# The Merger Control Review

Second Edition

Editor
Ilene Knable Gotts

Law Business Research

# The Merger Control Review

SECOND EDITION

# The Merger Control Review

Second Edition

Editor
Ilene Knable Gotts

Law Business Research Ltd

PUBLISHER
Gideon Roberton

BUSINESS DEVELOPMENT MANAGER
Adam Sargent

MARKETING MANAGERS
Nick Barette, Katherine Jablonowska

MARKETING ASSISTANT
Robin Andrews

EDITORIAL ASSISTANT
Lydia Gerges

PRODUCTION MANAGER
Adam Myers

PRODUCTION EDITORS
Joanne Morley, Davet Hyland

SUBEDITOR
Caroline Rawson

EDITOR-IN-CHIEF
Callum Campbell

MANAGING DIRECTOR
Richard Davey

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK


ISBN 978-1-907606-22-9

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: +44 870 897 3239

# ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

ACCURA ADVOKATPARTNERSELSKAB

ADVOKATFIRMAN CEDERQUIST KB

ADVOKATSKO DRUZHESTVO ANDREEV, STOYANOV & TSEKOVA IN COOPERATION WITH SCHOENHERR

ALI BUDIARDJO, NUGROHO, REKSODIPUTRO

ALTIUS

ANDERSON MŌRI & TOMOTSUNE

ANDREAS NEOCLEOUS & CO LLC

BARNERT EGERMANN ILLIGASCH RECHTSANWÄLTE GMBH

BLAKE, CASSELS & GRAYDON LLP

BLAKE DAWSON

BREDIN PRAT

CLIFFORD CHANCE LLP

COCALIS & PSARRAS

CREEL, GARCÍA-CUÉLLAR, AIZA Y ENRÍQUEZ, SC

CUATRECASAS, GONÇALVES PEREIRA

DILLON EUSTACE

EDWARD NATHAN SONNENBERGS

ELIG, ATTORNEYS-AT-LAW

HOUTHOFF BURUMA

KING & WOOD

LANNA PEIXOTO ADVOGADOS

LCS & PARTNERS

LUTHRA & LUTHRA LAW OFFICES

MARVAL, O'FARRELL & MAIRAL

MORAVČEVIĆ VOJNOVIĆ ZDRAVKOVIĆ
IN COOPERATION WITH SCHOENHERR

MOTIEKA & AUDZEVICIUS

NCTM

PELIFILIP

PELLEGRINI & URRUTIA ABOGADOS

ROSCHIER ATTORNEYS LTD

SCHOENHERR

SLAUGHTER AND MAY

SRS – SOCIEDADE REBELO DE SOUSA
& ADVOGADOS ASSOCIADOS, RL

TAVERNIER TSCHANZ

WACHTELL, LIPTON, ROSEN & KATZ

WDA LEGAL, SC

WIESNER & ASOCIADOS ABOGADOS

WONGPARTNERSHIP LLP

YULCHON, ATTORNEYS AT LAW

# CONTENTS

# EDITOR'S PREFACE

Perhaps one of the most successful exports from the United States has been the adoption of mandatory pre-merger competition notification regimes in jurisdictions throughout the world. Although adoption of pre-merger notification requirements was initially slow – with a 13-year gap between the enactment of the United States' Hart-Scott-Rodino Act in 1976 and the adoption of the European Community's merger regulation in 1989 – such laws were implemented at a rapid pace in the 1990s, and many more were adopted and amended during the past decade. China and India have just implemented comprehensive pre-merger review laws, and although their entry into this forum is recent, it is likely that they will become significant constituencies for transaction parties to deal with when trying to close their transactions. Indonesia also finally issued the government regulation that was needed to implement the merger control provisions of its Antimonopoly Law. This book provides an overview of the process in jurisdictions as well as an indication of recent decisions, strategic considerations and likely upcoming developments in each of these. The intended readership of this book comprises both in-house and outside counsel who may be involved in the competition review of cross-border transactions.

