Global Merger Control Manual

Eighth Edition

AUSTRIA[1]

Prepared by Sonja Eibl, Baker & McKenzie, Vienna
and Dr. Stefan Lausegger, Daghofer & Lausegger, Graz

AT A GLANCE

FILING REQUIREMENTS	TIMING	PENALTIES
Filing is **mandatory** if: 1. The parties' combined worldwide turnover exceeds €300 million (US$ 466,7 million); and 2. The parties' combined turnover in Austria exceeds €30 million (US$ 46,7 million); and 3. Worldwide turnover of at least two of the parties exceeds €5 million each (US$ 7,8 million); **unless:** 1. only one party achieved Austrian turnover exceeding €5 million (US$7,8 million), and 2. the remaining parties' worldwide turnover does not exceed €30 million (US$46,7 million). **Note**: different thresholds for the media sector. **Fees:** Up to €30,000 (US$ 46,676) depending on the economic relevance of the case, the extent of the merger control procedure, and the economic strength of the parties; A fixed fee of €1,500 (US$ 2,333) has to be paid prior to notification.	**Deadline for Filing:** Pre-completion. Time for Decision: average waiting period until clearance is obtained is 4 weeks. **Suspension:** Suspension of the transaction pending clearance.	**Failure to notify:** Fine of up to 10% of the turnover achieved by each party in the last fiscal year. **Misleading or incorrect information:** Fine of up to 1% of the worldwide turnover achieved by each party in the last financial year. **Completion prior to clearance:** Fine of up to 10% of the turnover achieved by each party in the last financial year. **Note**: contracts will be null and void if consummation proceeds in the absence of clearance.

[1] Austrian merger control law does not apply if the EC Merger Regulation or the merger control provisions of the EEA Agreement are applicable - see the European Union chapter.

OVERVIEW

Legislation and Regulations

Merger control in Austria is governed by the Austrian Cartel Act 2005 (the "Cartel Act"), which entered into force on 1 January 2006.

Competition Agency or Authority

The following competition agencies and authorities are responsible for the supervision and control of mergers in Austria:

The Cartel Court (*"Kartellgericht"*) is a special division of the Court of Appeals in Vienna. The Cartel Court makes the ultimate decision as to whether to clear or prohibit a merger, if the Court is called upon by the public parties.

The Cartel Court of Appeals (*"Kartellobergericht"*) is a special division of the Austrian Supreme Court in Vienna. Its composition is regulated in the Cartel Act. Judgments of the Cartel Court may be appealed to the Cartel Court of Appeals.

The Federal Competition Authority (*"Bundeswettbewerbsbehörde"*) (the "FCA"). The FCA is responsible for the enforcement of free competition and the application of the Cartel Act in compliance with European Community Law. Notifications of mergers meeting the thresholds set out in the Cartel Act must be made to the FCA. The FCA is headed by the Director General for Competition and is independent from other branches of the Federal administration. The FCA can act ex officio. It has been granted strong investigating powers. The FCA acts as a public party (*"Amtspartei"*) in merger proceedings before the Austrian Cartel Court.

Competition Commission (*"Wettbewerbskommission"*). The Competition Commission provides advice to the FCA. Its major task is to issue expert opinions and answer general questions on competition policy. It also makes recommendations to the FCA about the need to examine concentrations. If the FCA rejects a proposal, it has to issue a detailed statement setting out its reasoning. This is published on the homepage of the FCA's website (www.bwb.gv.at).

Federal Cartel Attorney (*"Bundeskartellanwalt"*). The Federal Cartel Attorney represents the public interest in matters of competition law before the Cartel Court. He works subject to the instructions issued by the Federal Minister of Justice. The FCA and the Federal Cartel Attorney have a duty to cooperate in relation to merger proceedings. The Federal Cartel Attorney acts as a public party (*"Amtspartei"*) in the merger proceedings of the Austrian Cartel Court.

The Federal Cartel Attorney and the Federal Competition Authorities together are referred to as *"the public parties"* (per section 40 of the Cartel Act).

