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Practical cross-border insights into merger control issues

Merger Control
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1 Relevant Authorities and Legislation

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

Merger control notifications must be filed with the Federal Competition Authority (*Bundeswettbewerbsbehörde*, "FCA"). The FCA is an independent authority headed by the Director General for Competition, who is appointed by the Austrian government but not bound by any instructions.

The FCA forwards the notifications to the Federal Cartel Prosecutor (*Bundeskartellanwalt*, "FCP"), who reports to the Federal Minister of Justice. The FCP is responsible for representing the public interests in competition law matters.

The FCA and the FCP, referred to as the "official parties" (*Amtsparteien*), share jurisdiction in phase I of the Austrian merger control proceeding and may apply for an in-depth investigation (phase II) before the Cartel Court (*Kartellgericht*, "CC") as the ultimate decision-making authority.

1.2 What is the merger legislation?

The Austrian merger legislation is based on the Cartel Act 2005 (*Kartellgesetz 2005*, "CA") and the Competition Act (*Wettbewerbsgesetz*).

1.3 Is there any other relevant legislation for foreign mergers?

Foreign mergers may be subject to an approval proceeding before the Federal Minister of Labour and Economy under the Investment Control Act (*Investitionskontrollgesetz*, "ICA") with the involvement of the European Commission ("EC") if:

- a foreign person, meaning a legal person with its seat or headquarters outside the EU, EEA and Switzerland or a natural person who is not an EU, EEA or Swiss citizen;
- acquires a specific amount of shares in or controlling influence over an Austrian undertaking; and
- the Austrian undertaking is active in a particularly sensitive sector or in other areas where threats to security or public order may arise (e.g. in the defence equipment, energy, IT or cybersecurity sectors).

A foreign direct investment may be prohibited or approved under conditions and requirements if the transaction poses a threat to security or public order.

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

The CA regulates special provisions for media mergers (*Medienzusammenschlüsse*). In case a media merger could impair the diversity of media, the completion of the merger must be prohibited.

Other regulatory approval requirements exist in all sectors listed in the ICA and in the banking, insurance and gambling sectors.

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

If a merger results from a foreign direct investment in an Austrian undertaking, the merger might be subject to an approval proceeding under the ICA (see question 1.3).

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?

The following transactions or measures constitute a merger within the meaning of Section 7 CA:

- the acquisition of the whole or a substantial part of an undertaking, in particular by merger or transformation;
- the acquisition of rights concerning the business of another undertaking by operational management or operational lease agreements;
- the direct or indirect acquisition of shares in an undertaking if the participation held after the acquisition is equal to or exceeds 25% or 50%;
- at least half of the management or members of the supervisory boards of two or more undertakings are identical;
- the acquisition of direct or indirect controlling influence over an undertaking; and
- the establishment of a joint venture that fulfils all functions of an independent economic entity on a lasting basis.

The CA does not contain a specific definition of the term "control". Under Austrian law, control means any factual, economic or legal measure that enables, to a significant extent, participation in the management of an undertaking and may constitute a controlling influence. The understanding of the term "control" corresponds to that used in European competition law.

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

According to Section 7 CA, the acquisition of a minority shareholding of 25% constitutes a merger. Please note that the acquisition of a shareholding of less than 25% may also be subject to notification if (i) the acquisition of a lower shareholding (e.g. 24%) is intended to evade the merger proceeding, or (ii) the acquirer will exercise a controlling influence over the target undertaking.

2.3 Are joint ventures subject to merger control?

The establishment of a joint venture that fulfils all functions of an independent economic entity on a lasting basis constitutes a merger and is subject to notification under Section 7 para. 2 CA. Please note that this regulation only applies to greenfield joint ventures. The provisions for an asset or share deal apply if pre-existing undertakings form a joint venture in the course of the transaction. In this regard, full functionality of the joint venture is not required.

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

Pursuant to Section 9 para. 1 CA, a notification must be filed to the FCA if the undertakings concerned achieved the following turnover thresholds in the financial year previous to the transaction:

- worldwide, in total, more than EUR 300 million;
- domestically, in total, more than EUR 30 million, whereby at least two undertakings generated more than EUR 1 million each; and
- worldwide, for at least two undertakings, more than EUR 5 million each.

