Merger Control 2025

14th Edition

Contributing Editors:

Nigel Parr & Steven Vaz

Ashurst LLP

glg Global Legal Group

TABLE OF CONTENTS

Austria

Dr. Valerie Mayer

Herbst Kinsky Rechtsanwälte GmbH

Overview of merger control activity during the last 12 months

Introductory remarks on Austrian merger control regime

Compared to international standards, the Austrian merger control regime features relatively low turnover thresholds and triggers for notifiable transactions. Consequently, the filing thresholds are often met, even in foreign-to-foreign transactions with little local nexus. Unlike the EU Merger Regulation, the acquisition of a minority shareholding of at least 25% constitutes a notifiable merger, even if the shareholding does not convey control of the target company.

Another characteristic of Austrian merger control is that there is more than one authority involved in the merger review process. The Austrian Federal Cartel Authority (*Bundeswettbewerbsbehörde*, "**FCA**") shares jurisdiction with the Federal Cartel Prosecutor (*Bundeskartellanwalt*, "**FCP**") in phase I merger proceedings. Both can apply for an in-depth review of a merger before the Cartel Court (*Kartellgericht*, "**CC**"), which automatically leads to the initiation of phase II. Decisions of the CC can be ultimately challenged before the Higher Cartel Court (*Kartellobergericht*, "**HCC**").

Highlights of Austrian merger control activity in 2024

An increased number of notified mergers compared to 2023, but still a significant decrease compared to 2021

In 2024, an aggregate 352 mergers were notified to the FCA. This represented an increase of 58 mergers compared to the year 2023.

Following the introduction of a second domestic turnover threshold of EUR 1 million for at least two undertakings involved in a merger by the Cartel and Competition Law Amendment Act 2021 ("**KaWeRÄG 2021**"), which applies in addition to the already required total domestic turnover of EUR 30 million, the number of mergers notified in Austria fell significantly (from about 650 in the year 2021 to 340 in 2022). This applies in particular to mergers that were previously subject to notification but had little or no local nexus.

The vast majority of notified mergers were cleared in a straightforward phase I

In approximately 95% of cases, the notified mergers were cleared without remedies at the end of the four-week (or, in rare cases, six-week) phase I review period. The FCA regularly sends two notices (one from each official party) to the notifying party on the day after the review period expires.

Thirteen mergers were cleared before the end of this period. In these cases, the notifying parties applied for a waiver of the official parties to request an in-depth investigation before the CC, and the official parties granted such waiver.

Mergers were rarely subject to remedies; no mergers were prohibited

Five mergers were cleared in phase I and one in phase II, all subject to remedies. No mergers were prohibited. Ten merger notifications were withdrawn, some presumably to avoid an unfavourable decision by the official parties or the cartel courts.

No merger was referred to the European Commission

In 2024, no mergers were referred to the European Commission ("**EC**"). However, the FCA reviews mergers notified to the EC for possible adverse effects in Austria. In particular, the FCA maintains close contact and exchanges information with the relevant departments of the EC in cases involving Austrian companies that are reviewed under regular (and simplified) procedure.

New developments in jurisdictional assessment or procedure

Pre-notification proceedings

In 2023, the FCA published a guideline on pre-notification proceedings. The FCA particularly recommends entering into dialogue prior to the notification of a merger in the following cases:

- high market shares are expected;
- a dominant market position is indicated;
- no established decision-making practice exists, and the market definition is uncertain;
- a link to industry investigations or the FCA's strategic priorities exists; and
- a referral of the merger to or from the EC is expected.

A pre-notification should help to identify and resolve potential competition concerns at an early stage, without triggering statutory deadlines or being published on the FCA's website. Ideally, this approach will help to avoid a phase II review by the CC.

Although a pre-notification can be useful in complex cases, the following aspects should be considered: the FCA's assessment in a pre-notification process is not legally binding; the authority's conclusion on a merger and remedies proposed only become legally effective upon formal notification; and, furthermore, due to limited resources of the FCA, early and realistic time planning is also essential for both the pre-notification and the subsequent merger control procedure.

