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Austria

MERGER CONTROL

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This country-specific Q&A provides an overview of merger control laws and regulations applicable in Austria.

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AUSTRIA
MERGER CONTROL

1. Overview

The main statute regulating merger control in Austria is the Cartel Act 2005 (*Kartellgesetz*).

The Austrian Supreme Court (in its capacity as Cartel Court of Appeals) describes the objective of merger control as "*the preventive support of the general interest in maintaining an 'Austrian' market structure* […]*, which ensures effective competition*".

The authorities competent for merger control are the same as those responsible for the (public) enforcement of competition law in general. Notifiable mergers have to be notified to the Federal Competition Authority (*Bundeswettbewerbsbehörde* – BWB); the BWB informs the Federal Cartel Prosecutor (*Bundeskartellanwalt* – FCP). These two institutions are commonly referred to as the Official Parties (*Amtsparteien*). If either of the official parties requests an in-depth examination (in principle, within four weeks of receiving the notification), the Higher Regional Court of Vienna (*Oberlandesgericht Wien*) sitting as the Cartel Court (*Kartellgericht*) opens Phase II proceedings. If the official parties do not see competition concerns, the notified merger is cleared upon expiration of the Phase I period or receipt of the official parties' waivers of their right to request Phase II proceedings. Decisions by the Cartel Court can be appealed against to the Austrian Supreme Court sitting as the Cartel Court of Appeals (*Kartellobergericht*). The decisions by the Cartel Court of Appeals in Phase III are final.

The Cartel Act defines which transactions qualify as notifiable mergers. Only transactions that are to be regarded as concentrations (*Zusammenschlüsse*) and exceed certain (essentially, turnover) thresholds have to be notified prior to implementation. If, even though the thresholds are exceeded, there is either no (potential) effect on the Austrian market (effects doctrine) or the thresholds of the EU Merger Regulation (EUMR) are also exceeded, Austrian merger control does, in principle, not apply but the transaction may be notifiable elsewhere or, according to the "one stop shop principle", to the European Commission.

While for a transaction to qualify as concentration, there typically needs to be a change of control (similarly as under the EUMR), the scope of Austrian merger control goes beyond that: Also the acquisition of only a 25% stake in another undertaking qualifies as concentration; further, the bringing about of an identity of at least half of the executive or supervisory board members is regarded a concentration between the concerned undertakings.

A notification threshold was introduced in 2017, which also takes the transaction value (and not only the parties' turnover) into consideration.

On 10 September 2021, an amendment to the Austrian Cartel Act entered into force, which introduced a second domestic turnover threshold (see below). This new threshold is applicable to transactions notified after 31 December 2021.

2. Is notification compulsory or voluntary?

In general, all concentrations exceeding the thresholds contained in the Cartel Act have to be filed for clearance prior to implementation.

Intra group concentrations do not have to be notified.

3. Is there a prohibition on completion or closing prior to clearance by the relevant authority? Are there possibilities for derogation or carve out?

According to Austrian law, notifiable mergers may only be implemented once the official parties have waived their right to request Phase II proceedings or the time period of Phase I, typically four weeks, has elapsed.

If a request for further examination was placed by one of the official parties, the concentration may only be implemented once the Cartel Court has issued its decision (and it is not a prohibition decision; in case the Cartel Court issues a conditional clearance decision, the

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conditions must be complied with or the parties run the risk to be regarded as implementing a merger without prior clearance).

According to jurisprudence, a concentration is implemented when the influence, which constitutes the core of the respective concentration, is exercised for the first time in a way affecting the competitive conditions. This would mean that the realisation of the concentration (including the registration in the commercial register) and the exercise of controlling influence can fall apart in terms of time. Apart from that, carve out or withhold constructions are hardly compatible with Austrian merger control.

In this context, the effects doctrine may also be mentioned. Irrespective of whether a concentration is realised in Austria or abroad, as long as the Austrian turnover thresholds are exceeded, a notification is, in principle, required. This is not the case, if it can be established that there will be no effect on the Austrian market – this may, in particular, be the case where the target is active on markets not including Austria and has no actual or foreseen Austrian turnover.

