

Guidance on pre-notification procedures in merger control

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1 Guidance on pre-notification procedures in merger control

In the interest of efficient merger control¹, under certain conditions the Federal Competition Authority (“FCA”; in German: Bundeswettbewerbsbehörde, BWB) grants companies the opportunity to notify the FCA in advance of a planned merger within the meaning of § 7 of the Federal Cartel Act (KartG) in the course of a pre-notification procedure even before the statutory deadline² has been triggered. Such pre-notification procedures precede the formal filing of a merger notification. In this context, parties interested in pre-notification can draw the FCA’s attention to potential competition law issues at an early stage, especially in complex cases, and ensure efficient further proceedings. The pre-notification procedure is usually carried out in writing.

It must be pointed out that there is no legal entitlement to a pre-notification procedure³, but implementation of the same is rather at the discretion of the FCA.

The question of the notification requirement must be separated from the pre-notification procedure, which is as a rule to be examined independently by the parties interested in pre-notification prior to the request with regard to a possible pre-notification procedure.⁴ Pre-notification procedures are as a rule indicated only in cases where the parties interested in pre-notification assume that they are subject to a notification requirement.

¹ See the corresponding recommendation of the International Competition Network (ICN), Recommended Practices for Merger Notification and Review Procedures, available at <https://www.internationalcompetitionnetwork.org/portfolio/merger-np-recommended-practices/>.

² The regular four-week period pursuant to § 11 (1) of the KartG (Phase 1) begins after the formal filing of the respective merger notification. Upon application of the parties, this period can be extended only by another two weeks (§ 11 (1a) of the KartG).

³ Even though § 2 (5) of the Federal Competition Act (WettbG) allows companies to ask the FCA for an informal assessment of a matter falling within the scope of Section 3 of Chapter I of the KartG 2005, the Federal Competition Authority is neither obliged to provide legal assessments nor bound by deadlines (951 BlgNR XXVII. GP, p. 28).

⁴ In the event of any ambiguities in this context, it is possible to contact the Legal Department (POST-Anmeldepflicht@bwb.gv.at) by email.

2 Expediency of a pre-notification procedure

The expediency of a pre-notification procedure depends on the circumstances of the individual case. In the following cases, the FCA has regularly considered a pre-notification procedure expedient in the interest of efficient procedural management:

- The merger leads to the creation or strengthening of a dominant position as a supplier or buyer within the meaning of § 4 (1) or (1 a) of the KartG or gives rise to a presumption of market dominance pursuant to § 2 or (2a) leg cit;
- there are other affected markets⁵ according to Section 5 of Form Sheet C for merger notifications⁶, and/or comments according to § 10 (4) of the KartG or concerns from consumers are to be expected;
- there are non-affected markets according to Section 4 of the Merger Notification Form Sheet, but according to the assessment of the parties interested in pre-notification, an in-depth investigation is indicated or otherwise likely⁷;
- the merger may give rise to competition concerns with regard to the findings or recommendations of a sector inquiry or any other current thematic focus of the FCA⁸.

⁵ In addition to the cases mentioned in § 4 of the KartG, a substantively and geographically relevant market is an affected market within the meaning of the Form Sheet if two or more of the companies concerned are active in the substantively same market and the merger will lead to a combined market share of 15 % or more (horizontal relationships), or if the companies affected by the merger are (also) active in substantively different markets that are upstream or downstream of each other and their market share there amounts to 25 % or more, irrespectively of whether there are supplier or customer relationships between the companies concerned (vertical relationships).

⁶ The current merger notification form sheet is available (only in German) at https://www.bwb.gv.at/en/merger_control.

⁷ This is conceivable e.g. in the case of (pending) questions regarding market definition, e.g. in the case of lacking decision-making practice or due to a deviating market definition compared to previous case practice in Austria or the EU, on the basis of market studies or other (publicly available or in-house) sources.

⁸ Sector inquiries by the FCA are available at https://www.bwb.gv.at/en/sector_inquiries (Note that not all sector inquiries are available in English).

3 Objectives of the pre-notification procedure

The pre-notification procedure can – without the pressure of ongoing procedural deadlines – serve the following purposes in particular:

- Discussion of (complex) issues and possible competition concerns⁹;
- clarification of the FCA's information needs (this includes data requirements and documents such as analyses, reports, studies and surveys, but also evidence prepared for the merger);
- preparation of market surveys by the FCA; this concerns the preparation of a questionnaire by the FCA and the contact data of the
- respondents prepared by the pre-notification applicants;
- discussion of any (private) expert opinions or studies submitted; in this case, the (raw) data and the (calculation) codes (e.g. do files in Stata) must be prepared and submitted to the FCA upon request.

⁹ Including questions concerning market definition, in particular lack of or deviation from relevant decision-making practice.

4 Initiation of a pre-notification procedure

- After clarification of the requirement for notification, a request for the commencement of a pre-notification procedure may be submitted. Such a request is to be sent by email to praenotifikation@bwb.gv.at. Please note that any communication in the procedure shall take place exclusively in German. The more detailed the information on the planned merger, the better the situation can be assessed by the FCA (see in detail under **Prerequisites**).
- It should be noted in advance that the parties interested in pre-notification must schedule a realistic time frame for pre-notification procedures and merger proceedings in the context of a planned merger. It should be borne in mind that, due to limited staff capacities at the FCA, pre-notification procedures can be carried out only on the basis of available resources.
- In the case of merger projects in the media sector that fall within the scope of application of both the ECMR and the Austrian merger control scheme, it is expedient to involve the FCA at an early stage, also in pre-notification procedures at EU level. The same applies to cases in which the parties interested in pre-notification consider a referral pursuant to Art 4 of the ECMR or Art 9 of the ECMR or Art 22 of the ECMR expedient, or expect a referral pursuant to any of these provisions.

