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The International Comparative Legal Guide to:

Merger Control 2006

A practical insight to cross-border merger control issues

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1 Relevant Authorities and Legislation

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

An amendment of the Austrian Cartel Act of 1988 (*Kartellgesetz* 1988, the "Cartel Act") in 2002 entailed major changes in the institutional structure of Austrian antitrust enforcement. Austrian merger control had been heavily criticised for years. Too little efficiency of the former official parties' control, lack of possibility to discuss and clear concerns with regard to delicate concentrations prior to notification, the plurality of contact persons and competent bodies authorised to apply for an in-depth examination as well as the lack of legal provisions regarding the pre-clearance of unproblematic cases were targets of criticism. The system of official parties being nominated by politically motivated social partners was replaced by the establishment of two new institutions, the independent Federal Competition Authority and the Federal Cartel Prosecutor. The powers of the social partners were drastically reduced.

The institutions involved in merger control in general are:

1. Cartel Court and Appellate Cartel Court

The Cartel Court (*Kartellgericht*) and the Appellate Cartel Court (*Kartellobergericht*) are the only competition authorities able to issue binding decisions.

2. Federal Competition Authority

The Federal Competition Authority (*Bundeswettbewerbsbehörde*, in the following "FCA") is located at the Federal Ministry of Economics and Labour as an independent body, whose main function is the investigation and detection of potential restrictions on competition, as well as filing petitions with the Cartel Court. It oversees the functioning of competition in Austria and has been given the following powers:

- investigation of suspected competition distortion;
- participation in proceedings before the European Commission and assistance in the Commission's investigations;
- investigation of branches of economic activities in respect of possible competition infringements;
- guarding the consistency of Austrian and European Competition Law as well as of the decisions issued by the regulatory bodies and the cartel jurisdiction;
- cooperation in respect of competition law with the Cartel Court, Appellate Cartel Court, administrative authorities, including the regulatory bodies, and with the Federal Cartel Prosecutor; and
- providing the Federal Cartel Prosecutor with information upon request.

In order to comply with its functions, the Federal Competition Authority is provided with extensive investigation powers, including house searches if ordered by the Cartel Court.

Upon request, proprietors and representatives of enterprises have to grant information and/or access to business related documents, unless if by doing so they risk criminal prosecution.

3. Federal Cartel Prosecutor

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

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

4. Commission on Competition

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

1.2 What is the merger legislation?

A "real" Merger Control, including the possibility of the Cartel Court to prohibit the concentration, was introduced in Austria in 1993. All mergers and acquisitions meeting the requirements set out in the Austrian Cartel Act (see questions 2.1 and 2.3 below) are subject to pre-merger control and have to be notified to, and cleared by, the Cartel Court before implementation.

With regard to concentrations of a European dimension, European merger control is applicable and prevails over the Austrian provisions. Thus in these cases notification to the Cartel Court is not necessary. However, as the Cartel Act provides special rules regarding the media sector: a notification of a concentration in the media industry is still required.

On June 8, 2005, the Austrian parliament passed an amendment to the Cartel Act (the "Cartel Act 2005") and an amendment to the Austrian Competition Act (*Wettbewerbsgesetz*) bringing about a clarification and simplification of Austrian cartel law. Concerning the Austrian merger regime governed by the Cartel Act and the Competition Act, the legislator has not deemed it necessary to change the main principles but instead has only passed some minor modifications. Since the Cartel Act 2005 and the amended Competition Act will enter into force on January 1, 2006, the following text sets out the merger regime still in force until end of December 2005 and will describe the main amendments expected to enter into force at the beginning of 2006 in each section.

1.3 Is there any other relevant legislation for foreign mergers?

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

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

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

For instance any change in ownership of an air carrier, which includes even minor transfers of shares, requires approval by the competent regulatory authority. In the case of media companies, banks, exchange operating companies and insurance companies the competent regulatory authority has to be notified of any actual or planned acquisition of a "qualified share" in the company. A "qualified share" is defined as either a share of a certain percentage (usually 10% or more) or a share that confers a substantial influence on the company. The regulatory authority may in these cases prohibit the acquisition within 3 months of notification.

