Merger Control 2025

21st Edition

Contributing Editors:

Nigel Parr & Steven Vaz

Ashurst LLP

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Expert Analysis Chapters

1 Catch-22 and Other Issues in Merger Control in Europe
Nigel Parr, Gabriele Accardo, Fiona Garside & Javier Torrecilla, Ashurst LLP

11 Loss of Potential Competition, Ecosystems, and AI – A New Frontier for EU and UK Merger Control
Ben Forbes & Mat Hughes, AlixPartners

23 A Year in Review: All Change, Please? Some Key Developments in UK Merger Control, 2024
Neil Baylis & Emma Waterhouse, CMS

Q&A Chapters

30 **Albania**
Srđana Petronijević, Danijel Stevanović & Filip Zafirovski, Schoenherr

40 **Austria**
Dr. Valerie Mayer, Herbst Kinsky Rechtsanwälte GmbH

49 **Bosnia & Herzegovina**
Srđana Petronijević & Danijel Stevanović, Schoenherr
Minela Šehović, independent attorney-at-law in cooperation with Schoenherr

59 **Brazil**
Gesner Oliveira, Rafael Oliveira, Jéssica Maia & José Matheus Andrade, GO Associados Consultoria Empresarial

69 **Canada**
Mark Katz, Umang Khandelwal & Teraleigh Stevenson, DAVIES

81 **China**
Liang Ding, DeHeng Law Offices

96 **Croatia**
Ana Mihaljević, Schoenherr

105 **European Union**
Ken Daly, Steve Spinks & Iva Todorova, Sidley Austin LLP

122 **Finland**
Anna Roubier, HPP Attorneys

132 **France**
Christophe Lemaire & Guillaume Vatin, Ashurst LLP

146 **Germany**
Dr. Tatjana Mühlbach & Dr. Andreas Boos, BUNTSCHECK Rechtsanwaltsgesellschaft mbH

157 **Greece**
Efthymios Bourtzalas, MSB Associates

168 **India**
Neelambera Sandeepan & Charanya Lakshmikumaran, Lakshmikumaran & Sridharan

177 **Japan**
Ryohei Tanaka, Tsuyoshi Isshiki, Nobuaki Ito & Haruki Koyama, Nagashima Ohno & Tsunematsu

187 **Korea**
John H. Choi & Sangdon Lee, Shin & Kim LLC

195 **Kosovo**
Filip Zafirovski, Schoenherr

204 **Malaysia**
Yuki Hashimoto, Farhatun Najad Zulkipli, Heng Zhen Hung (Zed) & Ahmad Sharil Ramli, One Asia Lawyers

214 **Mexico**
Gustavo Alcocer & Luis E. Astorga Díaz, OLIVARES

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

231 **North Macedonia**
Srđana Petronijević, Danijel Stevanović, Filip Zafirovski & Zoran Kobal, Schoenherr

241 **Portugal**
Pedro de Gouveia e Melo & Dzhamil Oda, Morais Leitão, Galvão Teles, Soares da Silva & Associados

255 **Romania**
Adrian Şter & Raluca Maxim, 360Competition

265 **Serbia**
Srđana Petronijević, Danijel Stevanović, Nina Rašljanin & Zoran Kobal, Moravčević, Vojnović i Partneri AOD Beograd in cooperation with Schoenherr

275 **Singapore**
Lim Chong Kin & Dr. Corinne Chew, Drew & Napier LLC

288 **Slovakia**
Ivan Gašperec & Jozef Boledovič, NOMUS

297 **Sweden**
Peter Forsberg & Philip Thorell, Snellman Advoktabyrå AB

305 **Switzerland**
David Mamane & Amalie Wijesundera, Schellenberg Wittmer Ltd.

315 **Taiwan**
Stephen Wu, Yvonne Y. Hsieh & Wei-Han Wu, Lee and Li, Attorneys-at-Law

Q&A Chapters Continued

324 **Thailand**
Pitch Benjatikul & Angsuwee Saeiew,
Anderson Mōri & Tomotsune (Thailand) Co., Ltd.