5 Prerequisites

For efficient handling of pre-notification procedures, the parties interested in pre-notification must at least agree in principle on the structure of the merger and the timetable for its planned implementation. Generally speaking, the recognisable intention of the parties interested in concentration to carry out the merger within a foreseeable period of time is sufficient (suitability for notification)¹⁰.

Initiation of a pre-notification procedure is at the discretion of the FCA, but in any case requires:

- Submission of a largely complete draft of the merger notification, taking into account the FCA's current template (Merger Notification Form Sheet)¹¹;
- timetable of the planned implementation;
- disclosure of all competition authorities to which a notification of the merger has been or is planned to be made; upon request of the FCA, transmission of a "*waiver of confidentiality*"¹² and – if and insofar as already known – relevant details of the contact persons (in particular telephone and email); and
- reasons why a pre-notification procedure is appropriate in this case from the point of view of the parties interested in pre-notification.

In view of the fact that pre-notification procedures are based on draft merger notifications¹³, it is expedient if the issues raised in the course of this procedure are also reflected accordingly in a subsequent formal filing of a merger notification.¹⁴

¹⁰ Cf. OGH (Supreme Court of Austria) as Supreme Cartel Court, 25.01.2021, 16 Ok 5/20a mwN.

¹¹ This means that hypothetical requests concerning planned transactions cannot be considered in the pre-notification procedure.

¹² In the case of mergers to be notified in a plurality of jurisdictions, it is essential for the sake of efficiency that an exchange of documents and confidential information between the competition authorities involved is made possible. Within the scope of application of § 10 WettbG, this is also possible without granting a "*waiver of confidentiality*".

¹³ Therefore the involvement of appropriate legal representation can be helpful already in the pre-notification procedure, even though there is no obligation for representation by a lawyer in the cartel proceedings as a whole.

¹⁴ The merger notification shall represent the *status quo* and thus contain all relevant information from the pre-notification procedure. With the formal filing of a merger notification, an additional document must be enclosed in which the amendments compared to the latest draft of the merger notification in the

By requesting a pre-notification, parties interested in pre-notification undertake to comply with the deadlines set by the FCA as far as possible.

course of the pre-notification procedure can be traced (in amendment mode or as a comparative version as a Word document).

6 Commitments and obligations

Commitments and obligations can be made binding only after the formal filing of a merger notification. In order to accelerate the procedure, the parties interested in pre-notification are, however, free to make specific proposals in the pre-notification procedure and/or with the formal merger notification that – irrespective of possible different legal opinions – could be suitable in the view of the FCA to eliminate competition-related concerns. In view of the fact that plausibility requirements must regularly be subjected to a so-called “market test”, a final assessment can usually only be made after the formal filing of a merger notification, primarily for reasons of confidentiality (see also **Binding effect and protection of secrets**).

7 Termination of the pre-notification procedure

The FCA and the parties interested in pre-notification may terminate a pre-notification procedure prematurely at any time. In the following cases, the FCA will usually abstain from continuing the pre-notification procedure:

- The merger project turns out not to be sufficiently concrete;
- the pre-notification procedure has already been conducted for a longer period of time and no further efficiency gains for a formal filing of a merger notification are to be expected from continuation;
- without justification, the parties interested in pre-notification fail to meet deadlines set by the FCA;
- without justification, the documents relevant to the FCA are not submitted completely.

8 Binding effect and protection of secrets

Pre-notification procedures are not covered by the FCA's publication obligations. The FCA's annual progress report only publishes the number of pre-notification procedures held. As a rule, the parties interested in pre-notification also point out the necessary protection of secrets in the pre-notification procedure. In view of the necessary protection of secrets in individual cases, market surveys in the pre-notification procedure can be carried out only with the consent of the parties interested in pre-notification and under special confidentiality precautions. Third parties therefore regularly have the opportunity to effectively comment on a merger notification only after the same has been formally filed and published on the FCA's website. Against this background, no final examination of the merger can take place before the formal filing of a merger notification.


9 Federal Cartel Prosecutor

In addition to the FCA, the second official party, the Federal Cartel Prosecutor (in German: Bundeskartellanwalt), bound by instructions from the Federal Minister of Justice, was established in July 2002 with the amendment to the Federal Cartel Act. The Federal Cartel Prosecutor has the same application powers in merger proceedings as the FCA has, but no investigative powers. In the interest of procedural efficiency, the FCA therefore involves the second official party, the Federal Cartel Prosecutor, in consultation with the parties interested in pre-notification, if possible, already in the pre-notification procedure.

10 Final note

Please note that in case of discrepancies between the German and the English version of this guidance paper the German version prevails.

Finally, it should be noted that this guidance reflects the FCA's current approach to pre-notification procedures. It cannot be ruled out that an evaluation and, if necessary, adaptations may follow on the basis of experience.



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