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The International Comparative Legal Guide to:

Merger Control 2018

14th Edition

A practical cross-border insight into merger control issues

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Country Question and Answer Chapters:

EDITORIAL

Welcome to the fourteenth edition of *The International Comparative Legal Guide to: Merger Control*.

This guide provides the international practitioner and in-house counsel with a comprehensive worldwide legal analysis of the laws and regulations of merger control.

It is divided into two main sections:

Three general chapters. These chapters are designed to provide readers with an overview of key issues affecting merger control, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in merger control laws and regulations in 44 jurisdictions.

All chapters are written by leading merger control lawyers and industry specialists, and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor, Nigel Parr of Ashurst LLP, for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.com.

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1 Relevant Authorities and Legislation

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

The relevant merger authorities in Austria are the Federal Competition Authority (*Bundeswettbewerbsbehörde* "FCA"), an independent administrative body assigned to the Federal Minister of Science, Research and Economy, the Federal Cartel Prosecutor (*Bundeskartellanwalt* "FCP", together with the FCA referred to as the "Official Parties"), who is assigned to the Federal Minister of Justice, and the Cartel Court (*Kartellgericht*).

The Official Parties assess notifications in phase I proceedings. Should a notification raise competition concerns, either of the Official Parties may apply to the Cartel Court to open phase II proceedings. Decisions of the Cartel Court may be appealed before the Supreme Cartel Court (*Kartellobergericht*).

Finally, the Competition Commission (*Wettbewerbskommission*) is an advisory body that may give (non-binding) recommendations to the FCA as to whether or not to apply for an in-depth investigation of a notified merger.

1.2 What is the merger legislation?

The relevant merger legislation is the Cartel Act 2005 (*Kartellgesetz* "Cartel Act"), particularly part I chapter 3 of the Cartel Act. In addition to the Cartel Act, the Competition Act (*Wettbewerbsgesetz*) contains some relevant procedural rules.

Transactions that are notifiable in Austria may at the same time have an EU Dimension pursuant to Article 1 of the EU Merger Control Regulation (Council Regulation No 139/2004; "EUMR"). Generally, the European Commission has sole jurisdiction to assess transactions with an EU Dimension. However, the Cartel Act contains specific rules on media mergers (see questions 2.4 and 4.3). In view of the exemption from the "one-stop-shop principle" pursuant to Article 21 (4) EUMR, media mergers require a filing to both the European Commission and the FCA, if the Austrian turnover thresholds are met (see question 2.4).

1.3 Is there any other relevant legislation for foreign mergers?

There is no other relevant legislation for foreign mergers.

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

Merger rules for particular sectors are contained in the Cartel Act and sector-specific regulation. The Cartel Act contains special provisions for mergers in the banking (see question 3.2) and media (see questions 2.4 and 4.1) sectors.

Further, it is foreseen that regulatory authorities in the energy and telecommunication sectors may submit (*ex officio* or upon request by the Cartel Court) advisory opinions on notified transactions that affect the respective sector. In transactions affecting air transport, the Federal Minister for Transport, Innovation and Technology may submit statements. Finally, the Chamber of Commerce, the Chamber of Labour and the presidential conference of the Federal Chambers of Agriculture may also submit statements, if the transaction affects the relevant sector.

In addition to the Cartel Act, sector-specific legislation applies, *inter alia*, to transactions in the energy and air carrier sector. In the banking, insurance and media sectors, the planned transaction has to be notified also to the sector-specific authority.

Furthermore, mergers between collecting societies do not fall within the ambit of the Cartel Act. They have to be cleared by the respective regulatory authority.

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 of the Cartel Act catches the following types of transactions:

- the acquisition of an undertaking or a major part thereof, especially by merger or transformation;
- the acquisition of rights in the business of another undertaking by operational management or operational lease agreement;
- the (direct or indirect) acquisition of shares, if thereby a shareholding of 25% or 50% is attained or exceeded (an acquisition of share options does not yet trigger a filing obligation);
- the establishment of interlocking directorships whereby at least half of the management or members of the supervisory boards of two or more undertakings are identical;

- any other concentration by which a controlling influence over another undertaking may be exercised; and
- the establishment of a full-function joint venture.