Current Enforcement Practice Trends

According to the activity report of the FCA for 2005/2006, there were 373 merger filings in 2005. From these notifications, the FCA commenced phase II proceedings in only 5 cases:

- *Bridgepoint/Tunstall* - an overlap in the parties' activities appeared likely to create or strengthen a dominant position on the Austrian market for emergency and communication systems. The parties provided commitments in the form of a management buy-out;
- *Medicur/ORS* - two issues raised concern: (i) the vertical integration of Medicur, which was considered to occupy a dominant or superior position in the relevant sectors (newspapers, magazines and outdoor advertising); and (ii) the design of the electronic programme guide that ORS sought to operate on a multi-channel basis. To address these issues, the parties provided commitments that ORS would not engage in broadcasting services.
- *Styrian Airways/Kärnten Tourismus Holding* - this transaction did not involve any horizontal overlaps. Kärnten Tourismus Holding was the majority shareholder of the Kärntner Flughafenbetriebsgesellschaft mbH which operates the Klagenfurt Airport. The FCA was concerned that Styrian Airways could receive preferential conditions from the Klagenfurt Airport following the merger. The parties provided commitments regarding slot allocation, airport fees and customs clearance services.

- *Flughafen Wien/Airport Bratislava*: this transaction was aborted as the Slovak government declined to proceed with the purchase agreement.

- *Erste Bank/Ceska sporitelna, a.s./Slovenska sporitelna, a.s.*: the Austrian Erste Bank sought to acquire the Czech Ceska sporitelna, a.s. and the Slovakian Slovenska sporitelna, a.s.. All entities were active in the banking sector. Given that the Czech and Slovak entities did not realize any turnover in Austria, the Erste Bank requested that the FCA determine that the merger was not subject to Austrian merger control. The FCA held that the fact that the targets did not achieve turnover in Austria did not preclude the transaction from affecting the Austrian market, thereby ruling that the merger had to be notified. On appeal, the Competition Court broke with a decision handed down by it shortly prior to this matter and repealed the FCA's decision holding the transaction not to be notifiable.

CRITERIA FOR REPORTABILITY

Types of Transaction Covered

According to section 7 of the Cartel Act, the following transactions are considered concentrations (mergers):

- the acquisition of an undertaking, or a substantial part of it, by another undertaking, especially by means of merger or amalgamation (transfer of all assets to the shareholders);

- the acquisition of rights in a branch of an undertaking by another undertaking through an agreement for the use and operation, or for the management, of the branch of the first undertaking;

- the direct or indirect acquisition of shares in a company that is an undertaking by another undertaking if a participation of 25 percent or of 50 percent is reached or exceeded;

- where as a result of the concentration, at least one half of the members of the boards of management, or of the members of the supervisory board, of two, or more companies will be identical;

- any other arrangement between companies pursuant to which an undertaking, directly or indirectly, exercises a dominating influence over another undertaking, constituting "control" within the meaning of the Cartel Act.

The same definition of concentrations also applies to concentrations of undertakings in the **media sector** (section 8 of the Cartel Act). The only difference here exists in relation to the turnover thresholds, which are considerably lower. Additionally, there is a provision that prohibits a media concentration where it is expected that media diversity will be compromised.

Joint Ventures

According to section 7(2) of the Cartel Act 2005, a joint venture is a concentration if the joint venture permanently fulfils all functions of an independent economic unit, i.e., all full-function joint ventures are subject to merger control.

Minority Interests

The acquisition of a minority interest will trigger the obligation to notify if a participation of 25% is reached or exceeded. Furthermore, even the acquisition of a minority interest of less than 25% may constitute a concentration if an undertaking is directly or indirectly able to exercise a dominating influence over another undertaking as a result of the arrangement.

The situations conferring control over an undertaking are assessed in compliance with the principles developed by the European Commission in connection with Art 3(3) of the EC Merger Regulation (**ECMR**). The physical exercise of control is not required. The mere ability to exercise control suffices.