Even if the above thresholds are met, a notification is not required if, in the previous financial year (i) only one of the undertakings concerned achieved a domestic turnover exceeding EUR 5 million, and (ii) the combined aggregate worldwide turnover of the other undertakings concerned does not exceed a total of EUR 30 million.

For the purpose of calculating turnover, undertakings connected with each other in one of the ways pursuant to Section 7 CA (e.g. the acquisition of a 25% shareholding in or controlling influence over an undertaking) are considered a single undertaking. In principle, both upstream and downstream connected undertakings are taken into account; intra-group turnovers are excluded from the calculation. No distinction is made between product and service turnover. For credit institutions, insurances and media mergers, deviating rules concerning the calculation of turnover apply.

However, mergers not fulfilling the above thresholds may also require a notification pursuant to the transaction value threshold (*Transaktionswert-Schwelle*) of Section 9 para. 4 CA if:

- the undertakings concerned achieved, in total, a worldwide turnover of more than EUR 300 million in the previous financial year;
- the undertakings concerned achieved, in total, a domestic turnover of more than EUR 15 million in the previous financial year;
- the value of the consideration for the combination exceeds EUR 200 million; and
- the target undertaking has significant domestic operations.

The value of the consideration includes all cash payments (including the purchase price), the transfer of voting rights, securities, as well as tangible and intangible assets; furthermore, the consideration is dependent on the fulfilment of certain conditions (e.g. those contained in earn-out clauses).

Significant domestic operations are regularly assumed if an undertaking operating exclusively or mainly on the domestic market is acquired. In addition, the factors for domestic activity depend on other criteria, such as the established benchmarks of the concerned industry. In the digital sector, these can be user figures ("Monthly Active User") or the access frequency of a website ("unique visits"). The undertaking's activities must be allocated to the location where the customer is based.

Based on the joint transaction value threshold guidelines of the German Federal Cartel Office and the FCA published in January 2022, the significance of domestic activities will often be assumed if the target company achieves a turnover of more than EUR 1 million in Austria, provided that the turnover adequately reflects the market position and the competitive potential of the target undertaking. However, a domestic market share of more than 10% on the relevant market also indicates substantial domestic activity.

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

Merger control also applies to mergers even if the business activities of the undertakings concerned do not 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??

"Foreign-to-foreign" transactions are subject to Austrian merger control if two undertakings concerned generated a domestic turnover of EUR 1 million each in the previous financial year or the target undertaking has significant domestic operations.

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

The Austrian merger control regime is suspended by the European merger control legislation if the thresholds of the EUMR are met. In such cases, the merger falls under the jurisdiction of the EC ("one-stop-shop principle").

An exception applies to media mergers that are subject to European merger control. In such cases, a notification must also be filed to the FCA; however, its competence only relates to whether the transaction might impair media plurality.

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?

Case law regarding the conditions under which several (successive) transactions are considered a single concentration is limited. The Austrian courts have clarified that the parties cannot evade merger control by artificially splitting the proposed 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?

A notification is compulsory if the relevant thresholds under the CA are met. This applies even if the business activities of the undertakings concerned do not overlap or raise competition concerns.

The CA does not provide a statutory period in which the parties must file their notification to the FCA.

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

Merger control legislation does not apply to intra-group restructuring measures or to credit institutions if the institutions acquire shares in an undertaking (i) for the purpose of sale, (ii) for the purpose of reorganising a distressed undertaking or securing claims against the undertaking, or (iii) in the exercise of the equity fund or capital financing business or by an undertaking whose sole purpose is to acquire interests in other undertakings and to manage such interests.

3.3 Is the merger authority able to investigate transactions where the jurisdictional thresholds are not met? When is this more likely to occur and what are the implications for the transaction?