However, intra-group transactions are not caught by the Cartel Act.

The Cartel Act does not provide for a definition of control. In practice, one may refer to the notion of control under EU merger rules. Hence, an undertaking has control over another undertaking if it has influence on decisions concerning management, budgets, business plans or strategically significant investments. According to the Austrian Supreme Cartel Court, it is decisive whether or not an undertaking may enforce its own competitive interests when it comes to decisions regarding the competitive market position of the other undertaking.

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

Yes, the Cartel Act catches any (direct or indirect) acquisition of a shareholding of 25% or more in another undertaking, regardless of whether or not control is conferred by the transaction. Therefore, only the acquisition of a non-controlling interest of less than 25%, by which no atypical rights are conferred, does not constitute a merger.

However, please note that the 25% threshold may also be triggered if only 25% of the voting rights are acquired or similar rights to those of a 25% shareholder.

2.3 Are joint ventures subject to merger control?

In line with Article 3 of the EUMR, the creation of a full-function joint venture is subject to merger control. Austrian merger control rules catch both concentrative and cooperative full-function joint ventures.

The concept of full functionality corresponds with EU merger rules: a joint venture is deemed to be full-function if it will perform – on a lasting basis – all functions of an independent economic entity, i.e. it has to possess sufficient resources, it has to be established permanently and must not only fulfil auxiliary functions for, or depend on, the business relations to its founders.

However, the creation of a non-full-function joint venture could nevertheless constitute a notifiable transaction if the assets contributed to the joint venture are considered (substantial parts of) undertakings. In this case, the transaction would qualify as a concentration within the meaning of the Austrian merger control regime since each mother company of the joint venture acquires shares in/control over (a part of) an undertaking previously solely owned/controlled by the other mother company.

Recently, the European Court of Justice held in a preliminary ruling following a request by the Austrian Supreme Court that the creation of joint ventures does not constitute a concentration under the EU Merger Regulation, unless the joint venture can be regarded as a full-function undertaking. The case concerned a change from sole control to joint control in a target company, which could not be considered full-function (since it should only supply its parents). Both the European Commission (for lack of full-function of the joint venture) and the Austrian Cartel Court (because it considered the Commission competent) had denied jurisdiction. The European Court of Justice now confirmed the previously established practice of the Commission that the change of an existing undertaking into a joint venture also requires full functionality to fall within the scope of the EU Merger Regulation. The case at hand, therefore, falls in the competence of the Austrian authorities, given that the Austrian merger control regime catches, as mentioned above, the creation of non-full-function joint ventures also.

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

A concentration has to be notified to the FCA if the following accumulative thresholds are fulfilled (based on the revenues of the last business year):

1. the combined worldwide turnover of all undertakings concerned exceeds EUR 300 million;
2. the combined Austrian turnover of all undertakings concerned exceeds EUR 30 million; and
3. the individual worldwide turnover of each of at least two of the undertakings concerned exceeds EUR 5 million.

However, even if the above thresholds are satisfied, no obligation to notify exists if:

- the Austrian turnover of only one of the undertakings concerned exceeds EUR 5 million; and
- the combined worldwide turnover of all other undertakings concerned does not exceed EUR 30 million.

Effective from 1 November 2017, additional thresholds introducing a transaction value test, entered into force. Even if the above listed thresholds are not met, a transaction requires pre-merger approval provided the following four cumulative conditions are fulfilled:

1. the combined turnover of all undertakings concerned exceeds EUR 300 million worldwide;
2. the combined Austrian turnover of the undertakings concerned exceeds EUR 15 million;
3. the "value of consideration" for the transaction exceeds EUR 200 million; and
4. the target has significant activities in Austria (local nexus).