335 **Turkey/Türkiye**
Dr. Gönenç Gürkaynak & Öznur İnanılır,
ELIG Gürkaynak Attorneys-at-Law

350 **United Kingdom**
Nigel Parr, Duncan Liddell, Steven Vaz &
Fiona Garside, Ashurst LLP

371 **USA**
Jim Lowe & Edward W. Sharon, Sidley Austin LLP

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

From the Publisher

Welcome to the 21st edition of *ICLG – Merger Control*, published by Global Legal Group.

This publication provides corporate counsel and international practitioners with comprehensive jurisdiction-by-jurisdiction guidance to merger control laws and regulations around the world, and is also available at www.iclg.com.

The publication begins with three expert analysis chapters written by Ashurst LLP, AlixPartners, and CMS that provide further insight into merger control developments.

The question and answer chapters, which in this edition cover 33 jurisdictions, provide detailed answers to common questions raised by professionals dealing with merger control laws and regulations.

As always, this publication has been written by leading merger control lawyers and industry specialists, for whose invaluable contributions the editors and publishers are extremely grateful.

Global Legal Group would also like to extend special thanks to contributing editors Nigel Parr & Steven Vaz of Ashurst LLP for their leadership, support and expertise in bringing this project to fruition.

Jon Martin
Publisher
Global Legal Group

Austria

Herbst Kinsky Rechtsanwälte GmbH

Dr. Valerie Mayer

1 Relevant Authorities and Legislation

1.1 Who is/are the relevant merger authority(ies)? If relevant, please include details of: (i) independence from government; (ii) who the senior decision-makers are (e.g. Chair, Chief Executive, Chief Economists), how long they have been in position, and their professional background (lawyer, economist, academia, industry, professional services, politics, etc.); and (iii) any relevant key terms of appointment (e.g. duration of appointment) of those in leadership positions (such as Chair, Chief Executive, and Chief Economist).

The relevant Austrian merger authorities are:

- **Federal Competition Authority** (*Bundeswettbewerbsbehörde*, "FCA")
  The FCA is headed by the Director General Dr. Natalie Harsdorf, LL.M., since her appointment in November 2023 for a period of five years. Prior, she managed the FCA in her role as Deputy Director General and Head since December 2021. She has been working with the FCA since 2009. The FCA is independent and not bound by any instructions.
- **Federal Cartel Prosecutor** (*Bundeskartellanwalt*, "FCP")
  The FCP, *Mag.* Heinz Ludwig Majer, MBA, has been appointed in September 2020 for a period of five years. Before, he was Deputy FCP since 2018, judge at the Commercial Court Vienna, worked at the Federal Ministry of Justice and for the European Commission. The FCP has to report to the Federal Minister of Justice.
  The FCA and the FCP (together the "official parties") share jurisdiction in Austrian phase I merger control proceedings. Each official party has the right to request an in-depth phase II merger proceeding before the Cartel Court. In such phase II, the FCA and the FCP are both parties to the proceeding.
- **Cartel Court** (*Kartellgericht*, "CC")
  The CC consists of two professional judges (one as chairperson) and two expert lay judges; one is a representative of the Austrian Federal Economic Chamber and the other a representative of the Chamber of Labour. If the vote of the four judges results in a tie, the chairperson has the casting vote.
- **Supreme Cartel Court** (*Kartellobergericht*, "HCC")
  The 16th Senate of the HCC consists of three professional judges (one as chairperson) and two expert lay judges as representatives of the Austrian Federal Economic Chamber and the Chamber of Labour. The HCC may also decide in form of a reinforced senate with seven professional judges and two expert lay judges. However, the HCC has never made use of deciding as a reinforced senate yet.
  The CC decides in Austrian phase II merger proceedings, whereby its decisions can finally be challenged before the HCC. Both the professional judges of the CC and the HCC are appointed for an indefinite period, while the lay judges are appointed for a period of five years. The professional and lay judges act independently and free from instructions.

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 Foreign Direct Investment ("FDI")-Screening Regulation and 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 headquarter outside the EU, EEA and Switzerland or a natural person who is not an EU, EEA or Swiss citizen, acquires a specific amount of voting 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 merger may be approved under conditions and requirements or prohibited if the merger poses a threat to security or public order. An exemption from such approval requirement just applies to the investment in microenterprises including start-ups with (i) fewer than 10 FTEs, and (ii) an annual turnover or an annual balance sheet total of less than EUR 2 million.