A lasting increase in fines for violations of the prohibition on implementation is expected

In early 2025, the HCC, in an appeal procedure, imposed a record fine on REWE International AG ("**REWE**"), which was about 46 times higher than the fine imposed by the CC. The facts of the case underlying this remarkable decision can be summarised as follows:

- In 2018, a REWE subsidiary leased a retail space in a shopping centre that had previously been operated by a food retailer and had been vacant for 11 months prior to reopening. This measure was not notified to the FCA as a merger.
- In 2021, the FCA submitted an application to the CC to address the breach of the prohibition on implementing the merger without notification and to seek an appropriate fine against REWE. REWE subsequently notified the merger as a precautionary measure. Due to this subsequent merger notification, the FCA amended its application for a declaratory judgment during the ongoing proceeding. However, the application for the imposition of an appropriate fine was upheld.

- In its decision, the CC confirmed that the takeover of the food retail space in the form of a lease agreement as substantial part of the former retailer constituted a notifiable merger, even though the retail store had already closed 11 months earlier. Nevertheless, the CC (in the first proceeding) rejected the FCA's request for an appropriate fine and declaratory judgment due to REWE's lack of culpability. The official parties appealed against the decision to the HCC.
- The HCC ruled in favour of the official parties and confirmed the notification requirement as well as the liability of the parent company REWE. The HCC referred the case back to the CC for a new hearing and decision, and emphasised that not just a "symbolic" fine, but rather a "tangible" one, has to be imposed.
- Consequently, the CC (in the second proceeding) imposed a fine of EUR 1.5 million which was challenged (again) by the official parties before the HCC.
- The HCC increased the fine from EUR 1.5 million to EUR 70 million, in particular considering (i) the mere violation of the prohibition of implementation without fulfilment of a prohibition requirement, (ii) there was no enrichment of REWE, (iii) the mere negligence of REWE, (iv) the small geographic scope of the affected market, (v) the high economic performance of REWE, (vi) the (long) duration of the infringement exceeding four years, (vii) the high market shares of the undertakings involved, and (viii) the renewed imposition of a fine due to prohibited implementation. The HCC justified its decision by stating that fines in Austria should be imposed in line with EU-wide and national practices of other EU Member States.

At least for the majority of legal practitioners, the amount of the fine imposed by the HCC came completely unexpected and remains controversial. This decision highlights the strict approach of the official parties towards violation of the prohibition on implementation and emphasises the HCC's willingness to impose significantly higher fines. The recent developments confirm that merger control enforcement is a clear priority for the official parties and cartel courts, with the HCC at the forefront, and that further substantial fines have to be expected in future. The notifying parties are therefore well advised to strictly adhere to the relevant requirements in order to avoid enforcement risks.

Key industry sectors reviewed and approach adopted to market definition, barriers to entry, nature of international competition, etc.

Recently, the FCA conducted several sector inquiries (*Branchenuntersuchungen*) to identify potential competition challenges within these sectors. These inquiries reflect the FCA's priorities, particularly in areas of high market concentration or strategic importance to consumers. The results of these investigations should promote competition, increase transparency, identify potential restrictions on competition and prevent market abuse.

The FCA also pays particular attention to these sectors when reviewing mergers. If a merger is potentially complex and relates to one of the following sectors, a pre-notification of such merger to the FCA is highly recommended.

The FCA screened the following sectors in the last two years.

Gas

The Austrian electricity and gas market is characterised by a high degree of market concentration. In many grid areas, a small number of suppliers dominate, particularly regional energy suppliers and large municipal utilities. This concentration has increased further in recent years, restricting competition and reducing choice for consumers. This has been accompanied by sharp rises in energy prices for end customers and extreme price volatility.

During the 2022 crisis, competition in the Austrian electricity and gas markets for end customers largely came to a standstill. In response, E-Control (the regulatory authority for the Austrian energy sector) and FCA set up a task force in January 2023 to investigate the situation on the domestic electricity and gas markets, with the aim of creating transparency in the energy markets. In August 2024 the task force published their second interim report of the electricity and gas markets.

In addition, a law was passed in 2024 to mitigate the consequences of the crisis and improve market conditions by strengthening competition and preventing dominant energy suppliers from abusing their market position (*Bundesgesetz zur Abmilderung von Krisenfolgen und zur Verbesserung der Marktbedingungen im Falle von marktbeherrschenden Energieversorgern*).

Food

The FCA launched a sector inquiry into the Austrian food industry. The analysis revealed several areas of weakness in terms of competition, providing valuable insights into price developments, market structures and consumer conditions. The investigation was initiated due to sharp increases in food prices, international developments in supply chains and high inflation.