For calculating the turnover thresholds, the revenues of all entities that are linked with an undertaking concerned as defined in Section 7 of the Cartel Act (see question 2.1 above) must be attributed, i.e. the turnover of a 25% subsidiary must also be attributed fully. Indirect shareholdings only have to be considered if the direct subsidiary (of at least 25%) holds a controlling interest in the indirect subsidiary. Please note that, according to Section 7 of the Cartel Act, undertakings linked via interlocking directorships and operational management/lease agreements must also be considered. The revenues of the seller shall be disregarded (unless the seller remains linked with the target undertaking as defined in Section 7 of the Cartel Act). Furthermore, specific provisions for the calculation of turnover apply for mergers in the banking, insurance and media sectors. As regards "media mergers" (i.e. mergers involving two undertakings that are – or hold a share of at least 25% in – either a media undertaking, a media service, or a media support undertaking), the Cartel Act stipulates that, with regard to the first and second turnover thresholds mentioned above, the turnover of media undertakings and media service undertakings has to be multiplied by 200, whereas the revenues of media support undertakings have to be multiplied by 20. The Federal Minister of Justice may – after consultation with the Competition Commission and the Federal Minister of Science, Research and Economy – define by decree further markets where the turnover thresholds shall be subject to a multiplier rule.

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

Merger control also applies in the absence of a substantive overlap.

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?

The Cartel Act only applies to agreements and practices that may impact the Austrian market. Hence, a transaction, despite meeting the turnover thresholds, does not require notification if it has no domestic effect, i.e. generally if the target is not active in Austria (or a larger market that Austria is a part of) and the transaction is also not apt to enhance the acquirer's market position in Austria (or a larger market that Austria is a part of).

So far, the Cartel Court has been rather negligent in declining a notification obligation for lack of domestic effects. However, with regard to the acquisition of a Czech and a Slovakian savings bank with purely local businesses by the Austrian Erste Bank, the Supreme Cartel Court overturned the decision of the Cartel Court by ruling that a strengthening of resources, such as an increase of financial power of Erste Bank in Austria, alone would not suffice in order to establish an effect on the Austrian market, if the target undertaking is active in a different limited geographic market (not including Austria) and has no turnover in Austria.

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

In addition to transactions that are not deemed concentrations pursuant to the Cartel Act, the operation of the jurisdictional thresholds may be overridden by the application of the effects doctrine (see question 2.6 above), and the one-stop-shop under the EUMR (see question 1.2 above).

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 no Austrian provision similar to Article 5 (2) of the EUMR. However, several concentrations that are part of the same project, and which are therefore economically linked, may be notified in one "joint" filing, even if the various transactions amount to different types of concentrations.

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?

Concentrations that meet the turnover thresholds must be notified to the FCA (unless the transaction has an EU Dimension pursuant to Article 1 EUMR; see also question 1.2 above). There is no formal filing deadline; however, a transaction must not be implemented prior to obtaining clearance.

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

With regard to the banking sector, the Cartel Act excludes certain transactions from the applicability of the merger control provisions irrespective of whether the turnover thresholds are met if an interest in an undertaking is acquired:

i) by a bank for the sole purpose of reselling the interest acquired;

ii) by a bank for the sole purpose of restructuring the undertaking in which the interest is acquired or serving as a guarantee for a claim against the respective undertaking; or

iii) for the sole purpose of managing and commercialising the interest acquired (investment fund or financing of capital business).

In such a scenario, the acquirer is restricted in the use of his voting rights. In case of i) or ii), the acquirer has to resell the interest acquired within one year, or after the restructuring has been accomplished, or after the purpose of the guarantee has ceased to exist respectively.

For other exceptions by which the operation of the jurisdictional thresholds is overridden, see question 2.7 above.

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

Companies must not implement a transaction prior to obtaining formal clearance. Possible sanctions for the infringement of this suspension clause are twofold: first, the underlying agreements/acts are null and void; and second, the undertakings may be fined up to 10% of the worldwide annual turnover (by the Cartel Court upon application of the Official Parties). Non-compliance with remedies imposed on the parties is tantamount to breaching the suspension clause and may lead to similar fines. (See also question 5.6.)

