The International Comparative Legal Guide to:

Merger Control 2016

12th Edition

A practical cross-border insight into merger control issues

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EDITORIAL

Welcome to the twelfth edition of *The International Comparative Legal Guide to: Merger Control*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of merger control.

It is divided into two main sections:

Three general chapters. These chapters are designed to provide readers with a comprehensive overview of key issues affecting merger control, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in merger control laws and regulations in 50 jurisdictions.

All chapters are written by leading merger control lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors Nigel Parr and Catherine Hammon of Ashurst LLP for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.co.uk.

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1 Relevant Authorities and Legislation

1.1 Who is/are the relevant merger authority(ies)?

The *Bundeskartellamt* (Federal Cartel Office – "FCO"), based in Bonn, is the German authority in charge of merger control enforcement. The FCO is assigned to the Federal Ministry of Economy and Technology but operates independently in its decision-making and is not subject to political orders. The FCO has 12 decision boards, nine of which are responsible for merger control enforcement covering all industries and sectors. The remaining three decision boards are responsible for investigating and prosecuting in cartel cases. The decision boards take independent decisions and are thus not subject to instructions of the FCO's president or any other authority.

More information on the FCO and its publications, including the bi-annual report and several guidance papers on merger control, is available on the FCO's website at www.bundeskartellamt.de.

1.2 What is the merger legislation?

The principal legal basis of German merger control is set out in chapter VII (§§ 35 – 43) of the *Gesetz gegen Wettbewerbsbeschränkungen* – "GWB" (Act against Restraints of Competition – "ARC"). In addition, the FCO has issued several guidelines and notices for the interpretation and practice of merger control in Germany, most of which are also available in English on the FCO's website. In the course of the 8th amendment of the ARC which took effect on 30 June 2013, some important changes to the merger control regime were introduced.

1.3 Is there any other relevant legislation for foreign mergers?

Based on § 5 of the *Aussenwirtschaftsgesetz* (Foreign Trade Act – "FTA"), the Ministry of Economics and Technology ("MET") is entitled to review and restrict the acquisition of shareholdings exceeding 25% in German companies by investors based outside the EU or EFTA, if the acquisition endangers the public order or security of the Federal Republic of Germany pursuant to § 4 FTA. The same applies to the acquisition of domestic companies or shares in such companies by foreigners if the domestic companies manufacture or develop war weapons or other military equipment, or manufacture products with IT security functions to process classified state material or components essential to the IT security function of such products, or have manufactured such products and still dispose of the technology if the overall product was licensed with the knowledge of the company by the Federal IT Security Agency.

According to § 50 (c) ARC, the FCO may forward information to the MET, if this information has been made available to the FCO in a merger control proceeding and if the information exchange is regarded as necessary in order to protect the security interests in the sense of § 4 and § 5 FTA.

Unlike the merger control regime, the FTA does not provide for a notification and clearance requirement. However, the MET may initiate investigations on its own accord within three months from the execution of the relevant purchase agreements. The parties may also proactively apply for a certificate of non-objection from the MET in order to gain legal certainty. In this case, the MET has a period of one month from the submission of a complete application to raise objections. If proceedings are not initiated within three months from the execution of the purchase agreement or – in the case of an application for a certificate of non-objection – within one month from the application, the validity of the transaction cannot be challenged under the FTA.

If proceedings are initiated and the MET considers that the transaction is likely to threaten Germany's public order or security, it has the power – with approval from the Federal Government – to impose restrictions or even prohibit the acquisition. It is not only very clear from the language of § 4 and § 5 FTA, but also has always been stressed by the MET that the power to review and restrict acquisitions is strictly limited to exceptional cases where the public security in Germany is to be protected and it is not intended to be an instrument of industrial policy.

1.4 Is there any other relevant legislation for mergers in particular sectors?

The merger control rules in the ARC generally apply across all industries and economic sectors. In addition, certain sectors have certain specific provisions applying to merger transactions. Acquisitions of private television channels, for example, are subject to a separate concentration control by media authorities designed to safeguard plurality of opinions in television broadcasting.

Other regulatory provisions such as specific licence requirements apply in the context of mergers in certain sectors, for example in telecommunications, financial services, postal services, energy, military technology or pharmaceutical products.

2 Transactions Caught by Merger Control Legislation

2.1 Which types of transaction are caught – in particular, how is the concept of "control" defined?

§ 37 (1) of the ARC contains a comprehensive list of events constituting a concentration relevant for merger control:

1. **The acquisition of all or a substantial part of the assets of another undertaking**: This covers typical asset acquisitions. However, the definition of "substantial part of the assets" is very wide and is determined not necessarily by quantitative but by qualitative criteria. If the purchased asset constitutes the principal basis for the seller's position in a particular market suitable to transfer this market position to the purchaser, it will qualify as a substantial part of the seller's assets. Accordingly, the acquisition of individual trademarks, newspaper and magazine titles, individual supermarket outlets or even individual buildings, etc. may qualify as asset acquisition for the purposes of merger control.
2. **The acquisition of direct or indirect control over another undertaking or parts thereof by one or several undertakings**: Control is constituted by rights, contracts or other means which, either separately or in combination and having regard to all considerations of fact or law involved, confer the possibility of exercising decisive influence on the activity of an undertaking, in particular through:
   a) ownership or the rights to use all or part of the assets of the undertaking; or
   b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of the undertaking.

