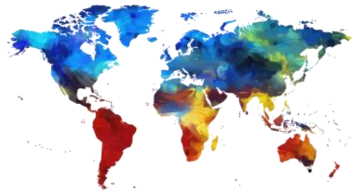
Comparative Guide
Merger Control - Germany



Merger Control Comparative Guide Germany

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1. Legal and enforcement framework

1.1 Which legislative and regulatory provisions govern merger control in your jurisdiction?

The provisions governing merger control in Germany are set out in the Act against Restraints of Competition (ARC), in particular Sections 35 to 43a. In addition, the Federal Cartel Office (FCO) has published several guidance papers and notices summarising its interpretation of certain provisions and best practices. Most of these documents are also available in English on the FCO website (although only the German language versions are authentic).

For more information about this answer please contact: Daniel Wiedmann from P+P Pollath + Partners

1.2 Do any special regimes apply in specific sectors (eg, national security, essential public services)?

Direct or indirect acquisitions by a foreign investor of, depending on the sector concerned, either 10% or 25% of the voting rights in a German company may be subject to the German foreign investment review regime set forth in the Foreign Trade Act and its accompanying ordinance. The German government has been increasingly active in this area recently. It may ultimately prohibit such acquisitions or impose obligations if this is necessary to safeguard public order or security. In this regard, an acquisition by a German company in which a foreigner holds 25% of the voting rights may be considered to constitute an indirect acquisition by a foreign investor.

A notification requirement applies to direct or indirect acquisitions of at least 10% of the voting rights if the German target is active in certain areas. Such transactions must be reported to the Federal Ministry of Economics and Energy (FMEE). For instance, this may apply to acquirers from outside the European Union or the European Free Trade Area (EFTA) if the target operates in one of the following areas:

- critical infrastructure, or the provision of software or cloud computing services in this area;
- telecommunications surveillance or telematics infrastructure; or
- radio, telemedia or print media with a wide-ranging impact.

Further, a notification requirement applies if the target manufactures or develops certain weapons, military equipment or technology used to process classified government information or components thereof, provided that the acquirer is foreign (including acquirers from EU or EFTA states).

The FMEE may ex officio review across sectors acquisitions of at least 25% of the voting rights in a German target by acquirers from outside the European Union or EFTA. There is no notification requirement for such acquisitions. However, in order to obtain legal certainty, an acquirer may request a certificate of non-objection from the FMEE.

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1.3 Which body is responsible for enforcing the merger control regime? What powers does it have?

The FCO, based in Bonn, is mainly responsible for enforcing the merger control regime. The FCO is an independent federal authority assigned to the FMEE. The FCO has approximately 330 employees. Decisions are taken by a total of 12 decision divisions, organised mainly by economic sector. Within the decision divisions, each case is decided by a collegiate body consisting of the respective division’s chairman and two associate members. All decisions must be majority decisions. The decision divisions decide autonomously and are not subject to instructions in their decision making.

The FCO has a wide range of powers. In particular, it may prohibit transactions or clear them subject to obligations or conditions. To safeguard its review powers, it may issue cease and desist orders or order the dissolution of a merger under certain circumstances. The FCO may impose substantial fines for failure to comply with merger control rules. It also has considerable information-gathering powers.

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2. Definitions and scope of application

2.1 What types of transactions are subject to the merger control regime?

The following types of transactions are subject to the German merger control regime, provided that the jurisdictional thresholds are met:

- acquisitions of all or of a substantial part of the assets of another undertaking;
- acquisitions of direct or indirect control by one or several undertakings of the whole or parts of one or more other undertakings (see question 2.2);
- acquisitions of shares in another undertaking resulting in a shareholding of at least 25% or 50% of the capital or voting rights; and
- any other combination of undertakings that enables one or several undertakings to exercise directly or indirectly a competitively significant influence on another undertaking (see question 2.3).

The acquisition of all or a substantial part of the assets of another undertaking includes asset deals. An acquisition concerns a substantial part of the assets if the assets represent:

- a market position which may be transferred to the acquirer as a result of the transaction; or
- a substantial proportion of all assets of the seller.

