THE MERGER CONTROL REVIEW

FOURTEENTH EDITION

Editor
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PREFACE

Pre-merger competition review has advanced significantly since its creation in 1976 in the United States. As this book evidences, today almost all competition authorities have a notification process in place – with most requiring pre-merger notification for transactions that meet certain prescribed minimum thresholds. Additional jurisdictions such as Malaysia are continuing to consider imposing mandatory pre-notification regimes, and in the meantime can assert some jurisdiction to review certain transactions under their conduct laws and for specific sectors (e.g., aviation, communications). The intended readership of this book comprises both in-house and outside counsel who may be involved in the competition review of cross-border transactions.

Given the ability of most competition agencies with pre-merger notification laws to delay, and even block, a transaction, it is imperative to take each jurisdiction – small or large, new or mature – seriously. For instance, the international business community had a wake-up call when, in 2009, China blocked the Coca-Cola Company's proposed acquisition of China Huiyuan Juice Group Limited and imposed conditions on four mergers involving non-China-domiciled firms. In *Phonak/ReSound* (a merger between a Swiss undertaking and a Danish undertaking, each with a German subsidiary), the German Federal Cartel Office blocked the entire merger, even though less than 10 per cent of each of the undertakings was attributable to Germany. In the United Kingdom, the Competition and Markets Authority (CMA) has effectively blocked transactions in which the parties question its authority. It is imperative, therefore, that counsel develop a comprehensive plan before, or immediately upon, execution of an agreement concerning where and when to file a notification with competition authorities regarding such a transaction. To this end, this book provides an overview of the process in 25 jurisdictions, as well as a discussion of recent decisions, strategic considerations and likely developments.

Some common threads in institutional design underlie most of the merger review mandates, although there are some outliers and nuances that necessitate careful consideration when advising a client on a particular transaction. Almost all jurisdictions vest exclusive authority to review transactions in one agency. The United States is now the major exception in this regard (China having consolidated its three antitrust agencies into one agency in 2018). Most jurisdictions provide for objective monetary size thresholds (e.g., the turnover of the parties, the size of the transaction) to determine whether a filing is required. Germany amended its law to ensure that it has the opportunity to review transactions in which, although the parties' turnovers do not reach the threshold, the value of the transaction is significant (e.g., social media, new economy, internet transactions). Other jurisdictions are also focused on ensuring that acquisitions involving smaller internet, online and data companies or, in other high-technology settings, a nascent competitor, do not escape review.

Newly adopted laws have tried to vest jurisdiction on these transactions by focusing on the 'value of the consideration' rather than turnover for acquisitions of nascent firms, particularly in the digital economy (e.g., in Austria and Germany). Some jurisdictions have also adopted a process to call in transactions that fall below the thresholds, but where the transaction may be of competitive significance. For instance, the Japan Federal Trade Commission (JFTC) has the ability to review and take action in non-reportable transactions (see discussion of *Google/Fitbit* in the International Merger Remedies and Japan chapters), and has developed guidelines for voluntary filings. Note that the actual monetary threshold levels can vary in specific jurisdictions over time. To provide the ability to review acquisitions of nascent but potentially important rivals, the European Commission (EC) has adopted potentially the most significant change in its rules: to use the referral process from Member States to vest jurisdiction in transactions that fall below its thresholds but that could have Community-wide significance. In one such matter, *Illumina/GRAIL*, the EC invited national competition authorities to request a referral of the transaction, even though it did not meet the review thresholds of the EU Merger Regulation or any national merger control rules (in fact, GRAIL had no sales at all in the European Union). At the time of writing, according to reports, the EC has since accepted Article 22 referral requests in three other cases (*Meta/Kustomer*, *Viasat/Inmarsat* and *Cochlear/Oticon Medical*), although in each of these the transaction triggered the national merger control thresholds in at least one EU Member State.

There are some jurisdictions that still use 'market share' indicia (e.g., Bosnia and Herzegovina, Colombia, Lithuania, Portugal, Spain, Ukraine and the United Kingdom). Most jurisdictions require that both parties have some turnover or nexus to their jurisdiction; however, there are some that take a more expansive view. For instance, in Poland, a notification may be required even though only one of the parties is present and, therefore, there may not be any effect on competition in Poland. Turkey recently issued a decision finding that a joint venture (JV) that produced no effect on Turkish markets was reportable because the JV's products 'could be' imported into Turkey. In Serbia, there is similarly no 'local' effect required. Germany also takes an expansive view by adopting as one of its thresholds a transaction of 'competitively significant influence'. Although a few merger notification jurisdictions remain 'voluntary' (e.g., Australia, Singapore, the United Kingdom and Venezuela), the vast majority impose mandatory notification requirements. Moreover, in Singapore, the transaction parties are to undertake a self-assessment of whether the transaction will meet certain levels and, if so, should notify the agency to avoid a potential challenge by the agency.

Although in most jurisdictions the focus of the competition agency is on competition issues, some jurisdictions have a broader mandate. For instance, the 'public interest' approach in South Africa expressly provides for consideration of employment matters, local enterprises and procurement, and for economic empowerment of the black population and its participation in the company. Many of the remedies imposed in South Africa have been in connection with these considerations. Notably, the current leadership at the US antitrust authorities have similarly suggested that their mandate under the antitrust laws is broader than the traditional focus on consumers and consumer welfare to include impact on labour, diversity and other considerations. It is unclear at this point how this shift will affect enforcement decisions and judicial challenges. Although a growing number of jurisdictions have separate regulations and processes for addressing foreign entity acquisitions when national security or specific industrial sectors are involved, in Romania, for example, competition law provides that the government can prohibit a merger if it determines that the merger could potentially affect national security.

Some jurisdictions are exempt from notification (e.g., Ecuador) or have special rules for the timing of bankrupt firms (e.g., Brazil, Switzerland and the Netherlands, where firms can implement before clearance if a waiver is obtained; Austria, India, Russia and the United States have shorter time frames). Also, in some jurisdictions, the law and precedent expressly recognise the consideration of the financial condition of the target and the failing firm doctrine (e.g., Canada, China and the United States). In Canada, for instance, the Competition Bureau explicitly permitted the *AIM/TMR* transaction to proceed on the basis of the failing firm defence. Similarly, the Netherlands has recently recognised the defence in a couple of hospital mergers. In a major matter in the United Kingdom, *Amazon/Deliveroo*, the CMA provisionally allowed the transaction to proceed owing to the target being a failing firm. This topic is likely to be an area to watch in other jurisdictions, particularly in some of the newer merger regimes.

The potential consequences for failing to file in jurisdictions with mandatory requirements vary. Almost all jurisdictions require that the notification process be concluded before completion (e.g., pre-merger, suspensory regimes), rather than permitting the transaction to close as long as notification is made before closing. Many of these jurisdictions can impose a significant fine for failure to notify before closing, even when the transaction raises no competition concerns (e.g., Austria, Cyprus, India, the Netherlands, Romania, Spain and Turkey). In France, for instance, the competition authority imposed a €4 million fine on Castel Frères for failure to notify its acquisition of part of the Patriarche group. In Ukraine and Romania, the competition authorities have focused their efforts on discovering consummated transactions that had not been notified and imposing fines on the parties. Chile's antitrust enforcer recommended a fine of US$3.8 million against two meat-packing companies, even though the parties had carved the Chilean business out of the closing. In 2021, Morocco similarly imposed a fine for failure to notify a transaction in excess of US$1 million.