As shown in further detail in the chapters, some common threads in institutional design underlie most of the merger review mandates, although there are some outliers as well as nuances that necessitate careful consideration when advising clients on a particular transaction. Almost all jurisdictions either already vest exclusive authority to transactions in one agency or are moving in that direction (e.g., Brazil, France and the UK). The US and China may end up being the outliers in this regard. Most jurisdictions provide for objective monetary size thresholds (e.g., the turnover of the parties, the size of the transaction) to determine whether a filing is required. Germany also provides for a *de minimis* exception for transactions occurring in markets with sales of less than €15 million. There are a few jurisdictions, however, that still use 'market share' indicia (e.g., Colombia, Lithuania, Portugal, Spain, the United Kingdom). Although a few merger notification jurisdictions remain 'voluntary' (e.g., Australia, Singapore, the United Kingdom, Venezuela), the vast majority impose mandatory notification requirements. Almost all jurisdictions require that the notification process be concluded prior to completion (e.g., pre-merger, suspensory regimes), rather than permitting the transaction to close as long as notification is made prior to closing. Some jurisdictions impose strict time frames by which the parties must file their notification. For instance, Cyprus requires filing within one week of signing of the relevant documents and agreements; Brazil requires that the notification be made within 15 business days of execution of the agreements; and Hungary and Romania have a 30-calendar-day time limit from entering into the agreement for filing the notification. Many jurisdictions have the ability to impose significant fines for failure to notify (e.g., the Netherlands, Spain and Turkey). Some jurisdictions that mandate filings within specified periods after execution of the agreement also have the authority to impose fines for 'late' notifications (e.g., Bosnia and Herzegovina, Serbia) for mandatory pre-merger review by federal antitrust authorities. Very little has changed in the US process in the three decades since its implementation, but some aspects of the US process have been adopted by other jurisdictions. For instance, Canada has recently transformed its procedure to resemble the US style of review, with a simplified initial filing, a 30-day period to issue a detailed information request and the waiting period tolled until the parties comply with the request. Germany and Canada have adopted a procedure, similar to the US, under which parties can 'reset the clock' by withdrawing and refiling the notification. Offers to resolve competitive concerns are only considered by the US after the more detailed investigation has been carried out. The US, Canadian and (although in other respects following the EU model) Swedish authorities must go to court to block a transaction's completion. Both jurisdictions can seek to challenge a completed merger, even if that transaction has already been reviewed pre-merger by the relevant authority, although in Canada, such challenges must be brought within one year of closing, while in the US there is no statute of limitations.

Most jurisdictions more closely resemble the European Union model. In these jurisdictions, pre-filing consultations are more common, parties can offer undertakings during the initial stage to resolve competitive concerns, and there is a set period during the second phase for providing additional information and the agency reaching a decision. In Japan, however, the JFTC announced in June 2011 that it would abolish the prior consultation procedure option. When combined with the inability to 'stop the clock' on the review periods, counsel may find it more challenging in transactions involving multiple filings to avoid the potential for the entry of conflicting remedies or even a prohibition decision at the end of a JFTC review.

The permissible role of third parties also varies across jurisdictions. In some jurisdictions (e.g., Japan) there is no explicit right of intervention by third parties, but the authorities can choose to allow it on a case-by-case basis. In contrast, in South Africa, registered trade unions or representatives of employees are even to be provided with a redacted copy of the merger notification and have the right to participate in Tribunal merger hearings and the Tribunal will typically permit other third parties to participate. Bulgaria has announced a process by which transaction parties even consent to disclosure of their confidential information to third parties. In some jurisdictions (e.g., Australia, the EU and Germany), third parties may file an objection against a clearance.

In almost all jurisdictions, once the authority approves the transaction, it cannot later challenge the transaction's legality. Other jurisdictions, such as Croatia, are still aligning their threshold criteria and process with the EU model. There remain some jurisdictions even within the EU, however, that differ procedurally from the EU model. For instance, in Austria the obligation to file can be triggered if only one of the involved undertakings has sales in Austria as long as both parties satisfy a minimum global turnover and have a sizeable combined turnover in Austria.