In order to prevent distortions in the internal market due to third-country subsidies, foreign mergers may also be notifiable to the EC under the Foreign Subsidies Regulation ("FSR") – if necessary, also in addition to a merger control and FDI procedure – if in the process:

- at least one of the merging companies, the acquired company or the joint venture is established in the EU and has an aggregate turnover in the EU of at least EUR 500 million; and
- all undertakings concerned in the concentration have received financial contributions totalling more than EUR

50 million from third countries in the three years preceding the conclusion of the agreement, the publication of the takeover bid or the acquisition of a controlling interest.

If the EC comes to the conclusion that there is indeed a third-state subsidy distorting the internal market, the merger will be prohibited.

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

The CA contains special provisions for media mergers (*Medienzusammenschlüsse*), which apply to transactions including media undertakings, media services and media support undertakings.

Other regulatory approval requirements apply 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 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?

The following transactions and 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;
- any other association of undertakings which gives one undertaking the possibility of directly or indirectly exercising a decisive influence over another 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 definition of the term "control". However, transactions providing one undertaking with the possibility of directly or indirectly exercising a decisive influence over another undertaking form a merger according to Section 7 CA. In practice, the term "exercising decisive influence" is interpreted in line with the control concept of Art 3 (2) EUMR and the EC's Consolidated Notice. Therefore, the term "control" is also used under Austrian law and 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.

According to European law, a distinction is made between sole and joint control:

- Sole control may be exercised if a single shareholder can determine strategic decisions in an undertaking (positive control) or cannot enforce such decisions but can prevent them through veto rights (negative control). The most recent case of acquiring sole control lies in the acquisition of a voting majority, which can also be granted to a minority shareholder.
- Joint control is exercised by two or more undertakings if a single shareholder cannot make strategic decisions about the controlled undertaking. The jointly controlling shareholders are much more dependent on each other. Joint control may be established, e.g. by the contractual granting of veto rights or by the joint exercise of voting rights.

2.2 Can the acquisition of a minority shareholding or other form of influence amount to a "merger"?

According to Section 7 CA, the acquisition of a minority shareholding of 25% or more constitutes a notifiable 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 (e.g. by granting voting rights equivalent to a shareholding of at least 25%), or (ii) irrespective of the shareholding, the acquirer will exercise decisive influence over the target undertaking.

2.3 Are joint ventures subject to merger control?

Joint ventures are subject to Austrian merger control, if the formal criteria of a concentration (see question 2.1 above) are satisfied. 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 – other than the EUMR – only applies to greenfield joint ventures (newly founded companies). The provisions for an asset or share deal apply if pre-existing undertakings form a joint venture during 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?

Section 9 CA sets forth specific thresholds, whereby Section 22 CA determines the rules for calculating turnover.

Turnover thresholds under Section 9 CA

1. **General thresholds**
   A merger notification obligation applies according to Section 9 para 1 CA if the undertakings concerned achieved the following turnovers in the financial year before the signing of the transaction:
   - in total more than EUR 300 million worldwide;
   - at least two undertakings more than EUR 5 million worldwide each;
   - in total more than EUR 30 million in Austria; and
   - at least two undertakings more than EUR 1 million in Austria each.
2. **Exemption**
   Even if the thresholds under point 1 are met, a merger notification is not required according to Section 9 para 2 CA if in the previous financial year:
   - only one of the undertakings concerned achieved a turnover exceeding EUR 5 million in Austria; and

- the combined aggregate turnover of the other undertakings concerned did not exceed a total of EUR 30 million worldwide.

3. **Special thresholds for media mergers**
According to Section 9 para 3 CA the turnover of media undertakings and media services must be multiplied by 200 and the turnovers of media support undertakings by 20.

4. **Transaction value threshold**
However, mergers not fulfilling the thresholds under point 1 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 turnover of more than EUR 300 million worldwide in the previous financial year;
   - the undertakings concerned achieved, in total, a turnover of more than EUR 15 million in Austria 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 above-mentioned "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.