A minority shareholding may result in control on either a de jure or de facto basis. Control may arise de jure, for example, where specific rights are attached to the minority shares. A minority shareholder may also be deemed to have sole control on a de facto basis if there are a large number of shareholders and the shares are widely dispersed among the public.

Foreign Transactions

There are no special provisions dealing with foreign transactions. As soon as the filing thresholds are exceeded, a filing is mandatory. It is not necessary that the target company achieves (any) domestic turnover. The mere lack of competitive overlap in Austria does not exclude an effect on the Austrian market. The Cartel Act will apply if the concentration results in an increase in assets such as patents, know-how or access to finance which may increase the acquirer's market share.

Public Takeovers

In cases of public takeovers the provisions regarding concentrations under the Cartel Act are fully applicable. The Austrian Takeover Act does not contain any special provisions on concentrations resulting from a takeover. Therefore, offers within the meaning of the Austrian Takeover Act should be conditional on the clearance of the concentration.

Excepted Transactions

Austrian merger control law does not apply if the EC Merger Regulation (the "ECMR") or the merger control provisions of the EEA Agreement are applicable - see the European Union chapter, in particular the section on *Threshold Exceptions* that explains referral mechanisms in detail.

A concentration will not have to be notified if all participating undertakings are part of the same group of companies, as defined in section 15 of the Stock Corporation Act of 1965 and section 115 of the Act on Companies with Limited Liability, as this will not be regarded as a concentration (section 7(4) Cartel Act). Pursuant to these provisions, legally independent companies form a group if they are governed in accordance with instructions issued by the same board of management.

If a company, by means of direct or indirect shareholdings, can exert a dominating influence ("control") over a legally independent company these two companies also form a group.

Section 19 of the Cartel Act contains two exceptions to the general merger filing requirements:

(i) According to section 19(1)(1) and (2) of the Cartel Act, a notification is also not required in the case of an acquisition of shares by a bank ("*Kreditinstitut*"):

- for the purpose of resale; or
- for the purpose of restructuring a company in financial distress; or
- for the purpose of securing claims against that company.

(ii) A notification is also not required if the acquisition takes place in the course of equity investment or equity fund transactions as defined in section 1(1)(11) and (12) of the Austrian Banking Act, or if the acquisition is made by a company whose sole purpose is to acquire, manage or exploit participations in other undertakings without interfering with the management of these undertakings (section 19(1)(3) of the Cartel Act).

In all of the aforementioned cases, the acquirer of the shares is not permitted to exercise the voting rights attaching to the shares in order to determine the company's competitive behaviour. However, the voting rights may be exercised in order to prepare for the shares' sale, the sale of the undertaking or parts thereof, or the assets of the company, or to preserve the full value of the investment.

In the case of a bank acquiring shares for the purpose of resale, the resale has to take place within one year following the acquisition. In the case of a bank acquiring shares for the purpose of restructuring a company in financial distress or as security for claims against this company, the shares have to be sold after the company has been restructured or after completion of the securing purpose.

The one-year deadline for the resale of the shares may be extended if it is unreasonable to sell the shares within that time.

Filing Thresholds

A filing is mandatory according to section 9 of the Cartel Act, if:

1. the parties' combined worldwide turnover exceeds €300 million (US$ 466,7 million); and
2. the combined Austrian turnover of the parties exceeds €30 million (US$ 46,7 million); and

3. worldwide turnover of at least two of the parties exceeds €5 million (US$7,8 million) each;

unless

1. only one party achieved Austrian turnover exceeding €5 million (US$7,8 million); and
2. the remaining parties' worldwide turnover does not exceed €30 million (US$ 46,7 million).

These turnover requirements have to be achieved in the last fiscal year prior to the concentration. They are cumulative, which means that all turnover thresholds have to be achieved or exceeded to trigger the obligation to notify the concentration to the Cartel Court.

In case of *media concentrations*, the actual turnovers of media businesses and media services have to be multiplied by 200, and the actual turnovers of media support businesses by 20 for the purpose of calculating the relevant thresholds (with exception of the € 5 million thresholds which are not multiplied). The requirement to multiply by factors of 200 or 20 means that the applicable thresholds are effectively considerably lower.

