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The International Comparative Legal Guide to:

Merger Control 2008

A practical insight to cross-border merger control issues

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1 Relevant Authorities and Legislation

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

Authorities involved in merger control proceedings are:

1) Federal Competition Authority

The Federal Competition Authority (*Bundeswettbewerbsbehörde*, in the following "FCA") is located at the Federal Ministry of Economics and Labour as an independent body, whose main function is the investigation and detection of potential restrictions on competition, as well as filing petitions with the Cartel Court. All concentrations triggering a filing obligation under the Austrian merger regime have to be notified to the FCA.

The FCA generally oversees the functioning of competition in Austria and has been given, *inter alia*, the following powers:

- performance of Phase-I merger control proceedings;
- investigation of suspected competition distortion;
- participation in proceedings before the European Commission and assistance in the European Commission's investigations;
- investigation of branches of economic activities in respect of possible competition infringements; and
- provision of administrative assistance in competition matters to the Cartel Court, Appellate Cartel Court, other courts, administrative authorities (including the regulatory bodies) and the Federal Cartel Prosecutor.

The FCA is provided with extensive investigation powers, including house searches if ordered by the Cartel Court. Upon request, proprietors and representatives of enterprises have to provide information and/or grant access to business related documents, unless if by doing so they risk criminal prosecution.

Both, the FCA and the Cartel Court qualify as competition authorities in the meaning of Regulation 1/2003.

2) Federal Cartel Prosecutor

The Federal Cartel Prosecutor (*Bundeskartellanwalt*, in the following "FCP") represents the public interest in competition matters and is bound by the instructions of the minister of Justice. Due to such right to instruct, the enforcement of cartel law still remains partly in political hands. The FCP is situated at the Cartel Court and is empowered to bring cases before the Cartel Court. His function replaces the former right of the Cartel Court to initiate proceedings ex officio. The FCP may ask the FCA to provide information or may request investigations.

The FCA and the FCP - together the so-called "official parties" (*Amtsparteien*) - play an important role in merger control proceedings, as they are the only parties entitled to apply for an in-depth examination (Phase-II proceedings) of a notified merger (see question 3.6 below).

There have been recent discussions to abolish the current dual structure of Austrian competition authorities by transferring and integrating the function of the FCP into the FCA. However, so far, no final political decision has been passed on that issue.

3) Cartel Court and Appellate Cartel Court

Both, the FCA and the FCP may apply for an in-depth examination of a notified merger before the Austrian Cartel Court (*Kartellgericht*). The Cartel Court's rulings might be appealed to the Appellate Cartel Court (*Kartellobergericht*) as a last instance.

4) Commission on Competition

The Commission on Competition (*Wettbewerbskommission*, in the following "CC") serves as advisory body to the FCA. The CC, as a board of experts, supplies expert opinions upon request of the FCA and the minister of Economics and Labour on questions regarding competition law. The commission is further authorised to give (only) recommendations in merger cases.

1.2 What is the merger legislation?

The first "real" merger control regime, including the possibility of the Cartel Court to prohibit concentrations, was introduced in Austria in 1993. All mergers and acquisitions meeting the requirements set out in the Cartel Act (see questions 2.1 and 2.3 below) are subject to pre-merger control and have to be notified to and cleared before implementation by the FCA or the Cartel Court, as the case may be.

With regard to concentrations of a European dimension, European merger control (ECMR) applies and prevails over the Austrian provisions. Thus in these cases a notification in Austria is not necessary. However, as the Cartel Act provides for special rules regarding the media sector: a notification of a concentration in the media industry might still be required even though the European merger control regime applies.

The last amendment of the Austrian Cartel Act and the Austrian Competition Act (*Wettbewerbsgesetz*) in 2005 brought about a clarification and simplification of Austrian cartel law. The main principles of the Austrian merger regime governed by the Cartel Act and the Competition Act remained unchanged apart from some minor modifications.