The sector inquiry aimed at increasing transparency and exposing competitive weaknesses. Rising food prices particularly affect low-income households, and more intense competition could provide relief here. The practices of "shrinkflation" and "skimpflation", i.e. hidden price increases through smaller packaging or lower quality, were also critically assessed. Additionally, numerous suppliers reported unfair trading practices in the form of unilateral contract changes. Another key finding was the so-called "Austria surcharge", whereby international food companies charge higher prices for identical products in Austria than in other EU Member States.

The analysis shows that the Austrian food retail sector is highly concentrated. The four largest suppliers – Spar, REWE, Hofer and Lidl – together hold a market share of 91%. Despite this dominance, however, no causal links could be established between market concentration and price increases. However, such a structure is typically associated with increased barriers to market entry and risks of collusion. Since 2019, for instance, over 200 local suppliers have left the market.

Based on its analysis, the BWB has introduced several measures, including: (i) promoting price transparency in food retail by improving data availability for price comparison platforms; (ii) strengthening the EU internal market and taking legal action against price discrimination; (iii) improving consumer protection, particularly with regard to packaging sizes and contents; and (iv) combatting unfair trading practices and creating legal certainty for suppliers.

District heating

Around one third of households in Austria are supplied with district heating. This supply is primarily concentrated in urban areas and is dominated by major energy suppliers such as Wien Energie, Energie Steiermark, KELAG, Energie AG, Salzburg AG and EVN. These suppliers operate extensive district heating systems in their respective regions. As a result, the alternatives available to connected customers are either limited or non-existent. Accordingly, the district heating suppliers have a unique regional market position.

Due to the special market structure and the increasing importance of district heating, the FCA has launched an industry study in the district heating sector. This still-ongoing investigation aims to analyse structural factors, market results, business conditions and possible practices that restrict competition. The focus is on the regional markets.

E-charging infrastructure

In view of the increasing switch to e-mobility, the FCA also examined the e-charging infrastructure in

detail. The sector inquiry focused on the market structure, the legal basis, the identification of key market players and the competitive situation in the area of publicly accessible e-charging stations. The aim was to identify potential restrictions on competition and derive recommendations for fair competition in this area.

The investigation revealed that the Austrian market for publicly accessible e-charging stations is characterised by high market concentration among a few public energy companies, which can lead to behaviour that distorts competition.

The FCA therefore recommended measures to promote competition, including the creation of transparent and non-discriminatory access conditions and the encouraging investment in charging infrastructure by new market participants.

In previous years, the FCA has (*inter alia*) conducted sector inquiries in various industries, including healthcare, mobile communications, fuel and electricity. These sectors remain of particular interest to the FCA.

Key economic appraisal techniques applied, e.g., as regards unilateral effects and co-ordinated effects, and the assessment of vertical and conglomerate mergers

The FCA examines mergers in Austria on a case-by-case basis using a combination of qualitative and quantitative assessment methods. In particular, economic models based on the guidelines of the EC are used. The analysis is always aimed at answering the central question of whether a significant impediment to effective competition in Austria is expected. If the assessment is negative, the FCA can file an application for prohibition with the CC pursuant to Section 12 CA. Depending on the type of merger, the potential effects on competition and therefore the assessment criteria differ.

The review of mergers is based on a hypothetical comparison of two future scenarios – with and without the merger (counterfactual analysis). The forecast period is generally three to five years, although deviations are possible in justified individual cases. The prohibition requires that the merger is more likely than not to significantly impede competition. In cases where competition concerns have been identified, the CC may impose remedies on clearance pursuant to Section 12 para. 3 CA. In addition, Section 12 para. 2 CA provides for the possibility of clearance despite the remedies for prohibition if demonstrable improvements in competition or economic benefits outweigh the negative effects.

Horizontal mergers

A transaction qualifies as a horizontal merger if the parties involved are actual or potential competitors in the same relevant market. The primary risk of horizontal mergers is therefore the creation or strengthening of a dominant market position. This can occur in two ways: on the one hand, the merger can lead to a superior market position of the acquirer (individual market dominance); or, on the other hand, an oligopolistic market structure can arise, in particular, due to the elimination of competitors, which enables the coordination of competitors (collective market dominance). The CA provides for certain presumptions of market dominance in both cases. In order to rebut the statutory presumption of market dominance, it must be proven that market entry is still sufficiently possible. In addition, it must be proven that any market entry would take place in time and to a sufficient extent. Accordingly, in the case of individual market dominance pursuant to Section 4 para. 2 no. 1 CA, a dominant market position is assumed from a market share of 30%. In the case of collective dominance within the meaning of Section 4 para. 2a CA, a dominant position is assumed to exist from a market share of 50%. These thresholds are indicative and are included in an overall assessment of the competitive situation. Market dominance can also exist below these thresholds, but can also be refuted if these thresholds are exceeded.