When assessing the amount of the fine to be imposed, the Cartel Court will, in particular, take into account the severity and duration of the infringement, the enrichment achieved by the infringement, the degree of fault and the economic capacity of the undertaking. So far, the highest fine imposed by the Cartel Court for an infringement of the suspension clause amounted to EUR 1.5 million. In other cases, the Cartel Court has imposed only symbolic fines of EUR 5,000 to EUR 10,000 for a breach of the suspension clause, as the undertaking in question filed the acquisition retrospectively on its own initiative. In a recent case, however, the Supreme Court overturned a decision of the Cartel Court and increased a fine for a breach of the suspension clause from EUR 4,500 to EUR 100,000. The Supreme Court argued that although (i) the breach was caused only by negligence, and (ii) the transaction did not have any negative impact on competition in Austria, a symbolic fine was not sufficient taking into account the duration of the infringement of three years and the financial power of the undertaking concerned. In a nutshell, there is still no established practice of the authorities with regard to the amount of fine to be imposed for gun-jumping.

For the sake of completeness, please note that a fine of up to 1% of the worldwide annual turnover may be imposed by the Cartel Court, if:

i) (in cases as described under question 3.2 above) an acquirer does not comply with an order of the court not to execute its voting rights or to resell the shares acquired; or

ii) incorrect or misleading information was given in a notification.

In October 2016, the Cartel Court has imposed a fine for the submission of incorrect/misleading information in a merger filing. The fine agreed in a settlement was EUR 750,000.

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

There is no provision or court ruling on the permissibility of carve-out mechanisms. On the one hand, any action by which the transaction is implemented in the sense of the Cartel Act (see question 3.7 below) constitutes an infringement of the suspension clause (see question 3.3 above). On the other hand, the Cartel Act only applies to facts that may have an impact on the Austrian market. In view of this, carving out the Austrian part of the transaction should be possible.

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

A notification may be filed as soon as the undertakings concerned can demonstrate their intention to enter into the ultimate transaction agreements and close the transaction in the foreseeable future (e.g. by means of a Memorandum of Understanding or a Letter of Intention; it is, however, not necessary to submit these documents).

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 upon submission of a notification (provided that the filing fee has been paid in due form; see question 3.10 below) to assess the transaction and decide whether to open phase II proceedings before the Cartel Court (by applying for an in-depth investigation). Upon request by the notifying party, the four-week review period in phase I proceedings may be extended to six weeks. If there is no request from the notifying party for an extension of Phase I, the Official Parties may still expand their timeframe for review (for instance, since they have not been provided with the additional information required in an information request) by requesting an in-depth proceeding before the Cartel Court in order to have more time to assess the case. If subsequently, they come to the conclusion that the transaction does not raise concerns, they would withdraw their application and thereby clear the transaction.

A transaction is cleared in phase I if the statutory four-week (or extended six-week) period expires and neither of the Official Parties has lodged an appeal for phase II proceedings (the next working day, the Official Parties have to issue a declarative clearance notice to confirm that no application has been lodged).

In addition, a transaction is also cleared if both Official Parties waive their right to apply for an in-depth investigation. However, the Official Parties are rather reluctant to grant "early clearance". According to a Notice of the FCA, it will – generally – only waive its right after two weeks and three days following publication of the transaction on the FCA's website (which will usually occur on the day of submission or the next working day) and only if it has safeguarded that the transaction does not raise competition concerns.

Phase II proceedings must be completed within five months (extendable to six months upon request of the notifying party) after the Official Parties have requested an in-depth investigation by the Cartel Court; otherwise the transaction is cleared by lapse of the five-month (or extended six-month) period. Apart from that, a transaction is cleared in phase II if the Official Party (or both Official Parties) requesting an in-depth investigation withdraw(s) the application for phase II proceedings, and the Cartel Court clears the transaction (with or without conditions).