It is becoming the norm in large cross-border transactions raising competition concerns for the US, EU and Canadian authorities to work closely with one another during the investigative stages, and even in determining remedies, minimising the potential of arriving at diverging outcomes. Regional cooperation among some of the newer agencies has also become more common; for example, the Argentinian authority has worked with that in Brazil, and Brazil's CADE has worked with Chile and with Portugal. Competition authorities in Bosnia and Herzegovina, Bulgaria, Croatia, Macedonia, Serbia, Montenegro and Slovenia similarly maintain close ties and cooperate on transactions. In transactions not requiring filings in multiple EU jurisdictions, Member States often keep each other informed during the course of an investigation. In addition, transactions not meeting the EU threshold can nevertheless be referred to the Commission in appropriate circumstances. In 2009, the US signed a memorandum of understanding with the Russian Competition Authority to facilitate cooperation; China has 'consulted' with the US and EU on some mergers and entered into a cooperation agreement with the US authorities in 2011, and the US has also announced plans to enter into a cooperation agreement with India.

Minority holdings and concern over 'creeping acquisitions', in which an industry may consolidate before the agencies become fully aware, seem to be gaining increased attention in many jurisdictions, such as Australia. Some jurisdictions will consider as reviewable acquisitions in which only 10 per cent interest or less is being acquired (e.g., Serbia for certain financial and insurance mergers), although most jurisdictions have somewhat higher thresholds (e.g., Korea sets the threshold at 15 per cent of a public company and otherwise 20 per cent of a target; and Russia, at any amount exceeding 20 per cent of the target). Jurisdictions will often require some measure of negative (e.g., veto) control rights, to the extent that it may give rise to *de jure* or *de facto* control (e.g., Turkey).

Given the ability of most competition agencies with pre-merger notification laws to delay, and even block, a transaction, it is imperative to take each jurisdiction – small or large, new or mature – seriously. China, for instance, in 2009 blocked the Coca-Cola Company's proposed acquisition of China Huiyuan Juice Group Limited and imposed conditions on four mergers involving non-Chinese domiciled firms. In *Phonak/ReSound* (a merger between a Swiss undertaking and a Danish undertaking, each with a German subsidiary), the German Federal Cartel Office blocked the merger worldwide even though less than 10 per cent of each of the undertakings was attributable to Germany. Thus, it is critical from the outset for counsel to develop a comprehensive plan to determine how to navigate the jurisdictions requiring notification, even if the companies operate primarily outside some of the jurisdictions. This book should provide a useful starting point in this important aspect of any cross-border transaction being contemplated in the current enforcement environment.

**Ilene Knable Gotts**
Wachtell, Lipton, Rosen & Katz
New York
November 2011

# Chapter 3

# AUSTRIA

*Isabella Hartung and Wolfgang Strasser**

## I INTRODUCTION

Austrian merger control law underwent its latest modernisation with the coming into force of the Austrian Cartel Act 2005 ('the Cartel Act') in January 2006.[1] The Cartel Act further aligned the Austrian merger control rules with the EC Merger Regulation ('the ECMR'). Nevertheless, the Cartel Act still includes provisions that are particular to it.

In general, the Austrian merger control regime applies to concentrations that exceed certain turnover thresholds. Transactions meeting these criteria require a mandatory pre-merger notification pursuant to the Cartel Act. Unlike in many other jurisdictions, concentrations that have to be notified to the European Commission ('the EC') pursuant to the ECMR are not always exempt from Austrian merger control law; media concentrations require a separate Austrian notification in addition to the filing with the EC.

### i Notion of 'concentration'

Under the definition of the Cartel Act the following transactions or measures constitute a concentration:

*a* the acquisition by one undertaking of all, or a substantial part of, the assets of another undertaking, especially by merger or transformation;[2]

*b* the acquisition of rights by one undertaking in the business of another undertaking by means of a management or lease agreement;[3]

---

* Isabella Hartung heads the competition law department and Wolfgang Strasser is an associate at Barnert Egermann Illigasch Rechtsanwälte GmbH.

1 Despite its name, the scope of application of the Cartel Act includes not only cartels, but competition law in general.

2 Section 7, Paragraph 1(1).

3 Section 7, Paragraph 1(2).

*c* the direct or indirect acquisition of shares in one undertaking by another undertaking if, as a result, a shareholding of 25 per cent or 50 per cent (in terms of share capital or voting rights) is reached or exceeded;[4]

*d* the establishment of interlocking directorates at the management or supervisory board level (if at least half of the members of the management or supervisory board of two or more undertakings are identical);[5]

*e* any other connection of undertakings conferring on one undertaking a direct or indirect controlling influence over another undertaking;[6] and

*f* the establishment of a full-function joint venture (i.e., a joint venture assuming permanently all functions of an independent business entity).[7]

Intra-group transactions do not constitute concentrations.