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

2 Transactions Caught by Merger Control Legislation

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

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

The first criterion to be examined is whether the transaction qualifies as a concentration within the meaning of the Cartel Act (S.41 Cartel Act, S.7 Cartel Act 2005).

The following transactions are considered as concentrations within the meaning of the Cartel Act (and the Cartel Act 2005):

1) an undertaking acquires, entirely or to a substantial extent, a business in particular by means of merger or change of corporate form;
2) an undertaking acquires control over another undertaking by contractual agreement (for instance granting the right to use, operate or manage a business);
3) an undertaking acquires, directly or indirectly, either 25% or more, or 50% or more of the shares of a company (regardless of whether or not this leads to a change in control);
4) an acquisition or any other measure has the effect that at least half the members of the management or the supervisory board of two or more companies are identical; and
5) any other combination of undertakings or businesses, where one company may exercise a controlling influence over another company (blanket clause).

Also concentrative full-function joint ventures are regarded as concentrations within the meaning of the Cartel Act, while cooperative joint ventures are regarded as cartels (see question 2.2 below). Under the Cartel Act 2005, cooperative full-function joint ventures will also be regarded as concentrations within the meaning of the Austrian merger regime. Intra-group transactions are exempt from merger control.

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

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

2.2 Are joint ventures subject to merger control?

The Cartel Act does not provide specific provisions on joint ventures. It is merely in respect to merger control that the act distinguishes between concentrative and cooperative joint ventures. According to s. 41/2 of the Cartel Act a joint venture, performing on a lasting basis all the functions of an autonomous economic entity, which does not give rise to coordination of the competitive behaviour of the parties amongst themselves or between them and the joint venture, shall constitute a concentration within the meaning of the Cartel Act. This definition corresponds to the definition of the European Merger Control Regulation before its amendment in 1997. The classical case of such a concentrative full-function joint venture is that the parent companies decide to enter - via their subsidiary - into a market they have not been active in so far. The borderline between a concentrative and a cooperative joint venture - which according to Austrian law constitutes a cartel - is sometimes difficult to draw. The practise follows the criteria developed by the European Commission in respect of Art 3/2 of the European Merger Control Regulation (before its amendment in 1997).

The Cartel Act 2005 will abolish the distinction between concentrative and cooperative full-function joint ventures in so far as both forms of joint ventures will qualify as concentration within the meaning of the Austrian merger regime.

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

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

If the transaction qualifies as a concentration, it further has to be examined, whether the relevant turnover thresholds are met. The relevant criterion here is whether the aggregate turnover is achieved by the undertakings concerned by the transaction within the last business year. The Cartel Act provides for a turnover-based threshold. It is irrelevant which market the turnover has been achieved in. Thus foreign sales revenues or revenues achieved in different markets are also to be considered. The turnovers of all undertakings linked to each other as defined in s. 41 of the Cartel Act (see question 2.1 above) have to be taken into consideration. If all of the following apply, the concentration must be notified to the Cartel Court:

1) the combined aggregate worldwide turnover of the undertakings concerned amounts to at least €300 million (US$362 million - exchange rates July 2005, www.ecb.int);
2) the combined aggregate turnover on the Austrian market of the undertakings concerned amounts to at least €15 million (US$18.1 million); and
3) each of at least two undertakings concerned has a worldwide turnover of at least €2 million (US$2.4 million).

The calculation of turnover in media, insurance and banking sectors are subject to special rules.

The Cartel Act 2005 will basically bring about the following changes:

- The turnover thresholds have to be exceeded instead of met.
- The second turnover threshold (combined turnover in Austria) will be increased to €30 million (US$36.2 million).
- The third turnover threshold (each undertaking concerned worldwide) will be increased to €5 million (US$6 million).
- Further, concentrations exceeding the turnover thresholds set out above will be exempt by law from the notification obligation, in case (i) only one undertaking concerned achieved turnover in Austria of more than €5 million (US$6 million); and (ii) the other undertaking(s) concerned achieved an aggregate turnover of not more than €30 million (US$36.2 million) worldwide. Such exemption is intended to cover, in particular, mergers having no material effect on the Austrian market (e.g. one big Austrian undertaking acquires one or more small foreign entities).

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

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

2.5 In what circumstances is it likely that transactions between parties out-side your jurisdiction ("foreign to foreign" transactions) would be caught by your merger control legislation?