For acquisitions of 25% or 50% of the capital or voting rights in another company it is irrelevant whether they will confer control or any sort of influence over the target; in other words, this is a purely quantitative assessment. Shares already held by the acquirer will be considered, as will shares held by another undertaking for the account of the acquirer. The two thresholds apply independently of each other – that is, an acquirer which has already notified an acquisition of 25% (but less than 50%) may need to notify a subsequent acquisition of 50%.

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2.2 How is 'control' defined in the applicable laws and regulations?

The definition of 'control' essentially corresponds to the definition applied at the EU level (Article 3 of the EU Merger Regulation). Control can be acquired on the basis of rights, contracts or any other means which – either separately or in combination, and having regard to all factual and legal circumstances – confer the possibility of exercising decisive influence on an undertaking.

Control can be acquired not only on a de jure basis (eg, based on a majority of the voting rights in the target), but also on a de facto basis (eg, if it may be expected that the acquirer will achieve a majority at the shareholders' meetings of the target, considering the level of its shareholding and the evidence resulting from the presence of shareholders at the shareholders' meetings in previous years). Further, a situation conferring control also exists if the acquirer will be in a position to veto strategic decisions in the target (so-called 'negative control'), such as decisions on the appointment or dismissal of management, financial budget, business plan, investments and/or market-specific decisions. Joint control is deemed to exist if several shareholders will be in a position to independently veto such decisions.

German merger control also covers transactions that will lead to a change in the quality of control – in particular, a change from sole to joint control (or vice versa), or the entry of an additional jointly controlling shareholder.

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2.3 Is the acquisition of minority interests covered by the merger control regime, and if so, in what circumstances?

An acquisition of a minority interest is covered if at least a 25% interest, control or a competitively significant influence is being acquired.

An acquisition of a competitively significant influence typically covers acquisitions of a shareholding of less than 25% if additional factors are present, making the acquisition comparable to an acquisition of 25% or more. Relevant factors may include the possibility to appoint members of the (supervisory or management) board, veto rights, de facto blocking minorities or even information rights. A significant competitively influence is less than control. The acquirer must merely be in a position to influence, but not control, the decision-making process of the target. Such influence must be relevant from a competition perspective. In practice, this relates to situations where the acquirer is a (potential or actual) competitor, or operates on a market downstream or upstream to the market of the target.

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2.4 Are joint ventures covered by the merger control regime, and if so, in what circumstances?

If there are two or more shareholders that will each hold at least 25% of the shares in the target after the transaction, or jointly control the target after the transaction, a joint venture is deemed to exist under German law. As consequence, the turnover of each such shareholder will need to be considered when assessing whether the jurisdictional thresholds are met. For example, if Company A acquires 25% of the shares in Company D and Companies B and C will each retain a shareholding of at least 25%, the turnover of each of A, B, C and D will need to be considered.

German merger control law applies to full-function and non-full-function joint ventures. In other words, the requirement under the EU Merger Regulation that a joint venture be full function does not exist under German law.

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2.5 Are foreign-to-foreign transactions covered by the merger control regime, and if so, in what circumstances?

Foreign-to-foreign transactions that meet the jurisdictional thresholds are subject to German merger control if they are capable of having an 'appreciable effect' within Germany. The German courts and the Federal Cartel Office (FCO) have interpreted this requirement very broadly. According to the FCO, a transaction clearly qualifies as having an appreciable domestic effect if the turnover thresholds (see question 2.6) are met and the target had a turnover exceeding €5 million within Germany. If the target does not exceed this threshold and the two domestic turnover thresholds are triggered only by its parents, the question of whether sufficient domestic effects can be expected requires a case-by-case assessment and will depend on the circumstances of each individual case.

The FCO has published a guidance paper entitled "Domestic Effects in Merger Control" that explains its analysis for such cases. In particular, it will be relevant whether the target operates on a geographical market that includes Germany (eg, an EU-wide market) and if so, its position on such market, as well as its parent's activities.

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2.6 What are the jurisdictional thresholds that trigger the obligation to notify? How are these thresholds calculated?