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 must not be consummated prior to obtaining formal clearance. Infringements of the suspension clause may lead to fines of up to 10% of the worldwide turnover of the infringing undertaking and nullity of the implementing measures (see question 3.3 above). However, we note that the meaning of "implementation" has not been clarified ultimately by the Cartel Act or the Cartel Court. One ruling suggests, however, that the mere acquisition of shares and/or voting rights without the acquirer exercising any controlling influence does not amount to an unlawful implementation of the transaction. In several more recent rulings concerning an implementation without clearance, the fine was calculated by taking into account the period as of the first exercise of voting rights (rather than as of acquisition of the shareholding). Also these rulings therefore suggest that the mere acquisition of shares does not qualify as implementation yet. Again, this question has not been ultimately clarified yet.

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

The Cartel Act only requires that, in the notification, accurate and complete information must be provided with regard to all facts by which a market-dominant position may be established or enhanced; these facts are, in particular, the structure of ownership, the turnover on the relevant markets and the respective market shares of each undertaking concerned, as well as information regarding the general structure of the market. However, the Official Parties have published a Notification Form which undertakings are well-advised to adhere to. Should the Official Parties find that the submitted information does not suffice to assess the transaction, they usually apply for an in-depth investigation to gain time for the assessment, as requests for information do not prolong the statutory four-week period (see question 3.6 above). Pre-notification discussions with the authorities are not required, but it is best practice in critical cases.

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?

If there are no affected markets in the meaning of the Notification Form published by the FCA and the FCP, not all sections of the form have to be completed.

An "affected market" is a market where:

- the transaction leads to or enhances a market dominant position or a presumption of market dominance as provided in Section 4 (2) Cartel Act is fulfilled (see question 4.1 below);
- the activities of the parties involved overlap and the parties account for a combined market share of at least 15%; or
- the undertakings involved are active on markets up or downstream of each other and a market share of 25% is achieved.

The only way of obtaining early clearance is by way of applying to the Official Parties to waive their right to request phase II proceedings (see question 3.6). There are no informal ways to speed up the process.

3.10 Who is responsible for making the notification?

Every undertaking concerned is entitled to file the notification. Usually the acquirer and target would submit a joint filing. In addition, the seller is generally also deemed to be entitled to submit a filing.

3.11 Are there any fees in relation to merger control?

The filing fee is EUR 3,500 and can either be paid in cash or transferred to a specific account of the FCA. Only the payment in cash (evidenced by the submission of the original deposit slip with the filing) has the effect of immediately triggering the start of the statutory four-week waiting period. A bank transfer of the filing fee only triggers the statutory four-week period once the amount has been received on the bank account of the FCA.

Should phase II proceedings be opened, the Cartel Court may impose an (additional) lump sum fee on the undertakings concerned of up to EUR 34,000. When assessing the costs, the court will take into consideration the politico-economic significance of the proceeding, its complexity, the economic capacity of the payer and to what extent the payer gave reason for the official acts. Furthermore, also some minor fees for the lay judges participating in an oral hearing will be imposed on the parties. No additional fees have to be paid for proceedings before the Supreme Cartel Court (i.e. if a decision of the Cartel Court is challenged).

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?

The Austrian merger control regime does not provide for special rules for transactions concerning a public offer.

3.13 Will the notification be published?

After submission, the FCA will (usually still on the same day or otherwise on the next working day) publish a short statement on the filing of the notification on its website stating the parties to the concentration, the intended transaction and the affected industry. The publication of this statement triggers the two-week period for third parties to submit comments on the intended concentration (see question 4.4 below).

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?