Unlike under the ECMR, the acquisition of a minority shareholding constitutes a concentration if the shareholding reaches or exceeds the threshold of 25 per cent (regardless of whether such minority shareholding confers control). The Austrian Cartel Court furthermore ruled that attempts to circumvent the 25 per cent threshold, for example, by endowing a 12.5 per cent shareholding with voting rights equal to a 25 per cent shareholding, cannot prevent the transaction from being qualified as concentration.

**ii Turnover thresholds**

The relevant criteria for assessing whether a concentration requires a pre-merger notification are turnover thresholds. A pre-merger notification must be made if the undertakings concerned (e.g., buyer and target company, merging companies) exceed the following turnover thresholds in the business year preceding the transaction:[8]

*a* a combined worldwide turnover of €300 million;

*b* a combined Austrian turnover of €30 million; and

*c* at least two of the undertakings concerned each had an annual worldwide turnover of €5 million.

Lower thresholds apply to media concentrations.

Even where these thresholds are met, mergers are exempt from the notification obligation where the Austrian turnover of only one of the undertakings concerned exceeded €5 million but the combined worldwide turnover of the other undertaking(s) concerned did not exceed €30 million.

For the purposes of calculating the turnover of an undertaking concerned, the turnover of the entire group has to be taken into account (to the exclusion of intra-group turnover). A group is essentially considered to include all companies that are connected in one of the ways that give rise to a concentration. In principle, upstream and downstream

4 Section 7, Paragraph 1(3).

5 Section 7, Paragraph, 1(4).

6 Section 7, Paragraph 1(5).

7 Section 7, Paragraph 2.

8 Section 9, Paragraph 1.

affiliated companies must both be taken into account. The above definition of a group is rather broad since, in particular, a 25 per cent shareholding is sufficient to have a company included. The assessment needs to be made on a case-by-case basis.

### iii Relevant authorities

All notifications must be submitted to the Federal Competition Authority. The Federal Competition Authority ('the FCA') and the Federal Cartel Attorney (together, 'the statutory interveners'), are a party to any merger control proceedings. Third-party undertakings cannot be party to the proceedings (see also Section II.ii, *infra*). The statutory interveners' role is to assess the notification (first phase) and, in case they have concerns, file a motion for an in-depth review of the concentration with the Cartel Court (second phase). The statutory interveners themselves have no power to decide on the substance.

The Competition Commission is a body attached to the FCA. The Competition Commission can submit a (non-binding) written opinion to the FCA advocating initiation of second-phase proceedings in a particular merger case.

## II YEAR IN REVIEW

### i Statistics

In 2010, a total of 238 concentrations were notified to the FCA. Only seven of these were subject to an in-depth review by the Cartel Court (second-phase proceedings), while more than 96 per cent of the notified concentrations were cleared in first-phase proceedings. A recent case decided by the Cartel Court and two rulings by the Supreme Court as Appellate Cartel Court are described below.

### ii Significant decisions and their strategic impact

In its Decision No. 16 Ok 6/10 of 4 October 2010, the Supreme Court discussed several merger control-related issues (even if only as *obiter dicta*). The case involved a company challenging a merger between a competitor (the acquirer) and a company undergoing bankruptcy proceedings (the target). The bankrupt company's assets were being sold off and the acquirer purchased all items stored within the warehouse by way of an asset deal. The acquirer had filed a merger notification with the FCA. Both statutory interveners then initiated second-phase proceedings at the Cartel Court. The court, however, dismissed these applications of the statutory interveners and held that the transaction did not actually constitute a concentration. The company challenging the merger thereupon filed a motion to the Cartel Court, claiming the purchase would strengthen an already dominant position.

One aspect dealt with by the Supreme Court in this case was whether a company undergoing bankruptcy proceedings and having ceased all business activity (due to court order issued in the course of bankruptcy proceedings) still constituted an 'undertaking' in the sense of the Cartel Act. The Supreme Court affirmed this, explaining that the Cartel Act applied as long as the transfer of assets entailed the transfer of a share of the market. For a certain time period after ceasing all market activity, a company does not lose its qualification as an undertaking, as long as it is not unlikely that it will take up business activity again in the future – either by itself or indirectly through a buyer.[9] Thus, acquirers in insolvency proceedings cannot assume that an entity that has ceased operations is necessarily exempt from merger control.