Turnover calculation under Section 22 CA

1. **General turnover calculation rules**
Section 22 CA determines the following general rules on calculating turnover of each undertaking involved:
   - The total turnover of the undertakings involved must be considered for the calculation. The relevant turnover is always a net turnover as only this reflects the real economic weight of the undertaking. Sales deductions, such as rebates, taxes and duties, must therefore be deducted. No distinction is made between product and service turnovers.
   - The turnover of the following affiliated companies (group turnover) must be attributed to the undertakings involved, whereby turnover between affiliated companies (intra-group turnover) must be excluded:
     - Undertakings in which the participating undertakings are directly or indirectly affiliated through a shareholding of at least 25% (direct and indirect parent companies, subsidiaries and sister undertakings). However, any further shareholding subsequent to a mere minority shareholding only has to be taken into account if it is a majority shareholding or a minority shareholding that is providing controlling influence.
     - Undertakings in which at least half of the members of the management board or the supervisory board have the same personal status as the management board or the supervisory board of the undertaking involved.
     - Undertakings over which the participating undertaking can directly or indirectly exercise a controlling influence in any other way (see question 2.2 above).

   For the geographical attribution of turnover, the place of the location of the customer at the time of the transaction is decisive. Turnover generated in Austria is therefore deemed to be turnover generated with goods or services for companies or consumers in Austria.

2. **Specific calculation rules**
For credit institutions and insurance companies, deviating rules concerning the calculation of turnover apply and specific income items replace turnovers.
For credit institutions, the following income items must be considered: interest income and similar income, income from shares, other equity and variable-yield securities, income from investments and income from shares in affiliated companies, commission income, net income from financial transactions and other operating income.
In the case of insurance companies, premium income takes the place of sales revenue.

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 likely caught by Austrian merger control legislation 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 (see question 2.4 above).

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 turnover thresholds of the EUMR are met. In such cases, the merger falls under the jurisdiction of the EC ("one-stop-shop principle"), ensuring that mergers with cross-border effects are reviewed at a European level.

An exception to the "one-stop-shop principle" ("exclusivity principle") applies to media mergers that are subject to European merger control. In order to maintain media diversity, such media mergers also have to be notified to the FCA.

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 on the conditions under which several (successive) transactions are considered a single concentration is limited. 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. However, transactions that are closely linked in terms of time and economic purpose and that have the same economic objective are generally considered to be a single transaction.

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?

If the relevant thresholds under the CA are met, a notification is mandatory. The CA does not provide a statutory period in which the parties must file their notification to the FCA. The notification can be submitted either pre- or post-signing, but in any case in good time prior to the closing of the transaction.

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 (a) intra-group restructuring measures, or (b) credit and financial 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* if the relevant thresholds are not met. If a notification is filed even though it is not required, the FCA will review the notification and clear the merger within the four-week phase I. Please note that such mergers cannot be implemented within the four-week reviewing period and filing fees of EUR 6,000,-- 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 official parties have not (yet) granted clearance, the statutory prohibition on implementation is violated. As a result, the CC may (i) declare that the transaction has been implemented in breach of the standstill obligation, (ii) impose a fine of up to 10% of the infringing party/parties' worldwide group turnover in the last financial year, and (iii) order measures to terminate the unlawful implementation of the merger (only if no subsequent clearance is obtained).

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

Carve-outs are not explicitly provided under 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 a 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 relevant agreement has been signed (pre-signing) 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 intention to complete the merger in the near future.

Besides, in complex proceedings, a pre-notification of the merger to the official parties can be considered prior to the submission of the official merger notification.

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:

Phase I

In 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 before the CC (phase II) shall be initiated. Upon request of the notifying party, the four-week reviewing period can be extended to a total of six weeks. Such request may be helpful if the official parties need more time for their investigations and there is still a valid chance that the merger can be cleared in phase I. If the official parties do not apply for in-depth investigations, 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 14-days after the date of the announcement of the notification on the website of the FCA to give third parties the opportunity to provide (critical) statements to the merger case. Please note that the parties have no right to obtain such a waiver from the official parties.

Phase II

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 (phase I and phase II) under the CA may take seven-and-a-half months overall until a decision in the first instance is issued.

