

Merger control in Germany: overview

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REGULATORY FRAMEWORK

1. What (if any) merger control rules apply to mergers and acquisitions in your jurisdiction? What is the regulatory authority?

Regulatory framework

The German merger control rules are found in sections 35 to 43 of the Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*) (ARC). The text of the ARC (including an English translation of it) as well as various notices and information leaflets are available on the website of the Federal Cartel Office (*Bundeskartellamt*) (FCO) (www.bundeskartellamt.de). Joint ventures are also reviewed under the rules for regulating restrictive agreements (see *Question 16*).

Regulatory authority

The main authority responsible for the implementation of German merger control rules is the FCO. The FCO is an independent federal authority and, although it reports to the Federal Ministry for Economic Affairs and Energy (*Bundesministerium für Wirtschaft und Energie*), it does not receive political orders in relation to its decision making.

See box, *The regulatory authority*.

TRIGGERING EVENTS/THRESHOLDS

2. What are the relevant jurisdictional triggering events/thresholds?

Triggering events

The following types of transactions are considered to be concentrations (*section 37, Act against Restraints of Competition* (ARC)):

- The acquisition of (direct or indirect) control over another undertaking or parts of it by one or several undertakings.
- The acquisition of all or substantial part of the assets of another undertaking.
- The acquisition of shares in a company's capital or voting rights resulting in an overall shareholding reaching or exceeding 25% or 50% respectively.
- Any other combination of undertakings enabling one or several undertakings to directly or indirectly exert a competitively significant influence on another undertaking.

The concept of "control" in German merger control law is very similar to the concept applied in EU merger control. Control can be acquired by rights, contracts or any other means which separately or in combination, and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking. Therefore, acquisitions of minority interests or de facto changes of control are also covered. There is an acquisition of control where one or more acquirers establish a new undertaking or

acquire control of an existing undertaking. There is a change of control where the structure of control changes (for example, from sole to joint control or a change in the number of undertakings controlling another undertaking).

The concept of "competitively significant influence" is much broader and may also cover acquisitions of minority shareholdings of less than 25%, particularly in the case of transactions involving strategic buyers.

If credit institutions, financial institutions or insurance companies acquire shares in another undertaking with a view of reselling them, this is not deemed to constitute a concentration provided that the voting rights attached to the shares are not exercised and the resale occurs within one year.

Thresholds

German merger control rules do not apply to concentrations that are subject to the EU merger control rules set out in Regulation (EC) 139/2004 on the control of concentrations between undertakings (Merger Regulation), except for particular cases set out in the Merger Regulation.

A concentration is subject to German merger control, if one of the following two alternative provisions are met (the alternative provision has been implemented by the ninth amendment to the ARC, which came into effect on 9 June 2017):

- In the last completed financial year preceding the transaction all of the following criteria were met:
 - the combined worldwide turnover of all participating undertakings exceeded EUR500 million;
 - the turnover of at least one participating undertaking exceeded EUR25 million in Germany; and
 - the turnover of at least one other participating undertaking exceeded EUR5 million in Germany.
- In the last completed financial year preceding the transaction all of the following criteria were met:
 - the combined worldwide turnover of all participating undertakings exceeded EUR500 million;
 - the turnover of one participating undertaking exceeded EUR25 million in Germany;
 - the turnover of neither the target or of any other participating undertaking exceeded EUR5 million in Germany;
 - the amount of the consideration for the transaction exceeds EUR400 million; and
 - the undertaking to be acquired is significantly active in Germany.

The consideration to the transaction comprises all assets, and other payments, the seller gets from the acquirer for the transaction (consideration), and the amount of debts assumed by the acquirer.

Foreign-to-foreign mergers are also subject to German merger control, provided both:



- The above turnover thresholds are met.
- The proposed concentration will have an appreciable effect in the German territory. In most cases a concentration will be deemed to have an appreciable domestic effect if the turnover thresholds are met.

The concept of turnover in German merger control law is very similar to the concept applied in EU merger control. The following is noteworthy:

- The turnover to be calculated must not comprise the turnover of the seller, unless after the acquisition the seller still holds control or holds at least 25% of the shares.
- Turnover figures must be calculated on a consolidated group basis excluding intra-group sales and VAT.
- For credit institutions, financial institutions as well as building and loan associations, the relevant turnover must be the total amount of proceeds including, among other things, any interest income, commission earnings or share earnings.
- For insurance companies, the premium income must be taken into account instead of turnover.