Some jurisdictions impose strict time frames within which the parties must file their notification. For instance, Cyprus requires filing within one week of signing of the relevant documents and agreements; Serbia provides for 15 days after signing of the agreement; and Hungary, Ireland and Romania have a 30-calendar-day time limit for filing the notification that commences with entering into the agreement. Some jurisdictions that mandate filings within specified periods after execution of the agreement also have the authority to impose fines for late notifications (e.g., Bosnia and Herzegovina, Indonesia and Serbia). Most jurisdictions also have the ability to impose significant fines for failure to notify or for closing before the end of the waiting period, or both (e.g., Austria, Canada, China, Greece, Portugal, Ukraine and the United States). In Macedonia, the failure to file can result in a misdemeanour and a monetary fine of up to 10 per cent of worldwide turnover. In Belgium, the competition authority fined a party for late submission of information.

The United States and the EC both have a long history of focusing on interim conduct of the transaction parties, which is commonly referred to as gun-jumping, even fining companies that are found to be in violation. For example, the EC imposed a €124.5 million fine on Altice and, in 2023, fined Illumina €432 million for its closing of the *Grail* transaction. Other jurisdictions have become increasingly aggressive in the imposition of fines. Brazil, for instance, issued its first gun-jumping fine in 2014 and later issued guidelines on gun-jumping violations. Since then, Brazil has continued to be very active in investigating and imposing fines for gun-jumping activities. In addition, the sharing of competitively

sensitive information before approval appears to be considered an element of gun-jumping. Also, for the first time, France imposed a fine of €20 million on the notifying party for failure to implement commitments fully within the time frame imposed by the authority.

In most jurisdictions, a transaction that does not meet the pre-merger notification thresholds is not subject to review or challenge by the competition authority; however, in Canada – like the United States – the Competition Bureau can challenge mergers that were not required to be notified under the pre-merger statute, as well as challenge notified transactions within the first year of closing. In Korea, Microsoft initially filed a notification with the Korea Fair Trade Commission (KFTC), but when it faced difficulties and delays in Korea, the parties restructured the acquisition to render the transaction non-reportable in Korea and consummated the transaction; however, the KFTC continued its investigation as a post-consummation merger investigation and eventually obtained a consent order. This list of jurisdictions is illustrative rather than comprehensive and is consistent with the overarching concerns expressed above regarding catching transactions that may have fallen below the radar but are subsequently deemed problematic. In the same spirit, the EC has fined companies on the basis that the information provided at the outset was misleading (for instance, it fined Facebook €110 million for providing incorrect or misleading information during the *Facebook/WhatsApp* acquisition).

In almost all jurisdictions, very few transactions undergo a full investigation, although some require that the notification provide detailed information regarding the markets, competitors, competition, suppliers, customers and entry conditions. Most jurisdictions that have filing fees specify a flat fee or state in advance a schedule of fees based on the size of the transaction; however, some jurisdictions determine the fee after filing or provide different fees based on the complexity of the transaction.

Most jurisdictions more closely resemble the EC model than the United States model. In these jurisdictions, pre-filing consultations are more common (and even encouraged); parties can offer undertakings during the initial stage to resolve competitive concerns; and there is a set period during the second phase for providing additional information and for the agency to reach a decision. In Japan, however, the JFTC announced in June 2011 that it would abolish the prior consultation procedure option. When combined with the inability to 'stop the clock' on the review periods, counsel may find it more challenging in transactions involving multiple filings to avoid the potential for the entry of conflicting remedies or even a prohibition decision at the end of a JFTC review. Some jurisdictions, such as Croatia, are still aligning their threshold criteria and processes with the EC model. Even within the EC, there remain some jurisdictions that differ procedurally from the EC model. For instance, in Austria, the obligation to file can be triggered if only one of the involved undertakings has sales in Austria, as long as both parties satisfy a minimum global turnover and have a sizeable combined turnover in Austria. Finally, some jurisdictions have developed a fast-track process for transactions that are unlikely to raise antitrust concerns (e.g., because the parties' combined shares of potential relevant markets are all below a certain threshold or because of the size of the transaction). China and the EC are two such regimes in which the adoption of this fast-track process can make a significant difference to the review period.

The role of third parties also varies across jurisdictions. In some (e.g., Japan), there is no explicit right of intervention by third parties but the authorities can choose to allow it on a case-by-case basis. In contrast, in South Africa, registered trade unions or representatives of employees must be provided with a redacted copy of the merger notification from the outset and have the right to participate in merger hearings before the Competition Tribunal; the

Tribunal will typically also permit other third parties to participate. Bulgaria has announced a process by which transaction parties even consent to disclosure of their confidential information to third parties. In some jurisdictions (e.g., Australia, the EC and Germany), third parties may file an objection to a clearance decision. In other jurisdictions (including Canada, the EC and the United States), third parties (e.g., competitors) are required to provide information and data if requested by the antitrust authority. In Israel, a third party that did not comply with such a request was fined by the antitrust authority.

In almost all jurisdictions, once the authority approves the transaction, it cannot later challenge the transaction's legality. The United States is one significant outlier with no bar for subsequent challenge, even decades following the closing, if the transaction is later believed to have substantially lessened competition. Canada, in contrast, provides a more limited period of one year for challenging a notified transaction (see the recent *CSC/Complete* transaction). In Hong Kong, the authority has six months post-consummation to challenge a transaction. Norway is also a bit unusual in that the authority has the ability to mandate notification of a transaction for a period of up to three months following the transaction's consummation. In 'voluntary' jurisdictions, such as Australia and Singapore, the competition agency can investigate and challenge unnotified transactions.

In large cross-border transactions raising competition concerns, it is becoming the norm for the US, Canadian, Mexican, EC and UK authorities to work closely together during the investigative stages, and even in determining remedies, minimising the potential of arriving at diverging outcomes. The KFTC has stated that it will engage in even greater cooperation with foreign competition authorities, particularly those of China and Japan, which are similar to Korea in their industrial structure. Regional cooperation among some of the newer agencies has also become more common; for example, the Argentinian authority has worked with Brazil's competition authority, which, in turn, has worked with the Chilean authority. Competition authorities in Bosnia and Herzegovina, Bulgaria, Croatia, Macedonia, Montenegro, Serbia, Slovenia and Turkey similarly maintain close ties and cooperate on transactions. Taiwan is part of the Asia-Pacific Economic Cooperation forum, which shares a database. In transactions not requiring filings in multiple European jurisdictions, Member States often keep each other informed during the course of an investigation. In addition, transactions not meeting the EC threshold can nevertheless be referred to the EC in appropriate circumstances. The United States has signed cooperation agreements with a number of jurisdictions, including, most recently, Peru and India. China has consulted with the United States and the EC on some mergers and entered into a cooperation agreement with the United States authorities in 2011.

The impact of multi-jurisdictional cooperation is very evident. For instance, the transaction parties in *Applied Materials/Tokyo Electron* ultimately abandoned the transaction following the combined objections of several jurisdictions, including the United States, Europe and Korea. In *Office Depot/Staples*, the US Federal Trade Commission and the Canadian Competition Bureau cooperated and both jurisdictions brought suits to block the transaction (although the EC had also cooperated on this transaction, it ultimately accepted the undertakings offered by the parties). In the *GE/Alstom* transaction, the United States and the EC coordinated throughout, including at the remedies stage. Additionally, in the *Halliburton/Baker Hughes* transaction, the United States and the EC coordinated their investigations, with the United States suing to block the transaction while the EC's investigation continued. Also, in *Holcim/Lafarge*, the cooperation between the United States and Canada continued at the remedies stage, where both consents included assets in the other

jurisdiction's territory. The United States, Canada and Mexico coordinated closely in the review of the *Continental/Veyance* transaction. In fact, coordination among the jurisdictions in multinational transactions that raise competition issues is becoming the norm.

