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The International Comparative Legal Guide to:

Merger Control 2018

14th Edition

A practical cross-border insight into merger control issues

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Country Question and Answer Chapters:

EDITORIAL

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

This guide provides the international practitioner and in-house counsel 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 an 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 44 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 editor, Nigel Parr of Ashurst LLP, for his 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.com.

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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 for Economic Affairs and Energy, but operates independently in its decision-making and is not subject to political orders. The FCO has 13 decision boards, nine of which are responsible for merger control enforcement covering all industries and sectors. 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 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 §§ 35–43a 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 9th amendment of the ARC, which took effect on 9 June 2017, some important changes to the merger control regime were introduced.

1.3 Is there any other relevant legislation for foreign mergers?

Under the recently amended Foreign Trade Ordinance (*Aussenwirtschaftsverordnung*), the Ministry for Economic Affairs and Energy may prohibit the acquisition of shareholdings exceeding 25% in a German company if the acquisition endangers the public order or security of the Federal Republic of Germany. If the domestic company's activities relate to military goods or the processing of classified state material, a notification to the Ministry is mandatory for all foreigners. If the domestic company's activities relate to telecommunications surveillance, e-health, large cloud-computing services, critical infrastructure or software for critical infrastructure, a notification to the Ministry is also mandatory but only for investors based outside the EU or EFTA. If the domestic company pursues other activities, a notification to the Ministry is not mandatory. However, the Ministry is still entitled to review such an acquisition if the investor is based outside the EU or EFTA. In such a case, the parties may proactively apply for a certificate of non-objection from the Ministry to gain legal certainty. The Ministry then has two months to decide whether it initiates a formal review of the acquisition. The FCO may forward information received in the merger control proceedings to the Ministry.

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

The merger control rules in the ARC generally apply across all economic sectors. In addition, some sectors have 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 the plurality of opinions.

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, what constitutes a "merger" and how is the concept of "control" defined?

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 is largely in line with the definition of control in Art. 3 of the European Community Merger Regulation ("ECMR"). It includes 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, typically requires a horizontal or vertical relationship between the purchaser and the target. 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.

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, it is not required for the joint venture to be a full-function autonomous economic entity. Accordingly, every transaction resulting in at least two independent 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.

Within the merger control procedure, the FCO generally only reviews a joint venture's concentrative aspects. In contrast, any possible co-operative aspects, particularly with respect to the parent undertakings, are reviewed in the context of the general cartel prohibition. 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 co-operative aspects and prohibit the transaction under the general cartel prohibition (§ 1 of the ARC (equivalent to Art. 101 TFEU)). As the review under the general cartel prohibition 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:

(1) the combined worldwide turnover of all participating undertakings exceeded EUR 500 million (approx. US$ 585 million in 2017 at the exchange rate of US$ 1.17 for EUR 1);

(2) one participating undertaking had a turnover exceeding EUR 25 million (approx. US$ 29 million) within Germany;

(3) at least one further participating undertaking had a turnover exceeding EUR 5 million (approx. US$ 5.8 million) within Germany; and

(4) unless the further participating undertaking is not a controlled undertaking and had a worldwide turnover of less than EUR 10 million (approx. US$ 11.7 million); this also applies if the seller (previously controlling the target) and the target are jointly below the EUR 10 million threshold (*de minimis* clause).

German merger control also applies if, in the last financial year prior to completion of the transaction:

(1) the combined worldwide turnover of all participating undertakings exceeded EUR 500 million;

(2) one participating undertaking had a turnover exceeding EUR 25 million within Germany;

(3) the transaction value amounts to more than EUR 400 million; and

(4) the target undertaking has significant activities in Germany.

"Participating undertakings" are generally the purchaser and the target. The seller's turnover is not considered in the calculation, unless the seller retains 25% or more of the target's shares or for the purposes of the *de minimis* clause.

"Turnover" is calculated by reference to the net consolidated group sales in the last completed financial year. VAT and intra-group sales are excluded. In asset acquisitions, the turnover of the target is calculated with reference to the sales generated by the assets to be acquired.

