry-specific indicators (e.g., in the digital economy, monthly active users and unique visitors).

In its assessment, the FCA also considers whether the target owns a site in Austria. If it does and if the activities carried out at that site are market-oriented (which may not be the case, e.g., if the Austrian site is that of a mere financial holding), the target will be presumed to have significant domestic activities.

2.5 Does merger control apply in the absence of a substantive overlap?

If the relevant thresholds are met, Austrian merger control applies. No overlaps or other competitive concerns are required to give rise to jurisdiction.

2.6 In what circumstances is it likely that transactions between parties outside your jurisdiction ("foreign-to-foreign" transactions) would be caught by your merger control legislation?

Since Austrian merger control does not require two parties to have local turnover, the thresholds can be met even if the target has no sales in Austria. The Austrian Supreme Court, however, has recognised that Austrian jurisdiction is limited by the effects doctrine. Accordingly, transactions which do not affect the market structure in Austria are not caught by Austrian merger control, even if the thresholds are met. Pursuant to case law, an effect on the local market structure may be ruled out if the target is neither actually nor potentially active in Austria.

2.7 Please describe any mechanisms whereby the operation of the jurisdictional thresholds may be overridden by other provisions.

In spite of the local thresholds being met, no Austrian merger filing is required if (i) the transaction does not have local effects (please see question 2.6 above), or (ii) the transaction comes within the jurisdiction of the European Commission under the EUMR (unless the transaction is a media merger, in which case the effects on competition will be analysed by the Commission, while the Austrian authorities will have jurisdiction to assess the impact on media diversity).

2.8 Where a merger takes place in stages, what principles are applied in order to identify whether the various stages constitute a single transaction or a series of transactions?

There is limited case law on the conditions under which several (stages of) transactions will be considered to constitute a single concentration. The Austrian Courts have, however, clarified that the parties cannot circumvent merger control by artificially splitting the intended acquisition of a target undertaking into several asset deals.

3 Notification and its Impact on the Transaction Timetable

3.1 Where the jurisdictional thresholds are met, is notification compulsory and is there a deadline for notification?

Notification to the FCA is mandatory if the jurisdictional thresholds are met, unless the European Commission has jurisdiction for the merger. There is no filing deadline.

3.2 Please describe any exceptions where, even though the jurisdictional thresholds are met, clearance is not required.

No clearance is required for the following transactions in the financial sector:

1) acquisition of shares of an undertaking by a credit institution for resale purposes;
2) acquisition of shares of an undertaking by a credit institution for purposes of restructuring the undertaking, or to serve as a guarantee for a claim against the target; or
3) acquisition of shares by investment funds or capital financing companies for the purpose of managing and commercialising the investment.

Acquirers may only use their voting rights to preserve the value and to prepare the sale of the investment. Moreover, in cases 1) and 2), the acquirer is required to resell the interest within certain deadlines.

3.3 Where a merger technically requires notification and clearance, what are the risks of not filing? Are there any formal sanctions?

The implementation of mergers prior to merger clearance is prohibited (section 17 CA). Sanctions in case of a breach of the standstill obligation include fines of up to 10% of worldwide aggregate turnover. The amount of the fine is determined based on the gravity and duration of the infringement, the enrichment due to the infringement, the degree of fault and the economic capacity of the undertaking, all of which are examined on a case-to-case basis. The highest fine imposed in Austria so far amounts to EUR 1.5 million. In most cases, fines imposed in practice have been significantly below this amount (usually below EUR 200,000).

In addition, agreements which breach the standstill obligation are null and void.

3.4 Is it possible to carve out local completion of a merger to avoid delaying global completion?

There are no specific rules or judgments regarding the criteria under which carve-outs will be permissible under Austrian merger control. Given the requirement of local effects (please see question 2.6 above), a carve-out which successfully removes the Austrian nexus of the main part of the transaction should be permissible. The FCA, however, takes a wide view of what may constitute local effects, and thus is likely to view carve-outs with considerable scepticism.

3.5 At what stage in the transaction timetable can the notification be filed?

The notification may be filed once there is a serious intention to enter into a notifiable transaction. This requires that the parties have a common understanding of the structure and timing of the transaction. A binding agreement is not required. Notifications are often submitted on the basis of Letters of Intention or Memoranda of Understanding.

3.6 What is the timeframe for scrutiny of the merger by the merger authority? What are the main stages in the regulatory process? Can the timeframe be suspended by the authority?

The Official Parties have four weeks after submission of the notification to examine the transaction and to decide whether to initiate phase II. Upon request by the notifying party, phase I may be extended by an additional two weeks. By contrast, the Official Parties do not have the power to extend the deadline *ex officio*. If the Official Parties need additional time, pull-and-refiles are sometimes agreed in order to avoid phase II. If the Official Parties do not initiate phase II within the four- (or six-) week period, the transaction is cleared automatically.