A merger has to be prohibited by the Cartel Court if it is expected to lead to the creation or strengthening of a market-dominant position. An undertaking is dominant in the meaning of the Cartel Act if it can act on the market largely independently of other market participants. However, Section 4 (2) Cartel Act provides for a refutable presumption of market dominance if the following market share thresholds are met:

i) a market share exceeding 30%;

ii) a market share exceeding 5% if no more than two competitors are active on the same market; or

iii) a market share exceeding 5% if the undertaking concerned is one of the four largest undertakings on the relevant market, which together account for a market share of at least 80%.

Furthermore, according to Section 4 (2a) Cartel Act, a company is also believed to be market dominant if:

- together with no more than two further companies it accounts for a market share of at least 50% on the relevant market; or
- together with no more than four other companies it accounts for at least two-thirds of the market.

4.2 To what extent are efficiency considerations taken into account?

The Cartel Act explicitly foresees that – even if the transaction creates or strengthens a market-dominant position – it has to be cleared if (i) its efficiencies outweigh its detrimental effects, or (ii) the merger is economically justified and essential for the international competitiveness of the undertakings concerned. Accordingly, the Notification Form published by the FCA also asks for such efficiencies in its Section 7.

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

The Cartel Act foresees that a media merger (see question 2.4) shall be assessed not only against its compatibility with competition rules, but also against the likelihood of the transaction adversely affecting media plurality in Austria.

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

Within two weeks of publication of the filing on the website of the FCA, any third party whose legal or economic interests are affected by the transaction may submit a written statement to the FCA and/or the FCP. However, the intervenient has no right to a specific treatment of its statement.

Within four weeks of the publication of the fact that phase II proceedings have been initiated before the Cartel Court, undertakings may submit written statements to the Cartel Court. However, during the court proceedings, interveners have no right to a specific treatment of their statements and no standing as a party to the proceedings.

With regard to the involvement of the relevant regulatory authorities and chambers, see question 1.4 above.

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

Generally, the FCA is vested with all the investigative powers that are necessary in order to fulfil its duties. In particular, the FCA may ask undertakings to provide all necessary information, as well as review and copy relevant documents on-site. In practice, the FCA sends information requests to the undertakings concerned, as well as other market participants, i.e. competitors, suppliers and/or customers. The FCA may also order the production of the requested information by administrative decision and may impose fines of up to EUR 75,000 in case of non-compliance, and enact its decision by imposing daily fines of up to 5% of the average daily turnover of the undertaking in question.

Furthermore, the FCA also has the right to conduct a dawn raid if it suspects an infringement of the prohibition to implement a merger before clearance.

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

When submitting a notification, it is advisable to also submit a non-confidential version of the filing. Generally, the FCA does not grant access to its file. However, the FCA may forward a non-confidential version of submissions to third parties for their comments.

With regard to proceedings before the Cartel Court, the Cartel Act provides for the protection of business secrets: third parties may only access the file of the court if all parties to the proceeding agree. The European Court of Justice has however ruled that this provision hinders the effectiveness of EU law and that, therefore, judges need to assess on a case-by-case basis whether access to (specific parts of) the file should be granted.

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

5.1 How does the regulatory process end?

Phase I proceedings may end by (i) time lapse, if neither Official Party has applied for an in-depth investigation or has withdrawn their respective application(s) within the phase I review period (see question 3.6 above), or (ii) issuance of a waiver by the Official Parties (see also question 3.6 above).

Phase II proceedings before the Cartel Court end by (i) the Official Parties withdrawing the application for an in-depth investigation, (ii) the Cartel Court rejecting the application of the Official Parties, as the merger was not notifiable, (iii) the Cartel Court declaring the merger not compatible with merger control rules (prohibition decision), (iv) the Cartel Court clearing the notified transaction (subject to conditions or unconditionally), or (v) lapse of the phase II review period (see question 3.6 above) without adoption of a prohibition decision. Decisions of the Cartel Court may be appealed before the Supreme Cartel Court.

In addition, the proceedings also end if the parties withdraw their notification.

