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Efficiencies in Merger Control – Note by Austria

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1. Introduction

1. Merger control is an important legal framework designed to ensure that a proposed concentration between companies does not impair effective competition in the market. In this regard, the Austrian Supreme Court, which acts as the Supreme Cartel Court in Austria, has clarified in one of its rulings that a certain number of independent and potentially competing undertakings should remain on the market to guarantee the functioning of competition. It expanded this view by explaining that merger control is a preventative measure with the intention to maintain a market structure that is in the "*interest of the general public*" (Austrian Supreme Cartel Court 10.3.2003, 16 Oct 20/02). Merger control has been characterised as regulatory in nature, as it serves to monitor and if necessary, prevent changes to the existing market structure ex ante. These changes, which result from takeovers and therefore external company growth, could otherwise lead to the creation of market dominance or the significant impediment of effective competition, potentially reducing overall welfare and thereby harming the overall economic interest. For this reason, Austrian merger control law lays out substantive tests, which set out to measure the level of concentration in a given market and whether additional concentrations would lead to anticompetitive conditions on the market.

2. This contribution will outline the practical approach taken in Austria when assessing efficiency gains in the context of merger cases. Notably, efficiency considerations are assessed both in phase 1 and in phase 2 merger cases as part of the examination of potential market dominance and the significant impediment of effective competition (SIEC). Furthermore, this publication will explore the extent to which out-of-market efficiencies, may, in exceptional cases, be considered a legitimate justification for approving a merger.

2. Consideration of efficiencies in merger control

3. Provisions dealing with mergers can be found in §§ 7 to 19 of the Austrian Cartel Act. Specifically, §§ 7 to 9 and § 19 define the scope of application of Austrian merger law, while §§ 10 to 18 regulate the procedural framework and set out the substantive criteria applied in the assessment of mergers.

4. Accordingly, undertakings that meet all the cumulative turnover thresholds in § 9 Cartel Act, or whose mergers fall under the transaction value threshold and have sufficient domestic impact, are required to notify their merger to the Austrian Federal Competition Authority (AFCA). The substantive requirements for merger applications can be found in § 10 (1) Cartel Act, which outlines the documentation companies have to submit together with their merger filing. In order to provide companies with assistance for their merger notifications pursuant to § 10 Cartel Act, the AFCA has published a standardised notification form on its website. This form serves as a practical guide and offers more detailed explanations regarding the specific requirements set forth in the relevant legal provisions.

5. The AFCA recognises that certain mergers can lead to improvements in terms of competitiveness of the parties involved or to improvements of parameters of competition such as e.g. innovation or product diffusion and that such improvements can in certain cases

benefit in particular also customers of the merging parties that might otherwise be worse off after the merger. Therefore, it is standard practice of the AFCA to take efficiency claims in merger proceedings very seriously and examine them under close scrutiny, in particular where they might have the potential to counteract merger-specific harm to affected consumers.

6. The market dominance test is decisive in the assessment of mergers and since 2021, with the introduction of the Cartel and Competition Law Amendment Act, the Austrian legislator has also introduced a significant impediment of effective competition (SIEC) criterion. This was essentially motivated by the fact that anticompetitive mergers may not solely be measured on the basis of market share criteria. A merger between the second and third largest undertaking on a market for instance could have negative effects on competition without them becoming dominant. Consequently, this possible loophole has been closed as a merger must now also be prohibited if, apart from the creation or strengthening of a dominant market position, the merger is also expected to significantly impede effective competition (§ 12 (1) 1 Cartel Act). As a result, the scope of Austrian merger control has become more comprehensive. Following this amendment, the market dominance test and the SIEC test are both assessed as parallel tests in merger examinations and together are referred to as "substantive tests". However, the structure of § 12 Cartel Act indicates that the SIEC test is only to be applied if there is no case of market dominance. Therefore, as soon as a dominant position is created or strengthened, no additional SIEC review is necessary.

7. The key consideration in the assessment of a merger is the anticipated change in market structure. In addition, other factors are taken into account, such as the financial strength of the undertakings involved, existing barriers to market entry, and the degree of access to upstream and downstream markets. It is moreover possible to consider certain balancing factors in the merger assessment. It was already possible under the provisions of § 20 Cartel Act to counteract presumptions of market dominance in affected markets pursuant to § 4 (2) and since the amendment to the Cartel Act this is also possible in the context of assessing the SIEC criterion. The notification form provided by the AFCA reminds companies of the possibility to refer to specific countervailing factors already in their merger notification. These factors will be taken into account by the AFCA when examining the merger. Relevant offsetting factors may include countervailing buyer power, market entry, efficiencies or the existence of a restructuring merger.