Following an amendment to the Act against Restraints of Competition (ARC) in 2017, there are now two alternative sets of thresholds. Besides the traditional turnover-based threshold, there is also an alternative threshold that takes into account the transaction value. German merger control applies if one of these sets of thresholds is triggered.

The turnover thresholds (referring to the last full business year) are triggered if:

- the combined worldwide turnover of all undertakings concerned exceeded €500 million;
- one undertaking concerned had a turnover exceeding €25 million within Germany; and
- at least one further undertaking concerned had a turnover in Germany exceeding €5 million.

The alternative thresholds (taking into account transaction value) are triggered if:

- the combined worldwide turnover of all undertakings concerned exceeds €500 million;
- one undertaking concerned had a turnover exceeding €25 million within Germany, but neither the target nor any other undertaking concerned had turnover of more than €5 within Germany;
- the transaction value exceeds €400 million; and
- the target has significant activities in Germany.

The 'undertakings concerned' are always the acquirer and the target. However, if another party either (solely or jointly) controls or holds an interest of at least 25% in the target, its turnover must also be taken into account. The turnover figures of each undertaking concerned must include the net turnover generated by its group (excluding intra-group turnover) in the full financial year preceding the transaction. This includes 100% of the turnover of jointly controlled companies. If necessary, adjustments should be made in order to include the turnover of acquired companies or deduct the turnover of divested companies. Geographically, turnover should be allocated to Germany if products are sold or services are provided to customers in Germany. An exception to this rule is banking or financial income, which should be allocated to Germany if it is received by the branch or division of a credit or financial institution established in Germany. There are specific rules for the calculation of the turnover of certain companies, including media companies, insurance companies and credit and financial institutions. In particular, eight times the amount of the turnover achieved by certain media companies (active in the area of newspapers, magazines, radio and television) must be taken into account.

If two or more transactions are effected between identical acquirers and sellers (including their respective affiliates) within a period of two years, they shall be treated as a single transaction if, as a result, the above thresholds are met for the first time. Further, several transactions may be regarded as a single transaction if they are interrelated.

'Transaction value' includes (but is not limited to) cash, securities, company shares not traded as securities, other assets (eg, real estate, tangible assets, current assets), intangible assets (eg, licences, usage rights, rights to a company name and trademark rights), liabilities assumed and consideration for non-competition. In addition, parties must take into account future and variable purchase price components (eg, earn-outs). 'Significant activities in Germany' are activities that do not yet account for significant turnover, but indicate a significant competitive potential. The FCO has published a guidance paper, entitled "Guidance on Transaction Value Thresholds for Mandatory Pre-merger Notification", that provides further details on both concepts.

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2.7 Are any types of transactions exempt from the merger control regime?

The ARC provides for a de minimis exemption if the turnover of one of the undertakings concerned (including its affiliates) did not exceed €10 million worldwide in the financial year preceding the transaction. In the case of the target, the turnover of the seller must be considered, provided that the seller controlled the target prior to the transaction. However, this exemption does not apply if the alternative thresholds (see question 2.6) are triggered.

If credit institutions, financial institutions or insurance undertakings acquire shares in another undertaking for the purpose of resale, this shall not be deemed to constitute a notifiable transaction, as long as the acquirer does not exercise the voting rights attached to the shares and resale occurs within one year. Upon application, this timeframe may be extended by the FCO.

Finally, German merger control law does not apply if the European Commission has exclusive jurisdiction under the EU Merger Regulation.

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3. Notification

3.1 Is notification voluntary or mandatory? If mandatory, are there any exceptions where notification is not required?

Notification is mandatory for relevant transactions (see question 2.1), provided that the jurisdictional thresholds are triggered (see question 2.6). In such cases, the transaction must not be consummated before the Federal Cartel Office (FCO) has granted clearance. Exceptions apply if a transaction has no appreciable effects in Germany (see question 2.5) or is exempt from the German merger control regime (see question 2.7).

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3.2 Is there an opportunity or requirement to discuss a planned transaction with the authority, informally and in confidence, in advance of formal notification?