The main sanctions for infringing the prohibition to implement notifiable concentrations prior to clearance are fines and nullity.

4. What types of transaction are notifiable or reviewable and what is the test for control?

The Cartel Act defines the term “concentration” legally and foresees five cases in which a concentration is realised.

A concentration always requires the involvement of two undertakings. The term “undertaking” is a very broad one. It is to be understood as an entity engaged in an economic activity irrespective of its legal form and means of funding. Even an insolvent and already closed business can be an undertaking. A natural person (shareholder) qualifies as undertaking if it can exert decisive influence over a company’s economic planning.

A concentration is considered to arise in the case of:

1. An acquisition of an undertaking, wholly or to a substantial part, by another undertaking. A substantial part is acquired, if an existing market position is transferred. This can include business units, production sites, branches, and also established trademarks.
2. An acquisition of management contracts or the like by an undertaking with regard to the business of another undertaking, which leads to a lasting change in the market structure.
3. A direct or indirect acquisition of 25% or more, or 50 % or more of a company’s shares by another undertaking. A concentration is also brought about if particularly voting rights are acquired that resemble such as a 25% or 50% (capital) participation would normally confer. It should be noted that in case of the acquisition of minority shareholdings of at least 25%, the possibility to control is not required. If the 25% shareholding already confers control, however, the later acquisition of further shares does not need to be notified. If it does not, the subsequent acquisition of 50% or more of the shares constitutes a separate concentration.
4. “Cross-management or supervision”: Acts that bring about the identity of at least half of the members of the executive or the supervisory board of two or more undertakings.
5. Any (other) acquisition of a direct or indirect controlling influence over another undertaking. According to jurisprudence, already the opportunity to exercise controlling influence on the activities of another undertaking is sufficient. Whether a controlling influence is actually exercised is irrelevant. It should also be noted that the shifting from joint to sole control constitutes a concentration. Sole control means that the acquirer is able to decide on its own over the strategic competitive behaviour of the target undertaking. This can also be the case where there are veto rights concerning strategic decisions (“negative sole control”). Joint control is gained, if two or more undertakings together exert a controlling influence on what is then commonly referred to as a joint venture. Each undertaking must have the opportunity to influence strategic decisions in the sense that such decisions cannot be made without it. Strategic decisions typically are decisions on the budget, important investments, the business plan and the composition of the management.

As noted, intra-group transactions do not have to be notified.

Further, there are some noteworthy exemptions in the financial sector:

- Under certain circumstances, a bank does not need to notify the acquisition of shares of a target company for the purpose of selling

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those, doing a restructuring against the background of an insolvency situation or in case it acquires shares for the purpose of securing its claims.
- Undertakings the only purpose of which is to acquire shares and to exploit these shareholdings may also benefit from an exemption. However, jurisprudence has made it clear that the exemption only applies if the investment entity does not intervene in the operative management of the target company, but merely holds the shares as financial assets.

5. In which circumstances is an acquisition of a minority interest notifiable or reviewable?

As noted above, also the acquisition of non-controlling shareholdings can qualify as a concentration under Austrian law.

In general, acquisitions of less than 25% of the shares in a company do not constitute a concentration. However, where such minority shareholding is combined with rights which are normally only given to shareholders holding at least 25%, there can still be a notifiable concentration.

6. What are the jurisdictional thresholds (turnover, assets, market share and/or local presence)? Are there different thresholds that apply to particular sectors?

There is no market share threshold in Austria.

The relevant turnover thresholds are both global and national in scope and they apply uniformly. There is no distinction between different sectors or industries save for a special rule when it comes to media concentrations.

A concentration has, in principle, to be filed for clearance with the BWB, if the undertakings involved achieved all of the following in the last business year:

- a combined aggregate worldwide turnover of more than EUR 300 million; and
- a combined aggregate turnover in Austrian of more than EUR 30 million with at least two of the undertakings concerned achieving a turnover of more than EUR 1 million each; and
- at least two of the undertakings involved had a worldwide turnover of more than EUR 5 million each.