8. If the notifying parties assume that the proposed concentration will result in efficiencies that will prevent anticompetitive effects of the concentration on the affected market, they are expected to clearly identify and substantiate these anticipated efficiencies in their merger notification. Such efficiencies may include, for example, reductions in variable costs or improvements in the quality or range of goods and services.

9. The notification must also specify when these efficiencies are expected to materialise, the extent of their impact, and the probability of their realisation. Another determining factor is how the expected efficiency benefits will be passed on to consumers. Furthermore, it is important to state why the undertakings concerned could not achieve similar efficiencies through alternative ways that would not give rise to competition concerns. In this context, particular emphasis is placed on the criteria of verifiability, specificity, and consumer pass-on. These elements must be convincingly demonstrated, and the standard of proof required is correspondingly high, reflecting the central importance of these factors in the overall analysis.

10. It is furthermore worth noting that efficiency claims are weighted in the same manner under both the market dominance test and the SIEC test. Notably, already under the previous legal framework prior to the inclusion of the SIEC criterion into Austrian

merger control law, the Austrian Cartel Court referred to the European Commission's guidelines regarding the SIEC test when examining efficiency gains. Thus, in its assessment of efficiencies under the market dominance test, the Cartel Court applied the same criteria (merger specificity, verifiability and benefit to consumers) that are used at EU level under the SIEC test. This approach was furthermore also in line with the established practice that the AFCA followed before the introduction of the SIEC test. Since the introduction of the SIEC test was also justified with reference to European harmonisation, it is to be assumed that the legal evaluation of efficiency gains under the market dominance test and the SIEC test are intended to be consistent irrespective of the legal test applied. From an economic point of view, there is no reason to apply a different weighting to efficiency gains in the two parallel tests.

11. A recent case shows that the burden of proof to assert countervailing factors of a merger is on the merging parties. Both the AFCA and the Cartel Court may only examine possible countervailing elements of a merger subject to market dominance presumptions as per § 4 (2), if the undertakings themselves bring forward specific efficiency claims (Cartel Court, 24.03.2022, 25 Kt 8/21w, *Metro/AGM*).

12. The *Meta/Giphy* case moreover illustrates the approach and reasoning of the Cartel Court when it examines mergers with regard to claimed efficiency gains: "*The effects on competition must also be assessed with regard to the efficiency gains demonstrated by the merging parties. Competition concerns can be excluded, for example, if there is sufficient evidence that the efficiencies brought about by the merger may strengthen the ability and incentive of the merged entity to act pro-competitively for the benefit of consumers, thereby counteracting the otherwise adverse effects of the merger on competition.*" (Cartel Court 02.02.2022, 28 Kt 8/21t, Meta/Giphy). The Cartel Court furthermore emphasises in this case that efficiency gains must benefit consumers and not the companies themselves: "*Based on the established facts, efficiency gains or innovations are possible on the markets affected by the foreclosure, but cannot be specifically identified, and would ultimately also mainly benefit the defendant and are therefore not suitable to remove the competition concerns of the foreclosure of inputs."*

3. Statutory justifications to merger prohibitions

13. When a merger is submitted to the Cartel Court for review, it is ultimately the Cartel Court that decides whether the transaction should be prohibited (Phase 2). Austrian law provides that the Cartel Court may refrain from prohibiting a merger even if the conditions for prohibition are formally met, provided that one of the legal justifications set out in the Cartel Act applies to the specific case.

14. In this context it should be stressed that these justifications do not explicitly constitute efficiency gains in a strict sense but act more as "public interest" tests or "out-of-market efficiencies", in which the competitive harm for consumers resulting from the merger is not necessarily fully compensated but rather where a balancing decision is made (Cartel Court 09.02.2016, 27 Kt 3/16, PremiQaMed Holding / Goldenes Kreuz).