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. The legislation does not provide an exception for the implementation of a merger before clearance in individual cases is granted. Violations of the implementation prohibition may result in penalties (see question 3.4 above).

3.9 Is a transaction which is completed before clearance is received 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 share purchase agreement itself contradict the implementation prohibition. Therefore, the invalidity can at most extend to the material transfer of the shares in the undertaking concerned (so-called "closing"). 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 (https://www.bwb.gv.at/). The form provides guidance in drafting the notification and specifies all information the parties must disclose to the merger control authorities and the 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 process. 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 (see question 3.7).

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 prepares and 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 (flat).

In phase II, court fees are fixed by the CC on a case-by-case basis at the end of the proceeding. The ceiling lies at a maximum of 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 considers to what extent the debtor has given reason for the official act. Further costs may result from the involvement of an economic expert (which often 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. However, specific regulations under the Austrian Stock Exchange Act 2018 (*Börsegesetz 2018*) may apply.

3.15 Are notifications published?

The FCA publishes all merger notifications on its website (https://www.bwb.gv.at/). The announcement contains:

- the names of the merging parties;
- a short description of the proposed transaction;
- the affected business sector(s);
- the date of the submission of the filing; and
- the date of the end of phase I.

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 have 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?

Third parties are not parties to the proceedings and do not have access to the file. However, the FCA may provide third parties with requests for information ("RfIs") to verify the party's statements in the notification and to obtain more detailed information about 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 such as 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 share 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.

To protect commercially sensitive information and trade secrets between the parties involved, the submission and exchange of attorney-confidential versions of the filing and further statements and papers shared with the authorities, the CC and the parties involved are highly recommended.

However, governmental agencies and foreign merger control authorities may also request the competition authorities to provide administrative assistance. In such cases, they might 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 two notices (one from each official party) on the day after the expiration 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 requirements and/or restrictions), (ii) the prohibition of the transaction, (iii) the decision of the CC that the transaction is not subject to notification, (iv) the withdrawal of the notification by the notifying party, or (v) the withdrawal of the request of the official parties who 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 regarding a merger, the official parties can negotiate remedies in the form of commitments with the parties concerned in phase I. All parties can propose such remedies (the official parties but also the merging parties). These remedies may go beyond the remedies imposed by the CC in phase II, but have the advantage that the initiation of a phase II might be avoided. As a result, the parties concerned may obtain clearance earlier.

In addition, the CC may impose remedies in its clearance decision. Such remedies are usually based on suggestions of an economic expert appointed by the CC in phase II. 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 Are there any (formal or informal) policies on the types of remedies which the authority will accept, including in relation to vertical mergers?

The CA itself does not contain any provision on which remedies are preferred by the official parties and the CC. In practice, the CC distinguishes between (i) requirements, namely (a) mere behavioural requirements, e.g. location guarantees and supply obligations, and (b) structural requirements, e.g. sales of business units, and (ii) restrictions, i.e. the merely partial clearance of the merger. In the past, the CC has often considered behavioural requirements sufficient; however, it has recently focused (also) on structural requirements, particularly in the case of horizontal mergers. Restrictions have been imposed in the past, but usually in addition to requirements.

5.4 To what extent have remedies been imposed in foreign-to-foreign mergers? Are national carve-outs possible and have these been applied in previous deals?

Remedies may apply to foreign-to-foreign mergers in the same manner as in domestic mergers. Taking into account the principle of proportionality domestic carve-outs are possible and have been imposed in the past by the FCA and the CC; most recently in CC, 13.06.2023, 127 Kt 1, 2/23v, *Wienerberger AG/ Terreal Holding S.A.S.*

5.5 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. If a transaction raises serious competition concerns, a pre-notification of the merger (before submitting the merger filing to the FCA) might be helpful. However, irrespective of a pre-notification, in complex cases it might make sense to contact the competent case handler early in phase I to discuss possible remedies in order to avoid the initiation of phase II.

5.6 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.

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

The parties may complete the merger before the remedies have been complied with. However, the parties must comply with the agreed remedies and the deadlines set out therein.

5.8 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.

5.9 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.

5.10 Can a decision on merger clearance be appealed?

Each official party and the notifying undertakings can appeal a clearance decision of the CC. The appeal is heard by the HCC.