A concentration is exempted from the notification obligation if the two following conditions are met:

- only one of the undertakings involved achieved a turnover of more than EUR 5 million in Austria and
- the combined aggregate worldwide turnover of the other undertakings involved was not more than EUR 30 million.

A special rule applies with regard to media concentrations. In case of a media concentration, the turnover of the media companies and media services (*Mediendienste*) is multiplied by 200 and the turnover of companies providing auxiliary services for media companies (*Medienhilfsunternehmen*) is to be multiplied by 20. However, these multipliers are not applied with regard to the two EUR 5 million thresholds mentioned above.

The thresholds refer to net turnover. All undertakings which are linked to each other in a way that would constitute a concentration if newly established are deemed as one single undertaking and, therefore, the turnover of the entire group(s) has to be taken into account. There is a limit in case of indirect shareholdings (participation via stages) according to jurisprudence: The turnover is only to be considered if on each stage subsequent to an indirect participation a controlling influence exists.

Turnover within the meaning of Austrian merger control is, as under the EUMR, generally understood as turnover resulting from the ordinary activities of all undertakings involved during the last completed business year. In the banking sector, turnover refers to interest and similar income, income from shares and other equity interests, income from non-fixed income securities, commission revenues, net earnings from financial transactions and other operating revenues. In the case of insurance companies, the premium incomes have to be used.

The seller group is, in general, not regarded as an undertaking involved. The turnover of the seller must only be included if the seller also post transaction will be connected (typically) to the target company in a way as described above.

In addition to the above mentioned “classic” turnover thresholds, a concentration has to be notified to the BWB, where

- the aggregate worldwide turnover exceeds EUR 300 million (same as first part of the mentioned classic turnover based threshold),
- the aggregate Austrian turnover exceeds EUR 15 million (half what is required under the

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classic turnover threshold),
- the value of the consideration for the transaction exceeds EUR 200 million, and
- the target is active in Austria "to a significant extent".

As with the existing thresholds, all four conditions have to be met cumulatively. The new "transaction value – threshold" applies to transactions implemented as of November 1, 2017.

As both, the term "consideration" and the condition "significant activity in Austria", are not defined in the Cartel Act, the BWB has together with the German Federal Cartel Office (*Bundeskartellamt*) issued a guidance paper (available at the homepages of the authorities) and there is also some additional explanation to be found in the official explanatory remarks to the amendment (*travaux preparatoires*) in Austria. It may be particularly noted here that

- The term "consideration" covers all assets and other services of monetary value (purchase price) which the seller receives from the purchaser in connection with the transaction plus the value of possible liabilities which the purchaser takes over.
- The "significant activity in Austria" criterion is essentially taken to be fulfilled where a site of the undertaking to be acquired is situated in Austria. However, this criterion can also be met in cases where there is no such presence but the "recognised key measures used in the respective industry" indicate a relevant Austrian connection. As regards the digital industry, for example, the number of monthly active users (from Austria) or the number of unique visits can be taken into account for ascertaining an Austrian nexus.

Five years in to the application of the transaction value-based filing threshold, the BWB and FCP in practice appear to be taking a restrained approach—in particular with respect to the presence of significant domestic activity by the Target—with respect to asserting the jurisdiction of Austrian merger control over transactions not captured by the traditional turnover-based threshold. The authority's assessment is highly case-specific. In the BWB's view, it is still too early to assess whether the transaction value-based filing threshold has met the legislator's expectations. However, the BWB notes that the new threshold does not yet primarily cover those (digital) transactions for which it was intended. The BWB also raised the question of whether and to what extent the Austrian competition authorities appear well suited to examine the content of such transactions which often have global importance.

7. How are turnover, assets and/or market shares valued or determined for the purposes of jurisdictional thresholds?

N/A

8. Is there a particular exchange rate required to be used to convert turnover and asset values?

Turnover has to be converted into Euro at the official exchange rate, i.e. the European Central Bank's official exchange rates for the last business year. Thereby, the annual average rate has to be used. The exchange rates can be found on the website of the European Central Bank.

9. In which circumstances are joint ventures notifiable or reviewable (both new joint ventures and acquisitions of joint control over an existing business)?