Although some jurisdictions have raised the size threshold at which filings are mandated (e.g., Austria), others have broadened the scope of their legislation to include, for instance, partial ownership interests. Some jurisdictions continue to have as their threshold test for pre-merger notification whether there is an acquisition of control. Many of these jurisdictions, however, will include, as a reportable situation, the creation of joint control, negative (e.g., veto) control rights to the extent that they may give rise to *de jure* or de facto control (e.g., Turkey), or a change from joint control to sole control (e.g., the EC and Lithuania). Minority holdings and concerns over 'creeping acquisitions', in which an industry may consolidate before the agencies become fully aware, have become the focus of many jurisdictions. Some jurisdictions will consider as reviewable acquisitions in which an interest of only 10 per cent or less is being acquired (e.g., Serbia for certain financial and insurance mergers), although most jurisdictions have somewhat higher thresholds (e.g., Korea sets the threshold at 15 per cent of a public company and otherwise at 20 per cent of a target; and Japan and Russia at any amount exceeding 20 per cent of the target). Others use as the benchmark the effect that the partial shareholding has on competition; Norway, for instance, can challenge a minority shareholding that creates or strengthens a significant restriction on competition. The United Kingdom also focuses on whether the minority shareholder has material influence (i.e., the ability to make or influence commercial policy) over the entity. Several agencies during the past few years have analysed partial ownership acquisitions on a stand-alone basis as well as in connection with JVs (e.g., Canada, China, Cyprus, Finland and Switzerland). Vertical mergers have also been the subject of review (and even resulted in some enforcement actions) in a number of jurisdictions (e.g., Belgium, Canada, China, Sweden and Taiwan). Portugal even viewed as an acquisition subject to notification the non-binding transfer of a customer base.

For transactions that raise competition issues, the need to plan and to coordinate among counsel has become particularly acute. Multi-jurisdictional cooperation facilitates the development of cross-border remedies packages that effectively address competitive concerns while permitting the transaction to proceed. The consents adopted by the United States and Canada in the *Holcim/Lafarge* merger exemplify such a cross-border package. As discussed in the 'International Merger Remedies' chapter, it is no longer prudent to focus merely on the larger mature authorities, with the expectation that other jurisdictions will follow their lead or defer to their review. In the current enforcement environment, obtaining the approval of jurisdictions such as Brazil and China can be as important as the approval of the EC or the United States. Moreover, the need to coordinate is particularly acute, to the extent that multiple agencies decide to impose conditions on the transaction. Although most jurisdictions indicate that structural remedies are preferable to behavioural conditions, a number of jurisdictions in the past few years have imposed a variety of behavioural remedies (e.g., China, the EC, France, Italy, Japan, the Netherlands, Norway, South Africa, Ukraine and Vietnam). This is particularly the case when non-compete or exclusive dealing relationships raise concerns (e.g., in Mexico and the United States). Some recent decisions have included as behavioural remedies pricing, sales tariffs and terms of sale conditions (e.g., Korea, Ukraine and Serbia), employee retrenchment (South Africa) and restrictions on bringing anti-dumping suits (e.g., Mexico). Many recent decisions have imposed behavioural remedies to strengthen the effectiveness of divestitures (e.g., Canada's decision in the *Loblaw/Shoppers*

transaction, China's Ministry of Commerce remedy in *Glencore/Xstrata* and France's decision in the *Numericable/SFR* transaction). It is important to note, however, that one of the areas flagged for change by the new leadership at the US antitrust authorities is the willingness to consider behavioural remedies, or, for that matter, any remedies, rather than bringing enforcement actions to challenge the transaction itself.

In many of the key enforcement regimes (e.g., the United States, Canada, China and the United Kingdom), we are at a potentially transformational point in competition policy enforcement; however, this book should provide a useful starting point in navigating cross-border transactions in this changing enforcement environment.

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July 2023

Chapter 4

AUSTRIA

Dieter Zandler and Vanessa Horaceck[1]

I INTRODUCTION

The Austrian merger control regime is set out in Part I, Chapter 3 of the Austrian Cartel Act of 2005 (KartG). The turnover thresholds that trigger a merger filing requirement in Austria are among the lowest in the European Union. However, following the Austrian Cartel and Competition Law Amendment Act 2021 (KaWeRÄG 2021) of 10 September 2021, in addition to a combined Austrian turnover of more than €30 million, it is now a requirement that at least two parties each achieved a turnover in Austria of more than €1 million in the previous financial year.

In addition, it is also important to note that the Austrian merger control rules contain very specific and sometimes far-reaching provisions concerning the attribution of turnover. In contrast to most other European Union jurisdictions, Austrian merger control rules not only require that the turnover of (directly or indirectly) controlling shareholders and (directly or indirectly) controlled shareholdings is attributed; rather, Austrian merger control rules normally also require that the turnover of non-controlling shareholders and non-controlling shareholdings with a participation (capital or voting rights) of 25 per cent or more is (fully) taken into account for calculating the turnover of a concerned undertaking.[2] Although this very wide attribution of turnover (which in some cases may lead to nearly indefinite 'chains' for turnover attribution) has to some degree been constricted by the case law,[3] establishing the turnover of the concerned undertakings for the purposes of Austrian merger control sometimes requires additional efforts and cannot simply be based on the consolidated group turnover figures.

The scope of Austrian merger control became even wider in 2017 with the entry into force of the Austrian Cartel and Competition Law Amendment Act 2017 (KaWeRÄG 2017), which introduced an additional jurisdictional threshold for concentrations based on the value of consideration (size of the transaction test).[4]

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2 See Austrian Cartel Act 2005 (KartG), Section 21, No. 2 in conjunction with Section 7(1), No. 3.

3 For example, indirect participations of at least 25 per cent normally are attributed only if there is also a controlling influence at the preceding level (Supreme Court of Justice (OGH) 17 December 2001, 16 Ok 9/01).

4 KartG, Section 9(4) (in the version set out in the Federal Law Gazette (BGBl) I No. 56/2017).

Altogether, these factors led to a relatively high number of merger filings in Austria; however, as a result of the second domestic turnover threshold introduced with the KaWeRÄG 2021 and the reduced merger activity following the war in Ukraine, the number of notifiable mergers in Austria decreased.[5]

The institutional structure of competition enforcement in Austria is split between the Federal Competition Authority (FCA) and the Federal Cartel Prosecutor (FCP) (together, the Official Parties) and the cartel courts (the Higher Regional Court of Vienna acting as the cartel court (the Cartel Court) and the Supreme Court of Justice (OGH) acting as the Supreme Cartel Court). Merger notifications in Austria have to be submitted to the FCA and are then assessed by the Official Parties in Phase I. The Official Parties have the exclusive right to request an in-depth (Phase II) review of a notified transaction by the Cartel Court.

Notwithstanding the above aspects, it is important to note that the vast majority of transactions notified in Austria receive merger clearance in Phase I.[6] Since there is no pre-notification requirement and no 'stop-the-clock' principle under Austrian law, merger control clearance for most cases can usually be obtained within the initial four-week review period. Moreover, the Official Parties have introduced an Austrian Form CO, which also provides for a simplified filing (comparable with a Short Form CO under the European Merger Regulation (EUMR)[7]) for merger control cases that do not exceed certain (market share) thresholds.[8]

Although the Official Parties (based on their headcount)[9] are rather small competition authorities or enforcers compared with most of their counterparts in the European Union and at the same time have to deal with a high number of merger filings each year,[10] they typically find a good balance between efficiency when dealing with straightforward transactions and accuracy when dealing with cases that might possibly harm competition. Therefore, despite its wide scope of application, in practice, the Austrian merger control system is working quite well.

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5 Accordingly, there were 313 fewer notified transactions in 2022, compared with 2021 (see discussion in Section II).