5.11 What is the time limit for any appeal?

The parties may appeal against the decision of the CC to the HCC 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 HCC must decide on the appeal within two months.

5.12 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 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 published a merger control guidance on the transaction value threshold in Austria and Germany together. 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 Cooperation 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?

Facts about merger control enforcement in Austria in 2023:

- 294 mergers were notified;
- 290 mergers were completed in phase I:
  - 288 mergers were cleared without remedies;
  - two mergers were cleared subject to remedies; and
  - in three merger cases, the review period was extended to a total of six weeks; and
- four mergers entered phase II (none of these proceedings were completed in 2023).

Please be informed that a 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 2024.

7 Is Merger Control Fit for Digital Services & Products?

7.1 In your view, are the current merger control tools suitable for dealing with digital mergers?

Digital markets differ from traditional markets. Merger control rules that are based on turnover often do not provide sufficient protection, as digital companies can achieve strong market positions without high turnover, for example through network effects and large numbers of users. To close this gap, Austria introduced a transaction value threshold in 2017, which must be taken into account in addition to the turnover thresholds. Furthermore, market definition in the digital sphere is complex because traditional tools, such as the hypothetical monopolist test (SSNIP test – "*Small but Significant and Non-transitory Increase in Price*") are not always applicable to zero-price services or platform-based business models (due to the lack of prices to be increased). Alternatively, the SSNDQ test ("*Small but Significant Non-transitory Decrease in Quality*") or the SSNIC test ("*Small but Significant Non-transitory Increase in Cost*") may be used. While the SSNDQ test analyses quality changes, the SSNIC test analyses cost changes. Furthermore, Austria introduced the SIEC test in 2022, which pays more attention to competitive effects. This is particularly relevant in digital markets, where precise market definitions are often complex (see question 4.1 above).

Digital markets also require adapted or new "*theories of harm*" regarding possible competitive harm caused by mergers. A distinction is made between (i) horizontal theories of harm, (ii) vertical theories of harm, and (iii) data conglomerate theories of harm. The reason for the lack of applicability on digital mergers are, e.g. network effects, zero-price services and data-based business models mean that traditional theories of harm do not always apply and innovation and quality losses are potentially greater dangers than price increases.

As a result, however, there is a need to expand and adapt existing merger control instruments to take account of the dynamic and data-driven nature of digital markets.

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

- the implementation of the SIEC test as an additional test (see question 4.1 above);
- the 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.

In addition, the EC's Market Definition Notice 2024, C/2024/1645, provides guidance in defining digital markets.

7.3 In your view, have any cases highlighted the difficulties of dealing with digital mergers? How has the merger authority dealt with such difficulties?

The mergers between Meta Platforms, Inc. (formerly Facebook, Inc., "Meta") and GIPHY, Inc. ("GIPHY", CC, 22.07.2021, 28 Kt 6/21y – *Facebook (Meta)/Giphy*) and Salesforce and Tableau (CC, 22.04.2021, 27 Kt 9/21g – *Salesforce/Tableau*) demonstrate the difficulties of dealing with digital mergers. Undertakings active on digital markets are mostly operating globally and often have a dominant position on the relevant market.

With regard to *Meta/GIPHY*, 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 HCC did not uphold these appeals. The merger was therefore implemented in Austria with the above-mentioned remedies.

In *Salesforce/Tableau*, the CC stated that a significant share of a market or segment could create significant domestic activity. As the merger was not notified, a fine was imposed. The target undertaking had sufficient domestic effect (a market share of 5–10% in the software segment for modern business intelligence platforms) and thus met the transaction value threshold introduced by the KaWeRÄG 2017 (see question 4.1 above).

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Valerie is specialised in antitrust law, with a strong focus on merger control, and in foreign direct investment law. Herbst Kinsky's antitrust and FDI team has grown strongly in the recent past and has gained significant new clients. Valerie advises her clients on the planning, coordination and execution of national and international M&A transactions from an antitrust and FDI perspective, including the obtaining of the required regulatory approvals. In this context, she represents clients before the competent Austrian competition and FDI authorities and courts but also before the European commission. Besides, Herbst Kinsky has built up an extensive network consisting of international partner law firms.

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