The creation of a joint venture – that is an undertaking being jointly controlled by at least two other undertakings – performing on a lasting basis all the functions of an autonomous economic entity qualifies as a concentration under Austrian law. Such joint ventures are also referred to as so-called full-function joint ventures. Similar as under the EUMR, a full-function joint venture has to be economically autonomous, permanent and must not fulfil only auxiliary functions. The joint venture must have sufficient resources to operate independently on a market in order to conduct its business activities on a lasting basis. Moreover, it must be involved in activities beyond one specific function for the parent companies.

If two undertakings gain joint control over an already operating target company, this can as well qualify as concentration (see the above elaboration on what transactions are concentrations under Austrian law). The full-function test is in such cases not a requirement to have a concentration.

10. Are there any circumstances in which different stages of the same, overall transaction are separately notifiable or reviewable?

N/A

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11. How do the thresholds apply to "foreign-to-foreign" mergers and transactions involving a target /joint venture with no nexus to the jurisdiction?

According to the effects doctrine, all concentrations having effects on the Austrian market are subject to the Austrian merger control regime. As the relevant criterion is the effect on the Austrian market, – in principle – no local presence and not even sales into Austria by the target are required but a relevant effect on Austria so far was only assumed if the market concerned by the transaction was also encompassing Austria (eg. in case of European- or at least supranational markets) . Therefore, in principle, also foreign-to-foreign mergers have to be notified if they exceed the mentioned thresholds and have an effect on the Austrian market.

However, Since the introduction of the second domestic turnover threshold (see above), the effects doctrine has largely lost importance, as it is now also required that at least two of the undertakings concerned each achieve a turnover in Austria. Thus, where the transaction in question "merely" involves an acquirer and the target, the merger only has to be notified if the target has turnover in Austria. However, in cases where the target company does not generate the relevant turnover for the thresholds in Austria, but possibly a second parent company, the effects doctrine remains relevant.

According to jurisprudence, there was no obligation to notify a merger where a foreign target company did not offer and in the foreseeable future would not offer any services in Austria. Furthermore, no other resources such as know-how, patents and so on, which could contribute to a noticeable increase in the market share of the acquirer, were part of the transaction. Also, the financial strength alone was found to constitute a rather indirect effect, which (as such) does not constitute a sufficient effect on the Austrian market. In one leading case, an Austrian bank was not obliged to notify the acquisition of a Czech and Slovak credit institute. The target companies were neither actual nor potential players on the Austrian market. On the other hand, in a different case, it was held that the acquirer was gun-jumping where the target company did not generate any turnover in Austria due to an increase in the financial strength in combination with the (increased) access possibilities to sales markets, the distribution network and the trade mark of the target company.

It may also be noted that the BWB essentially has a very strict view regarding the effects doctrine, which it has also published on its website (www.bwb.gv.at).

12. For voluntary filing regimes (only), are there any factors not related to competition that might influence the decision as to whether or not notify?

N/A

13. What is the substantive test applied by the relevant authority to assess whether or not to clear the merger, or to clear it subject to remedies? Are there different tests that apply to particular sectors?

In the past, Austrian merger control only employed the dominance test. The Cartel Court would examine whether or not the notified transaction created or strengthened a dominant position. However, the latest amendment to the Austrian Cartel Act saw an introduction of the SIEC-Test (Significant Impediment of Effective Competition Test), which is also used under the EUMR. Hence, mergers notified as of 1 January 2022 will be assessed as to whether they create or strengthen a dominant position and, in addition, as to whether they will significantly impede effective competition.

Pursuant to jurisprudence, a dominant position is given if an undertaking can prevent the maintaining of effective competition on the relevant market by being able to behave independently with regard to its competitors, customers and/or consumers to a notable extent.

In applying the substantive test, the Cartel Court (the BWB does not issue any binding decision but may simply refrain from or waive its right to ask for an in-depth examination of a merger case) evaluates the effects of the concentration on the market structure in a predictive approach. Competition conditions before and (hypothetically) post implementation of the concentration are compared. All circumstances may be taken into account, with market shares being a major factor. Strong buyer power, for example, is also considered.

In many cases, the Cartel Court relies on (economic) expert opinions.