There are also some specific rules that must be observed when calculating turnover in the context of German merger control:

- Only 75% of the turnover resulting from the trade of goods (that is, goods which were simply bought and resold) is to be taken into account.
- For undertakings that are active in the publication, production and distribution of press, or in the production, distribution and broadcasting of radio and television programmes and the sale of radio and television advertising time, the relevant turnover must be multiplied by eight for merger control purposes.
- Two or more concentrations that do not individually meet the above thresholds, but take place between the same parties within a two-year period, will be treated as one and the same concentration arising on the date of the last transaction.

German merger control rules do not apply and no notification is required if the worldwide turnover of one participating undertaking (including its controlling entity) was less than EUR10 million (*de minimis* company exemption). In this case, the turnover of the seller must also be considered when calculating the turnover of the target, provided that the seller controls the target before the proposed transaction.

Transactions affecting *de minimis* markets (that is, concentrations exclusively affecting a market in which goods or commercial services have been offered for at least five years and which had a market volume of less than EUR15 million in the last calendar year), are still exempt from a substantive review, but must be notified (section 36, ARC).

NOTIFICATION

3. What are the notification requirements for mergers?

Mandatory or voluntary

Concentrations that are subject to German merger control (see Question 2) must be notified to the Federal Cartel Office (FCO).

Timing

There is no deadline for submitting pre-merger notifications to the FCO. A notification can be filed at any time before the completion of the proposed concentration, even before the signing of the transactional documents.

Pre-notification and formal/informal guidance

The FCO is only prepared to give informal guidance before notification at the parties' request. Generally, the FCO requires a (nearly) complete draft application for any pre-notification discussions. Although pre-notification contracts may cover the required information, the contracts regularly concern the question of approval or prohibition. However, the FCO is not permitted (and therefore not willing) to give clear advice in this respect. Therefore, pre-notification contracts are in general advisable in cases with a high prohibition risk only, to avoid pre-merger public notice of the transaction.

Responsibility for notification

All undertakings participating in the proposed concentration are responsible for submitting a notification. However, in practice it is sufficient if only one party submits the notification on behalf of all the other parties involved.

Relevant authority

The notification must be addressed to the FCO.

Form of notification

There is no compulsory form to be used for the notification of concentrations to the FCO.

Filing fee

German merger control proceedings are subject to a fee, which is imposed by the FCO on the notifying party at the end of the proceedings. The fee amount depends on the FCO's administrative expenses and the economic significance of the notified transaction. The fee can amount up to EUR50,000 (EUR100,000 in exceptional cases). In cases of minor importance, the fees usually range between EUR5,000 and EUR15,000.

Obligation to suspend

A concentration that is subject to German merger control must not be implemented before the FCO has granted clearance. Any violation of this prohibition constitutes an administrative offence and results in all underlying contracts/transactions being (preliminarily) void and unenforceable under German law (see Question 11, *Implementation before approval or after prohibition*). In exceptional cases, the FCO can grant a waiver from the obligation to suspend the closing of the transaction, if the parties can provide important reasons for doing so (in particular, if a suspension would severely harm the participating undertakings or third parties).

PROCEDURE AND TIMETABLE

4. What are the applicable procedures and timetable?

Initial examination proceedings (Phase I)

On receipt of a pre-merger notification, the Federal Cartel Office (FCO) starts a preliminary investigation examining whether the concentration may raise substantial competition concerns in Germany and, thus, is likely to meet the conditions for prohibition. If the FCO does not identify substantial competition concerns, it issues an informal letter informing the notifying parties that the concentration is cleared and can be completed. The clearance letter is not reasoned and cannot be appealed by the participating undertakings or by third parties.

If the FCO does identify substantial competition concerns, it must inform the notifying parties that a main examination proceeding will be initiated within one month from receiving the (complete) notification. If the FCO does not notify parties of the initiation of main examination proceedings within one month, the concentration is deemed to be cleared.

Main examination proceedings (Phase II)

If the main examination proceedings confirm the existence of competition concerns, the FCO sends a written statement of objections to the notifying parties setting out the relevant issues. The parties can then submit (further) comments and/or proposals for commitments.

Phase II proceedings must be finalised within four months from receipt of the (complete) notification by one of the following:

- Unconditional clearance decision.
- Clearance decision, which is subject to conditions or obligations/commitments.
- Prohibition decision.