   The German concept of control under the ARC is largely in line with the definition of control in Art. 3 of the ECMR and will be interpreted accordingly. This applies to the acquisition of both sole and joint control.
3. **The acquisition of shares in another undertaking amounting, either separately or in combination with other shares already held by the undertaking, to 25% (or more) or 50% (or more) of the shares or voting rights in that undertaking**: Share acquisitions exceeding the 25% or 50% thresholds constitute events of concentration regardless of whether or not control is acquired. If more than one parent undertaking acquires such shareholdings in the same target company, it will be regarded as a joint venture and a concentration of the respective parent undertakings with respect to the markets in which the target company is active. This means that in transactions where the seller or another shareholder retain 25% or more of the shares, the total sales figures of such shareholder undertakings will have to be considered in the turnover calculation for the jurisdictional test.
4. **Any other combination of undertakings, enabling one or several undertakings to directly or indirectly exercise competitively significant influence over another undertaking**: This applies to acquisitions of minority shareholdings below the 25% threshold which, through contractual or other rights, put the purchaser in the position that a shareholder holding 25% or more would have in the company. There is no clear minimum threshold below which this acquisition of competitively significant influence can be excluded. In specific circumstances, even the acquisition of 10% or less of the shares or voting rights may fall under this rule if additional rights granting influence on the management or the competitive behaviour of the target are acquired by the purchaser. However, in practice 20% is a threshold above which the acquisition of competitively significant influence should be considered carefully.

   The influence on the activity of the target must be relevant to competition and, thus, requires a competitive relationship between the purchaser and the target. This generally applies to horizontal and vertical relationships. If there is no competitive relationship at all between the purchaser and the target, e.g. in the case of financial investors with no prior activities in the target's sectors, it is unlikely that a competitively significant influence will be acquired.

In case of doubt, the parties should enter into informal discussions with the FCO in the pre-notification stage.

2.2 Can the acquisition of a minority shareholding amount to a "merger"?

Yes, the acquisition of a minority shareholding can be subject to merger control in Germany. As explained under question 2.1 above, the acquisition of 25% or more of shares or voting rights of another undertaking constitutes a concentration for the purposes of German merger control. In addition, the acquisition of shares or voting rights below the 25% threshold may be subject to merger control if it enables the purchaser to exercise "competitively significant influence" over the target.

2.3 Are joint ventures subject to merger control?

Yes, joint ventures are subject to German merger control if the formal criteria of a concentration (see question 2.1 above) are satisfied. Unlike under the ECMR, no qualitative test applies and it is not required for the joint venture to be a full-function autonomous economic entity. Accordingly, every transaction resulting in at least two shareholders holding 25% or more of the shares or voting rights in the same entity will be reviewed as a joint venture and – for the purposes of merger control – deemed to be a concentration of the parent undertakings with respect to the markets in which the joint venture is active. This means that the total sales figures of the respective parent undertakings will have to be considered in the turnover calculation for the jurisdictional test.

It is important to note that the FCO generally takes a dual approach when reviewing joint ventures. Concentrative aspects are reviewed within the merger control procedure and any possible cooperative aspects, in particular with respect to the parent undertakings, are reviewed in the context of the general cartel prohibition. In practice, this may result in situations where the FCO clears a transaction under merger control rules within the applicable time periods but expressly reserves the right to review any cooperative aspects and prohibit the transaction under § 1 of the ARC (equivalent to Art. 101 of the TFEU). As the review under § 1 ARC is not subject to any statutory time limits, this may cause uncertainties for the parties in implementing the transaction.

2.4 What are the jurisdictional thresholds for application of merger control?

German merger control applies if, in the last financial year prior to completion of the transaction, all of the following thresholds are satisfied:

- the combined worldwide turnover of all participating undertakings exceeded EUR 500 million (approximately US$ 664 million for 2014 at US$ 1.3285 for EUR 1.00);
- one participating undertaking had a turnover exceeding EUR 25 million (approximately US$ 33 million) within Germany; and

- at least one further participating undertaking had a turnover exceeding EUR 5 million (approximately US$ 6.6 million) within Germany (so-called second domestic turnover threshold).

This is unless the following *de minimis* exemption applies:

- one party to the transaction which is not a controlled undertaking had a worldwide turnover of less than EUR 10 million (approximately US$ 13.3 million); this also applies if the seller (previously controlling the target) and the target are jointly below the EUR 10 million threshold.

The turnover figures are calculated by reference to the net consolidated group sales of the participating undertakings in the last completed financial year. VAT and intra-group sales are excluded. Special rules of turnover calculation apply for:

- traded goods: only 75% of the sales generated from the mere trading of goods is taken into account for the purposes of assessing jurisdiction;
- production and distribution of newspapers or magazines: the turnover derived from these activities is multiplied by eight;
- production and distribution of radio and television broadcasting as well as the sale of radio and TV advertising time: the turnover derived from these activities is multiplied by 20;
- financial institutions: the turnover is calculated on the basis of the financial income as under the ECMR; and
- insurance companies: the premium income represents the relevant turnover as under the ECMR.