6 According to the Federal Competition Authority (FCA) website, about 99.1 per cent of the merger cases notified to the FCA and the Federal Cartel Prosecutor (FCP) (together, the Official Parties) in 2022 were cleared in Phase I (after expiry of the initial four-week review period, waiver of their right to request an in-depth review by the Official Parties or withdrawal of the filing); see the merger control statistics in the FCA Annual Report 2022, at p. 79 (https://www.bwb.gv.at/fileadmin/user_upload/230621_BWB_Ta__tigkeitsbericht2022_FINAL_SCREEN.pdf (German language version) (accessed 3 July 2023)).

7 Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (referred to herein as EUMR).

8 A German version of the filing form/Austrian Form CO is available at www.bwb.gv.at/fileadmin/user_upload/PDFs/Formblatt_202010.docx (accessed 3 July 2023).

9 As at 31 December 2022, the FCA comprised 47 employees, including 39 case handlers (see FCA Annual Report 2022 (op. cit. note 6), at p. 32). The FCP consists of the Federal Cartel Prosecutor and deputies (according to KartG, Section 75(3), at least one deputy must be appointed) – currently, one deputy Federal Cartel Prosecutor is in post. Pursuant to KartG, Section 80(1), the FCP can use the administrative staff of the Cartel Court (for more information, see https://www.justiz.gv.at/home/justiz/justizbehoerden/bundeskartellanwalt.36c.de.html;jsessionid=BE843F56205C389404563171CB9FDA31.s2 (accessed 3 July 2023)).

10 In 2022, 340 merger cases were notified to the FCA in total. Thus, each FCA case handler handled an average of about eight mergers in 2022 – see FCA Annual Report 2022 (op. cit. note 6), at p. 79.

II YEAR IN REVIEW

In 2022, 340 merger cases were notified to the FCA in total (a decrease of 313 cases from 2021).[11] The large majority of notifications were cleared in Phase I after expiry of the initial four-week review period (i.e., in 95.9 per cent of the merger cases notified).[12] In 10 cases, the Official Parties waived their right to request an in-depth (Phase II) review even before the expiry of the four-week review period. In one case, the notifying party withdrew the filing in Phase I.[13]

Only three cases notified in 2022 were subject to an in-depth (Phase II) review by the Cartel Court.[14] In one of these,[15] the same transaction had already been notified on 28 December 2021, for which the FCP had requested an in-depth review on 8 February 2022.[16] However, as the merger notification was considered incomplete by the Cartel Court and was not supplemented in a timely manner with the legally required information with regard to potentially relevant product and geographical markets, following an order by the presiding judge of the Cartel Court, the notification was rejected by the Cartel Court on 29 March 2022 (in Phase I, the Official Parties cannot reject an incomplete merger notification).[17]

i Fines for violation of the standstill obligation

It is important to note that the Official Parties are quite active in cases involving violations of the standstill obligation and regularly request the imposition of fines by the Cartel Court in the case of a possible – even negligent – infringement for implementing a transaction prior to receiving Austrian merger clearance. Also, a violation of commitments imposed by the Cartel Court as a condition for merger clearance, or proposed by the notifying party or parties to the Official Parties, constitutes a violation of the standstill obligation and may be subject to fines imposed by the Cartel Court.[18] Further, it is important to note that providing incorrect or misleading information within a merger notification may also be subject to fines of up to 1 per cent of the worldwide (group) turnover achieved in the previous financial year.[19]

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11 For 2022, see the FCA website at https://www.bwb.gv.at/zusammenschluesse/2022 (last accessed 3 July 2023) and the merger control statistics on page 79 of the FCA's annual report of 2022 (op. cit. note 6). See also the English version of the FCA Annual Report 2021, at p. 48 (https://www.bwb.gv.at/fileadmin/user_upload/Annual_Report_14.12.2022.pdf (last accessed 3 July 2023).

12 In two cases, the notification was cleared subject to commitments in Phase I (BWB/Z-5902 and BWB/Z-6076); see the '2022 Phase I cases subject to commitments' table in Section II.ii).

13 See the merger control statistics in the FCA Annual Report 2022 (op. cit. note 6), at p. 79.

14 BWB/Z-6044, BWB/Z-6107 and BWB/Z-6156; see the '2022 Phase II cases' table in Section II.ii.

15 BWB/Z-6044, notification on 16 August 2022, request for in-depth review by the FCP on 27 September 2022; see the '2022 Phase II cases' table in Section II.ii.

16 BWB/Z-5828.

17 See Cartel Court 29 April 2022, 27 Kt 1/22g.

18 KartG, Section 17(2) in conjunction with Section 29, No. 1(a). The most recent example of a case in which fines were imposed on the grounds of violations of commitments (incorrect or misleading information in connection with the closing of a supermarket store to avoid an increase of market share) and of reporting obligations was the decision of the Cartel Court of 20 November 2018, 24 Kt 8/18h (REWE International AG; fine of €212,000).

19 See KartG, Section 29(1), No. 2(b). A recent example of a case in which fines were imposed, inter alia, for providing incorrect or misleading information was the decision of the Cartel Court of 14 July 2022, 24 Kt 3/22d (by providing incorrect or misleading information with respect to the voting majority required under the Articles of Association 2015).

The following table lists fines imposed by the Cartel Court for violations of the standstill obligation in 2022:[20]

2022 fines for violation of the standstill obligation

Date	Sector	Undertakings	Fine
5 December 2022	Media	Heise Medien GmbH & Co KG	€18,000*
14 July 2022	Mechanical fastening systems, assemblies, precision moulded parts and logistics solutions	SFS Gruppe	€220,000†

* Cartel Court, 5 December 2022, 25 Kt 9/22v
† Cartel Court, 14 July 2022, 24 Kt 3/22d

ii Overview of major Austrian merger control cases in 2022

2022 Phase II cases

Date	Sector	Undertakings	Outcome
Notification: 20 July 2021 Request for in-depth review: 17 August 2021 (FCA and FCP) Clearance: 3 March 2022 (appeal of FCA against clearance decision (subject to conditions) of Cartel Court: 23 June 2022 (decision of OGH confirming clearance decision (subject to conditions) of Cartel Court	Web portals	Facebook, Inc; Giphy, Inc	Decision of OGH confirming clearance decision (subject to conditions) of Cartel Court 23 June 2022*
Notification: 16 August 2022 Request for in-depth review: 27 September 2022 (FCP) Clearance: 6 February 2023	Information technology	Saubermacher Dienstleistungs AG; digi-Cycle GmbH	Clearance subject to commitments after withdrawal of request for in-depth review by FCP†
Notification: 12 October 2022 Request for in-depth review: 23 November 2022 (FCP) Clearance: 8 March 2023	Waste management	Saubermacher Dienstleistungs AG; Pölzleitner Holz GmbH	Clearance subject to behavioural commitments ensuring third party access to wood storage areas (including monitoring) after withdrawal of request for in-depth review by FCP‡
Notification: 20 December 2022 Request for in-depth review: 31 January 2023 (FCA and FCP) Clearance: n/a	Roofing material	Wienerberger AG; Terreal Holding SAS	Request for in-depth review by FCA and FCP§

* BWB/Z-5549; appeal by FCA against clearance decision (subject to conditions) of Cartel Court on 3 March 2022 and decision by OGH confirming Cartel Court decision of 23 June 2022 – more detailed information on the case is available on the FCA website at https://www.bwb.gv.at/en/news/news-2022/detail/submetering-cartel-decision-relating-to-ista-oesterreich-gmbh-final-1 (accessed 14 June 2023)
† BWB/Z-6044; request for in-depth review by FCP on 27 September 2022; withdrawal of request for in-depth review by FCP on 26 January 2023
‡ BWB/Z-6107; Cartel Court, 8 March 2023, 25 Kt 11/22p, request for in-depth review by FCP on 23 November 2022, withdrawal of request for in-depth review by FCP on 8 March 2023 – more detailed information on the case is available on the FCA website at https://www.bwb.gv.at/news/detail/bundeskartellanwalt-bmj-zieht-pruefungsantrag-zum-gemeinschaftsunternehmen-zwischen-saubermacher-und-poelzleitner-zurueck-und-genehmigt-somit-den-zusammenschluss-mit-auflagen (last accessed 21 June 2023)
§ BWB/Z-6156; request for in-depth review by FCA and FCP on 31 January 2023

20 See FCA, 'Fine decisions in Austria since 2002' (https://www.bwb.gv.at/fileadmin/user_upload/Geldbussentabelle_gesamt__Stand_04_2023__CD_Deutsch__21042023_.pdf (available in German only: 'Verbotene Durchführungen von Zusammenschlüssen' [forbidden implementation of a concentration]) (last accessed 3 July 2023)).