1.3 Is there any other relevant legislation for foreign mergers?

Austrian merger control does not provide for any regulation such as foreign investment control etc.

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

In addition to the general merger control legislation, in certain sectors one has to adhere to additional regulatory legislation of which some contain limitations for mergers and acquisitions.

Any change in ownership of an air carrier, for instance, which includes even minor transfers of shares, requires approval by the competent regulatory authority. In the case of media companies, banks, exchange operating companies and insurance companies the competent regulatory authority has to be notified of any actual or planned acquisition of a "qualified share" in the company. A "qualified share" is defined as either a share of a certain percentage (usually 10% or more) or a share that confers a substantial influence on the company. The regulatory authority may in these cases prohibit the acquisition within a certain time period after notification.

Regulatory bodies may in certain cases be called upon by the Cartel Court to state their opinion and also have the right to file submissions themselves, even if they are not a party to the proceedings.

2 Transactions Caught by Merger Control Legislation

2.1 Which types of transaction are caught - in particular, how is the concept of "control" defined?

Concentrations meeting certain turnover threshold requirements (see in detail question 2.3 below) and having effect on the Austrian market are subject to Austrian merger control. Upon request of the official parties (FCA, FCP), the Cartel Court initiates an in-depth examination of the notified transaction and may either clear (under certain remedies) or prohibit the concentration.

The first criterion to be examined is whether the transaction qualifies as a concentration within the meaning of the Cartel Act (s.7 Cartel Act).

The following transactions are considered as concentrations within the meaning of the Cartel Act:

1) the acquisition of the entire or a substantial part of an undertaking, especially by merger or transformation;
2) the acquisition of control over another undertaking by contractual agreement (for instance by means of business management agreements);
3) the direct or indirect acquisition of shares in an undertaking if the shares held after the acquisition are or exceed 25% or 50%;
4) at least half the members of the management bodies or the supervisory boards of two or several companies are caused to be identical; and
5) any other combination of undertakings which confers on one undertaking a direct or indirect controlling influence over another undertaking.

The establishment of full-function joint ventures is also deemed a concentration. Furthermore, the conclusion of certain agreements between banks within the meaning of s.30 (2a) Banking Act (*Bankwesengesetz*, BWG) qualifies as a concentration under the Cartel Act (e.g. agreements between banks on mutual financial support).

With respect to the 25%-threshold set out above, one has to be aware that there is some case law in Austria that a transaction could also qualify as a concentration in case of an acquisition of less than 25% of the share capital if at the same time 25% of the voting rights or similar rights comparable to a 25% shareholder were acquired. Further, "control" or a "controlling influence" is not defined by the Cartel Act but by respective case law. Generally, it can be said that the concept of control is similar to the respective concept under the ECMR.

Intra-group transactions are exempt from merger control. Further, the Cartel Act contains an exemption to the notification obligation concerning the banking business. Merger control rules do not apply to situations in which a bank acquires shares for purposes of resale, restructuring an insolvent company or securing the debt of such a company. The bank concerned is however subject to certain restrictions laid down by law, especially regarding its voting rights. It is further required that the shares are resold within one year of the date of acquisition or, in respect of restructuring and securing measures, after the finalisation of such measures. Further exceptions are provided for certain investment fund companies.

As regards the relevant thresholds, please see question 2.3 below.

The Cartel Act further governs mergers in the media sector aiming to ensure media variety.

2.2 Are joint ventures subject to merger control?

Only full-function joint ventures are subject to merger control. According to s.7 (2) Cartel Act, a joint venture qualifies (comparable to the ECMR) as a full-function joint venture in case it performs on a lasting basis all the functions of an autonomous economic entity. Since 2006, both concentrative and cooperative full-function joint ventures are subject to merger control.

The turnover thresholds do not differ from the ones described below (question 2.3).

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

If a transaction qualifies as concentration, it further has to be examined, whether the relevant turnover thresholds are met. The relevant criterion here is whether the aggregate turnover is achieved by the undertakings concerned by the transaction within the last business year. The Cartel Act provides for a turnover-based threshold.