Participating undertakings for the purpose of the turnover calculation are generally the purchaser and the target. In asset acquisitions, the turnover of the target is calculated with reference to the sales generated by the assets to be acquired. The seller's turnover is not considered in the calculation, unless the seller retains 25% or more of the target's shares (joint venture – see question 2.3) or for the purposes of the *de minimis* clause.

2.5 Does merger control apply in the absence of a substantive overlap?

Yes, the jurisdictional test for German merger control is strictly based on turnover of the parties. Any transaction meeting the formal turnover thresholds is subject to review, regardless of substantive overlaps or any other effects on the markets. Substantive aspects are analysed by the FCO in the formal procedure.

2.6 In what circumstances is it likely that transactions between parties outside Germany ("foreign-to-foreign" transactions) would be caught by your merger control legislation?

Foreign-to-foreign transactions are subject to German merger control if the jurisdictional turnover thresholds are satisfied by the participating undertakings, unless they have no "appreciable effect" in Germany. The introduction of the second domestic turnover threshold in 2009 (see question 2.4 above) was aimed at providing clear rules on jurisdiction, especially for foreign mergers. It can now be assumed that transactions meeting the worldwide and the two domestic turnover thresholds will have an appreciable effect in Germany.

However, there may be exceptional circumstances in which it can be argued that a transaction does not have an appreciable domestic effect despite meeting all relevant turnover thresholds. This may be the case in foreign joint ventures with no connection to Germany, when only the parent companies meet the domestic turnover thresholds with activities totally unrelated to the joint ventures. In case of doubt, it is advisable to seek informal guidance from the FCO. The FCO has published a guidance document "on domestic effects on merger control", which is effective since September 2014 and available on the FCO's website.

2.7 Please describe any mechanisms whereby the operation of the jurisdictional thresholds may be overridden by other provisions.

Only the exclusive jurisdiction of the Commission under the ECMR overrides German merger control rules if the turnover thresholds in Art. 1 (2) and (3) ECMR are met and the transaction constitutes the acquisition of control, unless the Commission decides to refer the case to the FCO under Art. 4 (4) or Art. 9 of the ECMR.

In this context, it should be noted that there may be cases of minority acquisitions which meet the ECMR turnover thresholds but do not constitute the acquisition of control and thus are not subject to EU merger control. These cases may still fall within the jurisdiction of the FCO if they constitute a concentration according to the definition of the ARC (see question 2.1), and if the German turnover thresholds are satisfied (see question 2.4).

2.8 Where a merger takes place in stages, what principles are applied in order to identify whether the various stages constitute a single transaction or a series of transactions?

Regardless of whether transactions are legally or economically linked, the ARC provides that two transactions which take place between the same parties within a two-year period will be deemed to be one single concentration if this leads to the turnover thresholds being exceeded for the first time. This rule, which is similar to Art. 5 (2) of the ECMR, aims to eliminate attempts to split transactions into several pieces in order to bring them outside the scope of German merger control.

Furthermore, mergers taking place in various stages will be reviewed as one single transaction if there is a legal or economic connection linking the different stages so that – considering the intention of the parties – they would not be executed independently of each other. This is obviously the case if there is a contractual connection in the transaction agreements. However, even without a binding contractual link between the different stages, there may be other factual or economic reasons suggesting that for the parties the different stages constitute one single transaction. In any event, it should be assessed separately for each stage whether it constitutes an event of concentration subject to merger control.

3 Notification and its Impact on the Transaction Timetable

3.1 Where the jurisdictional thresholds are met, is notification compulsory and is there a deadline for notification?

The notification of a concentration prior to completion is mandatory under the ARC if the jurisdictional thresholds are satisfied. There is no specific deadline for the notification, but the transaction must not be implemented before clearance from the FCO is obtained or the applicable deadlines have expired without the FCO having prohibited the merger (see question 3.6). When planning the transaction timetable, it is therefore important to assess any merger

control requirement at an early stage and allow sufficient time for the merger control process.

3.2 Please describe any exceptions where, even though the jurisdictional thresholds are met, clearance is not required.

The ARC provides for three exceptions:

- Under the so-called "banks clause", a transaction meeting the jurisdictional thresholds will not constitute a notifiable concentration if banks, financial institutions or insurance companies acquire shares in another undertaking merely for trading purposes, provided that any voting rights are not exercised and the shares are sold within one year. The one-year period may be extended by the FCO upon application. If the shares are not sold within one year and no extension is granted, the purchaser must notify the transaction to the FCO and obtain clearance under the merger control procedure.
- Upon application by the parties, the FCO will grant an exemption from the suspension obligation for important reasons, in particular for the prevention of substantial damage to the undertakings concerned or third parties. In this case, only the obligation to suspend is waived and the clearance requirement remains in place.
- Another exemption applies to public tender offers and series of stock market purchases of shares listed at a stock exchange or similar trading platform. This exemption provides that the transactions have to be notified to the FCO without undue delay and the voting rights attached to the shares are not to be exercised by the purchaser, unless authorised by the FCO for the preservation of the full value of the investment.

3.3 Where a merger technically requires notification and clearance, what are the risks of not filing? Are there any formal sanctions?

The implementation of a transaction subject to merger control without notification and clearance constitutes an administrative offence under § 81 of the ARC. The FCO can impose fines of up to 10% of the total worldwide group turnover of the undertakings concerned in the last financial year and up to EUR 1 million for natural persons responsible for the offence. The FCO has used this power repeatedly in recent years and imposed fines of more than EUR 4 million.

