

COVID-19 crisis: shutdown mergers expected

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In the wake of the global economic crises triggered by the ongoing COVID-19 crisis, the Austrian Federal Competition Authority (AFCA) expects an increased number of company takeovers in the coming months; however, the number of mergers in 2020 to date has been lower than in previous years.

The AFCA holds that it would not be appropriate to relax merger control for such 'shutdown mergers', as merger control is necessary to protect the Austrian market and the country's long-term economic development.

At the same time, the AFCA highlighted in a [handout](#)⁽¹⁾ its view on the macroeconomic effects of market power and its assessment of acquisitions of financially distressed companies. Generally, the AFCA considers that by preventing the accumulation of market power during the present crisis:

- Austrian merger control makes a positive contribution to the country's macroeconomic development and must still be conducted in accordance with objective criteria; and
- no additional macroeconomic assessment of mergers is required.

After explaining its economic models, the AFCA set out its tests and criteria for approving shutdown mergers. Based on the substantive test for the Austrian merger control (ie, "the creation or strengthening of a dominate position" (Section 12(1) of the Federal Cartel Act)), the AFCA elaborated that the failing firm defence ('rescue merger') might be acceptable in certain circumstances. The AFCA explicitly quoted the failing firm defence test as outlined by the European Commission⁽²⁾ and the European Court of Justice (ECJ).⁽³⁾ Further, the Supreme Court of Justice has recognised the ECJ's *K+S* criteria for the failing firm defence.⁽⁴⁾

Based thereon, the AFCA presented and discussed the following checklist for shutdown mergers:

- Assessment of shutdown mergers in merger control cases:
 - market dominance test;
 - urgency;
 - criteria for acceptance of failing firm defence; and
 - remedies in merger control cases.
- State aid as a possible alternative to a merger:
 - macroeconomic relevance;
 - distortions of competition should be avoided;
 - cost-benefit analysis; and
 - remedies in state aid cases.

As with other remedies during the present COVID 19 crisis, if and how the AFCA's test will work and its long-term and collateral consequences remain to be seen. In any case, the AFCA's economic outlook and its discussion of the failing firm defence could provide useful guidance for future filings.

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Endnotes

(1) Available [here](#).

(2) European Commission, 14 December 1993, IV/M.308, *Kali + Salz/MdK/Treuhand (K+S)*, para 71-72.

(3) ECJ, 31 March 1998, C 68/94 and C 30/95, France, *SCPA and EMC/Commission*, para 91-92, 112et sequ.

(4) Supreme Court, 4 October 2010, 16 Ok 6/10 *Holzhandel*, clause 5.

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