A concentration within the meaning of s.7 Cartel Act has to be notified to the FCA (see, however, exception below) if in the last business year before the transaction:

- the aggregate worldwide turnover of the undertakings concerned exceeded €300 million (US$ 377 million - exchange rate for full year 2006, www.ecb.int); and
- the aggregate turnover on the Austrian market of the undertakings concerned exceeded €30 million (US$ 37.7 million); and
- the worldwide turnover of each of at least two undertakings concerned exceeded €5 million (US$ 6.3 million).

However, concentrations exceeding the turnover thresholds above are exempt by law from the notification obligation, in case (i) only one undertaking concerned achieved turnover in Austria of more than €5 million (US$ 6.3 million); and (ii) the other undertaking(s) concerned achieved an aggregate turnover of not more than €30

million (US$ 37.7 million) worldwide. Such exemption is intended to cover, in particular, mergers having no material effect on the Austrian market (e.g. one big Austrian undertaking acquires one or more small foreign entities).

For the purpose of turnover calculation, the aggregate net-turnover, excluding intra-group turnovers, of all undertakings linked to each other as defined in s.7 Cartel Act must be taken into consideration. The calculation of turnover in the banking and insurance sector is subject to special rules. In the media sector, for the purpose of determining the aggregate worldwide turnover and the aggregate turnover on the Austrian market, the turnovers of media enterprises and media services have to be multiplied by 200, for media support companies by 20.

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

Yes, the Austrian merger control also applies in the absence of a substantive overlap of the concerned undertaking's business activities.

2.5 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?

Austrian merger control only applies if the relevant facts of a case affect the domestic market (s.24 (2) Cartel Act). On the other hand, affecting the domestic market is sufficient for a transaction to be caught by Austrian merger control, that is to say that "foreign to foreign" transactions may - under the demonstrated condition - also fall within its scope.

This "effects-doctrine" has been applied rather strictly in the past, as even a minor effect on the Austrian market has been deemed to be sufficient. In past cases, the Cartel Court has, for instance, deemed an increased access to resources (e.g. know-how, patents, financial resources) as sufficient effect. It seems that this rule of law has been amended by a ruling of the Appellate Cartel Court. In such ruling the Appellate Cartel Court has held that indirect effects on an Austrian undertaking acquiring a foreign entity (such as an increase of financial resources) is not sufficient to trigger a notification obligation in case the relevant markets do not overlap and the acquired undertaking does not generate turnover in Austria.

However, it has to be noted that even though this ruling seems to make the assessment of a filing obligation a little easier, such ruling has been heavily criticised by the FCA which has applied the "effects doctrine" very strictly so far and has announced on its website that it would have a careful look at transactions in the future not notified but meeting the jurisdictional turnover thresholds.

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

To concentrations of a European dimension, as already described above, European merger control applies and prevails over the Austrian provisions. In such cases, a notification in Austria is not required even though the Austrian thresholds are met. However, as the Cartel Act provides for special rules regarding the media sector, a notification of a concentration in the media industry may still be required.

2.7 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?

Even though there is no express rule in the Cartel Act on that issue, it is likely that Austrian competition authorities would only deem various transactions as one single concentration, if such transactions are conditional on each other. There is no principle under the Austrian merger regime comparable to Art. 5 (2) of the ECMR.

3 Notification and its Impact on the Transaction Timetable

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

Concentrations falling within the scope of the Cartel Act, exceeding the jurisdictional turnover thresholds and having an effect on the Austrian market must be notified to the Cartel Court. The notification is thus compulsory. (Please see however questions 2.3, 2.5, 2.6 and 3.2.)

There is no specific deadline for the notification after signing of respective contracts.

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

As outlined above under question 2.1, the Cartel Act provides for some exceptions to the notification obligation (e.g. banking sector and acquisitions by investment fund companies).