2022 Phase I cases subject to commitments

Date	Sector	Undertakings	Outcome
Notification: 14 March 2022 Clearance: 26 April 2022 (however, concentration was not closed; therefore, the commitments imposed did not come into effect)	Milk processing	Salzburger Alpenmilch Genossenschaft eGen; Gmundner Molkerei eGen	Clearance subject to behavioural commitments, including minimum guarantee package to safeguard position of dairy farmers (including monitoring) proposed by notifying party after negotiations with Official Parties*
Notification: 9 September 2022 Clearance: 7 October 2022	Milk processing	Gmundner Molkerei e Gen; Milchwerk Jäger GmbH, AG Traunstein	Clearance subject to behavioural commitments protecting dairy farmers, such as, in particular, priority delivery right (including monitoring) proposed by notifying party after negotiations with Official Parties†

* BWB/Z-5902; for more detailed information about the commitments, see https://www.bwb.gv.at/news/news-2022/detail/zusammenschluss-salzburger-alpenmilch-genossenschaft-egen-gmundner-molkerei-egen-in-phase-i-unter-auflagen-freigegeben-verpflichtungszusagen-mit-mindestgarantiepaket-fuer-die-milchbauern-beschlossen (in German only; accessed 3 July 2023)

† BWB/Z-6076; for more detailed information about the commitments and the case, see https://www.bwb.gv.at/news/news-2022/detail/bwb-genehmigt-gemeinschaftsmolkerei-zwischen-gmundner-molkerei-egen-und-milch-werk-jaeger-gmbh-mit-auflagen (in German only; accessed 3 July 2023)

III THE MERGER CONTROL REGIME

i Jurisdiction

The Austrian merger control regime requires a (mandatory) merger filing if:

a the transaction constitutes a concentration pursuant to Section 7 of the KartG;

b the turnover thresholds[21] or the (transaction value) thresholds of Section 9(4) of the KartG are met; and

c the transaction has an effect on the domestic (Austrian) market or markets.[22]

ii Concept of concentration

Unlike many other European jurisdictions, the Austrian merger control regime is not limited to acquisitions of control and full-function joint ventures (JVs) but has distinct definitions of the types of transactions that constitute a concentration. A concentration is defined as:

a the acquisition by one undertaking of all, or a substantial part of, the assets of another undertaking, especially by merger or transformation;

b the acquisition of rights by one undertaking in the business of another undertaking by means of a management or lease agreement;

c the direct or indirect acquisition of a participation of at least 25 per cent or 50 per cent (of the capital or voting rights) in one undertaking by another undertaking;

d the establishment of interlocking directorates at the management board or supervisory board level (if at least half of the members of the management board or the supervisory board in two undertakings are identical);

21 KartG, Section 9(1) (with the exemption in Section 9(2) not being applicable).

22 ibid., Section 24(2).

e any other connection between undertakings directly or indirectly conferring one undertaking a decisive influence over another undertaking; or
f the establishment of a full-function JV.[23]

Although Austrian merger control contains a specific provision declaring that the establishment of a full-function JV constitutes a concentration,[24] it is currently the prevailing view that this provision does not exclude non-full-function JVs from the scope of Austrian merger control. Instead, the establishment of a non-full-function JV may also qualify as a concentration if the transaction falls under any of the other types of concentrations set out above.[25]

iii Turnover thresholds

Under Austrian law, a concentration (see Section III.ii) shall be notified prior to its completion if the following turnover thresholds are met by the concerned undertakings in the previous financial year:

a combined worldwide turnover of all undertakings concerned exceeded €300 million;
b combined turnover in Austria of all undertakings concerned exceeded €30 million and individual turnover in Austria of at least two undertakings concerned exceeded €1 million; and
c the individual worldwide turnover of at least two of the undertakings concerned each exceeded €5 million.[26]

There are special rules about the calculation of turnover for credit institutions and insurance undertakings.[27] In addition, for media mergers, multipliers apply to determine whether the turnover thresholds are met (see Section III.vi).

Exemptions

Even if the above thresholds are met, no notification has to be made if, in the previous financial year:

a only one undertaking concerned achieved a domestic turnover of more than €5 million; and
b the combined aggregate worldwide turnover of the other undertakings concerned was less than €30 million.[28]

iv Transaction value threshold

The KaWeRÄG 2017 introduced a new jurisdictional threshold based on a 'value of consideration' criterion that entered into force on 1 November 2017 and applies in addition to the existing turnover thresholds. According to the legislative materials, the new threshold based on the value of consideration shall particularly prevent monopolisation in the digital economy field. The legislative rationale behind the provision is to make acquisitions of companies with low turnovers for which a high purchase price is paid (e.g., owing to the

23 ibid., Section 7, Nos. (1) and (2).
24 ibid., Section 7(2).
25 ibid., Section 7(1).
26 ibid., Section 9(1).
27 ibid., Section 22, Nos. 2 and 3.
28 ibid., Section 9(2).

value of data collected by a company) subject to merger control rules.[29] A comparable transaction value threshold has also been introduced in Germany (with a transaction value of €400 million; see the Germany chapter) with the Austrian provision closely following the German one. Both the Austrian and the German transaction value thresholds were triggered by the *Facebook/WhatsApp* transaction, which was reviewed by the European Commission based on a referral request under Article 4(5) of the EUMR.[30] The FCA announced in March 2021 that it was investigating whether Facebook's takeover of the US company Giphy in May 2020 should have been notified in Austria under the transaction value threshold.[31] On 22 July 2021, the Cartel Court imposed a fine of €9.6 million on Facebook for violation of the standstill obligation.

According to Section 9(4) of the KartG, concentrations that do not meet the turnover thresholds (see Section III.iii) also need to be notified to the FCA when the undertakings concerned achieved a combined aggregate turnover in the full financial year prior to the concentration exceeding €300 million worldwide of at least €15 million in Austria, the value of consideration for the concentration exceeds €200 million and the target company is active in Austria to a significant extent.