Pursuant to Section 12 para. 1 no. 2 CA, the material standard of review is – unlike under the EU Merger Regulation – the market dominance test or the Significant Impediment to Effective Competition Test ("**SIEC test**"). Based on this test, which was introduced into Austrian merger control with the KaWeRÄG 2021, a merger must be prohibited if (i) the merger creates or strengthens a dominant position, or (ii) effective competition is significantly impeded in any other way.

Vertical mergers

A vertical merger occurs when the parties involved operate at upstream or downstream market levels and are therefore at different stages of the supply chain. Although vertical mergers do not generally result in a direct reduction in competition on the same market, they can nevertheless have a significant indirect impact on competition, in particular through foreclosure effects, and create or strengthen a dominant position – individually or jointly.

A strong market position of the merging parties is generally considered a prerequisite for competition being harmed by a vertical merger. The EC clarifies this by stating that there are hardly any competition concerns if the parties involved have a market share of less than 30% on the affected markets and the HHI Index (Herfindahl-Hirschman Index) is below 2,000. Below market shares of 30%, vertical mergers will only require closer scrutiny if (i) parties with high growth are involved, (ii) there are significant cross-shareholdings or mutually occupied management positions, or (iii) coordinated market behaviour can be assumed.

Conglomerate mergers

Mergers qualify as conglomerate if the parties involved are neither active on the same market nor on upstream or downstream markets. Similarly to horizontal and vertical mergers, conglomerate mergers are assessed on the basis of Section 12 para. 1 no. 2 CA. Although conglomerate mergers do not directly change the market structure, they can have a restrictive effect on competition through strategic behaviour, e.g. if production or distribution require the same input products or if the products concerned are aimed at the same customer groups. Product bundling or tying, the transfer of market power to neighbouring markets, portfolio effects and resource advantages must therefore be critically assessed.

Although conglomerate mergers generally raise fewer competition concerns than other types of mergers, they can also under certain circumstances lead to restrictions of competition and thus create or strengthen a dominant position – individually or jointly. However, experience has shown that the market share threshold for prohibiting conglomerate mergers is higher than for horizontal mergers. Special circumstances are usually required, for example if one of the parties to the merger already has significant market power and the merger creates strategic foreclosure potential.

Approach to remedies (i) to avoid second stage investigation, and (ii) following second stage investigation

In Austrian merger control proceedings, remedies play a central role in ensuring that a merger can be approved in cases of doubt and in avoiding an in-depth investigation or even a prohibition of the underlying transaction. Remedies are aimed either at eliminating grounds for prohibition or at contributing to the emergence of grounds for justification.

The initiative to formulate specific remedies always lies with the parties involved, although the official parties may also suggest remedies. Both structural and behavioural remedies may be considered, with the former generally being more intrusive. Structural remedies may include the divestiture of certain business areas or locations, while behavioural remedies may include supply obligations, "hold separate" obligations and price fixing for a certain period. Reporting obligations and/or the appointment of a trustee help monitor compliance of the parties involved with the remedies following the transaction's

closing. In addition, it is advisable to include a modification clause, allowing subsequent adjustments to the remedies.

There is no formal deadline for the proposal of remedies; these can be presented at any stage of the proceeding (informally in a pre-notification proceeding at the earliest). In practice, the notifying parties often propose remedies to the official parties early in phase I in order to persuade them not to initiate a phase II proceeding. Alternatively, remedies may also be proposed during phase II proceedings in order to induce the official parties to withdraw their applications for an in-depth review by the CC. In such cases, an agreement with the official parties is required. Reaching a settlement with the official parties might save time and costs for the parties involved.

However, based on our experience, the official parties increasingly prefer to obtain a court decision on remedies from the CC in phase II. This is due to their limited resources for conducting a timely in-depth review of the proposed remedies. In phase II, a court-appointed expert typically reviews the proposed remedies to ensure their appropriateness and proportionality. Furthermore, the CC's decision on remedies can be appealed to the HCC.