Besides, when a merger concerns sectors subject to specific regulation (e.g. electricity and gas, broadcasting and telecommunication), the competition authorities collaborate closely with experts from the sector specific regulators.

14. Are factors unrelated to competition

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relevant?

Special provisions apply to media concentrations, aiming to preserve media diversity. Hence, notifiable mergers are not only subject to the market dominance – and SIEC-test but may also be prohibited if it is expected that the media diversity will be impaired.

Under Austrian law, media diversity is the existence of numerous independent media which are not connected and which shall guarantee press coverage reflecting a range of opinions. A concentration is classified as a media concentration if at least two of the undertakings involved in the merger are considered to be a media company; a media service (*Mediendienst*) or companies providing auxiliary services for media companies (*Medienhilfsunternehmen*) or other undertakings, which hold at least 25% of the shares of one of these companies. The terms are all legally defined in the Austrian Media Act.

It may also be mentioned that, pursuant to the Cartel Act, the Cartel Court is to clear a concentration even if the dominance test is fulfilled in case the concentration is indispensable for maintaining or improving the international competitiveness of the undertakings involved and justified macro-economically. However, in practice, this provision hardly plays a role.

15. Are ancillary restraints covered by the authority's clearance decision?

Regarding ancillary restraints, there are no clear rules in Austria. In practice, the European Commission's Ancillary Restraints Notice is used as guidance.

It should be noted that, according to jurisprudence, a parallel examination of facts under antitrust (prohibition of cartels) and merger aspects (creation of a dominant position) does not take place in Austrian merger control proceedings. Outside the scope of merger control, the behaviour in question must comply with the prohibition on cartels (which is to be evaluated by the undertakings concerned in a self-assessment).

16. For mandatory filing regimes, is there a statutory deadline for notification of the transaction?

The Cartel Act does not set forth a filing deadline. However, the ban of implementations before clearance sets a limit as it implicitly defines the latest possible moment for notification (at least some four weeks, the typically Phase I duration, prior to the desired closing date; one seems well advised to allow for more time with a view to allow for the preparation of the notification, etc).

17. What is the earliest time or stage in the transaction at which a notification can be made?

As mentioned, there is no explicit provision which governs the point(s) in time for an application for clearance. As regards the earliest date practicable, Austrian jurisprudence confirmed the established practice that a concentration can be notified as soon as the (serious) intention to merge within a foreseeable period of the actors involved is recognizable. An LoI (Letter of Intent) will often be a sufficient basis to notify a concentration.

18. Is it usual practice to engage in pre-notification discussions with the authority? If so, how long do these typically take?

N/A

19. What is the basic timetable for the authority's review?

The Austrian review process is divided into three phases: Phase I which is performed by the official parties; Phase II which takes place before the Cartel Court, and – in rare cases – Phase III before the Cartel Court of Appeals:

Phase I: Phase I takes typically four weeks. Within this period, the BWB and the FCP can apply for an in-depth examination to the Cartel Court. It starts to run with the receipt of the notification by the BWB. In Phase I, third party undertakings that consider their legal or economic interests affected by the concentration can submit written statements within two weeks as of the publication of a short notice on the concentration at the website of the BWB.

If the official parties waive their right to apply for Phase II proceedings or if they do not apply for such a proceeding within the four weeks' deadline, the concentration is deemed cleared and the merger can be implemented. The official parties inform the notifying parties that no application for Phase II was filed (or indeed if they waive their right to request such proceedings). Besides, the BWB publishes a short notice on its website.

The vast majority of notified mergers are cleared that way without there being a reasoned clearance decisions.

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The four week deadline in Phase I can be extended by two additional weeks upon request by the notifying parties.

Phase II: Phase II is initiated by the request of the BWB and/or the FCP. The opening of such in-depth examination is published on the website of the BWB. In practice, the official parties also apply for Phase II proceedings if concerns cannot be removed within the time period of Phase I or if they consider that the notification should be rejected all together (for lack of a notifiable merger). It may also be noted in this context that there is no 'stop the clock' mechanism for notifications regarded incomplete by the official parties.

Also in Phase II, third parties have the right to submit written statements to the Cartel Court.