A second issue related to the delimitation between merger control, the abuse of a dominant position and a restriction of competition. The court stated that the rules on abuse of dominance did not apply to the strengthening of a market position by a merger; instead, the merger control rules applied as *lex specialis*. The court continued that if the strengthening of a market position of a dominant undertaking by a merger constituted an abuse of that dominant position by itself, competitors of the undertakings concerned would acquire an influence on the merger control proceedings that the legislator consciously withheld from them. Only the statutory interveners are authorised to file a motion for in-depth scrutiny of a merger. Thus, third parties (like the applicant in this case) are not authorised to challenge a merger in court by relying on merger control rules. Moreover, the rules on the abuse of a dominant position can only be applied to a concentration if, in addition to the strengthening of the market position of a dominant undertaking, special circumstances occurred (e.g., the virtual termination of all competition).

With regard to procedural matters, the Supreme Court held that the Federal Cartel Attorney could appeal a decision of the Cartel Court even if he did not get actively involved with the proceedings before the Cartel Court, simply because he is a statutory party to the proceedings.

Another recent case, which involved commitments by the notifying parties, was the merger of the largest and the fourth-largest dairy in Austria, which was notified to the FCA in December 2010.[10] The concentration was bound to raise concerns, as only a year and a half earlier, the (same) largest dairy had merged with the ninth-largest and that merger had been cleared only after commitments had been offered.[11] In the 2010 case, the Federal Cartel Attorney initiated second-phase proceedings at the Cartel Court.

Their first concern related to the market of raw milk. Habitually, dairies are organised as collectives of milk producers, and this case was no exception. Because of the oversupply on the milk market, however, the collectives are generally hesitant to accept new members. Thus, the risk of a market foreclosure arose as milk producers who are not members of the collectives might have difficulties finding buyers. Accordingly, the Cartel Court only cleared the transaction under certain conditions:[12] the undertakings concerned were to buy, for a period of six years, a definite amount of milk every year from producers not belonging to a collective. The price for such purchase is to be pegged to an index. At the end of every year, the statutory interveners shall receive a report on

9 A similar approach had already been taken by the German Federal Cartel Office in the *Magna/Karmann* case (B 9-29320-Fa-13/10 – *Magna Car Top Systems GmbH/Karmann GmbH i.L*) and by the EC in Case No. IV/M.573 – *ING/Barings*.

10 BWB/Z-1314 *Berglandmilch reg.Gen.m.b.H /Tirol Milch reg.Gen.m.b.H.*

11 BWB/Z-993 *Landfrisch Molkerei reg.Gen.m.b.H./Berglandmilch reg.Gen.m.b.H.*

12 Decision 29 Kt 42, 43/10 of 3 February 2011.

the quantity of milk purchased. After four years, the obligations will be evaluated in order to decide whether they should remain in place for the remaining two years, or expire. Additional conditions concerned the downstream market for dairy products. In order to ensure effective monitoring for possible negative influences on the price paid by consumers, the retail prices of a selected group of dairy products, which comprises 60 per cent of the total produce of the undertakings concerned, shall be monitored for three years, and the statutory interveners shall be notified if any price irregularities arise. This case shows once more that the Austrian competition authorities are not all reluctant to accept behavioural remedies in merger cases.

The third significant decision (16 Ok 7/10 dated 7 February 2011) concerned, *inter alia*, the remuneration for an expert opinion of a court-appointed expert. Regularly, the costs of such expert opinions in merger control cases by far exceed the respective costs incurred in other civil proceedings. Section 25, Paragraph 1a of the Austrian Act on Fee Claims stipulates that an expert appointed by the court is obliged to notify the court when it becomes foreseeable that his or her fees – depending on the procedure – will exceed the amount of €2,000, €4,000 or the amount already deposited by the parties, respectively. Experts forfeit any claim exceeding the respective amount if they fail to notify the court accordingly. In the merger control case at hand, a consultancy charged with writing an expert opinion had produced an estimate of costs, but its final invoice exceeded its estimate by almost a third. No deposit had been paid by the parties. On appeal, the Supreme Court declared the Act on Fee Claims to also apply in competition law proceedings. Since no express rule existed, the court concluded by teleological analysis that the objective of the rule laid down in Section 25 would not be reached if the expert did not have the obligation to notify the court when the costs exceeded a prior estimate. The essence of such rule was to enable the parties to consider the usefulness of the expert opinion in relation to its cost and to take appropriate measures (like a further specification of the questions to the expert) if costs exceeded their expectations. This is of particular importance in competition law proceedings, since the complexity of the matter often leads to exorbitant costs for expert opinions.