Once a merger has been approved, the FCA publishes a summary of the remedies on its website. Trade secrets and other confidential information can be redacted in advance. The official parties monitor the implementation and compliance with the remedies. In the event of non-compliance or breach of the prohibition on implementation, administrative fines may be imposed. This applies in particular to behavioural remedies, which remain binding even after the merger has been completed.

Key policy developments

No substantial legislative amendments were made to the Austrian merger control regime in 2024. However, important developments took place at EU level, most notably the adoption of the new Vertical Block Exemption Regulation (*Commission Regulation (EU) 2022/720 of 10 May 2022 on the application of Article 101 (3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, along with revised vertical and horizontal guidelines*). These changes will continue to impact the enforcement of Austrian merger control.

Meanwhile, the FCA has been pursuing violations of the prohibition on implementation as well as conducting sector inquiries, particularly in the food, retail and energy sectors. Notably, a national law aimed at mitigating the consequences of the ongoing crisis and improving market conditions was enacted in 2024 (*Bundesgesetz zur Abmilderung von Krisenfolgen und zur Verbesserung der Marktbedingungen im Falle von marktbeherrschenden Energieversorgern*). This law was, *inter alia*, introduced to prevent dominant energy suppliers from abusing their market power.

In February 2023, the FCA introduced a guideline on pre-notification proceedings in merger cases. This guideline outlines the procedural requirements, objectives and practical considerations of pre-notification, as well as the FCP's involvement during this stage.

However, the most recent significant amendments to the Austrian merger control regime came into effect on 1 January 2022 through the KaWeRÄG 2021, which introduced the following key changes:

- the introduction of the aforementioned second domestic turnover threshold, which led to a noticeable decline in merger notifications;
- the implementation of the SIEC test as an additional test;
- an expanded set of justifications for mergers, allowing transactions where the economic advantages significantly outweigh the disadvantages of the merger; and
- an increase in the filing fee from EUR 3,500 to EUR 6,000.

The following changes based on the KaWeRÄG 2021 are related to digital mergers:

- the typical market dominance criteria relevant to the platform economy were added to the definition of market dominance, namely, intermediation power, access to competitively relevant data and the benefits derived from network effects;
- for intermediaries active in multi-sided digital markets, not only the maintenance but also the reliance on the establishment of business relationships in the face of otherwise threatening serious economic disadvantages fulfils the criteria of relative market dominance; and
- a special declaratory proceeding was introduced to enable the regulators to determine the dominant position of an undertaking operating on a multi-sided digital market in the event of a justified interest.

Reform proposals

No comprehensive reforms of the Austrian merger control regime are currently planned.

Dr. Valerie Mayer

Tel: +43 664 420 7520 / Email: valerie.mayer@herbstkinsky.at

Dr. Valerie Mayer leads the merger control and foreign direct investment practice group at Herbst Kinsky Rechtsanwälte GmbH ("**Herbst Kinsky**"), which she joined in early 2018. Prior, Valerie was University Assistant at the Department of Constitutional and Administrative Law of the Faculty of Law of the University of Vienna.

Valerie has a strong focus on merger control and foreign direct investments. Her team has grown strongly in the recent past and gained significant new clients, who are particularly active in the energy, healthcare and IT sectors. Valerie assists her clients in the planning, coordination and implementation of national and international M&A transactions, including the completion of regulatory approvals. In this context, she represents clients before the competent Austrian authorities and courts, and also the European Commission.

Herbst Kinsky Rechtsanwälte GmbH

Dr. Karl Lueger-Platz 5, 1010 Vienna, Austria

Tel: +43 1 9042 1800 / URL: www.herbstkinsky.at

Global Legal Insights – Merger Control

provides analysis, insight and intelligence across 15 jurisdictions, covering:

- Overview of merger control activity during the last 12 months
- New developments in jurisdictional assessment or procedure
- Key industry sectors reviewed and approach adopted to market definition, barriers to entry, nature of international competition, etc.
- Key economic appraisal techniques applied, e.g., as regards unilateral effects and co-ordinated effects, and the assessment of vertical and conglomerate mergers
- Approach to remedies (i) to avoid second stage investigation, and (ii) following second stage investigation
- Key policy developments
- Reform proposals

globallegalinsights.com