The FCA does not investigate transactions *ex officio* when the corresponding thresholds are not met. In case a notification is filed even if it is not required, the FCA reviews the notification and clears the merger within the four-week phase I. Please note that such mergers cannot be implemented within the four-week reviewing period and costs (fees) are incurred. Therefore, the undertakings concerned should ensure prior to the transaction whether a merger is indeed notifiable.

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

If the parties execute a merger even though the FCA has not (yet) granted clearance, the statutory prohibition on implementation is violated. As a result, the transaction might be void and fines may be imposed up to a maximum amount of 10% of the total turnover of the undertaking concerned in the previous financial year.

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

Carve-outs are not explicitly provided in the Austrian merger control legislation; however, the completion of a merger in other countries might be possible in cases where the structure of the merger permits a clear delimitation, so that the impact of the merger on the Austrian market is not yet given. Such lack of impact on the Austrian market can also be achieved by means of so-called "hold-separate" agreements, in which case the merger in Austria is postponed. The competition authorities have a very restrictive practice in this regard and a close coordination with the competition authorities is therefore strongly recommended.

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

The CA does not include a statutory period in which notifications must be submitted to the FCA. In general, the notifying party files the notification without delay after signing the merger agreement. This stems from the fact that clearance of the merger is condition precedence for the implementation of the transaction and, therefore, a fast initiation of the merger proceeding is usually in the interest of all parties concerned.

The parties may also notify the merger even before the corresponding agreement is signed if at least a mere concentration plan (embracing the exact structure and timeline of the proposed transaction) is reflected in the filing and the parties thereby prove their sincere intent to complete the merger in the near future.

3.7 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 CA regulates a merger proceeding of one to two phases. Within phase I, the official parties are granted a four-week reviewing period in order to decide whether the merger shall be cleared or whether an in-depth investigation (phase II) before the CC shall be initiated. The four-week reviewing period can be extended to six weeks upon request of the notifying party to avoid the official parties initiating phase II, not because of competition concerns but due to lack of time. If the official parties do not apply for in-depth investigation, the merger is automatically cleared after the four-week (or six-week) reviewing period.

If clearance is required earlier, the undertakings concerned may request a waiver of in-depth investigation. If the merger does not raise any competition concerns and the undertakings concerned have comprehensively stated the reasons for the factual urgency of the implementation of the merger in their request, the official parties may waive their right to apply for an in-depth investigation and grant clearance before the statutory period of phase I has expired. The official parties may grant such a waiver no sooner than a 14-day period, during which third parties may submit their observations starting from the date of the announcement of the notification. Please note that the parties have no right to obtain such a waiver from the official parties.

Phase II lasts five months after the official parties applied for an in-depth investigation by the CC. This period can be extended to six months, which means that merger proceedings under the CA may take seven-and-a-half months overall until a decision in the first instance is made.

3.8 Is there any prohibition on completing the transaction before clearance is received or any compulsory waiting period has ended? What are the risks of completing before clearance is received? Have penalties been imposed in practice?

The implementation of a merger prior to receiving clearance constitutes a breach of the statutory prohibition of implementation. An exception to implement a merger before clearance in individual cases is not provided by legislation. Violations of the implementation prohibition may result in penalties (see question 3.4).

3.9 Is a transaction which is completed before clearance deemed to be invalid? If so, what are the practical consequences? Can validity be restored by a subsequent clearance decision?

Agreements are invalid as far as they contradict the prohibition of implementation. However, only rarely will the company purchase agreement itself contradict the implementation prohibition. The invalidity can therefore at most extend to the material transfer agreement, meaning the transfer of the shares in the undertaking concerned. The question of whether validity can be restored by subsequent filing of the merger notification is also not regulated but occasionally accepted by the FCA.

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

The FCA has published a merger notification form on its website. The form provides guidance in drafting the notification and specifies all information the parties must disclose to the merger control authorities and documents that must be attached.

3.11 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 no market is affected by the merger, a shortened notification can be prepared. The FCA considers a market to be affected if the transaction leads to (i) the creation or strengthening of a dominant position, (ii) horizontal overlaps resulting in a combined market share of at least 15%, or (iii) vertical overlaps resulting in a combined market share of at least 25%.