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

The Cartel Act expressly foresees the possibility of the undertakings concerned to negotiate with the Official Parties on acceptable remedies, in both phase I and phase II proceedings. Also, the Cartel Court may clear a transaction subject to restrictions or conditions. Remedies agreed in phase I or phase II proceedings will be declared binding by decision of the Cartel Court. In practice both, structural but also (even more) behavioural remedies have been imposed by the Austrian authorities.

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

As far as can be gathered from the information publicly available, there have been some cases relating to foreign-to-foreign transactions, where the undertakings involved agreed on commitments with the Official Parties in order to avoid or terminate phase II proceedings before the Cartel Court. However, from the limited information that is publicly available, it may not be excluded that in some of these cases Austrian subsidiaries have been involved.

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

Remedies can be suggested at any stage during the merger control proceedings as there are no formal deadlines for their submission. If competition concerns are expected, the notifying parties are well-advised to submit commitment proposals in phase I (even together with the merger notification) in order to avoid the Official Parties filing an application for an in-depth investigation.

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 official statement of the Official Parties with regard to terms and conditions to be applied to divestments, as remedies are set individually in each case.

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

Non-compliance with commitments is tantamount to a breach of the suspension clause, i.e. it may entail fines and the respective acts are exposed to nullity. It therefore depends on the wording of the remedy as to whether the transaction can be closed prior to complying with the undertaken commitment.

5.7 How are any negotiated remedies enforced?

Non-compliance with remedies is tantamount to a breach of the suspension clause (see also question 3.3 above). Furthermore, the Cartel Court may (upon application of the Official Parties) impose subsequent measures or hand-down an order to stop the non-adherence to the remedies imposed.

5.8 Will a clearance decision cover ancillary restrictions?

Ancillary restraints (such as in particular non-compete clauses) are not assessed by the Official Parties in the merger process. It is the parties' responsibility to self-assess whether a restriction is indeed ancillary (i.e. pivotal for the success of the concentration and proportional) and, therefore, covered by the clearance decision. When looking at the permissibility of non-compete covenants, the EU Notice on ancillary restraints (which in principle allows for a two-year non-compete to be imposed on the seller of a business, and a three-year non-compete if know-how is transferred together with the divested business) should also be considered under Austrian law.

5.9 Can a decision on merger clearance be appealed?

A clearance (or other, e.g. prohibition) decision of the Cartel Court may be appealed by the parties (i.e. the notifying undertaking(s) and the Official Parties) before the Supreme Cartel Court which (upon receipt of the file forwarded by the Cartel Court) has two months to decide on the appeal.

5.10 What is the time limit for any appeal?

The ruling of the Cartel Court may be appealed within four weeks of receipt of the decision by the parties.

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

A fine may only be imposed by the Cartel Court if either of the Official Parties has applied for fines within five years from the day the infringement was terminated. However, the five-year period is interrupted by investigations of the FCA and then starts to run anew. There is an absolute time limit of 10 years as of 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 entitled to provide the European Commission and the competition authorities of other EU Member States with all information and documents required for the fulfilment of their duties. *Vice versa*, the FCA may also ask for the provision of such information and documents.

As the FCA is a member of the European and the International Competition Network, the FCA cooperates closely with all other members of the networks. Furthermore, the FCA is part of the Marchfeld Forum, a platform for Central and Eastern European competition authorities; it attends the annual meetings of the European Competition Authorities (ECA); has joined the Central European Competition Initiative (CECI), a platform for information exchange between Central European competition authorities; and also cooperates with the Eurasian Economic Commission (which is a supra-national agency of Russia, Belarus and Kazakhstan).

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

The latest amendment to the Cartel Act and the Competition Act, which introduced the new filing threshold based on transaction value to the merger control regime, entered into force on 1 November 2017.

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

Our answers are up to date as of October 2017.

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Schoenherr's EU & competition practice advises clients from across all industries in merger control, antitrust and state aid matters at European and national levels throughout the firm's comprehensive network in the CEE region and its office in Brussels. In addition, the practice supports other teams when specific issues under European law arise, for instance under the Accession Agreements of the new Member States.

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