If no decision is taken by the FCO within the prescribed period, the concentration is deemed to be cleared under German merger control rules. However, the following exemptions apply:

- The four-month period may be extended in any circumstances for a fixed time, provided that the notifying parties consent to it.
- The four-month period is extended automatically for one month, when the parties offer remedies for the first time (see *Question 10*).
- The four-month period is suspended automatically if the parties fail to provide sufficient and timely information in response to information requests of the FCO (until such information is provided).

Decisions adopted by the FCO in Phase II are formal decisions, which must be reasoned and are subject to appeal (see *Question 12*).

For an overview of the notification process, see flowchart, *Germany: merger notifications*.

PUBLICITY AND CONFIDENTIALITY

5. How much information is made publicly available concerning merger inquiries? Is any information made automatically confidential and is confidentiality available on request?

Publicity

The fact that a pre-merger notification has been submitted is published on the Federal Cartel Office's (FCO's) website. The following information is disclosed:

- The date of the notification.
- The identity of the participating undertakings.
- Business sector(s) affected by the concentration.
- The file number.
- The division unit in charge of the proceedings.
- Federal states (*Bundesländer*) where the parties' business seats are registered or which are affected by the concentration.
- The date of the Phase I clearance decision.
- The date of any decision (clearance/prohibition) adopted or other procedural developments (for example, extension of the investigation period, withdrawal of notification) in Phase II.

In addition, non-confidential versions of all Phase II decisions and summary reports of selected cases are published on the FCO's website.

Procedural stage

The list of notified concentrations published on the FCO's website is regularly updated. Therefore, the fact that a proposed concentration

has been notified becomes public relatively soon. Unlike EU merger control, the FCO by its publication does not actively solicit views from anonymous third parties, such as customers, competitors and suppliers (see *Question 6*).

Automatic confidentiality

The FCO has a statutory obligation to keep information relating to individual personal data or to business secrets confidential. Consequently, business secrets and other confidential information contained in pre-merger notifications, or provided by the parties in the context of a merger control proceeding, are kept confidential by the FCO.

Confidentiality on request

The parties may request that certain information provided to the FCO should be kept confidential. The FCO will accept such requests if that information amounts to a business secret (see *above*, *Automatic confidentiality*).

RIGHTS OF THIRD PARTIES

6. What rights (if any) do third parties have to make representations, access documents or be heard during the course of an investigation?

Representations

The Federal Cartel Office (FCO) may consult third parties affected by the proposed concentration (such as competitors, customers or suppliers) at any stage of the investigation and ask for information about the relevant market(s) or for their comments on the proposed concentration. On separate application, such third parties may also be admitted by the FCO to join the proceedings as "intervening party" if their interests are materially affected by the notified concentration. However, the FCO does not actively solicit views from anonymous third parties. Unlike EU merger control, the FCO does not conduct market tests of commitments offered by the notifying parties to achieve a merger clearance with conditions or obligations.

Document access

Only third parties admitted as intervening party have a right to access the file to the extent that the knowledge of the contents is necessary to assert or defend their legal interests. Drafts of decisions and preparatory documents of the FCO are not accessible. The same applies for documents that contain business secrets or other confidential information of the parties.

Be heard

Only third parties admitted as intervening party following an application, have a right to be heard by the FCO.

SUBSTANTIVE TEST

7. What is the substantive test?

A concentration must be prohibited by the Federal Cartel Office (FCO) if it leads to a significant impediment of effective competition (SIEC test), in particular if it leads to the creation or strengthening of a dominant market position, unless the parties can prove that it will also result in an improvement of market conditions on another market, which may outweigh the disadvantages of the market dominance (*section 36(1), Act against Restraints of Competition (ARC)*).

Under the statutory definition of market dominance (*section 18, ARC*), a dominant market position exists if one or more companies have no competitors at all, are not subject to significant competition or are in a superior market position that enables them to act independently of competitors, customers and other market

participants. When assessing a concentration, the FCO takes into account various criteria, including in particular:

- The market shares of the parties and their competitors.
- The financial power of the parties.
- Access to customers and suppliers.
- Any links with other companies.
- Any legal or factual barriers to market entry.
- Actual or potential competition by companies established within or outside Germany.
- The ability to switch supply or demand to other goods and services.
- The ability of the opposite market side to switch to other companies.
- The competitive structure of the relevant market.