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

Although complying with all the criteria set out in S.41 of the Cartel Act (in particular the turnover achieved on the Austrian market), the Supreme Court decided in its recent cases, that a concentration is not subject to the Austrian Cartel Act if it has no influence on the domestic market. The fact that certain turnovers are achieved on the domestic market thus does not suffice to constitute the required influence. For the evaluation, whether relevant influence is given, the Court set out as criteria the transfer of know-how and intellectual property rights, the increase of financial strength etc. The "effects doctrine" however has been applied very strictly so far.

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

To concentrations of a European dimension, as already described above, European merger control applies and prevails over the Austrian provisions. In such cases notification to the Cartel Court (to the FCA on and after January 1, 2006) is not required even though the thresholds are met. However, as the Cartel Act provides special rules regarding the media sector, a notification of a concentration in the media industry may still be required.

3 Notification and its Impact on the Transaction Timetable

3.1 Where the jurisdictional thresholds are met, is notification compulsory?

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

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

The Cartel Act provides for some exceptions to the notification obligation described in question 2.1. In the banking sector, merger control rules do not apply to situations in which a bank acquires shares for purposes of

resale, restructuring an insolvent company or securing the debt of such a company. The bank concerned is however subject to certain restrictions laid down by law, especially regarding its voting rights. It is further required that the shares are resold within one year of the date of acquisition or, in respect of restructuring and securing measures, after the finalisation of such measures. Further exceptions are provided for certain investment fund companies.

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

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

According to the model of the European Union, the criminal sanctions were replaced by a system of fines in 2002, set out in the Cartel Act itself (rather than in the Criminal Act). The amendments also introduced rudimentarily a kind of a leniency program to the Cartel Act.

The implementation of a prohibited concentration or failure to implement a concentration in accordance with restrictions or conditions imposed by the Cartel Court can lead to a fine ranging between €10,000 and €1 million or up to 10% of the worldwide turnover of the undertaking involved (the range of €10,000 to €1 million will be repealed by the Cartel Act 2005 leaving the 10% as a maximum fine). The submission of misleading or incorrect information in the notification may lead to a fine ranging from €3,000 to €35,000 (to a fine of up to 1% of the worldwide turnover according to the Cartel Act 2005) imposed by the Cartel Court. The amount depends on the severity, the duration, the achieved unjustified enrichment as well as on the degree of fault and the economic capacity of the undertaking.

A concentration must not be implemented before clearance. Any concentration implemented before clearance is void. However there are no specific time limits - such as a certain period after signing the agreement - for notification.

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

Any implementation before clearance is void. According to the Court rulings, a concentration is considered to be implemented as soon as it affects the market. It thus depends on actual realisation of the project, e.g. the request of consistent company directives, internal coordination of market behaviour etc, and is independent from its effectiveness according to civil law. Clearance in other jurisdictions does not affect the prohibition of implementation before clearance in Austria.

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

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

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

Within four weeks of receipt of the notification, the official parties (FCA, FCP) may ask for an in-depth examination of the merger. In addition, within three weeks, the CC may recommend the FCA to apply for an in-depth examination. The FCA does not have to follow this recommendation. If an in-depth examination is not requested, the concentration is cleared (receiving clearance this way takes about 6 weeks). If an in-depth examination has been applied for, the examination must be completed within five months of the notification being filed with the Cartel Court. If no decision is made within that time, either to block the merger or to give clearance under certain conditions and restrictions, the concentration is considered to be cleared.

Clearance may be obtained in one of the following ways:

- The Cartel Court issues a formal written confirmation that within four weeks an examination of the concentration has not been requested or that such a request has been withdrawn. Most cases are cleared in this manner.
- The Cartel Court issues a formal written confirmation that a period of five months from the date of filing has expired without prohibition under the examination procedure.
- The Cartel Court issues a clearance decision.

The Cartel Act 2005 will amend the described procedure as follows:

- Notifications have to be filed with the FCA instead of the Cartel Court. The FCA will immediately forward a copy of the notification to the FCP.
- A notification fee amounting to €1,500 shall be paid to the FCA.
- The five month time-limit for a decision of the Cartel Court starts to run at the time the FCA or the FCP files a request for an in-depth examination with the Cartel Court (extension of “Phase II” examination period).
- In case an examination of the concentration is not requested or such request has been withdrawn during the 4-week “Phase-I”, it is the FCA (instead of the Cartel Court) who will issue a respective confirmation at the end of such 4-week period.