Generally within five months after the receipt of the (first) application for an in-depth examination, the Cartel Court is to decide on the merits or to reject the notification. Upon request by the notifying party, the deadline within which the Cartel Court has to decide can be extended by one month to in total six months. Besides, the Cartel Court can issue an instruction to improve the notification within an appropriate deadline.

Phase III: A decision by the Cartel Court can be appealed to the Cartel Court of Appeals which triggers Phase III. This hardly ever occurs in practice. The Cartel Court of Appeals has to decide within two months after receiving the files.

20. Under what circumstances may the basic timetable be extended, reset or frozen?

N/A

21. Are there any circumstances in which the review timetable can be shortened?

As noted, Phase I proceedings may be shortened by approx. one and a half weeks if the official parties waive their right to apply for an in-depth examination. In practice, the BWB and FCP are willing to do so, if the deadline for third parties to submit statements has expired (two weeks upon publication of the concentration plus some days for postal delivery) and provided their examination of the concentration results in no concerns.

Such waivers are at the discretion of the official parties. In any case, the applicant has to substantiate the urgency of a fast conclusion of the proceedings.

22. Which party is responsible for submitting the filing?

According to the Cartel Act, each undertaking involved in the concentration is entitled to file the notification. However, this entitlement rather can be classified as an obligation to notify because the Cartel Act also contains the ban on implementation whose infringement is penalised.

In the absence of any special provisions with regard to joint ventures, the same principles apply.

23. What information is required in the filing form?

According to the Cartel Act, the notification must contain exact and exhaustive information on all circumstances which are relevant to the creation or strengthening of a dominant position or which might significantly impede effective competition. The Cartel Act indicates some circumstances such as the structure of each undertaking involved (in particular the ownership structure including corporate links, the relevant turnover separated into specific goods and services of the last years before the concentration), the market shares for each undertaking and the general structure of the market.

Further, the BWB has published a (new) form in 2020 which gives good indication of the essential information to be provided. This form can be downloaded from the website of the BWB.

The notification form foresees the provision of information such as a brief description of the notification, information about the undertakings involved, market definition(s) and data, reasons for justifications, special information on joint ventures and media concentrations.

A shorter version of the form may be filled-out in case there are no affected markets. This term is defined in the form itself. An affected market is given in case of (i) the creation or strengthening of a dominant position within the meaning of Article 4 of the Cartel Act; or (ii) horizontal overlaps where two or more undertakings involved are active on the same product market and the concentrations leads to a common market share of 15% or more; or (iii) vertical overlaps, ie the undertakings involved are active on different markets, of which one is upstream or downstream with regard to the other and their market shares amount to 25% or more.

The provided information has to be correct and complete. In the case of incorrect or misleading statements, the Cartel Court can impose a fine amounting to 1% of the total group turnover achieved in

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the preceding business year. If relevant information cannot be provided or documents cannot be submitted, the applicants have to give detailed reasons.

The notification has to be filed in German. As regards exhibits, the official parties generally accept English documents as well; the Cartel Court may well require translations.

Until recently, the actual notification had to be submitted to the BWB in paper form. However, in response to the COVID-19 crisis, the BWB launched an online merger notification system as of 23 March 2020, which can (or, at least in the BWB's view, must) now be used in place of hand delivery or mail submission.

24. Which supporting documents, if any, must be filed with the authority?

According to the form provided by the BWB, the following documents should be submitted: (i) annual reports of the undertakings involved, (ii) organizational charts and/or graphs illustrating the ownership structure before and after the merger, (iii) copies of all analysis, reports etc and other documents, on which the market definition(s) are based, (iv) documents proving reasons for justification, (v) documents supporting market information provided, (vi) relevant business plan(s), (vii) brochure(s) with product descriptions and price list(s).

In practice, often very few such supporting documents are enclosed with notifications.

In particular, there is also no need to present written powers of attorney, articles of associations and transaction documents or the like. Of course, the authorities may in the course of their investigation ask for the provision of such and additional documents.