The transaction value threshold contains a number of new legal terms that will require clarification by case law (in particular, 'value of consideration' and 'significance of domestic activities'). To assist undertakings with filing requirements, in 2018, the FCA and the German Federal Cartel Office (FCO) published a joint guidance paper on the application of the new transaction value threshold, which was updated in January 2022 (the Guidance).[32]

According to the Guidance, the concept of 'value of consideration' includes all forms of cash payments, securities, unlisted securities or shares, other assets (real estate, tangible assets and current assets), intangible assets (licences, usage rights, rights to the company's name and trademark rights, etc.) and considerations for a non-compete undertaking that are offered to the seller in return for the acquisition of the target company. In addition, the liabilities of the target company and the seller that are assumed by the buyer form part of the value of consideration.[33] In the view of the FCA and the FCO, however, the inclusion of liabilities applies only for interest-bearing liabilities.[34] Although the new threshold has some similarities with the 'size of transaction' test in the United States, the Austrian 'value of consideration' test does not require that the value of assets or voting rights already held by the acquirer prior to the transaction be aggregated to the value of the assets or voting rights subject to the concentration.[35]

29 ErlRV 1522 BlgNR 25. GP 3.

30 European Commission, decision dated 3 October 2014, Case COMP/M.7217, Paragraphs 9–12.

31 See the FCA's latest press release in this case, of 24 June 2022 (https://www.bwb.gv.at/en/news/news-2022/detail/submetering-cartel-decision-relating-to-ista-oesterreich-gmbh-final-1(accessed 19 July 2023)).

32 See FCA and German Federal Cartel Office (FCO), 'Guidance on Transaction Value Thresholds for Mandatory Pre-merger Notification' (Guidance) (https://www.bwb.gv.at/fileadmin/user_upload/Guidance_Transaction_Value_Thresholds_January_2022_final.pdf (accessed 3 July 2023)).

33 According to the Guidance (Paragraph 50), this also applies to liabilities of the target company that are not (directly) assumed by the acquirer (e.g., in cases of a share deal where the acquirer does not assume the target's liabilities). This interpretation is not necessarily supported by the wording of the new provision and could make the calculation of the 'value of consideration' for share deals more difficult.

34 See Guidance, Paragraph 50 et seq.

35 See ibid., Paragraph 13.

The local nexus requirement ('significance of domestic activities') shall exclude marginal activities of the target from Austrian merger control; however, on the basis of the legislative material, the target company having a location in Austria is already considered a significant domestic activity. Furthermore, the factors indicating a significant domestic activity will depend on the particular industry (e.g., the number of monthly active user or unique visits in the digital economy).[36] According to the Guidance, the Austrian turnover may also be used as a benchmark.[37]

v Media concentrations

A concentration qualifies as a media concentration[38] if at least two undertakings concerned can be qualified as:

a media undertakings[39] or media service companies;[40]

b media support undertakings (i.e., publishers, printing houses, undertakings that procure advertising orders, undertakings that procure the distribution of media on a large scale and film distributors);[41]

c undertakings holding an (aggregate) direct or indirect participation of at least 25 per cent in a media undertaking, media service company or media support undertaking; or

d if one undertaking concerned can be qualified as a media undertaking, media service company or media support undertaking, and one or more media undertakings, media service companies or media support undertakings directly or indirectly hold an (aggregate) participation of at least 25 per cent in another undertaking concerned.

The turnover thresholds (see Section III.iii) also apply to media concentrations, with the difference that the turnovers of media undertakings and media service companies are multiplied by 200 and the turnovers of media support undertakings are multiplied by 20 for calculating the combined (worldwide and domestic) turnover.[42]

If a media concentration has to be notified under the EUMR, the transaction nevertheless may require an Austrian media merger control notification if the turnover thresholds for media concentrations are met[43] (cumulative judicial competence as provided

36 ErlRV 1522 BlgNR 25. GP 3.

37 See Guidance, Paragraph 77 et seq.

38 Section 8(1) and (3) KartG.

39 Media undertakings are defined in Section 1(1), No. 6 of the Austrian Media Act 1981 (MedG) as undertakings (1) supplying or providing the content of a medium and (2) providing or arranging its production and dissemination or, in the case of an electronic medium, its broadcast, accessibility or dissemination.

40 Media service companies are defined in MedG, Section 1(1), No. 7 as undertakings recurrently providing media undertakings with contributions in word, print, sound or image.

41 KartG, Section 8(2).

42 ibid., Section 9(3) in conjunction with Section 9(1), Nos. 1 and 2, and 9(2), No. 2.

43 See, for example, Comcast Corporation's (contemplated) acquisition of Sky, which was notified under the EUMR to the European Commission (and not opposed by the Commission: Commission, decision dated 6 June 2018, Case M.8861, *Comcast/Sky*) and – as a media concentration – to the FCA (and approved in Phase I: Case No. BWB/Z-3915); Reidlinger and Hartung, *Das österreichische Kartellrecht* (2014), p. 173 et seq.; Urlesberger in Petsche, Urlesberger and Vartian (eds), *Kartellgesetz* (2016), before KartG, Section 7, Paragraph 41.

for in Article 21(4) of the EUMR). In such a case, the substantive assessment under Austrian law is limited to assessing whether the concentration limits media plurality or diversity (see Section III.viii).[44]

vi Consequences for completion without merger clearance

In addition to fines, the main legal consequence for infringing the obligation of not implementing a merger without prior clearance is that the agreement implementing the concentration is invalid. Although there is no specific case law on whether a subsequent notification may cure this invalidity, it is common practice also to file for merger clearance if a filing obligation initially has been ignored. According to the unanimous opinion expressed in legal writing, an agreement implementing a concentration prior to the expiry of the standstill obligation is (only) provisionally invalid as long as merger clearance has not been obtained. Thus, once the transaction receives clearance, the agreement implementing the concentration (which was initially invalid as it violated the standstill obligation) will become legally effective with retroactive effect.[45]

Furthermore, the Cartel Court may:

a order measures to terminate the implementation of an unlawful concentration (only if clearance is not obtained subsequently);[46]

b declare that a concentration was implemented contrary to the standstill obligation (if clearance is subsequently obtained);[47]

c impose a fine of up to 10 per cent of the worldwide (group) turnover achieved in the previous financial year against an undertaking violating the standstill obligation; and

d impose a change of the corporate structure of the concerned undertakings (e.g., forced unwinding) if other alternative measures are not equally effective or are more burdensome for the concerned undertakings.[48]

In addition, culpable violations of the standstill obligation may allow injured parties to claim damages before civil courts under general civil law rules (the special provisions of the KartG governing private antitrust damage actions normally do not apply for such cases).[49]

The Official Parties actively pursue infringements of the standstill obligation and regularly request the imposition of fines. Fines for a violation of the standstill obligation are regularly imposed by the Cartel Court, even if the concerned undertakings have voluntarily disclosed the infringement to the Official Parties after a short period (e.g., in the context of a subsequent filing) and the (subsequent) substantive review of the concentration proved to be unproblematic (see Section II.i).

44 KartG, Section 13.

45 Urlesberger in Petsche, Urlesberger and Vartian (eds), *Kartellgesetz* (2016), KartG, Section 17, Paragraph 31.

46 KartG, Section 26.

47 ibid., Section 28; this requires a legitimate interest of the party requesting the declaration.

48 ibid., Section 26.

49 See ibid., Section 37b, No. 1.

vii Procedure

The Austrian merger control regime does not provide for a filing deadline or a pre-notification requirement. A notification can be filed as soon as the parties have agreed on the structure and timing of the transaction and intend to implement the proposed transaction within a reasonable time frame.[50] However, notifications must be submitted before the implementation of the transaction, as transactions subject to merger control must not be implemented before merger clearance (standstill obligation).

Every concerned undertaking is entitled to submit a merger notification to the FCA[51] (i.e., not only the acquirer but also the target undertaking[52] and (based on case law) even the seller).[53] There are no specific form requirements for merger filings with the exception that the notification has to include the information pursuant to Section 10(1) of the KartG.[54] The Official Parties have published a Form CO (comparable with the Form/Short Form CO under the EUMR), which is intended to facilitate the swift review of a merger notification.[55] Although the use of this filing form is not mandatory, it is common practice to follow the structure of the Form CO when making merger filings in Austria.