Furthermore, any legal acts implementing the transaction, such as the transfer of shares or assets, are invalid under German civil law.

If the FCO becomes aware of a notifiable transaction which was implemented without notification and clearance, it will normally initiate a formal unwinding procedure. The unwinding procedure generally applies the same substantive test as a merger control procedure (i.e. whether the merger significantly impedes effective competition – see question 4.1), but has no timing restrictions. If the substantive analysis comes to the conclusion that the conditions for a prohibition of the transaction are fulfilled, the FCO will order the dissolution of the merger. Otherwise, it will close the proceedings without issuing a clearance decision. In this case, the temporary invalidity of the transaction under civil law will be cured.

3.4 Is it possible to carve out local completion of a merger to avoid delaying global completion?

A carve-out of German completion in an international transaction is hardly possible, unless the transaction is structured so that it would no longer be subject to German merger control. This is unlikely to succeed in practice.

In the *Mars/Nutro* case, the parties notified the acquisition of the US pet food producer Nutro by Mars in a number of jurisdictions including Germany and Austria. After the transaction – which predominantly related to the US-market – was cleared by the US regulator, the parties decided to complete the share transfer in the US, although merger control proceedings were still pending in Germany and Austria. In order to carve out the completion in Germany and Austria, the distribution rights for Nutro in both countries were transferred to a separate entity of the seller which was excluded from the transfer. Nevertheless the FCO took the view that Mars had deliberately ignored the suspension obligation in Germany and imposed a record fine for gun-jumping of EUR 4.5 million. It should be noted, however, that the case also raised severe substantive competition concerns, as Mars was a clear market leader for the relevant products in Germany.

3.5 At what stage in the transaction timetable can the notification be filed?

A transaction can be filed with the FCO at any time, provided that the parties are reasonably confident that an agreement will be reached and the transaction can be described in sufficient detail (parties, structure, ancillary restraints, etc.) in order to allow a substantive merger control analysis. No binding definitive agreement or even letter of intent is required for that purpose.

It should be noted that the FCO will publish the fact that a notification has been filed on its website within a few days from receipt of the notification. Hence, confidentiality of the transaction cannot be maintained once the formal notification has been filed. Also, administrative fees will normally be imposed when a formal notification has been filed, even if the transaction is abandoned and the notification withdrawn before a decision by the FCO. In practice, parties are, therefore, often hesitant to file a formal notification before definitive agreements have been signed and they are comfortable that the deal will actually take place.

3.6 What is the timeframe for scrutiny of the merger by the merger authority? What are the main stages in the regulatory process? Can the timeframe be suspended by the authority?

Like the EU regime, the German merger review process has two phases:

- Upon receipt of a complete merger notification, the initial proceedings (phase 1) begin. The FCO then has one month to decide whether to clear the merger by way of an informal clearance letter or, if substantive competition concerns have been identified, whether to open the main proceedings (phase 2).
- The main proceedings must be completed by a formal decision (clearance or prohibition) within four months from receipt of a complete notification, unless the parties agree to an extension of the time period for the proceedings. Even without agreement of the parties, the four-month period is extended by one month if a party has submitted proposals for remedies to the FCO.
- The vast majority (approximately 90%) of transactions notified to the FCO are cleared within one month of the initial proceedings. In straightforward cases with no substantive overlaps or insignificant effects in Germany, the FCO often issues clearance letters a long time before the end of the statutory one-month period; in exceptional cases even within one week from receipt of the notification. In main proceedings, the full four-month period is normally used to complete the in-depth investigations and to prepare a reasoned decision.

- Under the recently introduced "stop-the-clock" rule, the clearance period is suspended if the parties fail to supply information formally requested by the FCO in a timely manner and completely based on circumstances within the responsibility of the parties.

3.7 Is there any prohibition on completing the transaction before clearance is received or any compulsory waiting period has ended? What are the risks in completing before clearance is received?

A transaction subject to German merger control must not be implemented before clearance from the FCO is obtained or the relevant waiting periods have expired without a decision of the FCO. A violation of this suspension obligation is an administrative offence and may be subject to fines of up to 10% of the total annual group turnover of the undertakings concerned, and up to EUR 1 million for natural persons responsible for the offence. In addition, any legal acts implementing the transaction, such as the transfer of shares or assets, are invalid under German civil law (see also question 3.3).

In recent years, the FCO has fined several cases of gun jumping with a maximum of EUR 4.5 million (*Mars/Nutro*, see question 3.4 above). The amount of fines is calculated on the basis of the turnover achieved by the parties on the relevant markets in Germany, adjusted by various factors. An important factor for the assessment of fines will be the question of whether the transaction raises substantive concerns.

3.8 Where notification is required, is there a prescribed format?

There is no prescribed format for the notification of a merger in Germany. The FCO has developed a recommended form which is available on its website, but it is not commonly used in practice. Most merger notifications are made in the form of a letter containing the information required by the ARC (§ 39 (3)). This includes:

- the form of the concentration;
- name, place of business or registered seat of each undertaking concerned; type of business of each undertaking concerned;
- the turnover in Germany, the EU and worldwide (or the equivalent of turnover for banks and insurance companies) on a consolidated group basis;
- market shares (including the basis for calculation) if they exceed 20% in Germany or a substantial part thereof (even for markets which are not affected by the transaction);
- for share acquisitions, the amount of participation held by the purchaser after the proposed acquisition; and
- contact details of a person authorised to accept service in Germany if the relevant party is based outside of Germany.