Appeals against decisions of the Cartel Court must be lodged within four weeks. The Appellate Cartel Court (= Supreme Court) has to decide within two months after the last reply to the appeal (under the new Cartel Act 2005, this two month period will begin to run on the day the Appellate Court receives the file).

If the implementation violates any of the above-mentioned conditions, the official parties or any undertaking with legal or economic interest, any association representing the economic interests of companies, the Federal Chamber of Commerce, the Federal Chamber of Labour or the Presidential Conference of the Austrian Chambers of Agriculture can ask the Court to rule that the concentration had been implemented illegally.

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

The concentration may not be implemented before clearance (please see question 3.4).

The Austrian Cartel Act does not provide for a specific accelerated procedure for unproblematic concentrations. Especially in respect of multi-jurisdictional filings, that is to say concentrations requiring clearance in more than one country, the Austrian proceedings of approximately six weeks are quite long. In order to comply with the need for a faster clearance in certain cases, the legislator provided for the FCA and the FCP the possibility to waive their right to apply for an in depth-examination and thereby pre-secure validity of the concentration. The accelerating effect is however rather small.

According to the international standard, the FCA acts as sole contact to the companies concerned, especially regarding informal discussions in respect of notional concentrations ("one-stop-shop").

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

Notifications of concentrations shall contain all material information required for as-sessing the concentration.

S.68a (S.10 Cartel Act 2005) of the Cartel Act provides, that the notification shall contain detailed information regarding circumstances able to constitute or aggravate a dominant market position, especially in respect of the undertaking itself, its ownership, the market structure and market shares. If the notification does not comply with the provisions of S.68a of the Cartel Act, the official parties or the Cartel Court may require completion of the notification. In case of non-completion, the Cartel Court may reject the notification.

The FCA issued a form for merger notifications in May 2003. Although its use is not compulsory, it is recommended, as it ensures that the Cartel Court and the authorities dispose of any information required and thus minimises the risk of the notification being rejected.

The form for the notification of concentrations is published on http://www.bwb.gv.at/BWB/English/default.htm.

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

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

Filing Fees:

For proceedings concerning the notification of a concentration, a flat rate court fee of €75 (a filing fee of €1,500 under the new Cartel Act 2005), but in the event of the institution of an examination procedure before the Cartel Court, a variable court fee from €1,500 to €30,000 is charged (the Cartel Act 2005 will repeal the minimum of €1,500). After the conclusion of the proceedings, the amount of the variable fee shall be fixed by decision of the presiding judge of the Cartel Court at his discretion considering in particular the following: significance of the proceedings with respect to economic policy, the expenditure connected with the official act, the economic conditions of the party liable to pay and the fact to what extent the party liable to pay has given reason for the official act. Additionally costs for the publication in the Official Gazette in the amount of approximately €150 occur.

4 Substantive Assessment of the Merger and Outcome of the Process

4.1 What is the substantive test against which a merger will be assessed?

The Cartel Court may prohibit the notified concentration, on request of the official parties, on the grounds that the proposed concentration will create or strengthen a dominant position in the affected market. According to S.34 of the Cartel Act an undertaking holds a dominant position if it (i) is either exposed to no or only insignificant competition; or (ii) holds a predominant position in relation to other competitors. In order to assess market power, financial strength, relations to other undertakings, access to suppliers and markets, as well as entry barriers for other undertakings are to be considered. S.34 of the Cartel Act further provides a disprovable presumption (burden of proof is placed on the undertaking concerned) that an undertaking holds a dominant position if it either:

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

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

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

The Cartel Court may also impose restrictions or conditions to its clearance to prevent the creation or strengthening of a dominant position or to achieve at least compensating advantages.

The Cartel Act 2005 will not change this substantive test and will not in this respect adapt the Austrian merger regime to the ECMR (using the SIEC test).