As regards concentrations without any influence on the domestic market, please see question 2.5.

Finally, concentrations exceeding the jurisdictional turnover thresholds above are exempt by law from the notification obligation, in case (i) only one undertaking concerned achieved turnover in Austria of more than €5 million (US$ 6.3 million); and (ii) the other undertaking(s) concerned achieved an aggregate turnover of not more than €30 million (US$ 37.7 million) worldwide.

3.3 Where a merger technically requires notification and clearance, what are the risks of not filing?

Concentrations subject to a notification obligation must not be implemented until clearance has been granted. Any contracts violating this prohibition are legally void. An implementation of a concentration prior to clearance constitutes a prohibited implementation and can lead to fines of up to 10% of the worldwide turnover achieved in the preceding financial year by each of the enterprises involved in the violation. Further, it has to be noted that the submission of misleading or incorrect information in the notification itself may lead to a fine of up to 1% of the worldwide turnover to be imposed by the Cartel Court.

The amount of such fines depends on the severity, the duration, the unjustified enrichment achieved as well as on the degree of fault and the economic capacity of the undertaking.

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

Any implementation of a concentration before clearance is void and

may lead to fines (see above). According to one ruling of the Cartel Court, a concentration is considered to be implemented as soon as it affects the market. It thus depends on actual realisation of the project, e.g. the request of consistent company directives, internal coordination of market behaviour etc., and is independent from its effectiveness according to civil law. However, it has to be noted that there is no ruling of the Appellate Court in this respect. There is therefore the risk that even though local completion of a concentration is carved out, the Cartel Court could hold that the concentration has been implemented in violation of the Cartel Act.

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

Basically a notification can be filed as soon as the parties have agreed on all relevant terms of the transaction. As already mentioned above, the Cartel Act does not set out any deadlines for notification. However, a concentration must not be implemented before clearance.

It is recommended, in particular in problematic cases, to have pre-filing discussions with the FCA.

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

The FCA announces the fact of notification on its website (http://www.bwb.gv.at/BWB/Veroeffentlichungen/Zusammenschluesse/default.htm) immediately after it has received the notification. Within 14 days after this publication, third parties may submit statements to the FCA and/or the FCP (such third parties, however, do not become parties to potential proceedings before the Cartel Court and can, in particular, not appeal any decision by the FCA or the Cartel Court).

Within four weeks after receipt of the notification by the FCA (Phase-I), the FCA and the FCP may apply for an in-depth examination of the merger before the Cartel Court (Phase-II). If no such application is filed within the said four-week period, or applications have been withdrawn by the official parties (e.g. after remedies have been offered by the applicants), the concentration is automatically cleared (in such case, the FCA confirms to the applicant in writing that no applications have been filed within Phase-I).

It is important to note that the mentioned four-week time period only starts to run in case the filing fee (amounting to €1,500) has been duly paid to a specific account of the FCA and in case such payment is proven in the merger filing (by attachment of the original payment form).

If a Phase-II examination is applied for, the Cartel Court may prohibit the concentration (or clear it under appropriate restrictions and/or conditions) within five months after the FCA or the FCP have initiated the Phase-II examination. If no decision is issued by the Cartel Court within the five-month period, the concentration is deemed to be cleared without restrictions.

It is possible to speed up the process as the official parties may waive their right to apply for an in-depth examination, thus clearing the concentration, before the four-week period of Phase-I has ended. In order to obtain such waiver, the official parties require a formal application in writing providing sound reasoning why the matter is of urgency. The accelerating effect is, however, rather small, as a waiver is usually only issued after the two-week period for third parties to submit statements has expired.

Appeals against decisions of the Cartel Court must be lodged within four weeks. The Appellate Cartel Court then has to decide within two months after it has received the file.