## III THE MERGER CONTROL REGIME

### i Waiting periods, time frames and parties' ability to accelerate the review procedure

Merger notifications can be filed by any of the undertakings concerned. In cases where an undertaking is being acquired, the buyer usually files the notification.

The filing has to be submitted to the FCA, who must transmit a copy to the Federal Cartel Attorney and publish a short note on the FCA's website. Such public announcement of the concentration on the website must mention the undertakings concerned, the nature of the concentration and the business sector concerned.

The Cartel Court will only be involved if at least one of the statutory interveners requests second-phase proceedings. Such request can be made within four weeks of submission of the filing to the FCA (with the four-week period only starting to run once the filing fee of €1,500 has been duly paid by the notifying party).

The undertakings concerned can (especially in cases that do not give rise to concerns) contact the statutory interveners even prior to notification and enquire whether they have any objections to make and, if this is not the case, whether they would be ready to waive their right to initiate second-phase proceedings. The Federal Cartel Attorney (unlike the FCA) can waive his or her right to initiate second-phase proceedings even before formal submission of the notification (although in practice the statutory interveners wait 14 plus three days from filing before they grant a waiver – see below).

However, it is not easy to speed up first-phase proceedings in urgent cases. The institutional setting with the two statutory interveners requires that both of them waive their rights to initiate second-phase proceedings before the merger can be implemented. It is possible to ask the statutory parties to do so by written application, but such application has to be accompanied by a credible and well-reasoned explanatory statement as to why implementation of the merger is urgent and earlier submission of the notification was not possible. The minimum waiting period before a waiver even becomes an option is 14 plus three days from filing.[13] Naturally, a waiver will only be granted if the proposed merger is entirely unproblematic.

The concentration is deemed to be cleared (first-phase clearance) if:

*a* both statutory interveners have waived their rights to initiate second-phase proceedings; or

*b* neither statutory intervener has filed a request to initiate second-phase proceedings within the four-week period from the filing of the notification.

If, however, a request for an in-depth investigation is made, such fact is published on the FCA's website and the Cartel Court reviews the concentration as to whether it requires a prohibition. The court has five months (from the receipt of a request to initiate second-phase proceedings) to investigate the transaction on the merits and to either prohibit the concentration or clear it (or declare that the transaction does not constitute a concentration).

If the statutory interveners have not already informally requested and obtained an amendment of an incomplete notification, the Cartel Court can send such incomplete notifications back to the notifying party for completion within a month of filing of a request for second-phase proceedings. The five-month period for the Cartel Court to render a decision only starts to run from the date of submission of the complete notification.

The Cartel Court will prohibit a concentration if it creates or strengthens a dominant position (Section 12, Paragraph 1). A dominant position is deemed to exist if an undertaking:

*a* is exposed to little or no competition;

*b* has a superior market position in relation to its competitors, taking into account its financial strength, its links or relationships with other undertakings and its

13 That is the period for submission of written comments by undertakings whose interests are affected by the merger plus three days to allow for delivery by postal service.

access to suppliers and customers – barriers to entry will also be taken into account (Section 4, Paragraph 1); or

*c* is in such a superior position with respect to its customers or suppliers that the latter must maintain their business relationship with the undertaking concerned as a matter of economic necessity (Section 4, Paragraph 3).

If, as a result of the concentration, the combined entity were to exceed certain market share thresholds (e.g., if it were to have a hypothetical market share of 30 per cent or more), a statutory presumption of dominance would apply (Section 4, Paragraph 1a). In such a case the undertakings concerned would have to rebut the presumption by proving that the concentration would not create or strengthen a dominant position.