In practice, the markets affected by the transaction will be described in some detail, stating the parties' market shares, even if they are below 20%. The level of detail, in particular with respect to market information and analysis of competitive effects, depends on the extent to which competition concerns are expected. In complex cases, draft notifications may be submitted in the pre-notification phase and the FCO is generally open to pre-notification discussions, although this is not a requirement.

If a notified and cleared transaction has been completed, the parties are required to notify the FCO without undue delay. However, the post-merger notification is a formality.

3.9 Is there a short form or accelerated procedure for any types of mergers? Are there any informal ways in which the clearance timetable can be speeded up?

There is no short form or accelerated procedure in German merger control. The FCO will normally try to handle straightforward cases which evidently raise no competition concerns quickly without exhausting the statutory one-month period. However, whether a clearance decision can be obtained within a couple of weeks or even sooner always depends on individual factors, such as the current workload of the decision board, the FCO's level of prior knowledge on the relevant markets, and the level of information provided in the notification.

The clearance timetable can sometimes be speeded up through informal pre-notification discussions. If the case officer is made familiar with the case and has seen a draft notification before the formal notification is submitted, it will generally (though not always) help to speed up the process. Therefore, it is often advisable to start the preparation of the notification early in the process and approach the FCO on an informal and confidential basis well ahead of the intended filing date.

3.10 Who is responsible for making the notification and are there any filing fees?

The undertakings concerned and (for share and asset acquisitions) also the sellers are under the obligation to notify. If a complete notification is submitted by one party, the other undertakings concerned are relieved from the obligation to notify. In practice, the notification is often submitted by or on behalf of the purchaser with the consent of all other undertakings concerned. Sometimes, the other parties prefer to submit separate letters, making reference to the merger notification.

There are no filing fees to be paid up-front. The administrative fees for the merger control procedure are charged by the FCO after the decision has been issued. The amount of the fees is based on the economic significance of the case, the complexity and the duration of the procedure. The statutory maximum is EUR 50,000 (EUR 100,000 in exceptional cases). In straightforward phase 1 clearance cases, the administrative fees are often below EUR 10,000. The fee decision is subject to appeal. However, in practice, the fees are rarely challenged as the FCO has a wide discretion in determining the amount.

3.11 What impact, if any, do rules governing a public offer for a listed business have on the merger control clearance process in such cases?

As set out above (see question 3.2), the ARC allows the implementation of public tender offers before merger clearance, provided the merger notification is made without undue delay and the voting rights are not exercised unless authorised by the FCO.

In hostile takeovers, it may be difficult for the potential acquirer to obtain and provide the information on the target undertaking necessary for a complete merger notification, in particular with respect to turnover and market share data. In practice, the acquirer will provide as much information on the target as is available. If this is not sufficient for the FCO and the target is unwilling to provide the data, the FCO may issue a formal request for information, asking the target undertaking for the relevant turnover and market information. In this case, the FCO may consider the notification to be incomplete until the required information has been provided.

This will normally delay the timetable for the clearance and should be considered when planning a merger control process in the context of a hostile takeover offer.

3.12 Will the notification be published?

No, the merger notification itself will not be published. However, the FCO will publish the fact that a notification has been submitted by the parties and the economic sector concerned on its website within a few days from receipt of the notification.

Intervening parties, if any (see question 4.4 below), will have the right to receive non-confidential versions of the merger notification and all other relevant documents, in which case the FCO will ask the parties to submit non-confidential versions of the merger notification and related documents.

4 Substantive Assessment of the Merger and Outcome of the Process

4.1 What is the substantive test against which a merger will be assessed?

The FCO must prohibit a merger if it significantly impedes effective competition (SIEC); in particular, if it is expected to create or strengthen a dominant market position unless:

- the undertakings concerned prove that the merger leads to improvements of conditions of competition which outweigh the impediments to competition; or
- the conditions for a prohibition only relate to a so-called *de minimis* market which has been in existence for more than five years and whose total market volume amounted to less than EUR 15 million (approximately US$ 19.9 million); in the last calendar year; or
- the dominant market position applies to a newspaper or magazine publisher acquiring a small or medium-sized publisher if it can be proven that the acquired publisher has made losses for the last three years and its existence would be threatened without the merger; furthermore, it must be demonstrated that no other purchaser could be found who has been able to offer a solution less damaging to competition.

The SIEC-test has been introduced recently in order to bring German merger control in line with European substantive standards. It corresponds in principle with Art. 3 (3) of the ECMR:

- The main differences are the three exemptions set out above relating to positive effects outweighing the impediments to competition (balancing clause), the *de minimis* market clause and the exemption for distressed mergers in the press sector.
- It is too early to tell how the FCO will interpret and apply the new substantive test in practice. However, it can be expected that the FCO will largely revert to EU case law and practice of the Commission when assessing mergers under the SIEC-test (see chapter on European Union). This implies that the Commission guidelines for the assessment of horizontal and non-horizontal mergers will be an important source of orientation.
- The previously applicable dominance-test will still play a central role in the SIEC-analysis. If a dominant market position is created or strengthened as a result of the merger, it will most likely constitute a SIEC. In this context, it is important to note that the market share threshold for the statutory presumption of single dominance has recently been raised from 33.3% to 40%. At this stage, it is unclear whether the FCO will go beyond dominance and try to prohibit mergers with so-called unilateral effects which do not create or strengthen a dominant market position, but may constitute a SIEC.