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

The Cartel Court publishes the fact of the notification in the Official Gazette (*Amtsblatt zur Wiener Zeitung*). On and after 1 January 2006, it will be the FCA who will publish the fact of merger notifications on its website (www.bwb.gv.at). The publication contains the name of the undertakings concerned, the concerned branch, and any other circumstances necessary for the implementation of the concentration. Any third party whose legal or economic interests are affected by the concentration may file a submission with the Cartel Court (with the FCA during Phase I under the Cartel Act 2005) within 14 days after publication. The concerned third party, however, does not have any right to special treatment of its submission; in particular it does not have any right to require an in-depth examination (see above). This right is reserved to the official parties (FCP, FCA) only. The affected third party is thus not party to the examination proceedings. It may however submit its arguments to the official party, who may arrange informal hearings.

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

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

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

In the sector of antitrust, the FCA is the most important investigation authority. It is provided with extensive investigation powers including the possibility to gather information and examine business documents of the concerned undertakings, and - if necessary to assess whether a concentration is illegally implemented and if ordered by the Court - to carry out house searches.

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

All material information necessary for assessing the concentration are to be provided. If certain information or documents cannot be furnished, full reasons have to be given. Although proceedings are not public, some details of the notification are in the public domain as they are registered in the cartel register after clearance. Delicate information or documents should be marked as such and a non-confidential version of the notification of concentration can be supplied for filing in the archives.

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

5.1 How does the regulatory process end?

Please see questions 3.6 and 4.1.

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

Already in "phase I", that is to say before an in-depth examination is applied for, the FCA may remedy competitive disadvantages or critical issues by way of negotiations. The FCA hereby may scrutinise the relevant facts. In most of the cases, the FCA asserts - in co-operation with the FCP, the association representing the economic interests of companies, if necessary with the regulatory bodies, the competitors and consumers (hearing of witnesses, demanding information etc.) - its concepts by demanding changes of the notified concentration. If an agreement cannot be achieved, an in-depth examination is initiated. Also during "Phase II" (in-depth examination), a modification of the notified concentration, elaborated together with the FCP dispelling any concerns of the FCP is still possible and may lead to the cancellation of the application of an in-depth examination.

Further, the Cartel Court may issue clearance under certain conditions or restrictions. Such conditions or restrictions may also be imposed after clearance, if the non-prohibition or waiver of the official parties to apply for an in-depth examination was caused by incorrect or misleading information for which the undertaking is responsible.

5.3 At what stage in the process can the negotiation of remedies be com-menced?

See question 5.2 above.

5.4 How are any negotiated remedies enforced?

As the remedies negotiated together with the FCA lead to a change of the concentration project itself, no special enforcement rules are provided. In case the parties to the concentration do not fulfil the remedies (do not adhere to the conditions or restrictions agreed upon with the Cartel Court), the concentration is illegally implemented (see question 3.3).

5.5 Will a clearance decision cover ancillary restrictions?

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

5.6 Can a decision on merger clearance be appealed?

Decisions of the Cartel Court are subject to appeal by all notifying parties, as well as the official parties (who are considered to be party to all proceedings regarding competition law). The period for an appeal to be filed is four weeks from service of the decision. The appeal is heard by the Supreme Court as Appellate Cartel Court.

The appeal is then served to the other parties, who may file a counter-statement within four weeks after service of the appeal. The Appellate Cartel Court has to decide within a period of two months after receipt of the last counter-statement (under the new Cartel Act 2005, this two months period will begin to run on the day the Appellate Court receives the file).

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

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

Additionally, as already mentioned above, concentrations subject to notification must not be implemented until clearance has been granted by the Cartel Court. Any contracts violating this prohibition are legally void and thus non-binding to the parties and unenforceable. The Cartel Court will, upon application, determine whether a concentration has been implemented in a prohibited way. The parties eligible to apply in this case are the official parties, the Austrian Economic Chamber, the Federal Chamber of Labour, the Presidential Conference of the Austrian Chamber of Agriculture, the sector-specific regulators and any third party whose legal or economic interests are affected, as well as any association that represents the economic interests of undertakings, if those interests are affected. The prohibited implementation of a concentration may lead to fines being imposed (see question 3.3 above). The Cartel Court may furthermore, upon application by an official party, order the publication of this decision at the cost of the undertakings or association of undertakings involved.

6 Miscellaneous

6.1 To what extent do the regulatory authorities in your jurisdiction liaise with those in other jurisdictions?

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

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

July 30th, 2005.

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