In order to obtain prior clearance, the notifying party may request that the FCA and the FCP formally waive their right to initiate phase II. In order to obtain a waiver, the parties must demonstrate that (i) the transaction does not give rise to any plausible competition concerns, and (ii) there is an urgent need to obtain clearance prior to the deadline.

If an in-depth investigation is initiated, jurisdiction devolves to the CC. The CC has five months to complete the investigation. An extension to six months is possible upon request by the notifying party. In total, therefore, merger proceedings may last up to 7.5 months in the first instance.

3.7 Is there any prohibition on completing the transaction before clearance is received or any compulsory waiting period has ended? What are the risks in completing before clearance is received?

Transactions subject to Austrian merger control may not be completed prior to clearance or expiry of the waiting periods.

Infringements of the standstill obligations are subject to fines of up to 10% of worldwide turnover, and may give rise to nullity of the underlying agreements (please see question 3.3 above).

3.8 Where notification is required, is there a prescribed format?

A model notification form for merger filings is available on the FCA's website (https://www.bwb.gv.at). The form is not legally binding, but its use is encouraged by the Official Parties.

3.9 Is there a short form or accelerated procedure for any types of mergers? Are there any informal ways in which the clearance timetable can be speeded up?

A short form is available for transactions which do not give rise to affected markets. A market will be considered affected if (i) there is a horizontal overlap and the combined market share amounts to 15% or more, (ii) the undertakings concerned are active on vertically related markets and hold a market share of at least 25%, or (iii) a dominant position will be created or strengthened as a result of the transaction.

There is no informal way to speed up the clearance process. The only way to obtain clearance prior to the expiry of the phase I deadline is to apply for a waiver (please see question 3.6 above).

3.10 Who is responsible for making the notification?

All undertakings concerned may notify transactions to the FCA. Usually the acquirer files the notification, regardless of the type of concentration. A joint notification is possible but is not common in practice.

3.11 Are there any fees in relation to merger control?

The fee in phase I amounts to EUR 3,500. The waiting period is only triggered upon receipt of the fee by the FCA.

In phase II, an additional court fee of up to EUR 34,000 will become payable. The amount of the fee depends, *inter alia*, on the economic importance of the transaction and on the complexity of the case. In addition, if the CC retains an economic expert to analyse the transaction (which is standard practice in phase II cases unless there is a consensual resolution), the notifying party will be required to bear the costs of the expert. As a rule, these costs significantly exceed the court fee.

3.12 What impact, if any, do rules governing a public offer for a listed business have on the merger control clearance process in such cases?

Austrian merger control does not provide for special rules for public bids.

3.13 Will the notification be published?

Shortly after submission, the FCA publishes a brief summary of the transaction on its website. This announcement includes information on the parties concerned, the type of the intended transaction, and the relevant business sector. Third parties may submit their views to the FCA and FCP within 14 days after publication of the summary. In practice, however, the Official Parties often also take account of third-party submissions made later in time.

4 Substantive Assessment of the Merger and Outcome of the Process

4.1 What is the substantive test against which a merger will be assessed?

Austrian law still uses the dominance test. Transactions will be prohibited if they are expected to give rise to the creation or strengthening of a dominant position. Austrian law provides for a number of refutable presumptions of dominance in case certain market share thresholds are met. Dominance will be presumed if an undertaking holds:

- a market share of at least 30%;
- a market share of more than 5%, if there are no more than two other undertakings active on the same market; or
- a market share of more than 5%, if the undertaking concerned is one of the four largest undertakings on the relevant market, which collectively hold a market share of at least 80%.

Alternatively, collective market dominance is rebuttably presumed if:

- three or fewer undertakings hold a combined market share of at least 50%; or if
- five or fewer undertakings hold a combined market share of two-thirds.

In assessing whether a dominant position is created or strengthened, the Austrian competition authorities are not limited to any particular theory of harm. Horizontal, vertical and conglomerate effects may all be relied on. In practice, horizontal concerns are the most frequent.

4.2 To what extent are efficiency considerations taken into account?

Austrian law provides for an efficiency defence. Transactions which create or strengthen a dominant position nonetheless have to be cleared if they give rise to efficiencies which outweigh the harm to competition. Pursuant to case law, both efficiencies on the market on which the harm occurs and efficiencies on other markets may be taken into account.

4.3 Are non-competition issues taken into account in assessing the merger?

Non-competition issues may be taken into account both as a sword and as a shield. Their use as a sword is, however, limited to media mergers, where the Austrian authorities must also assess the transaction's impact on media diversity in Austria, in addition to its effects on competition.