Threshold Exceptions

The Ministry of Justice can, by mutual agreement with the Ministry of Economics and Labour, issue regulations lowering the thresholds for concentrations affecting certain markets (section 18 of the Cartel Act). However, no such regulations have been issued so far.

Calculation of Thresholds

All related entities (see section 7 of the Cartel Act) are treated as one undertaking, irrespective of whether they are active in the same markets. Proceeds from internal sales within the group are excluded when calculating the relevant thresholds.

The assessment of whether an undertaking is involved in a concentration depends on the type of concentration. In the case of an acquisition of shares, for example, the purchaser and the target undertaking are the undertakings involved, but not the seller of the shares.

When calculating the turnover of a bank, the following profits have to be taken into account:

- interests and similar earnings;
- earnings from stocks, other shares and securities with not fixed interest rates;
- earnings from participations and earnings of shares of affiliated companies;
- commissions;
- net earnings of financing transactions; and
- other operational earnings.

In the case of insurance companies only the premium income is relevant.

The turnover has to be reduced by rebates, bonuses or deductions pursuant to warranty claims. This, however, does not apply to freight-costs, insurance premiums and provisions payable to agents. Furthermore, value added tax is to be deducted from the turnover.

Related entities are treated as one undertaking for the purpose of calculating the relevant turnover. The turnover of the whole group of undertakings is taken into account when calculating the relevant thresholds. Importantly, all undertakings in which one of the participating parties holds 25% are connected for the purposes of section 7 of the Cartel Act.

In the case of indirect shareholding of 25%, turnover is not taken into account if it is achieved outside the relevant economic business unit ("*wirtschaftliche Einheit*"). If undertakings are only loosely connected, active on different markets, or if they are only indirectly connected to each other through a mere holding company, there is no reason to assume that one undertaking exerts a dominating influence over the other.

MAKING A FILING

Voluntary or Mandatory

The notification is mandatory when the transactions achieve the above thresholds. There are no exceptions.

Responsibility for Filing and Filing Fees

Any of the parties involved in the concentration is entitled to notify the concentration. The Cartel Act does not specify which party to the concentration should make the filing. It is, however, usually the purchaser who prepares and lodges the filing. Filings should be lodges as soon as possible because the concentration cannot be implemented prior to the receipt of clearance, or confirmation from the public parties that they have waived their right to file an application to examine the concentration, or withdrawn any applications filed.

A fee of €1,500 (US$ 2,333) is payable for review of the filing. The filing is only considered complete once this payment has been received (and not just paid) by the competition authority. Thereby, it should be made prior to lodgment of the filing.

The Cartel Court may set a court fee of up to €30,000 (US$ 46,676) at its discretion, taking into consideration the economic relevance of the case, the extent of the merger control procedure and the economic strength of the parties.

Timing of Filing

The Cartel Act does not provide a deadline for filing. However, the filing and approval of the transaction must occur before the merger's conclusion.

Pre-signing Contacts with the Authorities

It is possible to lodge a filing before a binding agreement has been signed. However, the structure of the transaction must be sufficiently clear (i.e., based on a letter of intent or a memorandum of understanding).

After notification the right to file an application for further examination of the concentration lies with the FCA and the Federal Cartel Attorney. In cases where an application for examination by the public parties is likely, or in cases where, for examples due to timing problems, a waiver by the public parties to request examination of the notified concentration is desired, it is advisable to contact the FCA (and the Federal Cartel Attorney) prior to signing a binding agreement, or prior to filing a notification, to discuss the concentration's structure and effects. As the period for filing an application for examination is short (4 weeks), an application for "security considerations" (due to the fact that the effects of the concentration could not be evaluated in time) might be avoided by contacting the FCA in advance.

The FCA may request that the Federal Cartel Attorney to waive their right to apply for an in-depth examination with respect to a notified concentration. If the Federal Cartel Attorney does not respond within 14 days following receipt of the request, they are deemed to have waived their right to apply for an in-depth examination of the notified concentration.