Initial four-week (Phase I) review

The initial four-week review period will commence on the day the notification is received by the FCA (provided that the notification is received within the business hours of the FCA, otherwise, the four-week review period will commence on the next working day), provided that the notifying party has also paid the merger filing fee (currently €6,000)[56] and the merger filing fee has been credited to the FCA's account.[57] After receipt of the filing, the FCA has to publish on its website the fact that the notification was made, including its date and a short summary of the proposed transaction (including the names of the parties, the nature of the concentration and the business segment concerned).[58] This publication triggers a two-week

50 OGH 23 June 1997, 16 Ok 4/97.

51 KartG, Section 10(1), first sentence.

52 OGH 12 October 2016, 16 Ok 9/16h.

53 See OGH 23 June 1997, 16 Ok 6, 7, 8/97; Cartel Court 24 November 2008, 26 Kt 10/08, 26 Kt 11/08. Similarly, Hoffer (*Kartellgesetz* (2007), Section 10, p. 158 et seq.) and Reidlinger and Hartung (*Das österreichische Kartellrecht* (2014), p. 191) hold the view that the seller is not entitled to directly make a merger filing.

54 The notification must particularly include (1) the corporate structure of the undertakings concerned and its connected undertakings, (2) their turnover in the previous financial year, (3) the market shares of the undertakings concerned in each relevant market, (4) information about the general market conditions, and (5) for a media concentration, information about all factors that may have negative effects on media plurality or diversity. In addition, a notification shall include information about all factors that may give rise to the creation or strengthening of a dominant market position.

55 See footnote 8.

56 Austrian Competition Act (WettbG), Section 10a(1). Following the Competition Law Amendment Act 2021 (KaWeRÄG 2021), the filing fee for all mergers being notified after 31 December 2021 has been increased to €6,000 (from €3,500).

57 See WettbG, Section 10a(2) and the information on the FCA website (https://www.bwb.gv.at/en/merger_control (accessed 3 July 2023)).

58 KartG, Section 10(3), No. 2 in conjunction with WettbG, Section 10b.

period allowing interested third parties to provide comments to the Official Parties in respect of the proposed transaction;[59] however, under Austrian merger control rules, third parties are not considered parties to the proceedings and do not have access to the file.

Unlike in many other countries, the Austrian merger control system does not have a 'stop-the-clock' mechanism if the Official Parties request additional information[60] or if a remedy proposal is submitted; however, the notifying party may request an extension of the initial four-week Phase I review period to six weeks.[61]

The Official Parties have the exclusive right to request an in-depth (Phase II) review by the Cartel Court. If neither of the Official Parties requests the initiation of an in-depth review within the initial four-week (or, if extended, six-week) review period, the transaction subject to notification is cleared upon expiry of the review period. The Official Parties have to inform the applicant of the fact that they did not initiate an in-depth review.[62]

Prior to the expiry of the initial review period, the Official Parties can waive their right to request an in-depth (Phase II) review, thereby allowing an early merger clearance prior to the expiry of the initial review period. In practice, the Official Parties are very restrictive in granting such a waiver and an early clearance is possible only if the following prerequisites are met (which must be demonstrated by the notifying parties):

a the two-week period allowing an interested third party to provide comments in respect of the notified transaction has expired;

b the Official Parties were able to complete the substantive assessment of the notified concentration (and the assessment has not raised any concerns that – in the view of an Official Party – warrant an in-depth review by the Cartel Court); and

c the notifying party has provided legitimate grounds for expedited clearance (e.g., in the case of financial difficulties of the target company requiring a quick completion or refinancing).[63]

The notifying party or parties may propose commitments to the Official Parties aimed at preventing the initiation of an in-depth review before the Cartel Court.[64]

59 KartG, Section 10(4).

60 If the Official Parties hold the view that they require further information for the assessment of a notified concentration and that information is not provided to them in time to complete the assessment within the initial review period, they may request an in-depth review of the notified concentration (see www.bwb.gv.at/recht_publikationen/standpunkte/mangelhafteunvollstaendige_anmeldung _eines_zusammenschlus/ (accessed 3 July 2023)). If a merger notification does not contain the information required pursuant to KartG, Section 10, No. 1 (and No. 2 in the case of a media concentration), the presiding judge of the Cartel Court may order the notifying party, either *ex officio* or at the request of an Official Party in the application for in-depth review (within one month), to supplement the merger notification. If the notifying party does not comply with this order, the merger notification can be rejected. Furthermore, a request for supplementing the merger notification from the Cartel Court will 'stop the clock' until the supplemented merger notification has been received (see KartG, Section 43).

61 KartG, Section 11(1a). This extension has been requested by the notifying parties in certain case, for example BWB/Z-4651, BWB/Z-4588 and BWB/Z-4428.

62 ibid., Section 11(4).

63 See https://www.bwb.gv.at/recht-publikationen/standpunkte/abgabe-von-pruefungsverzichten (in German only) (accessed 19 July 2023).

64 KartG, Section 17(2), second sentence, first alternative.

In-depth (Phase II) review by Cartel Court

If at least one of the Official Parties requests an in-depth review, the Cartel Court will review the notified transaction. The Cartel Court must reach its decision within five months of receipt of the (first) request. If requested by the notifying party, this review period can be extended to six months.[65] If the Cartel Court does not reach a decision within the five-month (or, if extended, six-month) review period, the concentration cannot be prohibited and the Cartel Court has to terminate the review proceedings[66] (with the termination decision effecting a clearance of the transaction).[67]

The Cartel Court may adopt a clearance decision subject to commitments if the transaction otherwise would not fulfil the clearance requirements.[68] An implementation of a concentration having received merger clearance only subject to commitments without adhering to such commitments is considered a violation of the standstill obligation.[69] Furthermore, the violation of a commitments decision after implementing a concentration or obtaining a clearance decision on the basis of incomplete or incorrect statements allows the Cartel Court to impose proportionate post-merger remedies on the undertakings concerned.[70]

A prohibition decision will be issued if the Cartel Court considers that the concentration leads to the creation or strengthening of a dominant market position or – following the KaWeRÄG 2021 – a significant impediment of effective competition (SIEC) unless the grounds for a justification set out in Section 12(2) of the KartG apply.[71]

Furthermore, the Cartel Court may reject an application for in-depth review (e.g., because it was lodged after the expiry of the initial review period or because the notified transaction does not qualify as a (notifiable) concentration under Austrian merger control rules).[72]

A final decision of the Cartel Court can be appealed with the OGH. The deadline for lodging an appeal is four weeks.[73] The OGH has to render its decision within two months of

65 ibid., Section 14(1), second sentence.

66 ibid., Section 14(1), third sentence.

67 ibid., Section 17(1), third case.

68 According to the prevailing view, a clearance subject to commitments requires the approval of the notifying parties. The notifying parties may also propose commitments to the Official Parties in Phase II with the aim of the Official Parties withdrawing their request for an in-depth review (KartG, Section 17(2), second sentence, second alternative).

69 Section 17(2), first case, KartG.

70 ibid., Section 16 KartG.

71 According to KartG, Section 12(2), a clearance shall be granted notwithstanding any existing provisions to prohibit a concentration if (1) it is expected that the concentration will also bring about improvements in competitive conditions that outweigh the disadvantages of the concentration or (2) the concentration is necessary to maintain or improve international competitiveness of the undertakings concerned and is economically justified, or (3) the economic advantages of the concentration significantly outweigh its disadvantages. The most recent prohibition decision was rendered by the Cartel Court in the *Novomatic/Casinos Austria* case (OGH 21 December 2016, 16 Ok 11/16b). In addition, the structural commitments (divestment of the operational part of the target company, Lekkerland AG in Austria) agreed by the parties on 21 October 2019 in Case BWB/Z-4588 (REWE-ZENTRALFINANZ eG; Lekkerland AG & Co KG; Lekkerland AG) led to a de facto abandonment of the Austrian part of the transaction in Phase I.