The *de minimis* exemption was previously a jurisdictional test and has recently been changed to become a substantive criterion. The total market value for the *de minimis* market clause (EUR 15 million) is to be assessed on the basis of the German market, even if the actual geographic market is wider. That does include the value of goods processed/manufactured within the territory of Germany even if it is clear that these goods will not be offered on the national market, but may be sold outside Germany. If the actual geographical market is narrower than the German territory, then the respective narrower market is taken as a basis for the calculation. In certain exceptional and clearly defined circumstances, the FCO may bundle similar neighbouring local or regional markets for the purposes of assessing the *de minimis* market clause.

The exemption for the acquisition of distressed press publishers has also been introduced recently. However, the scope of this exemption appears to be very narrow as the conditions for its application are extremely onerous.

4.2 To what extent are efficiency considerations taken into account?

Efficiencies may be taken into account as part of the SIEC test and – under exceptional circumstances − in the context of the balancing clause if it can be shown that they have a direct effect on the competitive conditions of the market.

However, it is generally difficult to succeed with efficiency arguments in a merger case if a dominant position is created or strengthened. The FCO takes the view that dominant undertakings are generally unlikely to pass on efficiencies to the consumer. In its guidance paper ("Guidance on Dominance in Merger Control") of March 2012, the FCO sets out additional arguments against efficiency considerations in the merger control analysis. In particular, it is argued that considerable resources are required for the parties and the competition authorities to verify efficiency claims, and the considerable additional costs "seem to be out of proportion to the added value created by broader recognition efficiencies".

4.3 Are non-competition issues taken into account in assessing the merger?

At the level of the merger control review by the FCO, non-competition issues are not relevant and will not be taken into account.

However, pursuant to § 42 ARC a prohibition decision by the FCO may be overruled by the Federal Minister of Economics and Technology if the anti-competitive effect of the merger is outweighed by benefits to the economy as a whole or if the merger is justified by an overriding public interest. The terms "benefit for the economy" and "overriding public interest" leave significant room for interpretation and the Minister has a wide discretion in the substantive analysis of the conditions for a ministerial permission. The practical relevance of the ministerial permission is very limited. Since its introduction in 1973, just over 20 applications for ministerial permissions have been filed and only eight cases have been successful.

4.4 What is the scope for the involvement of third parties (or complainants) in the regulatory scrutiny process?

Upon application, third parties, such as competitors, customers or suppliers may formally participate in the merger control process

as intervening parties if their commercial interests are materially affected by the merger. Intervening parties have the right to be heard, the right of access to file (subject to the protection of business secrets of the undertakings concerned) and the right to appeal the FCO's decision. The FCO is generally willing to admit intervening parties, provided a commercial interest in the outcome of the merger control process can be reasonably demonstrated. The application must be filed during the course of the formal proceedings, otherwise the opportunity for third parties to challenge a clearance decision is lost.

In addition to formal participation, any party may submit comments and information to the FCO in the course of a merger control review process. If the FCO performs market investigations as part of the review, it will send information requests to relevant market participants in order to obtain first-hand information and opinions from unrelated parties. Usually, the response deadlines to such questionnaires are relatively tight. However, it is legally required to comply with these requests and the FCO has the power to impose fines in cases of non-compliance.

4.5 What information gathering powers does the regulator enjoy in relation to the scrutiny of a merger?

In the course of merger control proceedings, the FCO has the right to request the documents and information necessary for the assessment of the competitive effects of the merger. If the missing information is considered to be part of the information required by statute (see question 3.8), the FCO may declare the notification to be incomplete until the requested information is provided. In addition, the FCO may request detailed market and turnover information from the undertakings concerned and its affiliates, including affiliates located abroad. The information can be requested informally or by way of a formal information request.

If a formal information request is not complied with, fines of up to EUR 100,000 can be imposed by the FCO. Also, the FCO may suspend the procedural deadlines ("stop the clock") if the parties fail to supply the requested information timely or fully based on circumstances within the responsibility of the parties. Formal information requests may also be addressed to third parties as part of the market investigations (see question 4.4).

4.6 During the regulatory process, what provision is there for the protection of commercially sensitive information?

The content of the notification and the information provided by the parties will not be published or otherwise disclosed to the public during the regulatory process. Only parties formally participating in the proceedings, including intervening parties, will have access to the file. However, the FCO is legally obliged to protect business secrets and will normally ask the parties to submit non-confidential versions of the relevant documents before disclosing it to third parties. In this context, it is advisable for the parties to take a reasonable approach when declaring information as business secrets, as the FCO will not accept excessive deletions. In practice, turnover and market share information, as well as information with strategic relevance, will normally be accepted as business secrets.