Moreover, according to the 9th amendment to ARC, when assessing a market position of an undertaking concerned, particularly with respect to two-sided markets or networks, the FCO takes further criteria into account, including in particular:

- Direct or indirect network effects.
- Multi-homing, and switchover costs for the customer.
- The undertaking's economies of scale in correlation with network effects.
- The undertaking's access to competition-relevant data.
- Competitive pressure by innovation.

German merger control rules contain several rebuttable presumptions as to the existence of market dominance (see *Question 17, Restraints of trade and dominance in Germany: overview*).

8. What, if any, arguments can be used to counter competition issues (efficiencies, customer benefits)?

Neither the Act against Restraints of Competition (ARC) nor German case law recognise an "efficiency defence". However, under the SIEC test (see *Question 7*), the Federal Cartel Office (FCO) must not prohibit a concentration if the notifying parties can prove that the concentration will lead to improvements of the conditions of competition and these improvements will outweigh the impediment of competition (*section 36(1), ARC*).

Since this "balancing-test clause" (*Abwägungsklausel*) is tied to improvements of the conditions of competition, only competition-related aspects can be taken into account. Macroeconomic aspects, general interests, customer benefits, job security or efficiency gains are not considered competition-related within this meaning. In addition, pure efficiencies of a merger (for example, increased capacity utilisation or cost-savings) are not considered capable of improving the conditions of competition.

The improvements of the conditions of competition must, with substantial likelihood, be achieved precisely by the concentration (causality requirement). It is essential that the improvements can only be achieved through the concentration in this specific form. Improvements of the conditions of competition can also take effect in a different market, provided this market is in Germany.

9. Is it possible for the merging parties to raise a failing/exiting firm defence?

A "failing firm defence" is recognised by German case law. The Federal Cartel Office (FCO) must not prohibit a concentration that leads to a significant impediment of effective competition, if the merging parties can prove all of the following:

- The party in need of financial restructuring would be jeopardised without the concentration.
- There is no alternative to the takeover by the other party.
- A substantial part of the remaining market potential would, in any case, accrue to the acquiring party if the party in need of financial restructuring fails or otherwise exits the market.

Apart from the failing firm defence, the Act against Restraints of Competition (ARC) provides an exemption for mergers of publishing companies (*section 36(1)*).

REMEDIES, PENALTIES AND APPEAL

10. What remedies (commitments and undertakings) can be imposed as conditions of clearance to address competition concerns? At what stage of the procedure can they be offered and accepted?

Unlike EU merger control, the Federal Cartel Office (FCO) can impose remedies such as conditions and obligations in Phase II decisions only. However, the parties can offer such remedies at any stage of the merger control proceedings. In practice, the FCO prefers to impose structural remedies, but may also accept behavioural remedies in specific cases. Remedies subjecting the parties to permanent behavioural control are prohibited by law.

Structural remedies such as the obligation to divest certain parts of the parties' business to a suitable buyer (to be approved by the FCO) are usually accompanied by arrangements ensuring the implementation and the monitoring of the proposed divestment, for example, by appointing an independent monitoring trustee (*Sicherungstreuuhänder*) and/or divestiture trustee (*Veräußerungstreuuhänder*). The appointment of such trustees requires the FCO's prior written approval.

The FCO has published on its website several model texts (in German and English) for different types of remedies and a trustee mandate (see *below, Online resources*). In remedy cases, the examination period (Phase II) is extended automatically for one month (see *Question 4*).

11. What are the penalties for failing to comply with the merger control rules?

Failure to notify correctly

An incorrect or incomplete notification of a concentration constitutes an administrative offence which may result in fines of up to EUR100,000 (in case of intentional violation) or up to EUR50,000 (in case of negligence) being imposed on the relevant company and/or its officers. A failure to notify is not deemed an infringement on its own. However, failing to notify is, in general, accompanied by implementing the merger before approval, and the latter, constitutes an administrative offence, which can result in high fines (see *below, Implementation before approval or after prohibition*).

Implementation before approval or after prohibition

Closing a notifiable concentration without the FCO's prior clearance (or following a prohibition) constitutes an administrative offence, which may result in fines of up to:

- EUR1 million, for individuals.
- 10% of the worldwide group turnover, for companies.

The Federal Cartel Office (FCO) can also initiate demerger proceedings in relation to notifiable concentrations that have been closed without the FCO's prior clearance (*section 41, Act against Restraints of Competition (ARC)*). There is no limitation period for the initiation of such proceedings.