"Transaction value" includes the purchase price and any liabilities assumed by the purchaser. While not reflected in the wording, this new jurisdictional threshold shall refer to the acquisition of

companies active in the digital economy like in the case *Facebook/WhatsApp*. Accordingly, "significant activities in Germany" shall refer to activities in Germany that do not yet account for significant turnovers but have a high competitive potential, as indicated by, for example, the number of users in Germany. In contrast, the acquisition, for example, of a typical industrial company with a German turnover of EUR 4 million is not reportable. In case of doubt, it is highly recommended to seek informal pre-notification guidance from the FCO.

Special rules apply to:

- traded goods: the turnover derived from the mere trading of goods is multiplied by 0.75;
- newspapers, magazines, radio and television: the turnover derived from their production and distribution is multiplied by eight;
- insurance companies: the premium income represents the relevant turnover;
- financial institutions: the turnover is calculated on the basis of the financial income; and
- members of a saving or cooperative banks association that primarily provide services for members of that association: Mergers between them are exempted from German merger control.

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

Yes, transactions meeting the jurisdictional thresholds (see question 2.4) are subject to review, regardless of substantive overlaps.

2.6 In what circumstances is it likely that transactions between parties outside your jurisdiction ("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 thresholds are satisfied.

However, in cases involving more than two parties, 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 thresholds. This may be the case for a foreign joint venture when only the parent companies meet the domestic turnover thresholds, while the joint-venture itself does not and will not have significant activities in Germany, and all participating undertakings do not have a significant position on the market concerned and its related markets. The FCO has published a "Guidance document on domestic effects in merger control", which is available on the FCO's website. In case of doubt, it is advisable to seek informal guidance from the FCO.

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 European Commission under the ECMR overrides German merger control rules if the turnover thresholds in Arts. 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.

In this context, it should be noted that there may be cases of minority acquisitions which meet the ECMR turnover thresholds but which do not constitute the acquisition of control, and are therefore not subject to EU merger control. These cases may still fall within the jurisdiction of the FCO if they constitute a concentration (see question 2.1), and if the German jurisdictional 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, German merger control law 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 jurisdictional thresholds being exceeded for the first time. This rule aims to eliminate attempts to split transactions into several pieces 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 the different stages for the parties 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 German merger control law 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.

German merger control law provides 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 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. 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 and imposed fines of more than EUR 4 million in individual cases.
- 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 (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 retroactively.

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 decided to complete the share transfer in the US, although merger control proceedings were still pending in Germany. In order to carve out the completion in Germany, the German distribution rights for Nutro 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 fine for gun-jumping of EUR 4.5 million.

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.) 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 (see question 3.13 below). Hence, confidentiality of the transaction cannot be maintained once the formal notification has been filed. In practice, therefore, parties are often reluctant to file a formal notification before definitive agreements have been signed. Also, administrative fees will normally be imposed when a formal notification has been filed (see question 3.11 below), even if the transaction is abandoned and the notification withdrawn before a decision by the FCO.

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?

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 proposed remedies to the FCO. Under the "stop-the-clock" rule, the review period is suspended if the parties fail to supply information formally requested by the FCO in a timely manner.

More than 95% of the 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 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.

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 worldwide group turnover of the undertakings concerned, and up to EUR 1 million for natural persons responsible for the offence. The FCO has fined several cases of gun-jumping up to EUR 4.5 million (see question 3.4 above). 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).

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

There is no prescribed format for the notification of a merger in Germany. Most merger notifications are made in the form of a letter containing the information required by law. 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;
- for acquisitions which are only reportable due to the transaction value, information on the transaction value, on the basis for its calculation, and on the type and scale of the business activities in Germany; and
- for parties based outside of Germany, contact details of a person authorised to accept service in 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 handler is made familiar with the case and has seen a draft notification before the formal notification is submitted, it will often help to exhilarate the process. Therefore, in complex cases, it may be useful 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?

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 usually 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.

3.11 Are there any fees in relation to merger control?

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.

3.12 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), public tender offers may be implemented before merger clearance, provided that the merger notification is made without undue delay and that 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 formally request the target undertaking to provide 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.

3.13 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. In this context, it is important to note that the market share threshold for the statutory presumption of single dominance is 40%.