5 The End of the Process: Remedies, Appeals and Enforcement

5.1 How does the regulatory process end?

The initial proceedings (phase 1) end within one month from receipt of the notification by either an informal clearance letter informing the parties that the conditions for a prohibition of the merger are not satisfied, or by a letter notifying the parties that the FCO will initiate main proceedings (phase 2). If no such letter is served to the parties within one month from receipt of a complete notification, the merger is deemed cleared.

Main proceedings (phase 2) end within four months from receipt of a complete notification by a formal clearance or prohibition decision. The four-month period can be extended (see question 3.6). The formal decision contains a detailed reasoning and will subsequently be published in a non-confidential version on the FCO's website. If a prohibition decision is imminent, the parties may decide to withdraw the notification in order to avoid a formal decision. If no decision is served within four months from receipt of a complete notification, the merger is deemed cleared unless the review period has been extended (see above and question 3.6).

If a merger is prohibited, the parties have the option to apply for a ministerial permission (see question 4.3) within one month from service of the prohibition decision. The Minister has to decide within four months from the application.

5.2 Where competition problems are identified, is it possible to negotiate "remedies" which are acceptable to the parties?

The FCO may issue a clearance decision subject to suspensive or dissolving conditions and obligations (§ 40 (3) ARC). Only structural, not behavioural remedies are permitted by law. According to the case law of the Federal Court of Justice, the FCO has no discretion whether or not to issue a clearance decision if a remedy proposed by the parties is suitable to address and remove the competition concerns (*Phonak/GN Resound*).

- Where structural measures, such as the divestment of a business, are imposed as suspensive conditions (*aufschiebende Bedingungen*), the FCO's clearance decision is invalid pending compliance with the conditions.
- If the FCO imposes dissolving conditions (*auflösende Bedingungen*) or obligations (*Auflagen*), the merger may be completed as notified, and a time period is set during which the conditions and requirements respectively must be fulfilled. If the conditions or requirements are not fulfilled, the clearance decision will become invalid or may be revoked respectively, and the FCO may initiate unwinding procedures. Divestment commitments are generally accompanied by a proposal to maintain and protect the divested business in the interim. For this purpose, a monitoring trustee will have to be appointed by the parties, in order to oversee the management and ensure the preservation of the competitive potential of the divested business.

In practice, the FCO has a preference for suspensive conditions. Dissolving conditions and obligations are only accepted if there is no reasonable doubt that the conditions will be fulfilled and the effects on competition in the interim can be tolerated.

The FCO is generally prepared to discuss the substantive scope of commitments with the parties. It is not keen, however, ongoing through complex negotiations or extensive bargaining sessions. It is therefore advisable for the parties to start the discussions with reasonable proposals rather than trying to open a bargaining process with extreme positions.

5.3 To what extent have remedies been imposed in foreign-to-foreign mergers?

It is generally possible for the FCO to impose remedies on foreign-to-foreign mergers and the FCO has used this power in several cases. However, the majority of the commitments related to divestments of businesses or assets predominantly located in Germany. In theory, there is some uncertainty as to the enforceability of divestiture commitments on undertakings located entirely outside the German territory, but no authoritative precedent on this point has been reported so far.

If the FCO imposes conditions also relating to foreign businesses or assets, it will normally liaise with the competition authorities in the respective countries in order to monitor the development. For this purpose, the FCO will request a waiver from the parties allowing it to exchange confidential information with foreign competition authorities.

5.4 At what stage in the process can the negotiation of remedies be commenced? Please describe any relevant procedural steps and deadlines.

The parties can propose remedies at any time during the main proceedings (phase 2), as there is no fixed timetable in this respect. In practice, remedies will normally be proposed towards the end of the phase 2 proceedings, after the FCO has submitted its statement of objections to the parties – this will trigger the extension of the statutory deadline by one month. In the statement of objections, the FCO indicates its intention to prohibit the merger and sets out the reasons for a prohibition decision. The parties then have the opportunity to comment. This is often the moment when remedies are proposed by the parties in order to avoid a prohibition decision. If the FCO decides to enter into remedy discussions, it will often ask the parties for an extension of the statutory review period. At this stage of the process, the parties are normally willing to grant such an extension, giving both sides the time to consider and negotiate the appropriate remedies.

5.5 If a divestment remedy is required, does the merger authority have a standard approach to the terms and conditions to be applied to the divestment?

Similar to the practice of the Commission, the process of clearance subject to commitments has been somewhat formalised in recent years. In 2008, the FCO developed and published standard texts for conditions, obligations and trustee mandates which are used as a basis in these cases. They are also available in English on the FCO's website at www.bundeskartellamt.de.

5.6 Can the parties complete the merger before the remedies have been complied with?

If the remedy is a suspensive condition (*aufschiebende Bedingung*), the merger must not be completed before the conditions are satisfied, since the clearance decision is valid only pending fulfilment of the conditions. Completing before clearance carries all the risks of invalidity and administrative fines (see question 3.3). The FCO will often adjust the wording of the clearance decision accordingly and allow completion of the notified merger with the exception of the parts to be divested.

If the remedy is a dissolving condition (*auflösende Bedingung*) or an obligation (*Auflage*), the merger may be completed as notified. The parties are then under the obligation to satisfy the conditions within a defined time period. Failure to comply with the dissolving condition will render the clearance decision invalid. Failure to comply with the obligation will allow the FCO to revoke its clearance decision.