The FCO is generally open to discussing jurisdictional and substantive issues on an informal and confidential basis in advance of formal notification. However, there is no standard procedure for such discussions. Typically, such discussions are entered into only if they involve more complex questions.

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3.3 Who is responsible for filing the notification?

In principle, all involved parties are responsible for filing the notification. In practice, it is often the acquirer that files the notification in fulfilment of the notification obligations of all other undertakings concerned.

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3.4 Are there any filing fees, and if so, what are they?

There is a filing fee of up to €50,000, which may increase to €100,000 in exceptional cases. In practice, the filing fee usually ranges between €3,000 and €15,000. The actual amount depends on the FCO’s administrative efforts (in terms of personnel and material) and the economic significance of the transaction.

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3.5 What information must be provided in the notification? What supporting documents must be provided?

A notification must include only a very limited amount of information, including:

- a description of the transaction;
- a description of the parties and their turnover (worldwide, in the EU and in Germany);
- their market shares, including the basis for their calculation or estimate, if the combined shares of all undertakings concerned amount to at least 20% within Germany; and
- for foreign parties, the details of a person authorised to accept service in Germany.

If a filing is required because the alternative thresholds are triggered, information specific to these thresholds – for example, on the calculation of the transaction value – must be submitted. In practice, parties also (voluntarily) submit information about the relevant markets with a view to accelerating proceedings.

No supporting documentation must be provided. However, particularly in complex cases, the FCO sometimes requests documents such as the transaction agreement or internal presentations.

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3.6 Is there a deadline for filing the notification?

There is no deadline for filing. However, notifiable transactions must not be consummated prior to clearance.

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3.7 Can a transaction be notified prior to signing a definitive agreement?

Yes, it is possible to notify a transaction prior to signing a definitive agreement. The notifying party may be asked to substantiate that it has a good-faith intention to enter into a definitive agreement.

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3.8 Are the parties required to delay closing of the transaction until clearance is granted?

A notifiable transaction must not be consummated before clearance has been granted. Public takeovers may be consummated prior to clearance, provided that the transaction will be notified to the FCO without undue delay and the acquirer does not exercise the voting rights attached to the securities in question, or does so only to maintain the full value of those investments and on the basis of a derogation granted by the FCO. Parties may also request an exemption from the standstill obligation, although this is rarely granted by the FCO.

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3.9 Will the notification be publicly announced by the authority? If so, how will commercially sensitive information be protected?

The FCO will publish a short announcement that a notification has been submitted on its website. This announcement includes a file number, the names of the parties, the date of the notification and the economic activity concerned.

The notification itself will not be published by the FCO. Third (eg, intervening) parties may request access to the notification. If so, as the FCO is under a legal obligation to protect business secrets of the parties, it will not disclose information identified as business secrets by the undertakings concerned (which typically includes non-public information about turnover, market shares, transaction structures and so on).

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4. Review process

4.1 What is the review process and what is the timetable for that process?

Upon submission of a complete notification, the Federal Cartel Office (FCO) has one month (Phase 1) to decide whether to clear the transaction or to initiate an in-depth review (Phase 2). The vast majority of cases are cleared during Phase 1. In most cases the FCO clears the transaction before the end of the one-month period. If the FCO neither clears the transaction nor initiates Phase 2 within the one-month review period, the transaction is deemed to have been cleared by operation of law with the lapse of the one-month review period.

If the FCO intends to initiate Phase 2, it must inform the parties accordingly within the Phase 1 period. The FCO will initiate Phase 2 if it needs further time for its assessment. The initiation of Phase 2 extends the review period to four months in total (including Phase 1 and Phase 2). It can be initiated at any time during Phase 1. During Phase 2, the FCO can either clear or prohibit the transaction. If it does not take a decision, the transaction is deemed to be cleared with the lapse of the four-month review period.

The review period can be extended on agreement with the notifying party. It will be extended by one month if, for the first time, a notifying party offers a remedy (ie, commitments to remedy competition concerns) to the FCO.

Before issuing a prohibition decision, the FCO will send a statement of objections to the parties summarising its concerns and affording them the possibility to comment.