The FCA and the FCP have no means under Austrian competition law to suspend the timeframe during Phase-I. Generally, even though the Cartel Court may in principle have the possibility to suspend the proceedings, albeit under some very specific circumstances, any such suspension does not influence the timeframe foreseen for the Phase-II examination. In other words, a concentration is deemed to be cleared without restriction in any case after the expiration of the five-month period (Phase-II). However, in case the Cartel Court at the beginning of Phase-II proceedings holds that the merger filing has been incomplete, the five-month period of Phase-II is suspended until the merger filing has been completed by the notifying party.

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

All transactions subject to a notification obligation must not be completed until clearance has been received. Contracts in violation of this prohibition are legally void.

Moreover, if the transaction is completed before clearance has been granted, the Cartel Court upon application of the official parties, the Austrian Economic Chamber, the Federal Chamber of Labour, the Presidential Conference of the Austrian Chamber of Agriculture, the sector-specific regulators and any third party whose legal or economic interests are affected, as well as any association that represents the economic interests of undertakings, if those interests are affected, can impose fines of up to 10% of the worldwide turnover achieved in the preceding financial year by each of the enterprises involved in the violation (please see questions 3.3 and 3.4).

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

Notifications of concentrations shall contain all material information required for assessing the concentration.

S.10 Cartel Act provides that the notification shall contain, inter alia, detailed information regarding circumstances able to constitute or aggravate a dominant market position, especially in respect of the undertaking itself, its ownership, the market structure and market shares. If the notification does not comply with the provisions of s.10 Cartel Act, the Cartel Court may, within one month after receipt of the application for an in-depth examination, require completion of the notification. In case of non-completion, the Cartel Court may reject the notification. The five-month time period of Phase-II only starts to run after completion of the notification.

The FCA has issued a form for merger notifications. Although its use is not compulsory, it is recommended, as it ensures that the Cartel Court and the authorities dispose of any information required and thus minimises the risk of the notification being rejected.

The form for the notification of concentrations is published (in German) under http://www.bwb.gv.at/BWB/Service/Formblaetter/fbz010106.htm.

3.9 Is there a short form or accelerated procedure for any types of mergers?

The Cartel Act does not provide for a specific accelerated procedure

for unproblematic concentrations. Especially in respect of multi-jurisdictional filings the Austrian Phase-I proceedings of four weeks are quite long. In order to comply with the need for a faster clearance in certain cases, the legislator provided for the FCA and the FCP the possibility to waive their right to apply for an in depth-examination and thereby pre-secure validity of the concentration. However, as already indicated under question 3.6, the accelerating effect is rather small. According to the international standard, the FCA acts as the sole contact to the companies concerned, especially regarding informal pre-filing discussions.

3.10 Who is responsible for making the notification and are there any filing fees?

The undertakings participating in a concentration are entitled to and responsible for filing the notification. Also a joint filing is possible, however not a requirement. Usually the acquirer files the notification.

Filing Fees:

A filing fee of €1,500 shall be paid at the time of filing. In this respect, it is important to note that the four-week time period of Phase-I only starts to run in case the filing fee has been duly paid to a specific account of the FCA and if such payment is proven in the notification (by attachment of the original payment form).

If Phase-II proceedings before the Cartel Court are initiated, a variable court fee up to €30,000 is charged. After the conclusion of the proceedings, the amount of the variable fee is fixed by decision of the presiding judge of the Cartel Court at his discretion considering in particular the following: significance of the proceedings with respect to economic policy; the expenditure connected with the proceedings; the economic conditions of the party liable to pay; and to what extent the party liable to pay has given reason for the proceedings.

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 Cartel Court may prohibit a notified concentration, on request of the official parties, on the grounds that the proposed concentration will create or strengthen a dominant position in the affected market. According to s.4 of the Cartel Act an undertaking holds a dominant position if it (i) is either exposed to no or only insignificant competition; or (ii) holds a predominant position in relation to other competitors. In this respect financial strength, relations to other undertakings, access to suppliers and markets, as well as entry barriers for other undertakings are to be considered. S.4 (2) of the Cartel Act further provides for a disprovable presumption (burden of proof is placed on the undertaking concerned) that an undertaking holds a dominant position if it either:

- has a market share of at least 30%;
- is exposed to competition by not more than two other companies and has a market share of more than 5%; or
- is one of the four largest undertakings, which together account for a market share of at least 80% (if it has a market share of more than 5% of the market), regardless of whether the market is defined nationally, regionally or locally.