72 KartG, Section 12(1) No. 1; see also footnote 60 on the treatment of merger filings that do not contain the information required by law.

73 ibid., Section 49(2).

receipt of the files from the Cartel Court.[74] If the matter is referred back to the Cartel Court, it is likely that the Court will, again, have five months to adopt a new decision.[75] Particularly in cases of transactions that are likely to raise substantive issues that may have to be analysed in an in-depth (Phase II) review, the above deadlines should be kept in mind for the overall time required until clearance of the transaction can be expected.

viii Substantive assessment

Whereas Austrian merger control traditionally (only) applied a dominance test, the KaWeRÄG 2021 additionally introduces the SIEC test in Section 12(1), No. 2b of the KartG (as applied under the EUMR) for concentrations notified after 31 December 2021. As regards media concentrations, the assessment – in addition to the dominance and the SIEC test – is based on whether the concentration has negative effects on media plurality or diversity.[76]

Under the dominance test, a concentration shall be cleared if it does not lead to the creation or strengthening of a dominant market position. An undertaking is considered dominant if it (1) is not subject to any or only insignificant competition or (2) holds a superior market position in comparison with all other competitors.[77] Two or more undertakings are considered to hold collective dominance if there is no significant competition between them and (1) they are not subject to any or only insignificant competition or (2) together they hold a superior market position in comparison with all other competitors.[78] The KartG contains rebuttable presumptions of (single or collective) dominance if certain market share thresholds are exceeded.[79]

During in-depth review (Phase II) proceedings before the Cartel Court, (independent) court-appointed experts play a significant role when defining the relevant markets and providing a competitive analysis as regards the effects of a notified transaction. Therefore, the substantive assessment of a merger will often be based to a significant extent on the findings of this expert, and is often used as the basis for the Cartel Court's decision.

IV OTHER STRATEGIC CONSIDERATIONS

The FCA is a member of the European Competition Network and the International Competition Network. On 13 May 2019, the FCA also became a founding member of the Framework on Competition Agency Procedures of the International Competition Network. The Official Parties cooperate closely with other competition authorities, particularly

74 ibid., Section 14(2).

75 OGH 17 December 2001, 16 Ok 9/01 (this decision was made under the old Austrian Cartel Act of 1988).

76 KartG, Section 13.

77 ibid., Section 4(1).

78 ibid., Section 4(1a).

79 ibid., Section 4(2) and (2a), containing the various thresholds triggering a (rebuttable) presumption of dominance. In particular, a rebuttable presumption of (single) dominance exists if the market share of an undertaking in the relevant market exceeds 30 per cent. In these cases, the onus is on the concerned undertakings to prove that they do not hold a dominant market position.

with the FCO.[80] If a transaction has to be filed in multiple jurisdictions, the concerned undertakings should ensure to provide consistent information in their respective filings. Further, it should be noted that the FCA is quite active in submitting referral requests to the European Commission pursuant to Article 22(1) of the EUMR if the turnover thresholds of the EUMR are not met.[81]

Following the KaWeRÄG 2021, the FCA is now also required to forward all merger filings to the Federal Minister for Digital and Economic Affairs to administer their tasks under the Investment Control Act.[82] As a consequence, it is expected that transactions involving direct or indirect third-country acquirers or ultimate beneficial owners (in non-European Economic Area countries or Switzerland) where an Austrian merger filing but no Austrian foreign direct investment filing is made will face heightened scrutiny from the Austrian foreign direct investment authority.

Under Austrian merger control law, pre-notification negotiations with the Official Parties are not mandatory and, although possible (and generally encouraged by the Official Parties), not very common.[83] However, in complex cases where it is likely that the Official Parties will raise competition concerns, pre-notification discussion can be very useful to avoid extensive and costly in-depth reviews before the Cartel Court. Pre-notification contacts can also be useful if there are doubts as to whether a filing is required (e.g., because a transaction lacks domestic effect or does not qualify as a concentration).

Because the initiation of an in-depth (Phase II) review leads to a change of the decision-making body, the review process is essentially restarted, with the notifying party or parties and the Official Parties becoming parties of the Cartel Court proceedings. Court-appointed experts play a significant role in merger control proceedings before the Cartel Court, especially in connection with the definition of the relevant market and regarding the competitive analysis of a notified transaction.

80 For example, in connection with the commitments imposed in Case BWB/Z-3633 (acquisition of all shares in CIT Rail Holdings SAS by VTG Rail Assets GmbH; see the English version of the FCA Annual Report 2017, at p. 40 (www.bwb.gv.at/fileadmin/user_upload/Englische_PDFs/Annual_Reports/Annual_Report_2017.pdf (accessed 3 July 2023)) and Cartel Court, 28 March 2018, 24 Kt 8/17g for more detailed information about the commitments). The same commitments were made in the German merger control proceedings before the FCO; see FCO, decision dated 21 March 2018, B 9 – 124/17.

81 The most recent example of the FCA submitting a request for referral to the European Commission under EUMR, Article 22(1) was the contemplated acquisition of software provider Figma, Inc (US) by Adobe Inc (US) notified on 16 December2022, BWB/Z-6151. As the Commission considered the criteria for referral under EUMR, Article 22 to be met, Adobe was asked to notify the transaction to the Commission – see European Commission press release (https://ec.europa.eu/commission/presscorner/detail/en/MEX_23_904#:~:text=Mergers%3A%20Commission%20to%20assess%20proposed%20acquisition% 20of%20Figma%20by%20Adobe (accessed 3 July 2023)).

82 Competition Act, Section 10, Paragraph 6.

83 According to the FCA, 16 pre-notification negotiations were held in 2022, of which 10 cases were notified to the FCA (of these, one case was cleared subject to commitments in Phase I and one case was subject to an in-depth (Phase II) review by the Cartel Court: see FCA Annual Report 2022 (op. cit. note 6), at p. 78. One example of a case in which pre-notification discussions with the Official Parties allowed a clearance subject to commitments during Phase I was the acquisition of 71 per cent of the shares in Barracuda Holding GmbH by Eventim Live GmbH in Case BWB/Z-4651.

V OUTLOOK AND CONCLUSIONS

Overall, as a result of the broad scope of application of the Austrian merger control regime, the number of merger control filings in Austria has been increasing constantly year after year. However, following the second domestic turnover threshold introduced by the KaWeRÄG 2021 – requiring that at least 'two of the undertakings concerned each have a turnover of more than €1 million' in Austria – as well as the crisis in Ukraine, the number of notifiable mergers in Austria in 2022 was lower than in 2021.[84] Overall, according to the FCA, the second domestic turnover threshold has led to a decrease in merger filings of 32 per cent in an average comparison of the past five years.[85] In particular, the amendment following the KaWeRÄG 2021 excluded most cases of acquisition of sole control from Austrian merger control where the target company achieved only insignificant domestic turnover (unless the transaction falls under the alternative transaction value threshold or if a JV is created where the turnover of other shareholders has to be taken into account, such as a remaining shareholder with a participation of 25 per cent or more).

84 Merger control cases notified with the FCA between 2018 and 2022: 481 (in 2018), 495 (in 2019), 425 (in 2020), 655 (in 2021) and 334 (2022); see the merger control statistics in the FCA Annual Report 2022 (op. cit. note 6), at p. 79.

85 See the FCA Annual Report 2022 (op. cit. note 6), at p. 78.