As a shield, industrial policy considerations may be relied on as a defence in all mergers. Pursuant to Austrian law, transactions which create or strengthen a dominant position nonetheless must be cleared if they are necessary to maintain or improve the international competitiveness of the undertakings concerned and if they are justifiable from a macro-economic perspective.

4.4 What is the scope for the involvement of third parties (or complainants) in the regulatory scrutiny process?

Third parties whose legal or economic interests are affected by the transaction may submit written observations both in phase

I (within two weeks of publication on the FCA's website) and in phase II. In addition, sectoral regulators as well as the Federal Chambers of Commerce, Labour and Agriculture are also entitled to submit their observations.

Third parties, however, do not have standing as parties in the proceedings, whether they submit observations or not. In particular, third parties have no right of access to the file.

4.5 What information gathering powers (and sanctions) does the merger authority enjoy in relation to the scrutiny of a merger?

The FCA has a broad array of investigatory powers, which includes the hearing of parties and witnesses and, in particular, requests for information ("**RfI**"). In case of suspected violations of the standstill obligation, it may also carry out dawn raids.

The provision of incorrect or misleading information in merger filings is subject to fines of up to 1% of worldwide turnover. Furthermore, administrative fines may be imposed for providing incorrect or misleading (and in case of formal requests for information, also incomplete) information in response to a RfI. These fines may amount to up to EUR 25,000 in case of simple RfIs, or up to EUR 75,000 in case of formal RfIs. Furthermore, the FCA may impose daily penalty payments of up to 5% of average daily turnover in order to enforce compliance with its RfIs.

4.6 During the regulatory process, what provision is there for the protection of commercially sensitive information?

Third parties have no right of access to the file. The FCA, however, may provide copies of the notification or parts thereof to third parties in order to invite comments. With a view to this, it is advisable to also submit a non-confidential version of the filing.

In phase II proceedings before the CC, business secrets are also protected by way of restrictions on third-party access. Third parties are granted access to the court files only if all parties agree.

5 The End of the Process: Remedies, Appeals and Enforcement

5.1 How does the regulatory process end?

Phase I ends (i) by expiry of the review period, if neither the FCA nor the FCP applies for phase II review, or (ii) if waivers are granted by both Official Parties (please see question 3.6 above). There are no formal phase I clearance decisions. The FCA, however, provides the notifying party with a declaratory confirmation of clearance, usually on the working day after expiry of the deadline.

Phase II proceedings are terminated (i) if the Official Parties withdraw their application(s) for phase II review, or (ii) if the CC decides that the transaction is not notifiable, or (iii) if the CC prohibits or clears (if applicable, subject to conditions and/or obligations) the transaction, or (iv) by way of expiry of the phase II review period (please see question 3.6 above) without a decision having been taken.

In addition, proceedings will also be terminated if the notification is withdrawn.

5.2 Where competition problems are identified, is it possible to negotiate "remedies" which are acceptable to the parties?

The parties may negotiate remedies with the FCA and the FCP both in order to avoid the initiation of or to obtain early termination of phase II. Such remedies are not formally imposed by the CC but are nonetheless binding on the parties. Even if phase II is not terminated early, the CC may grant clearance subject to conditions or obligations. Unlike many other jurisdictions, the Austrian authorities do not have a strict preference for structural remedies, but often also accept behavioural commitments.

5.3 To what extent have remedies been imposed in foreign-to-foreign mergers?

While more common in cases involving national players, remedies have also been imposed in foreign-to-foreign mergers. Typically, the parties in those transactions, however, had substantial activities in Austria.

5.4 At what stage in the process can the negotiation of remedies be commenced? Please describe any relevant procedural steps and deadlines.

There are no statutory deadlines for remedy negotiations. Commitments may be proposed at any stage of the merger control proceedings. Given the limited time available in phase I, however, it is advisable to enter into discussions early if the parties want to avoid phase II.

5.5 If a divestment remedy is required, does the merger authority have a standard approach to the terms and conditions to be applied to the divestment?

There is no standard approach or model with regard to divestments. Remedies are negotiated individually in each case.

5.6 Can the parties complete the merger before the remedies have been complied with?

The parties may usually close the transaction but are required to comply with the remedies within certain deadlines. Fix-it-first or up-front buyer remedies are rare in Austria.

5.7 How are any negotiated remedies enforced?

Remedy packages often include reporting obligations to the FCA. Non-compliance with remedies is subject to fines of up to 10% of worldwide aggregate turnover and may give rise to nullity of the underlying agreements. In addition, the CC may (upon application by the Official Parties) impose measures to eliminate or mitigate the effects of the transaction.

5.8 Will a clearance decision cover ancillary restrictions?

Pursuant to case law, merger control clearance also extends to ancillary restrictions, such as non-compete covenants. The Austrian authorities, however, do not examine such restrictions in the course of the proceedings. It is up to the parties to

assess whether a restriction is indeed ancillary. While not legally binding on the Austrian authorities, the European Commission's Notice on Ancillary Restraints offers guidance in this regard.