Information and Documents to be Submitted

Pursuant to section 10(2) of the Cartel Act, the Ministry of Justice, by mutual consent with the Ministry of Economics and Labour, may issue details about the form and contents of filings. The current Official Form for the Notification of Concentrations (FNC) has been promulgated in a revised version following the amendment of the Cartel Act 2005.

The FNC distinguishes between a long-form notification and a short-form notification. The decision whether it will be necessary to file a long-form or a short-form notification can only be taken after an assessment of preliminary information such as:

- turnover;
- participants' market shares on the relevant product market both for Austria and any other relevant geographic market; and
- market data about the three biggest competitors on each relevant market.

Long-form Notification

A long-form notification is required if one or several markets within the meaning of Chapter 5 of the FNC are affected.

Penalties for Filing Violations

A failure to file a notification may lead to an administrative fine up to 10% of the worldwide turnover achieved by each of the undertakings in the last completed business year.

Undertakings and associations of undertakings, which provide incorrect or incomplete information to the Cartel Court, may be subject to administrative fines ranging of up to 1% of the worldwide turnover achieved in the last completed fiscal year.

A five year statute of limitations applies. The Cartel Court cannot impose a fine more than five years after cessation of the infringing conduct. The Cartel Act does not specifically cover continuing infringements. However, because the Cartel Act refers to the cessation of the infringement as the relevant starting point for calculating the five year statute of limitations, it can be interpreted to also apply to continuing infringements.

MERGER REVIEW PROCEDURES

Timing of Process

The notification must be submitted to the FCA. Upon receipt of the notification, the FCA must notify the Federal Cartel Attorney of receipt of the application and publish details of the notification on its internet website. Undertakings whose legal or economic interests may be affected by the notified concentration have the right to submit a written objection to the notified concentration within 14 days publication of the notification (section 10(4) of the Cartel Act). There is, however, no obligation on the public parties to deal with such objections. In particular, by making such an objection, the undertakings do not become party to the proceedings.

The public parties may file a request for an examination of the concentration within four weeks of the receipt of the notification (section 11(1) of the Cartel Act) or waive their right to file an application for examination (section 11(4) of the Cartel Act). If no request is made, the public parties will inform the notifying party (section 11(4) of the Cartel Act). However, this statement is of declaratory character only, i.e. obligation to suspend a transaction ceases after the 4 week period has expired. If a request for an examination of the concentration is filed, the FCA has to publish the fact of receipt of such request (section 11(2) of the Cartel Act). During the review procedure, any undertaking whose legal or economic interests may be affected by the notified concentration has the right to submit to the Cartel Court written objections regarding the proposed transaction (section 11(3) of the Cartel Act).

If a request for a review of a concentration is made, the Cartel Court must issue a decision within five months of the receipt of the request (or the first request) for an in-depth (phase II) review. After this deadline has expired, the Cartel Court may no longer prohibit the concentration and it may then be implemented.

The Cartel Act does not provide the FCA with the power to require further information in the event of incomplete filing. Accordingly, the FCA has to file a request for an in-depth review. Then, the Cartel Court can issue a request for further information completion (section 43 of the Cartel Act). The five month period available for an in-depth review will only start after the receipt of the completed filing.

Expedited Review

An application for an expedited review may be lodged with the merger notification. Such application needs to set out detailed reasoning for the urgent clearance of the proposed transaction and should not raise any material competition issues. In these circumstances, the public parties can waive their right to file an application for an in-depth review (section 82 of the Cartel Act), which will shorten the review period by 14 days.

Suspension Obligation

The concentration may be implemented upon expiry of the four-week period granted to the public parties to file an application for examination of the concentration by the Cartel Court, provided that no such application was filed.