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4.2 Are there any formal or informal ways of accelerating the timetable for review? Can the authority suspend the timetable for review?

There are no formal ways to accelerate the timetable for review. However, the FCO, within its sole discretion, often clears non-complex cases quickly, particularly if the parties can demonstrate a need for speedy review. The parties can accelerate the proceedings by providing additional information in the notification on relevant markets, competitive conditions and so on. In complex cases, informal pre-notification discussions with the FCO can be helpful – for instance, in order to clarify what information should be covered by the notification.

The four-month time limit can be suspended if a party has failed, for reasons for which it is responsible, to comply with a prior request for information in full or in a timely manner. The suspension ends as soon as the party has submitted all information requested to the FCO. The Phase 2 review period will be extended by one month if the notifying party offers remedies for the first time. Finally, the time limits do not apply if:

the FCO has refrained from initiating Phase 2 or from prohibiting the transaction because of incorrect particulars or because information has not been provided in time; or

a person authorised to accept service in Germany is no longer appointed as such.

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4.3 Is there a simplified review process? If so, in what circumstances will it apply?

There is no simplified review process. However, the amount of information required to submit a complete notification in Germany (see question 3.5) is quite modest as compared to other jurisdictions.

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4.4 To what extent will the authority cooperate with its counterparts in other jurisdictions during the review process?

The FCO exchanges information within the European Competition Network and with certain other authorities. However, confidential information of the parties may be exchanged only if the parties have granted a waiver of confidentiality. Cooperation will typically take place if transactions raise similar substantive or jurisdictional issues in several jurisdictions. For instance, authorities may discuss conceptual frameworks, theories of harm or appropriate remedies.

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4.5 What information-gathering powers does the authority have during the review process?

The FCO has the right to request all documents and information necessary for its competitive assessment of a transaction. Information can be requested informally or by way of a formal information request. Requests can be made not only to the undertakings concerned, but also to third parties (eg, customers, competitors and suppliers). If a formal information request is not complied with, fines of up to €100,000 can be imposed by the FCO. As explained in question 4.2, time limits may be suspended or may not apply if information is provided too late or in an incorrect manner.

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4.6 Is there an opportunity for third parties to participate in the review process?

Third parties may formally participate in the proceedings as intervening parties upon application, provided that their commercial interests are materially affected by the transaction. In practice, this mainly applies to competitors, customers and suppliers. Intervening parties have the right to be heard, the right to access the non-confidential part of the file and the right to appeal the FCO’s decision (if adopted in Phase 2).

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4.7 In cross-border transactions, is a local carve-out possible to avoid delaying closing while the review is ongoing?

A local carve-out may be possible in certain cases. Such a carve-out must ensure that closing has no effect on competition in Germany. It is highly advisable to assess the possibilities of a carve-out very carefully, as the FCO has demonstrated in the past that it will critically review such arrangements and may impose significant fines if considers that, despite the carve-out, competition in Germany is affected.

For instance, in 2008 the FCO imposed a fine of €4.5 million on Mars for acquiring shares in Nutro while clearance in Germany was pending. Although Mars had attempted to carve out Nutro's German businesses by temporarily assigning the distribution rights for Germany to a separate entity held by the seller, the FCO concluded that Mars, by acquiring Nutro's trademarks and production facilities, had already acquired the assets relevant to compete and that these assets were also essential to Nutro's market position in Germany.

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4.8 What substantive test will the authority apply in reviewing the transaction? Does this test vary depending on sector?

The FCO will prohibit a transaction if it would significantly impede effective competition – in particular, if it would create or strengthen a dominant market position.

The Act against Restraints of Competition provides for rebuttable presumptions of market dominance which are often the starting point of the FCO's analysis. An undertaking is considered to be dominant if it has a market share of at least 40%. Further, three undertakings or fewer are considered to be collectively dominant with a combined market share of at least 50% and five undertakings or fewer with a combined share of two-thirds. Besides market shares, a number of additional factors will be considered in assessing an undertaking's market position. Ultimately, the market-share based presumption of dominance is relevant only for non liquet situations.