There is no informal way to speed up the clearance timeline. Upon request of the undertakings concerned, the official parties may waive their right to apply for an in-depth investigation if the merger does not raise any competition concerns.

3.12 Who is responsible for making the notification?

Each undertaking concerned by the transaction can file the notification to the FCA. A joint notification is permitted, but not required. In general, the acquiring undertaking files the notification.

3.13 Are there any fees in relation to merger control?

The filing fee in phase I amounts to EUR 6,000.

In phase II, court fees are fixed by the CC in each case at the end of the proceeding. The ceiling lies at EUR 34,000, depending on the economic importance of the merger, the complexity of the proceeding and the factual economic circumstances of the debtor. The CC further takes into account to what extent the debtor has given reason for the official act. Further costs may result from the involvement of an economic expert that will exceed the fixed court fee.

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

Rules governing a public offer have no impact on the merger control clearance process.

3.15 Will the notification be published?

The FCA publishes all merger notifications on its website. The announcement must contain at least the names of the parties concerned, a brief description of the proposed transaction, the nature of the merger and the business sectors affected.

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?

The FCA examines mergers on the basis of two parallel criteria, namely whether the merger creates or strengthens a dominant position or otherwise significantly impedes effective competition ("market dominance test"). The concept of market dominance is essentially based on non-existent or hardly existent competition or on reaching or exceeding threshold values, which triggers the legal presumption of a dominant position. In practice, the most important threshold is a market share of 30% in the relevant market. The second test is the Significant Impediment to Effective Competition Test ("SIEC test"), which originates from European competition law and was introduced as an additional test under the latest reform, the Austrian Cartel and Competition Law Amendment Act 2021 ("KaWeRÄG 2021"). The SIEC test focuses more on the economic approach to a proposed merger, according to which mergers are also to be prohibited below the market dominance threshold if a significant impediment to competition is expected. Both standards of review exist side by side and the SIEC test has by no means replaced the review of the creation or strengthening of a dominant position.

4.2 To what extent are efficiency considerations taken into account?

The FCA takes efficiencies into account to the extent that they prevent the merger from having an anti-competitive effect. The parties must state in the notification what the expected efficiencies are, how the expected efficiencies will be passed on to consumers, and why the efficiencies cannot be achieved in any other way than through the proposed merger.

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

The competition authorities shall not prohibit a merger, even if the requirements for prohibition are met, if the economic advantages substantially outweigh the disadvantages of the merger. Economic benefits include growth, innovation and full employment as key goals of the Austrian economic policy, as well as an increase in prosperity and improvement in the citizens' quality of life through job security, income growth and fair income distribution.

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

The FCA may provide third parties with requests for information ("RfIs") in order to verify the party's statements in the notification and to obtain more detailed information of the relevant markets. Such RfIs are no longer permitted after a request for in-depth investigations has been made by the official parties. Third parties might be competitors, suppliers, customers, institutions like the Austrian Economic Chamber or the Chamber of Labour, as well as regulators like the Energie-Control Austria.

In addition, any entrepreneur whose legal or economic interests are affected by the concentration may file written statements (i) in phase I to the official parties within 14 days from the announcement of the notification, whereby the submitting person does not have a right to any particular treatment of the statement, and (ii) in phase II to the CC in judicial review proceedings.

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

The FCA can take various investigative actions, in particular interviewing parties and witnesses but also sending out RfIs to undertakings or institutions. The FCA may also involve experts in the proceedings and request the disclosure of documents from the parties concerned. If the prohibition of execution is violated, house searches can also be carried out.

In case the notification contains incorrect or misleading information, the FCA may impose fines up to a maximum amount of 1% of the total turnover of the notifying undertaking in the previous financial year. In addition, daily penalty payments up to a maximum amount of 5% of the average daily turnover achieved in the previous financial year may be imposed to enforce RfIs or the tolerance of a house search.

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

Third parties have no right to access the files kept by the FCA; however, the FCA may in phase I send copies of the notification or parts thereof to competitors, suppliers and customers of the parties concerned for them to comment. For these purposes, the FCA requests the parties to enclose a non-confidential version of the notification that does not contain any business secrets.