Substantive Review

At the end of the proceedings the Cartel Court may declare that the notified concentration either does not fall within the scope of the Cartel Act, or it may approve or prohibit the concentration (section 12 of the Cartel

Act). The approval may also be subject to certain conditions. The Cartel Court will prohibit the concentration if it is to be expected that the concentration will create or strengthen a dominant market position. A market position is regarded as dominant if an undertaking, acting on either the supply or the demand side of the relevant market, when:

- it is subject to no or insubstantial competition; or
- it has a superior market position in relation to its competitors.

When assessing whether an undertaking is dominant, the Cartel Court will examine the undertaking's financial power, its relationship with other companies, and access to the market.

According to section 4(2) of the Cartel Act, an undertaking is deemed to be dominant when it has:

- a market share of at least 30 percent on the domestic market or another relevant geographic market; or
- a market share of at least 5 percent and is subject to competition by no more than two other undertakings; or
- a market share of at least 5 percent and is one of the four largest undertakings which have a total combined market share of at least 80 percent.

The onus is on the party deemed to be dominant to show that the concentration will not create or strengthen a dominant market position.

Even if a dominant market position is created or strengthened by the proposed concentration, the Cartel Court may approve the concentration if:

- it concludes that the concentration will improve competitive conditions and these advantages outweigh the disadvantages of market domination; or
- it realizes that the concentration is necessary to preserve or improve the international competitiveness of the concerned undertakings and is justified by macroeconomic considerations.

If the Cartel Court cannot approve the concentration in accordance with the above-mentioned requirements, the Cartel Court may nevertheless approve the concentration subject to specific conditions. These conditions may be lifted or modified by the Cartel Court upon application by one of the undertakings involved, if the circumstances relevant to the decision of the Cartel Court have changed considerably and the conditions are, therefore, no longer necessary.

According to section 15 of the Cartel Act, the Cartel Court must publish decisions by which it imposes commitments or conditions.

Penalties for Procedural Infringements

The implementation of a concentration without the prior approval of the Cartel Court may be subject to administrative fines valued at up to 10% of the respective undertaking's turnover of the prior business year.

Furthermore, after the lawful implementation of a concentration subject to notification, the Cartel Court may impose subsequent requirements on the parties involved in the concentration if:

- the non-prohibition of the concentration, the waiver for filing an application for examination of the concentration, the omission to file such application or the withdrawal of such application, respectively, was based on false or incomplete information provided by one of the undertakings involved in the concentration (fine of up to 1 % of the undertaking's turnover of the prior business year) or
- the conditions imposed are breached (fine of up to 10 % of the undertaking's turnover of the prior business year).

Appeals

The decisions issued by the Cartel Court can be appealed to the Cartel Court of Appeals. An appeal must be filed within four weeks of the receipt of the Cartel Court's decision (section 49(2) of the Cartel Act). The Cartel Court of Appeals must decide the appeal within 2 months following receipt of the file (section 14(2) of the Cartel Act).

Confidentiality

Pursuant to section 10 of the Competition Act ("Wettbewerbsgesetz"), the FCA is entitled:

- to forward information and documents to the Cartel Court, the Cartel Court of Appeals, the Federal Cartel Attorney, the Competition Commission, the European Commission, the competition authorities of other EU Member States and all other regulators as required in order to enable them to fulfill their duties insofar as no Community law applies to the contrary; and
- to request information and opinions from the Federal Cartel Attorney, the Competition Commission, the European Commission, the competition authorities of other EU Member States, and other regulators. The FCA may provide these authorities with information and documentation received from the notifying parties for this purpose. The FCA may also inspect the Federal Cartel Attorney's files.

In addition, members of the Competition Commission must, upon their request, be granted the right to inspect merger notifications and to take copies. Notwithstanding any statutory secrecy obligations, any knowledge gained by the Competition Commission in pursuing the fulfillment of the its tasks may only be used for the purpose of issuing a written opinion regarding a proposed merger.

The Cartel Court and the Cartel Court of Appeals may ask the FCA to provide information as well as reasoned position papers relating to competition matters.

Decisions and proposals published on the FCA's internet website will not include confidential information.

REFORM

No further reforms are currently envisaged.