An undertaking is also considered to be dominant if it holds a dominant position in relation to its customers or suppliers. This is particularly the case if customers or suppliers are in fact obliged to maintain business relations with the undertaking concerned in order to avoid serious economic disadvantages. If the Cartel Court comes to the conclusion that a dominant position will be created or strengthened, it either prohibits the concentration or grants clearance provided that:

- the concentration is likely to improve the competition in the market in a way that the advantages outweigh the disadvantages of the creation or strengthening of the dominant position; or
- the concentration is necessary to conserve or improve the international competitiveness of the undertaking concerned and additionally is justifiable on macro-economic grounds.

The Cartel Court may also approve a concentration and impose certain conditions (remedies) to prevent the creation or strengthening of a dominant position or to achieve at least compensating advantages.

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

The FCA publishes the fact of a merger notification on its website (www.bwb.gv.at). The publication contains the name of the undertakings concerned, the concerned branch, and any other circumstances necessary for the implementation of the concentration. Any third party whose legal or economic interests are affected by the concentration may file a submission with the FCA and/or the FCP within 14 days after such publication. The concerned third party, however, does not have any right to special treatment of its submission; in particular it does not have any right to require an in-depth examination (see above). This right is reserved to the official parties (FCP, FCA) only. The affected third party is thus not party to the examination proceedings.

Furthermore, the Federal Chamber of Commerce, the Federal Chamber of Labour and the Presidential Conference of the Austrian Chambers of Agriculture as well as the regulatory bodies may file submissions. The latter can also be called upon by the Cartel Court to state their opinion.

4.3 What information gathering powers does the regulator enjoy in relation to the scrutiny of a merger?

The FCA is provided with extensive investigation powers, including house searches if ordered by the Cartel Court. Upon request, proprietors and representatives of enterprises have to provide information and/or grant access to business related documents, unless if by doing so they risk criminal prosecution.

The proceedings before the Cartel Court are dominated by the principle of inquisition. Thus the Cartel Court has the authority to take evidence ex officio. The Cartel Court may also authorise the FCA to accomplish the necessary inquiries.

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

All material information necessary for assessing the concentration are to be provided. If certain information or documents cannot be furnished, full reasons have to be given. Information and documents which constitute business secrets should be flagged. Even though the FCA does not allow third parties to access the file, it recommends filing a non-confidential version, the reason being that the FCA might need a non-confidential version in the course of its market examinations.

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

5.1 How does the regulatory process end?

Phase-I: In case the official parties do not file an application for Phase-II examinations with the Cartel Court within Phase-I, or such applications have been withdrawn by the official parties within Phase-I (e.g. after remedies have been offered by the applicants and accepted by the official parties), the concentration is automatically cleared (in such case, the FCA confirms towards the applicant in writing that no applications have been filed within Phase-I).

Phase-II: In Phase-II proceedings it is the Cartel Court which decides on the case by a resolution. The following rulings are possible:

- resolution according to which the application(s) for investigation of (the) official part(y)ies are dismissed on the grounds that the proposed concentration does not constitute a concentration within the meaning of s.7 Cartel Act;
- resolution according to which the proposed concentration is not (under certain remedies) prohibited;
- resolution according to which the proposed concentration is prohibited;
- resolution according to which the investigation proceedings before the Cartel Court are terminated due to the expiry of the 5-month time period of Phase-II; or
- resolution according to which the investigation proceedings before the Cartel Court are terminated due to the official parties' withdrawal of their respective investigation applications (e.g. after remedies have been agreed between the official parties and the applicants).