In the absence of market dominance, the FCO may also consider whether a transaction may significantly impede effective competition for different reasons, such as due to unilateral or coordinated effects.

Even if the requirements for a prohibition are met, the FCO cannot prohibit a transaction if an exemption is available. For instance, a transaction cannot be prohibited if the parties can prove that the concentration will also lead to improvements in competitive conditions which will outweigh the impediment to competition (the so-called 'balancing clause'). Further, a transaction cannot be prohibited if it concerns a de minimis market – that is, a market on which goods or commercial services have been offered for at least five years and which had a sales volume of less than €15 million in the last calendar year in Germany(the so-called 'de minimis clause') – unless the market is a market on which services are provided free of charge or the transaction has been notified under the alternative thresholds. Some further exceptions to this rule may allow the FCO to bundle closely related geographical and product markets under certain circumstances. Finally, there is a specific failing firm defence for the press sector.

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4.9 Does a different substantive test apply to joint ventures?

Joint ventures are also subject to the substantive test set out in question 4.8. In addition, the FCO may assess cooperative aspects of joint ventures in separate proceedings under the rules relating to anti-competitive agreements. This review may be performed either in parallel or after the merger control proceedings. In particular, the FCO may initiate such separate proceedings if there is a concern that the joint venture will lead to coordination between the parent companies – in particular, if the parent companies continue to be active on the same market as the joint venture or a market upstream or downstream thereto.

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4.10 What theories of harm will the authority consider when reviewing the transaction? Will the authority consider any non-competition related issues (eg, labour or social issues)?

The FCO will assess all relevant aspects of competition, including unilateral and, less often, coordinated effects in horizontal, vertical or conglomerate mergers.

As regards horizontal mergers, the FCO will typically consider whether the merger will eliminate an important competitive constraint, allowing the merged entity to unilaterally exercise market power – for instance, by profitably raising prices. This analysis is typically based on factors such as:

- market shares and concentration levels;
- closeness of competition;
- capacities and capacity restraints;
- customer preferences and switching costs;
- the importance of intellectual property and know-how; and
- countervailing buying power.

In vertical mergers, a typical focus is on possible customer or input foreclosure issues. In conglomerate mergers, the FCO may look at tying or bundling issues or portfolio effects.

However, the FCO may also consider other factors, such as effects on buying markets, innovation competition and access to data.

The FCO will not consider any non-competition related issues. However, a prohibition decision may be overruled by the Federal Ministry of Economics and Energy (FMEE) if the anti-competitive effects of the merger are outweighed by the benefits to the economy as a whole or if the merger is justified by an overriding public interest. The FMEE enjoys a significant degree of discretion in this respect. In practice, the relevance of such ministerial permission is very limited. So far, there have been 22 applications for ministerial approvals, nine of which were successful.

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5. Remedies

5.1 Can the parties negotiate remedies to address any competition concerns identified? If so, what types of remedies may be accepted?

The Federal Cartel Office (FCO) generally prefers divestiture commitments to behavioural remedies. In particular, behavioural remedies must not result in a need for long-term monitoring by the FCO. Where the sale of a business or part of a business is not a feasible option, behavioural remedies may also, in appropriate cases, be accepted as a remedy. For instance, it may be sufficient to enable third companies to enter the market – for example, by providing access to important infrastructure, granting licences to technologies or disclosing interface information, granting customers special rights to terminate long-term contracts or opening up the award of long-term contracts to a public tender process. The closure of capacities and the obligation to implement so-called 'Chinese walls' to protect competitors' business secrets are typically not considered effective behavioural remedies for enabling market access.

Remedies must be proposed by the parties. While the remedies must be sufficient to address competition concerns identified by the FCO, they can be requested by the FCO only if and to the extent that the transaction would otherwise have been prohibited. If accepted, they can take the form of conditions (subsequent or precedent) to clearance or obligations, which are independent legal acts. The FCO has a preference for conditions precedent, which must be fulfilled for the clearance decision to become effective.