15. As a first step of the review process, the Cartel Court thus examines whether the merger should be prohibited due to the creation or strengthening of a dominant market position (§ 12 (1) Cartel Act) and as a second step it examines whether one of the justification grounds pursuant to § 12 (2) may apply to the merger. According to this provision in the Cartel Act there exist three different conditions that allow for the authorisation of otherwise prohibited mergers:

1. Improvements in competitive conditions: if it is expected that such merger will also bring about improvements in competitive conditions which outweigh the disadvantages of the merger;
2. Improvements in international competitiveness: if such merger is necessary to maintain or improve international competitiveness of the undertakings concerned and economically justified, or
3. Economic advantages: if the economic advantages of the merger significantly outweigh its disadvantages.

16. An important distinction between the justifications in § 12 (2) is that the first and third justifications are not concerned with improving the competitive conditions of the companies in question, but with structural improvements on a third market (Cartel Court, 21.5.2002, 26 Kt 143, 186, 191, 192/01, *Wolters Kluwer/Linde*) or general economic benefits. The second justification, however, focuses on the competitiveness of the companies involved and therefore focusses on the companies as an economic unit (Supreme Cartel Court 14.2.2005, 16 Okt 1/05, *Lenzing/Tencel*). In this context a macroeconomic justification must also apply.

17. Companies wishing to do so can already indicate at the merger notification stage that the notified merger meets one of the justification criteria. The AFCA notification form specifies that in the event that the concentration creates or strengthens a dominant position within the meaning of § 4 Cartel Act, the merging parties may in advance state why in their opinion

1. it is to be expected that the concentration will also lead to improvements in competitive conditions that outweigh the disadvantages of market dominance; or
2. the concentration is necessary to maintain or improve the international competitiveness of the undertakings concerned and is economically justified; or
3. the economic advantages significantly outweigh the expected disadvantages of the merger.

18. The Cartel Court can then approve mergers on the basis of the above-mentioned justifications or impose effective remedies so that these justifications can nevertheless be realised (Cartel Court 5.8.2004, 26 Kt 132/04, 26 Kt 167/04, 26 Kt 168/04, *Morawa Grosso*).

3.1. Improvement in competitive conditions criterion

19. The improvement in competitive conditions justification refers to circumstances that have a positive impact on the market structure on a third market (Supreme Cartel Court 17.12.2001, 16 Okt 9/01, *Wolters Kluwer/Linde*). The reason why it is third markets that are considered in the assessment of justification grounds is because improvements on the affected market of the merger are already taken into account as countervailing factors in the context of the substantive tests, as explained above (Cartel Court 26.1.2001, 26 Kt 342, 369, 380, 381, 382, 383/00, Formil). Against this backdrop, it is irrelevant who benefits from the improvement in competitive conditions, whether it is third parties or a party to the merger. Nevertheless, pure rationalisation effects do not constitute an improvement of the competitive conditions; on the contrary, they often have the effect of strengthening a dominant market position (Supreme Cartel Court 17.12.2001 16 Ok 9/01, *Wolters Kluwer/Linde*).

20. When examining the merger for the suitability of the relevant justification, the negative effects of the merger must be weighed against the competitive advantages. It must

be assumed that the corresponding advantages of efficiency gains will outweigh the disadvantages for competition, such as restrictions of competition and the associated economic consequences for end consumers. This was highlighted by the Cartel Court and subsequently by the Supreme Court in the *Lenzing/Tencel* case: "*However, the efficiencies described apply to the entire, newly created company. Even if the entire operating result of the target company was assumed to be balanced, it can be presumed in the sense of an economically rational strategy of the notifying party that the efficiency gains achieved through the transaction would primarily be used to reduce losses and would not be passed on to consumers. By merging the research areas, the technological standard would improve on the one hand, but on the other hand competition between the independent research areas of two independent companies would be eliminated. [...] The planned merger would eliminate the only serious, current or at least potential competitor both in Austria and worldwide [...]. If one further considers that there is no other serious competitor in the lyocell market worldwide, an improvement of the competitive conditions through the creation of a monopoly can only be denied*." (Supreme Cartel Court 14.02.2005, 16 Ok 1/05, Lenzing/Tencel).