In phase II, business secrets of the parties concerned are also protected from access by third parties. Third parties may only be granted access to court files if all parties of the phase II proceeding consent.

However, governmental agencies and foreign merger control authorities may also request the competition authorities to provide administrative assistance, in which case they might be able to obtain access to notification materials.

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

5.1 How does the regulatory process end?

In most merger cases, the regulatory process ends with the expiration of the four-week (or six-week) phase I reviewing period. The FCA provides the notifying party with a clearance notice (which is not a formal clearance decision) one working day after expiry of the above statutory period. In rare cases, the regulatory process ends in phase I prior to the expiration of the above period (i) if the official parties have waived their right to request an in-depth investigation before the CC, or (ii) if the notifying party withdraws its notification.

If at least one of the official parties has requested an in-depth investigation and therefore initiated phase II before the CC, the regulatory process may end with (i) the approval of the transaction (which can be subject to conditions and/or requirements), (ii) the expiration of the phase II reviewing period without a decision having been made by the CC, (iii) the prohibition of the transaction, (iv) the decision of the CC that the transaction is not subject to notification, (v) the withdrawal of the notification by the notifying party, or (vi) the withdrawal of the request of the official parties that initiated phase II.

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

In case of competition concerns with regard to a merger, the official parties can negotiate remedies in the form of commitments with the parties concerned in phase I. These remedies may go beyond the remedies imposed by the CC in phase II but have the advantage that the initiation of phase II might be avoided, or the official parties might withdrawal their (already filed) request for an in-depth investigation. As a result, the parties concerned may obtain clearance earlier.

In addition, the CC may impose remedies (conditions or obligations) in its clearance decision. In the event of a significant change in circumstances after the CC has declared its decision, the CC may upon the request of a party concerned amend or annul the remedies.

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

Remedies can also be imposed in foreign-to-foreign mergers; however, please note that in cases where remedies were imposed, the undertakings concerned usually had a significant presence on the Austrian market.

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

The CA does not provide statutory periods for the commencing of negotiations of remedies. It is recommended to start negotiations early in phase I in order to avoid the initiation of 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?

The merger authorities do not have a standard approach to the terms and conditions to be applied to the divestment. Remedies must be negotiated in each individual case.

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

The parties may complete the merger and must comply with the agreed remedies within the deadlines set forth by the competent authority.

5.7 How are any negotiated remedies enforced?

The CC can impose fines of up to a maximum of 10% of the worldwide turnover achieved in the previous financial year on an undertaking that did not comply with the negotiated remedies. Furthermore, the CC may, at the official parties' request, take measures to eliminate or mitigate the effects of the merger.

5.8 Will a clearance decision cover ancillary restrictions?

A clearance decision also covers all the ancillary restrictions that are directly related to and necessary for the merger, without the authorities having to examine them on a case-by-case basis. In principle, ancillary restrictions must be reviewed by the undertakings concerned themselves. The Austrian merger authorities are not obligated to review and approve ancillary restrictions on an individual basis.

5.9 Can a decision on merger clearance be appealed?

Merger decisions of the CC are subject to appeal by the official parties and the notifying undertakings. The appeal is heard by the Austrian Supreme Court.

5.10 What is the time limit for any appeal?

The parties may appeal against the decision of the CC to the Austrian Supreme Court within four weeks of its receipt. The other parties have the right to respond to the appeal within an additional four weeks. After receipt of the files, the Austrian Supreme Court must decide on the appeal within two months.

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

The time limit for imposing a fine is five years after termination of the infringement. However, this time period shall be interrupted as soon as at least one undertaking involved in the infringement is notified of an act of the FCA aimed at investigating the infringement. With each interruption, the time limit shall start once again. It shall expire in any case 10 years after the termination of the infringement. The duration of proceedings before a court shall not be included in this time period.