Austrian merger control law also does not contain explicit "age restrictions" for documents. However, typically the last business year before the concentrations is of particular interest. In the case of affected markets (see on the definition above), it is the three ultimate business years. There are also no strict provisions as to the form of documents to be submitted. Hence, typically copies are sufficient.

25. Is there a filing fee?

The filing fee with the BWB amounts to EUR 6,000.

In the notification, the payment has to be proven.

In case proceedings before the Cartel Court are initiated, an additional so-called framework fee (*Rahmengebühr*) has to be paid; the fee currently amounts to up to EUR 34,000.00.

26. Is there a public announcement that a notification has been filed?

N/A

27. Does the authority seek or invite the views of third parties?

The rights which are granted to third parties are rather limited.

The notification of a concentration is disclosed to the public immediately after the receipt of the application. The BWB essentially publishes the names of the undertakings involved, the nature of the concentration, the affected business branch(es).

Within two weeks as of such publication third parties are allowed to submit statements. The consideration of such statements is at the discretion of the official parties, however. The same applies to any statements by third parties in Phase II proceedings before the Cartel Court. In particular, third parties do not formally become parties to the proceedings and have no standing to lodge an appeal.

It may also be noted in this context that, if considered necessary, the BWB may also upon its own initiative contact market participants for further information; inter alia, they may market test remedies offered.

28. What information may be published by the authority or made available to third parties?

As mentioned, the BWB publishes the fact that a notification has been made (not the notification as such) and a short description of the concentration on its website.

Further, the BWB publishes a note on its website when a request to open an in-depth (Phase II) examination is made and the notified transaction is cleared.

Besides, Austrian merger control law foresees certain further publications on the BWB's website such as established infringements of conditional clearances.

Business secrets are generally not at issues regarding such publications As a large part of these types of publications, such as the short notice on the website, are

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very short and publications with substantial content are usually discussed and agreed with the parties involved.As noted, the BWB may, however, in its own motion request additional information from market participants in the course of it examining the notified transaction. In so doing, the BWB may want to provide certain pieces of information to third parties. As requested in the BWB's form anon-confidential version of the notification together with the original notification has to be provided; thereby making clear what the applicant(s) consider business secrets which shall not be disclosed to third parties.

Further, it may be mentioned that final decisions of the Cartel Court are published by inclusion in a special on-line archive (www.ediktsdatei.justiz.gv.at). The publication identifies the parties involved and provides at least the essential content of the decision. Parties have the possibility prior to such publication to comment on issues of business secrets. Decisions by the Cartel Court of Appeals are as a matter of principles published via the federal legal information system (www.ris.bka.gv.at/Judikatur). At least the names of the undertakings concerned are redacted.

In practice, third parties are not granted access to the files of the BWB nor, in general, to the files of the Cartel Court.

29. Does the authority cooperate with antitrust authorities in other jurisdictions?

Austria is a Member State of the EU and the BWB cooperates closely with the European Commission and national competition authorities. A particularly close cooperation exists with the German *Bundeskartellamt*.

30. What kind of remedies are acceptable to the authority?

Pursuant to the Cartel Act, the Cartel Court may not prohibit the concentration in case the concentration can be combined with commitments or restrictions which prevent the creation or strengthening of a dominant position or by means of which a justification of the concentration is realized. If after the imposing of certain restrictions or commitments by the Cartel Court, the relevant circumstances change, the Cartel Court may alter or revoke restrictions or commitments upon application of an undertaking involved in the concentration.

In practice, commitments and restrictions are often offered in order to avoid Phase II proceedings or to resolve them.

While the Austrian authorities have accepted behavioural remedies, there is a preference towards structural remedies. In comparison with the EUMR, the conclusion or imposing of remedies is more flexible in Austria, as there are no strict rules or deadlines governing them.

31. What procedure applies in the event that remedies are required in order to secure clearance?

Remedies can be offered both in Phase I and Phase II. They may be given by notifying parties' offer or upon official parties' request. The notifying parties may offer remedies in order to convince the official parties not to refer a case to Phase II or to withdraw their Phase II request(s). Another possibility is that the notifying parties negotiate commitments with the official parties and present them to the Cartel Court, which will then issue a decision including the commitments.