The Cartel Court may clear a concentration despite the creation or strengthening of a dominant position (Section 12, Paragraph 2) if:

*a* an improvement of competitive conditions resulting from the proposed concentration, on balance, outweighs the negative effects of market dominance, or

*b* the concentration is necessary to preserve or enhance the competitiveness of the undertakings concerned on an international scale and is justified by considerations of national economy.

Media concentrations are also assessed on their effect on media diversity; for example, such concentrations may be prohibited for impairment of media diversity.

### ii Resolution of authorities' competition concerns

The undertakings concerned may offer commitments to the statutory interveners in order to persuade them to withdraw a request to initiate second-phase proceedings. There is no stop-the-clock mechanism; so once the notification has been submitted, there is little time for amendment (e.g., offering commitments) if the case raises concerns. However, even if the statutory interveners do not withdraw their request, also the court's clearance decision may contain conditions or obligations regarding pro-competitive remedies to be taken by the undertakings concerned, meaning the parties may still offer commitments during a second-phase investigation.

### iii Appeals and judicial review

The court's decision may, within four weeks, be appealed by the notifying parties and the statutory interveners. The Supreme Court has to render its decision within two months of the date of receipt of the files. If it reverses the Cartel Court's decision, it can either adopt a final decision itself or send the case back to the Cartel Court, which then has another five months to adopt a new decision. The Supreme Court can reverse decisions of the Cartel Court only for errors in law, but not for errors in fact.

After a concentration has been cleared and implemented, the Cartel Court can, upon request of a statutory intervener, a sector regulator, an official interest grouping (e.g., Chamber of Commerce) or an undertaking whose interests are affected, impose measures on the undertakings concerned in order to weaken or remove the effects of the concentration (also taking into account the proportionality principle) if:

*a* clearance of the concentration was based on incorrect or incomplete information for which the undertakings concerned are responsible, or
*b* an obligation attached to the clearance decision is being violated.

### iv Hostile transactions

The statutory interveners generally expect that pre-merger notifications follow the standard form that the FCA has published on its website.[14] It is highly advisable to stick to the form's format, although it is not required by law. In the case of a hostile transaction, where information and market data cannot be sought from the target, it is advisable to discuss a draft of the notification with the statutory interveners (i.e., to contact them before the notification is filed).

### v Third-party access to the file and rights to challenge mergers

Undertakings whose interests are affected by a concentration (e.g., competitors, customers) are entitled to submit written comments on the proposed concentration to either or both statutory interveners within 14 days of the public announcement of the notification on the FCA's website and within 14 days after the publication of the fact that a request for an in-depth investigation has been filed. However, such third parties are not entitled to (1) request any particular action to be taken on the basis of their comments, (2) access the file of the statutory interveners or the Cartel Court or (3) file an appeal against a decision of the Cartel Court (see Decision No. 16 Ok 6/10, described in Section II.ii, *supra*).

### vi Effect of regulatory review; tender offers

Concentrations that require a pre-merger notification must not be implemented (closed) before clearance has been granted. If the concentration has not been cleared in advance, the underlying agreements will be void under civil law. Further, implementation of the transaction in violation of the standstill obligation can be sanctioned with fines of up to 10 per cent of the worldwide turnover achieved in the previous business year, which can be imposed on all undertakings participating in the breach.

In contrast with the ECMR (Article 7, Paragraphs 2 and 3), the Cartel Act does not provide for any derogation from the standstill obligation. Consequently, even concentrations brought about by public takeover bids must not be implemented before clearance is obtained.

## IV OTHER STRATEGIC CONSIDERATIONS

As the Austrian turnover thresholds – according to their wording – can also be reached where the target achieves zero turnover in Austria, regard is often had to the effects doctrine, according to which a concentration must (only) be notified in Austria if it 'affects the domestic market'. However, the FCA takes a restrictive approach when deciding

14 www.bwb.gv.at.

whether a concentration effected outside Austria affects the domestic market. The Cartel Court held that the 'potential effect' or even the 'abstract possibility of an effect' on the market might be enough. In the FCA's view, only concentrations that obviously and undoubtedly do not relate to Austria fall outside the scope of merger control. This might be the case when the target company does not have any turnover, branches or subsidiaries in Austria, nor will it have any in the foreseeable future. Additionally, the acquiring undertaking must not gain access to resources (know-how, patents, financial resources, etc.) that might considerably strengthen the undertaking's position in the Austrian market. In a more recent decision, however, the Supreme Court considered the FCA's interpretation as overreaching: if a transaction merely strengthens the financial resources of an undertaking incorporated in Austria, it does not affect this undertaking's position in the Austrian market.