21. In another case the approval of a joint venture in the media sector that allowed the establishment of a nationwide free newspaper and advertising "ring" was upheld, subject to the improvement of competition conditions. In view of § 4 (2) Cartel Act it was stated that the potential of the joint venture to create market dominance in several Austrian federal states could not be ruled out, nor could the strengthening of any existing dominant position as a result of the merger. However, the Cartel Court at first instance based its decision on the forecast that the joint venture would strengthen competitive conditions at national and regional level to such an extent that the advantages would outweigh the possible limited market share gains on the regional markets. The Court referred in particular to the fact that the previous market dominator will face competition on the national advertising market and that the competitive situation will also improve on the regional markets for example through the formation of a "counter-ring" to the merger. The risk of competitors being squeezed out of the local markets was rejected based on the lack of relevant effects of the joint venture. Ultimately, it stated that the requirements for non-prohibition of the merger pursuant to § 12 (2) 1 Cartel Act are therefore met (Supreme Cartel Court 17.12.2007, 16 Ok 15/08, *Styria Medien AG/ Moser Holding AG*).

22. Similarly to the market dominance effects, the stated improvement of competitive conditions must be directly attributable to the merger. The law therefore requires a causal link between the merger and the change in the market structure. To this end, the competitive conditions of the affected market before and after the merger must be compared, taking into account all relevant circumstances and the expected market development. If the improvement in the market structure would occur in the same way without the merger, the merger is not causal, and the requirements of the justification ground are not met. However, it should be emphasised that the predicted changes do not have to occur simultaneously with the implementation of the merger. It is sufficient if they are expected to be realised with a high degree of probability within the predicted period. While this period depends on the individual circumstances of the market concerned, a short to medium term of up to three years is generally common. However, the period can be extended if long-term market developments can be estimated relatively accurately.

23. Moreover, causality is also not established if the competitive advantages can possibly be generated in a less restrictive manner. As with the balancing factors, the burden of proof lies with the merger applicants to demonstrate that improvements in competitive conditions will occur as a result of the merger.

3.2. Improvement in international competitiveness criterion

24. This criterion refers to the ability of an undertaking to compete on a durable basis. In order to qualify for this justification, it is required that the merger improves or maintains international competitiveness and there must be evidence that the merger is necessary to achieve this outcome. Additionally, there should be no reasonably achievable alternatives to the merger that could ensure the requirement of international competitiveness in the long term. The prerequisite is therefore that without the merger the competitiveness of the companies involved would deteriorate compared to competitors operating transnationally. Improvements may be realised by cost savings or other advantages made possible by the merger, such as the merging of sales structures, research units, or expertise.

25. According to §12 (2) 2 Cartel Act the merger must not only improve international competitiveness but also be economically justified. While it is unclear what exactly is referred to by the latter, it is assumed to generally refer to broad economic objectives such as full employment, stability of the value of money, foreign trade balance and growth. Possible economic advantages must then be weighed against competitive disadvantages. In practice, mergers that safeguard competitiveness but are not economically justified are hardly conceivable.

3.3. Economic advantages criterion

26. This fairly recently implemented provision has not yet been applied in practice. According to this justification, mergers are not to be prohibited if there are economic reasons that favour the approval of the merger in individual cases. Thereby, economic advantages must outweigh the competitive disadvantages. The balancing criteria include national economic policy objectives such as growth, innovation and full employment, as well as societal goals such as increasing prosperity, improving the quality of life of citizens i.e. by increasing employment, income growth and fair income distribution. Environmental standards, which were introduced with the last amendment to Austrian competition law in 2021, may also be considered under this criterion.

4. Conclusion

27. Efficiency gains are indeed considered in Austrian merger control and are taken into account in various stages of the merger review process. They are initially given consideration under the substantive tests where they may serve as countervailing factors provided that the merging parties have presented these balancing factors to the Federal Competition Authority in a sufficiently substantiated manner. In Phase 2 of a merger control review carried out by the Cartel Court, efficiencies can also serve as justification for a merger that potentially would otherwise be prohibited. For example, the Cartel Court may clear a merger if the efficiency benefits outweigh the negative effects of the merger. This may be the case for example, if the merger improves competitive conditions on a third market, increases international competitiveness or brings important economic advantages. Such justifications nevertheless cannot be qualified as efficiency justifications in a strict sense but should rather be understood as balancing decisions that take into account broader policy objectives or out-of-market efficiencies.

28. In practice, however, the Austrian Cartel Court has invoked these grounds for justification only in exceptional cases. One reason is certainly that the burden of proof to be met by the undertakings is quite high. Consequently, it is difficult for companies to

provide the necessary supporting documentation that the anticipated efficiency gains will effectively materialise following the merger.