5.7 How are any negotiated remedies enforced?

If the remedy is a suspensive condition and the parties complete the transaction without implementing the condition, they are in breach of the suspension obligation. Any legal act implementing the merger is thus invalid under German law.

In cases of dissolving conditions (*auflösende Bedingungen*), the clearance decision is invalid if the parties fail to satisfy the conditions imposed in the decision; in case of obligations (*Auflagen*), the clearance decision may be revoked. The FCO may then open unwinding procedures, possibly resulting in an order to dissolve the merger. The same applies if a clearance decision is based on incorrect information or fraudulent behaviour of the parties in obtaining the clearance decision.

In all the cases above, the FCO may impose fines of up to 10% of the undertakings' worldwide turnover and up to EUR 1 million for natural persons responsible for the breach.

5.8 Will a clearance decision cover ancillary restrictions?

Due to the principle of dual control, ancillary restrictions will not automatically be covered by the merger control clearance decision. If restrictive agreements are part of the transaction, such as non-compete obligations, the FCO will review them separately under the general cartel prohibition (§ 1 ARC/Art. 1 TFEU). In substance, the FCO will apply similar standards to ancillary restraints as the Commission, in accordance with the Commission notice on ancillary restraints (2005/C 56/03).

In complex cases of horizontal or vertical restraints, the FCO may initiate separate proceedings under § 1 ARC which are not subject to any time limits. In this case, the FCO may issue a clearance decision in the merger control proceedings and reserve the right to review and prohibit the restrictive aspects separately. The parties have to decide whether or not to complete the merger before a decision on § 1 ARC is rendered. As the review under § 1 ARC does not provide for a suspension obligation, it is not legally required for the parties to wait for a decision. However, if the restrictive arrangements are an essential part of the commercial deal which cannot be separated from the concentrative part, it may be prudent to hold off completion until all relevant aspects of the transaction have been approved by the FCO.

5.9 Can a decision on merger clearance be appealed?

A clearance decision rendered in the initial proceedings (phase 1) by way of an informal letter of non-objection is not subject to appeal. Only the amount of administrative fees can be appealed in this case (see question 3.10).

Formal clearance decisions rendered in the main proceedings (phase 2) can be appealed by intervening parties formally participating in the proceedings. The undertakings concerned may also appeal a clearance decision if it is made subject to conditions or obligations.

Prohibition decisions are, of course, also subject to appeal by all parties.

In the first instance, the Higher Regional Court (*Oberlandesgericht*) of Düsseldorf has exclusive jurisdiction to review German merger control decisions. A judgment of the Higher Regional Court of Düsseldorf is subject to appeal to the Federal Court of Justice (*Bundesgerichtshof*) on questions of law only.

5.10 What is the time limit for any appeal?

An appeal against a merger control decision of the FCO must be lodged with the FCO or the Higher Regional Court of Düsseldorf within one month from service of the decision. Appeals against a judgment of the Higher Regional Court of Düsseldorf must be lodged with the court within one month from service of the judgment.

5.11 Is there a time limit for enforcement of merger control legislation?

There is no time limit for the FCO's power to prohibit a merger or to initiate unwinding procedures and issue an order to dissolve a merger.

The right to impose fines on undertakings for a breach of the suspension obligation is subject to a statutory time limit of five years from the end of the violation. However, the FCO regards a breach of the suspension obligation as a permanent violation (*Dauerdelikt*) which is ongoing as long as the merged undertaking is active in the market. Hence, the five-year time limit begins only when the merged undertaking ceases to operate in the market. Accordingly, the risk of fines imposed for a breach of the suspension obligation can remain for much longer than five years after completion of the transaction.

6 Miscellaneous

6.1 To what extent does the merger authority in Germany liaise with those in other jurisdictions?

The FCO maintains working relationships with competition authorities around the world. It is a member of several international networks of competition authorities and other international organisations:

- the European Competition Network (ECN): The ECN is a discussion and cooperation forum of the European Commission and the national competition authorities from all EU Member States;
- the European Competition Authorities (ECA): The ECA, which exists in parallel with the ECN, is a discussion forum set up by the competition authorities within the European Economic Area, the European Commission and the EFTA supervisory authority;
- the International Competition Network (ICN): The ICN is a worldwide network of over 100 competition authorities offering an informal, project-based network for intensifying cooperation in issues concerning the implementation of competition law;
- the Organisation for Economic Co-operation and Development (OECD): The FCO is a member of the Competition Committee of the OECD and its two working groups on "Competition and Regulation" and "International Cooperation"; and
- the United Nations Conference on Trade and Development (UNCTAD): UNCTAD helps developing countries to integrate into the world trade system, addressing competition law and policy issues.

Within the ECN and the ECA, the FCO is in regular contact with other European competition authorities, exchanging information on merger control, cartel and dominance cases of international relevance. However, in merger control cases, the FCO must obtain prior approval from the parties before confidential information can be shared with other authorities.

6.2 Are there any proposals for reform of the merger control regime in Germany?

As the 8th amendment to the ARC has been introduced quite recently at the end of June 2013, there are currently no proposals for a reform of the merger control regime in Germany.

6.3 Please identify the date as at which your answers are up to date.

These answers are up to date as of September 2015.

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