It also has to be noted in this respect that the geographical scope of the standstill obligation under Austrian law is interpreted very widely (i.e., hold-separate agreements should only be used with caution).

## V OUTLOOK AND CONCLUSIONS

In 2010, the Austrian Social Partners (unions and chambers of commerce) published a study on the future of competition policy in Austria. It describes possible amendments to the Cartel Act, including in the area of merger control.

One such suggestion by the Social Partners concerns the widening of the scope of the term 'concentration' by including the exertion of a 'significant influence' on another undertaking. The significant influence concept has featured in the German Act against Restraints on Competition for more than 20 years now. Its specific aim is to capture concentrations that fall short of a shareholding threshold but could nevertheless raise concerns. A second suggestion relates to the incorporation of a stop-the-clock mechanism similar to the one included in the ECMR. A third topic was the adoption of the 'ministerial authorisation', another, more recent feature of the German Act against Restraints on Competition: even though a concentration has been prohibited, the competent minister may nevertheless authorise it to go ahead on the basis of policy considerations other than competition. Finally, applying a 'turnover multiplicator' to mergers in 'problematic' sectors of the economy (e.g., chemists, cinemas) was considered.

At present, such a multiplicator is only applied to media merger cases. The Cartel Act authorises the competent minister to promulgate a directive defining such sectors and multiplicators, but this authorisation has so far not been used. To follow up on the results of the study, a working group on the reform of competition law, comprising all relevant actors in the field, convened for a first meeting in spring 2011 upon invitation by the Federal Ministry of Justice and the Federal Ministry of Economy. Apart from the subjects mentioned above, its agenda encompassed topics such as the extension of the rights of the defence, clarifying rules on the protection of trade secrets and the calculation of fines, introduction of a possibility to challenge the fact-finding of the Cartel Court on appeal and, finally, incorporating the attorney–client privilege into the Cartel Act. The feasibility of derogations from the standstill obligation is also being discussed. With regard to merger control thresholds for turnover achieved within Austria, many professionals hold the opinion that the introduction of a second turnover threshold similar to the one laid down in Section 35, Paragraph 1(2) of the German Act against Restraints on Competition would help filter unproblematic concentrations where only one of the undertakings concerned has any turnover in Austria. Not only undertakings concerned would benefit from a similar provision in Austria; it would also free up much-needed resources at the FCA from examining rather unimportant merger cases. Thus, possible amendments of the turnover thresholds will also be discussed by the working group.

## Appendix 1

# ABOUT THE AUTHORS

**ISABELLA HARTUNG**
*Barnert Egermann Illigasch Rechtsanwälte GmbH*
Isabella Hartung heads the competition law department of Barnert Egermann Illigasch. She advises local and international clients on all aspects of Austrian and EU competition law.

Ms Hartung graduated from the University of Vienna in 1997. After having completed her postgraduate studies in European law at the College of Europe (Bruges), she received her *doctor juris* from the University of Vienna in 2000. During her studies Ms Hartung completed internships in the European Parliament and the European Commission. From 2000 to 2006, she worked as an associate in the antitrust, competition and trade department of a magic circle firm (Vienna and London office). Ms Hartung was admitted to the Vienna Bar in 2003.

She is author of several articles on competition law and co-author of a textbook on Austrian competition law (*Das österreichische Kartellrecht – Ein Handbuch für Praktiker*, 2nd edition, Linde Verlag 2008).

**WOLFGANG STRASSER**
*Barnert Egermann Illigasch Rechtsanwälte GmbH*
Wolfgang Strasser joined Barnert Egermann Illigasch as an associate in 2010. Prior to this, he studied at the University of Vienna and the University of Lund (Sweden) and completed an internship at the Austrian Cartel Court.

**BARNERT EGERMANN ILLIGASCH RECHTSANWÄLTE GMBH**
Rosenbursenstraße 2
1010 Vienna
Austria
Tel: +43 1 513 80 08 0
Fax: +43 1 513 80 08 40
office@beira.at
www.beira.at