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

Already during Phase-I, that is to say before an in-depth examination is applied for, the official parties might be open for discussion on remedies. However, in most of the problematic cases the FCA might be forced to apply for Phase-II examination to have more time for assessing the case.

The Cartel Act expressly provides for the possibility that the applicants commit themselves directly towards the official parties to certain remedies. The official parties would, in such case, either refrain from filing a Phase-II application or withdraw their Phase-II applications (in which case the Cartel Court would be obliged to close Phase-II proceedings).

Further, the Cartel Court may issue a clearance decision under certain conditions or restrictions.

5.3 At what stage in the process can the negotiation of remedies be commenced?

See question 5.2 above.

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

There is no published standard approach for divestments. In a past case the Cartel Court has, for instance, ordered the acquirer to divest certain branches whose combined turnover equalled the proportion of its market share which would have exceeded the 30% threshold after the transaction. Further, terms and conditions to be applied to divestments are set on a case-by-case basis (e.g. need for an up-front buyer, etc.).

5.5 Can the parties complete the merger before the remedies have been complied?

A concentration deviating from remedies imposed must not be implemented. Hence, the transaction may only be completed, once the remedies have been complied with by the parties, unless in case of remedies which need to be fulfilled only during a certain time period after completion of the merger.

5.6 How are any negotiated remedies enforced?

In case the parties to the concentration do not fulfil the remedies (do not adhere to the conditions or restrictions agreed upon with the official parties or contained in the Cartel Court's ruling), the concentration is illegally implemented (for consequences see question 3.3).

5.7 Will a clearance decision cover ancillary restrictions?

Austrian merger control basically follows the ancillary restraints doctrine. This means that restrictive provisions in an agreement are only cleared if they are directly related and necessary for the implementation of the concentration. Ancillary restraints have to be notified together with the concentration. Otherwise they might not be covered by clearance.

5.8 Can a decision on merger clearance be appealed?

Decisions of the Cartel Court are subject to appeal by all notifying parties, as well as the official parties (who are considered to be parties to all proceedings regarding competition law). The period for an appeal to be filed is four weeks from service of the decision. The appeal is heard by the Appellate Cartel Court which has to decide within a period of two months after it has received the file.

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

The decisions of the Cartel Court/Appellate Court are in principle binding. If however the approval of a concentration, the non-filing of an application for an in-depth examination, the waiving of the right to file such an application, or the withdrawal of such an application is based on incorrect, incomplete or misleading information for which any of the undertakings involved is responsible, or if any stipulation tied to the approval of a concentration is contravened, the Cartel Court may, upon application and with due regard to the principle of proportionality, order the enterprises involved to take measures to mitigate or even eliminate the effects of the concentration.

Additionally, as already mentioned above, concentrations subject to notification must not be implemented until clearance has been granted. Any contracts violating this prohibition are legally void and thus non-binding to the parties. The Cartel Court will, upon application, determine whether a concentration has been implemented in a prohibited way. The parties eligible to apply in this case are the official parties, the Austrian Economic Chamber, the Federal Chamber of Labour, the Presidential Conference of the Austrian Chamber of Agriculture, the sector-specific regulators and

any third party whose legal or economic interests are affected, as well as any association that represents the economic interests of undertakings, if those interests are affected. The prohibited implementation of a concentration may lead to fines being imposed (see question 3.3 above). A violation of the Cartel Act only becomes time-barred if prosecution of such violation does not begin within a five year period after the violation has ended. The question remains open whether an implementation of a concentration without notification to/approval by the Austrian competition authorities can become time-barred (one could argue that such implementation, in itself, represents a violation of the Cartel Act that does not end).

6 Miscellaneous

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

The cooperation of Austrian competition authorities with those of other jurisdictions is mainly based on the European Competition Network (ECN) as well as on the network of the European Competition Authorities, including all members of the EFTA. It can be observed that Austrian competition authorities cooperate more and more with the corresponding foreign authorities (especially in multi-jurisdictional filings).

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

June 2007.

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