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5.2 What are the procedural steps for negotiating and submitting remedies? Can remedies be proposed at any time throughout the review process?

Remedies can generally be submitted at any stage of the proceedings, including Phase 1. However, the negotiations between the FCO and the merging parties on the scope and content of remedies can generally be concluded only once the FCO's investigations of the likely competitive effects of the transaction are complete. This stage of the FCO's investigations is usually marked by the FCO's statement of objections. In some cases it may also be possible to finalise the negotiations once preliminary competition concerns have been orally communicated to the parties. In Germany, a merger can be cleared subject to remedies only once Phase 2 is complete. Clearance with commitments in Phase 1 is not possible under German competition law. Remedies should be submitted in due time before the end of the Phase 2 proceedings, so as to give the FCO sufficient time to assess the proposed commitments and carry out a market test.

To facilitate the drafting of remedy proposals, the FCO has formulated model texts for divestment remedies which are available on its website.

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

The FCO has imposed remedies in a number of foreign-to-foreign transactions. A typical remedy imposed in such a transaction is a condition or obligation to divest the German operations of one of the undertakings concerned to a third party. However, the FCO may also require the divestiture of operations located outside Germany. According to case law, public international law is not in conflict with a prohibition of a foreign-to-foreign merger if the merger produces effects in the German territory. If a merger is subject to review in several jurisdictions, the FCO may discuss appropriate remedies with other competition authorities, provided that the parties have granted a waiver of confidentiality.

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6. Appeal

6.1 Can the parties appeal the authority's decision? If so, which decisions of the authority can be appealed (eg, all decisions or just the final decision) and what sort of appeal will the reviewing court or tribunal conduct (eg, will it be limited to errors of law or will it conduct a full review of all facts and evidence)?

A clearance decision rendered in Phase 1 is not subject to appeal. Prohibitions and clearance decisions subject to conditions or obligations issued by the Federal Cartel Office (FCO) following a Phase 2 investigation are subject to full judicial review by the Dusseldorf Higher Regional Court. Judgments of that court can be appealed (on grounds of law) to the Federal Supreme Court.

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6.2 Can third parties appeal the authority's decision, and if so, in what circumstances?

Judicial review of Phase 2 clearance decisions is also available to third parties admitted as intervening parties during the review proceeding, to the extent that they can show that their competitive interests are directly and individually affected by the decision. Such parties may also request the Dusseldorf Higher Regional Court to order interim measures preventing the parties from consummating the transaction. Such measures will be ordered if the appellants can show that their rights are infringed by the clearance decision and the court has serious doubts as to the legality of the appealed clearance decision.

Ministerial authorisation decisions overruling a prohibition order of the FCO are also subject to full judicial review by the Dusseldorf Higher Regional Court.

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7. Penalties and sanctions

7.1 If notification is mandatory, what sanctions may be imposed for failure to notify? In practice, does the relevant authority frequently impose sanctions for failure to notify?

Transactions that violate the standstill obligation are deemed invalid under German law. Further, the Federal Cartel Office (FCO) may impose significant fines on the undertakings concerned and, in certain cases, also on the seller. Fines of up to 10% of an undertaking's total worldwide group turnover can be imposed on undertakings and fines of up to €1 million on individuals. Whether the FCO imposes a fine is subject to its discretion. Relevant factors include whether the parties acted deliberately or negligently, whether they are repeat offenders and whether the transaction has significant effects in Germany. If the FCO decides to impose a fine, the amount of the fine will be set on the basis of the FCO's guidelines on calculating fines.

The partial implementation of a transaction before clearance may also violate this prohibition. In November 2017, a decision of the Federal Supreme Court in the Edeka/Tengelmann case confirmed that measures or conduct which does not meet the requirements of a notifiable type of transaction but occurs in connection with such a transaction, and which is suitable to at least partially realise the effects of such a transaction, in particular on the market, may also violate the standstill obligation. The decision concerned a joint purchasing cooperation within the context of a framework agreement between the merging parties.

The FCO may issue an administrative order to prevent parties from violating the standstill obligation. If a transaction has been consummated without clearance, the FCO may initiate a divestiture proceeding and order the dissolution of the transaction, provided that the preconditions for a prohibition are met.