In Phase II, the notifying parties may also offer remedies directly to the Cartel Court. However, in practice, remedy negotiations with the BWB and the FCP are much more common.

In the last years, the number of cases, in which parties have entered into commitments in order to get clearance, has increased substantially.

There is no specific procedural regime for remedies discussions, nor are there any strict deadlines. However, if the parties consider offering remedies in Phase I, these should be offered relatively early in the proceedings, given the short time available (maximum of six weeks). In Phase II, more time is available for remedy discussions.

32. What are the penalties for failure to notify, late notification and breaches of a prohibition on closing?

Concentrations which exceed the above mentioned thresholds have to be notified to the BWB and cleared before being implemented. In case of failure to notify or late notification that is after implementation, the prohibition on closing (also ban on implementation or standstill obligation) is violated.

If the concentration was only cleared by imposing certain restrictions or commitments, the concentration must not be implemented in a way differing from those restrictions or commitments.

Upon application by the official parties, the Cartel Court

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is to impose fines amounting to up to 10% of the concerned group's turnover in the preceding business year in so called gun jumping cases (violations of the ban on implementation). The imposition of a fine largely is a discretionary decision. When assessing the fine, the gravity and duration of the infringement, level of fault involved and economic performance of the infringing undertaking(s) is (are) considered.

According to Austrian jurisprudence, violations of the prohibition on closing before clearance are generally regarded as a serious infringement. So far, fines in the range of some thousand Euros (following later notification in the undertakings' own initiative) to EUR 1.5 million have been imposed.

Other sanctions such as cease orders do not play a significant role in practice. However, it should be noted that the law also foresees a nullity sanction in cases of infringements of the ban on implementations. This does not concern agreements preparing the concentration, but legal acts implementing the concentration or taken after an illegal implementation.

33. What are the penalties for incomplete or misleading information in the notification or in response to the authority's questions?

Undertakings which provide intentionally or negligently incorrect or misleading information in a notification may upon application by the official parties be fined by the Cartel Court up to 1% of their (group's) total turnover in the preceding business year.

Information is incorrect or incomplete in case that it gives a distorted picture of reality in significant aspects. Significant aspects concern the minimum requirements regarding the content which notifications have to comply with. According to jurisprudence, in case of minor fault and insignificant consequences, the imposition of a fine can be refrained from if the fine is not deemed necessary on special or general preventive grounds.

In a recent case, the Cartel Court fined an undertaking with EUR 50,000 for failure to provide the (relevant) identity of two of three executives.

34. Can the authority's decision be appealed to a court?

As noted, decisions by the Cartel Court can be appealed against to the Cartel Court of Appeals. However, an appeal may only be lodged on points of law, as the Cartel Court of Appeals is not competent to review the assessment of evidence. The period within which a remedy has to be brought is four weeks after the service of the decision.

35. What are the recent trends in the approach of the relevant authority to enforcement, procedure and substantive assessment

The Austrian competition authorities and particularly the BWB are kept quite busy with merger control. As in previous years, the BWB has reviewed many concentrations. In 2021, 653 national filings were made, 651 of which were cleared in Phase I. That is, the BWB and FPA only requested two Phase II proceedings in 2021.

As mentioned, particularly in complex cases it can be advisable to hold pre-notification talks with the official parties. In addition, in some limited circumstances, it can be possible to obtain a waiver of a Phase II review in advance of the natural expiration of the four-week Phase I review period. In 2021, the Official Parties granted such a waiver in only 15 out of 653 filings.

Merger prohibitions remain rare in Austria. For example, from 2017 through 2021, not a single notified transaction has been prohibited by the Cartel Court.

With regard to recent enforcement trends, one notable decision of the Austrian Cartel Court in 2019 resulted in a modification of a remedy that was previously put in place to clear a 2015 merger of two brewers (Brau Union / VKB). 26 Kt 3 / 19i. In that case, certain obligations imposed on the merging brewers to run their operations independently had not had the expected pro-competitive effect on the market, and so the Cartel Court terminated the obligations at

36. Are there any future developments or planned reforms of the merger control regime in your jurisdiction?

Following the last amendment to Austrian competition law in September 2021, there are currently no plans for further changes.

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