The following exceptions apply:

- the undertakings concerned prove that the merger leads to improvements of conditions of competition which outweigh the impediments to competition; 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; or
- the conditions for a prohibition exclusively relate to a so-called *de minimis* market. This is a market (i) whose total market volume amounted to less than EUR 15 million (approx. US$ 17.5 million) in the last calendar year, (ii) in which services are not rendered free-of-charge, and (iii) which has been in existence for more than five years. The market value is to be assessed on the basis of the German market, even if the actual geographic market is wider. 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. This exception does not apply if the transaction is only reportable due to its transaction value (see question 2.4 above).

4.2 To what extent are efficiency considerations taken into account?

Efficiencies may be taken into account as part of the SIEC test and 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 on Substantive Merger Control, 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 of 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, a prohibition decision by the FCO may be overruled by the Federal Minister for Economic Affairs and Energy 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 Minister has discretion with regard to this analysis. The practical relevance of the ministerial permission is very limited. Since its introduction in 1973, just over 22 applications for ministerial permissions have been filed, and only nine 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 that 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 comment 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 to obtain first-hand information and opinions from unrelated parties. Usually, the response deadlines to such questionnaires are relatively tight. However, for formal requests, compliance is legally required and the FCO has the power to impose fines in cases of non-compliance.

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

In the course of merger control proceedings, the FCO has the right to request 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 four-month review period for the main proceedings ("stop-the-clock") if the parties fail to supply the requested information timely. 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 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 shall decide within four months from the application; this period may be extended to up to eight months.

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

The FCO may clear a transaction subject to suspensive or dissolving conditions and obligations. According to the case law of the Federal Court of Justice, the FCO has no discretion whether or not to clear a transaction if a remedy proposed by the parties is suitable to address and remove the competition concerns.

- Where structural measures, such as the divestment of a business, are imposed as suspensive conditions, the FCO's clearance decision is invalid pending compliance with the conditions.
- If the FCO imposes dissolving conditions or obligations, 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 to oversee the management and ensure the preservation of the competitive potential of the divested business.

Behavioural remedies are only permitted by law if they do not require continued monitoring of the companies involved. In practice, the FCO clearly prefers structural remedies (in particular, divestments) implemented by 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, on going 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 are 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 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 stage of the procedure, 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 to avoid a prohibition decision. If the FCO decides to discuss remedies, 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?

The FCO has published standard texts for conditions, obligations and trustee mandates. They are also available in English on the FCO's website. The parties may deviate from these standard texts but have to justify any deviations.

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

If the remedy is a suspensive condition, 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 will allow completion of the notified merger with the exception of the parts to be divested.

If the remedy is a dissolving condition or an obligation, 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, the clearance decision is invalid if the parties fail to satisfy the conditions imposed in the decision; in the case of obligations, 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 of the cases above, the FCO may impose fines of up to 10% of the undertakings' total worldwide group turnover and up to EUR 1 million for natural persons responsible for the breach.

5.8 Will a clearance decision cover ancillary restrictions?

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. In substance, the FCO will apply similar standards to ancillary restraints as the European Commission, in accordance with the Commission notice on ancillary restraints.

In complex cases of horizontal or vertical restraints, the FCO may initiate separate proceedings under the general cartel prohibition which are not subject to any time limits. In this case, the FCO may clear the merger but reserve the right to review and prohibit the restrictive aspects separately. The parties then have to decide whether or not to complete the merger before a decision under the general cartel prohibition is rendered. If the restrictive arrangements are an essential part of the commercial deal, 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. Ministerial authorisations, however, may only be appealed by a third party claiming direct infringement of its rights.

In the first instance, the Higher Regional Court 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 order the dissolution of 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 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 your jurisdiction liaise with those in other jurisdictions?

The FCO maintains working relationships with competition authorities around the world. It is a member of the ECN, the ECA, the ICN, the UNCTAD and the OECD's Competition Committee.

Within the ECN and the ECA, the FCO is in regular contact with other European competition authorities, exchanging information on 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 your jurisdiction?

Given that the 9th amendment of the ARC became effective only in June 2017, there are currently no plans for further reform. However, the FCO is currently preparing guidelines for the interpretation of the new jurisdictional threshold based on the transaction value.

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

These answers are up to date as of 21 September 2017.

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