Failure to observe

If clearance is granted by the FCO subject to conditions precedent, it does not become effective unless the conditions are actually met.

Clearance decisions, which are subject to conditions subsequent, allow the concentration to be implemented immediately, but automatically become invalid if the conditions are not met. In such cases, the FCO can order the concentration to be dissolved.

If the clearance decision is subject to obligations and the parties fail to comply with these obligations, the FCO can issue a decision withdrawing the clearance and ordering the dissolution of the concentration.

Non-compliance with conditions or obligations ordered by the FCO constitutes an administrative offence, which can result in fines of up to EUR1 million (for individuals) or 10% of the total worldwide group turnover (for companies).

12. Is there a right of appeal against the regulator's decision and what is the applicable procedure? Are rights of appeal available to third parties or only the parties to the decision?

Rights of appeal

Only Phase II decisions of the Federal Cartel Office (FCO) can be appealed (such as, clearances (by third parties, see *Question 6*), clearances with remedies (by the notifying parties and/or by third parties) and prohibitions (by the notifying parties).

Procedure

The appeal must be filed with the FCO in writing within one month following the date on which the decision is notified to the appellant. The decision on the appeal is taken by the Higher Regional Court (*Oberlandesgericht*) in Düsseldorf (*section 63 et seq., ARC*). The timeframe for a decision on appeal varies, but takes at least several months.

In addition, the parties can also apply for a special Ministerial Authorisation (*Ministererlaubnis*), granted by the German Federal Minister for Economic Affairs and Energy, if a proposed concentration has been prohibited by the FCO (*section 42, ARC*). Such an application must be submitted in writing:

- Within one month following the date of the service of the FCO's prohibition decision.
- If the decision is appealed, within one month following the date when the decision becomes final.

Third party rights of appeal

Third parties are only entitled to appeal FCO's decisions if they have been admitted to the merger control proceeding as intervening party (see *Question 6*).

AUTOMATIC CLEARANCE OF RESTRICTIVE PROVISIONS

13. If a merger is cleared, are any restrictive provisions in the agreements automatically cleared? If they are not automatically cleared, how are they regulated?

A merger clearance does not automatically clear all restrictive provisions contained in the underlying agreements, such as non-compete obligations. Such provisions can be reviewed by the Federal Cartel Office (FCO) or any other competent competition authority under rules for regulating restrictive agreements (*sections 1 to 3, Act against Restraints of Competition (ARC)*) at any time. However, as a general rule, the rules for regulating restrictive agreements of the ARC do not apply to ancillary arrangements that are related and indispensable to the implementation of a concentration.

REGULATION OF SPECIFIC INDUSTRIES

14. What industries (if any) are specifically regulated?

Irrespective of the application under (German) merger control rules, acquisitions of shareholdings in German undertakings may be subject to the special rules of the Foreign Trade and Payments Act (*Außenwirtschaftsgesetz*). If an investor from outside the EU intends to acquire a shareholding of 25% or more in a German undertaking, the transaction may be subject to a separate examination by the Federal Ministry of Economics and Technology whether it is likely to threaten Germany's public policy or security. The same applies if such a shareholding is acquired by an EU-based investor in which an investor from outside the EU holds a share of 25% or more.

According to the ninth amendment to the Foreign Trade and Payments Regulation (*Außenwirtschaftsverordnung*) which came into effect on 18 July 2017, a threat to public policy or security is considered especially if the acquired company:

- Is an operator of "Critical Infrastructure" within the meaning of the Act on the Federal Office for Information Security.
- Develops or modifies software, which is a critical infrastructure within the meaning of the Act on the Federal Office for Information Security.
- Is charged with organisational tasks under section 110 of the Telecommunications Act or manufactures or has manufactured technical facilities for the implementation of legal measures for the monitoring of telecommunications and has knowledge of the technology.
- Provides cloud computing services and the infrastructure used for this reaches or exceeds the thresholds under Annex 4, Part 3, No. 2 of the Regulation on the definition of "critical infrastructure" to the Act on the Federal Office for Information Security.
- Holds a licence for components or services in the telematics infrastructure according to section 291b (1a) or (1e) Volume V of the German Social Insurance Code.