6 Miscellaneous

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

The FCA has an ongoing and close cooperation with other merger authorities within the European Competition Network ("ECN"). There is an especially close cooperation between the Austrian and the German competition authorities, who just published a merger control guidance on the transaction value threshold in Austria and Germany. Additionally, the FCA is part of multiple Europe-wide working groups, such as the ECN Digital Markets Working Group or the ECN Merger Working Group.

There are also several international forums for the discussion of competition policy issues that the FCA is part of: the United Nations Conference on Trade and Development ("UNCTAD"); the Organisation for Economic Co-operation and Development ("OECD"); and the International Competition Network ("ICN").

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

With the KaWeRÄG 2021 providing a second domestic turnover threshold of more than EUR 1 million for at least two undertakings involved in the transaction, a significant decrease of 44% of the 653 submitted notifications in 2021 is expected in 2022. This should enable the competition authorities to focus on merger cases with a significant relevance to the Austrian market. As at 24th October 2022, the FCA has received 284 merger notifications. Phase II is generally only initiated for a small number of notifications; a prohibition remains the exception.

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

Currently, there are no proposals for any reforms of the merger control regime. In 2021, the Austrian legislator reformed the Austrian competition and cartel law with the KaWeRÄG 2021 implementing the EU Directive (EU) 2019/12 ("ECN+ Directive") and amending the Cartel and Competition Act.

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

The answers are up to date as at October 2022.

7 Is Merger Control Fit for Digital Services & 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 acknowledged the importance of seeing mergers in connection to digitalisation by referring to an article written by the Director General for Competition about e-commerce and cartel law in the FCA's yearly activity report (*Harsdorf-Borsch*, Handbook of Digitalization (*Zankl*), *E-Commerce und Kartellrecht* (2021)).

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)?

In the course of the KaWeRÄG 2021, the following changes were made with regard to digital mergers:

- typical market dominance criteria relevant to the platform economy were added to the definition of market dominance, namely intermediation power, access to competitively relevant data and the benefits derived from network effects;
- for intermediaries active in multi-sided digital markets, not only the maintenance but also the reliance on the establishment of business relationships in the face of otherwise threatening serious economic disadvantages fulfils the criteria of relative market dominance; and

- a special declaratory proceeding was introduced to enable the official parties and the regulators to determine the dominant position of an undertaking operating on a multi-sided digital market in the event of a justified interest.

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

The merger between Meta Platforms, Inc. (formerly Facebook, Inc., "Meta") and GIPHY, Inc. ("GIPHY") shows how digital mergers are difficult to deal with. Undertakings active on the digital market are mostly operating globally and often have a dominant position on the relevant market. In this instance, Meta has very high market shares and benefits from relatively high barriers to market entry. This is one of the rare cases where the FCA referred the merger to the CC for a phase II in-depth investigation due to competition concerns.

In its decision, the CC cleared the merger, but imposed the following remedies: (i) the non-discriminatory access to GIPHY's services for a period of five years; and (ii) the establishment of an additional GIF provider for a period of seven years. An independent regulatory trustee will monitor them.

Both the FCA and the FCP appealed against this decision because they considered the conditions insufficient. The Austrian Supreme Court did not uphold these appeals. The merger may, therefore, be implemented in Austria with the above-mentioned remedies.

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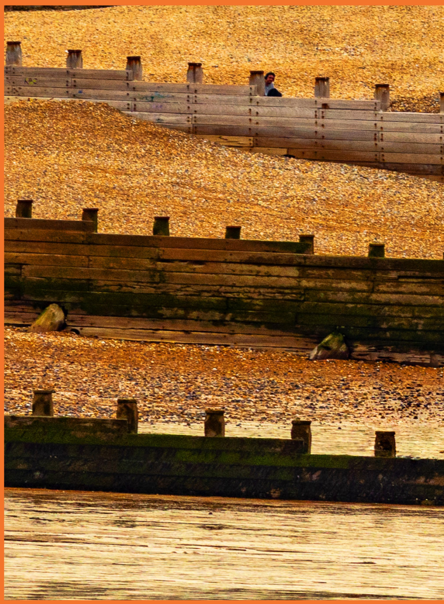

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