5.9 Can a decision on merger clearance be appealed?

Both the notifying party and the Official Parties have the right to appeal the decision of the CC to the Supreme Court. Appeals are generally limited to points of law; appeal only lies on errors of fact in egregious cases.

5.10 What is the time limit for any appeal?

A merger decision (clearance or prohibition) may be appealed within four weeks of receipt. The respondent will be granted another four weeks for its reply. Upon receipt of the file (including appeal and reply), the Supreme Court has two months to decide on the appeal.

5.11 Is there a time limit for enforcement of merger control legislation?

Fines may be imposed only if the application to the CC is filed within five years after termination of the infringement. This time period is interrupted by investigatory measures taken by the FCA regarding the infringement. Interruptions lead to the deadline starting to run anew. There is, however, an absolute limitation period, which ends 10 years after termination of the infringement.

6 Miscellaneous

6.1 To what extent does the merger authority in your jurisdiction liaise with those in other jurisdictions?

The FCA is a member of the European Competition Network ("**ECN**") and of the EU Merger Working Group. Within this group, members exchange non-confidential information on multijurisdictional mergers. The authorities may also ask for waivers of confidentiality in order to discuss confidential information when reviewing the same merger. Cooperation is particularly close with the German Federal Cartel Office, due to commonalities of language and similarities in industry structure. In addition, several regional and bilateral initiatives also encourage cooperation in cross-border mergers.

6.2 What is the recent enforcement record of the merger control regime in your jurisdiction?

Given Austria's low jurisdictional thresholds, the FCA receives a large number of merger control notifications. The number of notifications has been steadily increasing since its low point during the financial crisis (205 notifications in 2009) to almost 500 in 2019. Only a small number of transactions (typically no more than 10 each year; only one in 2018) are referred to phase II. The newly introduced transaction value threshold gave rise to 17 notifications to the FCA. Formal prohibitions are extraordinarily rare; transactions which raise concerns are usually cleared based on remedies, or in some cases are abandoned.

6.3 Are there any proposals for reform of the merger control regime in your jurisdiction?

The latest reform of the merger control regime became effective in November 2017. Austrian competition law will have to be amended again to comply with the ECN+ Directive by 4 February 2021. The government has launched a consultation process, in the course of which changes to Austrian merger control have also been considered. No draft of the proposed amendment is available at this stage.

6.4 Please identify the date as at which your answers are up to date.

The answers are up to date as of September 2020.

7 Is Merger Control Fit for Digital Services and Products?

7.1 Is there or has there been debate in your jurisdiction on the suitability of current merger control tools to address digital mergers?

The FCA recently (June 2020) published a paper summarising lessons learned in relation to digital markets. With regard to mergers, the paper tentatively notes that the transaction-value threshold introduced in 2017 may not primarily capture the transactions which it was intended for, and proposed a change from the dominance to the SIEC ("significant impediment of effective competition") test. In addition, the FCA increasingly cooperates with the Austrian telecoms regulator RTR, *inter alia*, in monitoring digital platforms.

7.2 Have there been any changes to law, process or guidance in relation to digital mergers (or are any such changes being proposed or considered)?

Together with Germany, Austria was among the first EU Member States to introduce a transaction value threshold in 2017. The threshold (please see question 2.4 above) aims to capture acquisitions of undertakings which do not yet achieve high revenues, but have significant competitive potential. While the threshold is not limited to the digital economy, the Austrian legislator specifically intended to capture acquisitions of online platforms.

7.3 Have there been any cases that have highlighted the difficulties of dealing with digital mergers, and how have these been handled?

While, even in the digital economy, demand (e.g. on transaction platforms) may have a national dimension, the main suppliers on these markets will usually operate on an international level. From the point of view of a small jurisdiction like Austria, digital industry transactions, therefore, often have a foreign-to-foreign character. This makes effective intervention more difficult. National competition authorities may increasingly resort to referrals to the European Commission pursuant to Art 22 EUMR in such cases, as was done by the Austrian FCA in *Apple/Shazam*.

Heinrich Kühnert is a partner and heads DORDA's antitrust and regulatory practice group. Heinrich advises domestic and international clients on all aspects of Austrian and European competition law (merger control, antitrust, abuse and state aid). He has broad experience in a large number of industries, including the energy, transport, telecom, media, healthcare, mechanical engineering as well as retail sectors. In addition to his advisory work, Heinrich publishes regularly on competition law topics. Prior to joining DORDA in March 2016, Heinrich practised as a partner in a leading Austrian competition practice, and as principal associate in the antitrust, competition and trade group of Freshfields Bruckhaus Deringer. Heinrich received his legal education at the Universities of Vienna, Oxford and Fribourg (Switzerland).

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