There is no general obligation to notify such a transaction to the Federal Ministry of Economics and Technology, but the Ministry may decide to start an investigation on its own initiative. However, an exception applies if there is a threat to public policy or security (see *above*). In such cases, the acquiring party must notify the closing of the purchase agreement to the Federal Ministry of Economics and Technology. Moreover, the acquisition of a shareholding of 25% or more in undertakings active in the war weapons industry or in the industry of IT products that are concerned with the processing of governmental classified information must be notified to the Federal Ministry of Economics and Technology in advance by the acquiring

party and may be prohibited for public security reasons. The Ministry also examines acquisitions by EU citizens if it suspects that the merger is designed in a way that it attempts to abusively circumvent the examination.

The Federal Cartel Office (FCO) must obtain the opinion of a specific regulator, the Federal Network Agency (*Bundesnetzagentur*), if it initiates a main examination proceeding (Phase II) for a concentration in one of the following sectors:

- Network-based supply of energy or gas.
- Telecommunications.
- Postal services.

15. Has the regulatory authority in your jurisdiction issued guidelines or policy on its approach in analysing mergers in a specific industry?

The Federal Cartel Office (FCO) has not issued guidelines or policy on its approach in analysing mergers in a specific industry.

JOINT VENTURES

16. How are joint ventures analysed under competition law?

The creation of a joint venture or the acquisition of a shareholding in an existing joint venture may qualify as a concentration under German merger control rules if it results in two or more shareholders each holding a share of 25% or more in the joint venture. The same applies if two or more shareholders acquire joint control of the joint venture.

In these cases, the acquisition is subject to German merger control if the turnover thresholds are met (see *Question 2, Thresholds*), irrespective of whether the joint venture constitutes a full-function joint venture under the meaning of the Regulation (EC) 139/2004 (Merger Regulation).

In addition, the creation of a joint venture may also be reviewed under the rules regulating restrictive agreements (see *Question 7*).

INTER-AGENCY CO-OPERATION

17. Does the regulatory authority in your jurisdiction co-operate with regulatory authorities in other jurisdictions in relation to merger investigations? If so, what is the legal basis for and extent of co-operation (in particular, in relation to the exchange of information, remedies/settlements)?

The Act against Restraints of Competition (ARC) (*section 50 b*) entitles the Federal Cartel Office (FCO) to co-operate with regulatory authorities in other jurisdictions, especially in relation to merger investigations. In particular, the FCO is authorised to exchange information with other regulatory authorities. However, confidential information can only be exchanged if the undertakings concerned have waived confidentiality.

Details for the co-operation between EU national regulatory authorities in multi-jurisdictional merger investigations are set out in the document on Best Practices on Cooperation between EU National Competition Authorities in Merger Review, which was drawn up by the EU Merger Working Group.

In addition, the FCO co-operates with other competition authorities on the basis of bilateral agreements, for example, with the US Department of Justice and the Federal Trade Commission, and within the framework of the International Competition Network (ICN).

RECENT MERGERS

18. What notable recent mergers or proposed mergers have been reviewed by the regulatory authority in your jurisdiction and why is it notable?

Notable recent mergers include:

- **Airbus/CSALP (B9-165/17).** The proposed acquisition by Airbus of the Canadian airplane manufacturer CSALP (a subsidiary of Bombardier) has been approved by the FCO. The merger will leave only three major manufacturers on the worldwide market for commercial aircraft construction. However, the FCO reasoned that the portfolio of the two merging companies will have limited overlap. CSALP focusses on smaller aircraft with 100 to 150 seats, while Airbus mainly produces aircraft with more than 150 seats. Also, on a market entailing all single aisle aircraft, CSALP's market share would be only marginal. The market for aircraft with 100 to 150 seats was only a de-minimis market in Germany, as the turnover was less than EUR15 million.
- **CTS Eventim/Four Artists (B6-35/17).** The FCO has prohibited the proposed acquisition of the concert and event agency Four Artists by CTS Eventim (the operator of the largest ticketing system in Germany). The FCO argued that CTS Eventim holds a dominant position on the two-sided ticketing market with a market share of 60-70%. Four Artists organises and markets concerts and represents approximately 300 national and international artists. The acquisition of Four Artists would have strengthened CTS Eventim's dominant position. This is because with Four Artists, CTS Eventim would have integrated an important event organiser into its company, tying additional ticket quotas of around 500,000 to 1 million tickets to its ticketing system.
- **Kraft Heinz/Mondelez International.** The re-acquisition of the brand names "Kraft" and "Bull's Eye" by The Kraft Heinz Company from Mondelez International has been approved by the FCO. The brand names had been licenced to Mondelez for use in Germany and other countries. Initially, the licence agreement had been concluded in 2012 for a period of ten years, when Kraft Foods was split up into two separate companies. The FCO has now permitted the premature termination of this agreement. Through this acquisition, Kraft Heinz will expand its market share to more than 30%. However, according to the FCO's investigation, Kraft ketchup accounts for only a small part of this share. The FCO expects that sufficient competitive pressure will remain from other manufacturers. Kraft Heinz products have seen several de-listings recently.
- **Europcar/Buchbinder (B9-93/17).** The FCO has cleared the proposed acquisition of the European car rental company Buchbinder Group by Europcar. The FCO considered the existence of several separate markets, because commercial and private customers represented different customer groups, and cars, vans and trucks were different products. However, even on a basis of such narrow market definitions, the FCO found that competition problems would be unlikely. It argued that the German car rental market would be very heterogeneous and the parties to the merger would have combined market shares of less than 40%, except for the sector of utility vehicle rentals, where it would be just over 40%. Even though the merged company would also supersede Sixt as the market leader, the FCO argued that there still existed some larger competitors and a number of regional companies.
- **Hytera Communications/Sepura (B7-31/17).** The FCO has examined a proposed acquisition of the English Sepura by Chinese Hytera, both worldwide active producers of professional mobile radio systems and solutions. After a preliminary assessment, the FCO expected functioning competition to be

considerably worsened. However, the parties have withdrawn the application since they have not met the turnover thresholds according to the last annual statement (which had been testified during the second phase of the merger procedure). The FCO considered referring to the expected increase of market power of a third party not involved in the merger when justifying the decision prohibiting the merger. This was because it was expected that the merged company would have withdrawn certain products from the market.

PROPOSALS FOR REFORM

19. Are there any proposals for reform concerning merger control?

There are currently no visible proposals to reform merger control in Germany.

ONLINE RESOURCES

Federal Cartel Office (*Bundeskartellamt*) (FCO)

W www.bundeskartellamt.de

Description. Official website of the FCO which provides information on German and EU competition law, the FCO's activities, the FCO's internal structure, and so on. Some documents are also available in English and French.

THE REGULATORY AUTHORITY

Federal Cartel Office (*Bundeskartellamt*) (FCO)

Head. Andreas Mundt **Contact details.** Kaiser-Friedrich-Str. 16 D-53113 Bonn Germany **T** +49 228 94 99 0 **F** +49 228 94 99 400 **E** poststelle@bundeskartellamt.bund.de **W** www.bundeskartellamt.de

Outline structure. The FCO comprises 12 independent decision-making departments (*Beschlussabteilungen*), nine of which are in charge of competition law enforcement in specific economic sectors (including merger control). The remaining three decision-making departments specialise in the prosecution of hard-core cartels. The decision-making departments are supported by a specialised team of economists, among others.

A detailed organisational chart listing the respective areas of competence is available on the FCO's website.

Responsibilities. The FCO is the regulatory authority responsible for the enforcement of German and EU competition law, including the control of concentrations and the investigation and prosecution of anti-competitive agreements and practices, as well as of abuses of market powers.

The FCO is an independent authority which is accountable to the Federal Ministry for Economic Affairs and Energy.

Procedure for obtaining documents. There is no particular procedure for obtaining documents from the FCO. However, the text of the relevant legal provisions, information leaflets, further guidance documents and decisions issued in individual cases are published on the FCO's website. Most of these documents are in German, but some documents are also available in English and French.

Practical Law Contributor profile



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Professional qualifications. Germany, Attorney-at-law (*Rechtsanwalt*), 1998

Areas of practice. German and EU competition law.

Non-professional qualifications. University of Göttingen, Germany, 1993; J.D., 1996

Recent transactions

Has recently advised and represented clients in cartel cases relating to the following goods and markets:

- Propane gas (German investigation; Supreme Court).
- Automatic doors (German investigation).
- Sausages and meat products (German investigation).
- Sewage duct construction, refractory construction et seq. (bid-riggings, German investigations).
- Metal packaging (EU investigation).
- Steel (German investigation).

Languages. German, English

Professional associations/memberships. Association of German Anti-trust Lawyers (Studienvereinigung Kartellrecht e.V.; Network Compliance (Netzwerk Compliance eV).