The FCO regularly imposes fines for closing notifiable transactions prior to clearance. The highest fine imposed so far was €4.5 million.

For more information about this answer please contact: Daniel Wiedmann from P+P Pollath + Partners

7.2 If there is a suspensory obligation, what sanctions may be imposed if the transaction closes while the review is ongoing?

The sanctions for closing a transaction while review is ongoing are the same as those for failure to notify (see question 7.1). The standstill obligation applies to both kinds of situations. However, the risk of a fine may be higher if the transaction closes while review is ongoing. Since the parties in such cases know that there is a filing obligation, and consequently also a standstill obligation, it is more likely that the FCO will consider that they violated the prohibition deliberately.

For more information about this answer please contact: Daniel Wiedmann from P+P Pollath + Partners

7.3 How is compliance with conditions of approval and sanctions monitored? What sanctions may be imposed for failure to comply?

The FCO monitors compliance with remedies. The parties have reporting obligations with regard to the FCO. In addition, monitoring or divestiture trustees can play an important role. Such trustees are appointed by the parties, subject to prior approval of the FCO. They report to the FCO and are bound by the FCO's instructions. If remedies are not complied with, the clearance decision may not be effective or may be revoked.

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8. Trends and predictions

8.1 How would you describe the current merger control landscape and prevailing trends in your jurisdiction? Are any new developments anticipated in the next 12 months, including any proposed legislative reforms?

In 2018 approximately 1,300 transactions were notified to the FCO, which initiated a Phase 2 review in approximately only 1% of these cases. One transaction was cleared subject to remedies and three notifications were withdrawn. In the first half of 2019 the FCO has prohibited two transactions and four notifications have been withdrawn.

The enforcement of competition law in the digital economy has been, and will remain, a clear priority of FCO enforcement. The last reform of the Act against Restraints on Competition (ARC) provided the FCO with additional powers in this area. In particular, the alternative thresholds seek to capture so-called 'killer acquisitions' – that is, acquisitions of innovative targets with no or only little turnover, with the aim of pre-empting future competition. However, so far, there have been no cases in this regard. In its analysis of mergers involving internet platforms, the FCO will consider factors such as:

- (direct and indirect) network effects;
- the relevance of multi-homing (ie, the use of several platforms in parallel); and
- the relevance of access to data.

As regards substantive assessment, the FCO increasingly also assesses whether transactions may substantially lessen competition even in the absence of a dominance position.

According to the German government, a draft bill for the next reform of the ARC may be presented later this year. Currently, it is expected that the second domestic turnover threshold of €5 million will be increased to €10 million. Other changes are being discussed, such as empowering the FCO to review successive acquisitions in particular sectors that, on an individual basis, would remain below the thresholds.

For more information about this answer please contact: Daniel Wiedmann from P+P Pollath + Partners

9. Tips and traps

9.1 What are your top tips for smooth merger clearance and what potential sticking points would you highlight?

The parties to a transaction should ensure that information provided to the FCO is complete and accurate, in particular as regards sales, market share and affiliates. While the FCO tries to handle notified transactions efficiently and in a non-bureaucratic manner, it expects the parties to provide complete and accurate information, and may have little tolerance – and even impose fines – if the parties fail to do so.

Given the FCO's focus on the digital economy, transactions in this area may be more likely to be scrutinised. Notifications of such transactions should be prepared thoroughly, taking into account relevant factors such as network effects, customer data and so on. Generally, for cases that may raise substantive issues, the parties' transaction timetable should allow for sufficient flexibility for pre-notification, an extended review and a possible need for remedies. In particular, pre-filing contact with the FCO can be very helpful to identify and resolve potential competition issues at an early stage, and may help the parties to avoid a Phase 2 investigation. Finally, parties should be careful when drafting internal documents discussing the transaction, in particular for the purposes of presenting the transaction to the board of directors or shareholders, as such documents may need to be disclosed to the FCO.

For more information about this answer please contact: Daniel Wiedmann from P+P Pollath + Partners