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Merger Control

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Contributing Editors: **Nigel Parr & Steven Vaz**

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Germany

Dr. Christian Bürger & Dr. Tobias Teichner
GÖRG Partnerschaft von Rechtsanwälten mbB

Overview of merger control activity during the last 12 months

Germany's Federal Cartel Office (*Bundeskartellamt*, the "**FCO**") in 2020 reviewed around 1,200 merger filings, of which less than 1% (eight out of 1,200) entered into an in-depth review in Phase II.

In comparison to 2019, there were about 200 fewer merger filings and only about half the number of Phase II proceedings (2019: 14). In particular, the following stands out – no Phase II proceedings were prohibited in 2020, but approximately 29% were prohibited in 2019 (four out of 14). In 2020, the parties withdrew their application in about 24% of Phase II proceedings, in contrast to 43% of the applications having been withdrawn in 2019 (six out of 14). In 2020, mergers were cleared *without* conditions and obligations in about 38% of the Phase II proceedings and were cleared *with* conditions and obligations in about 38% of the proceedings. In 2019, only approximately 14% (two out of 14) were cleared *without* conditions and obligations, and the same applies to clearance *with* conditions and obligations (also two out of 14).

New developments in jurisdictional assessment or procedure

10th ARC-Amendment

Merger control

As of 19th January 2021, the 10th Amendment to the German Act Against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*, the "**ARC**") – formally known as the "*Act Amending the Act against Restraints of Competition for a Focused, Proactive and Digital Competition Law 4.0 and Amending Other Competition Law Provisions – ARC Digitalisation Act*" – came into effect. With it, major changes became applicable to merger control filings. Since then, mergers will only be subject to merger control if one undertaking concerned generated domestic turnover in Germany of more than EUR 17.5 million (instead of the previous EUR 5 million) and another undertaking concerned generated domestic turnover of more than EUR 50 million (instead of the previous EUR 25 million) in the last full financial year. The threshold for the combined aggregate worldwide turnover – generated together by all of the undertakings concerned – remains unchanged, i.e. more than EUR 500 million in the last full financial year.

The alternative size of transaction test, which was introduced in 2017, was changed accordingly. If an undertaking concerned generated domestic turnover of more than EUR 50 million in the last full financial year, but neither the company to be acquired nor another undertaking concerned generated domestic turnover of more than EUR 17.5 million, the transaction will still be subject to merger control if the transaction value threshold of EUR 400

million is exceeded. Furthermore, the company to be acquired must (as before) be active to a significant extent in Germany. The threshold for the combined aggregate worldwide turnover generated by all of the undertakings concerned remains unchanged (EUR 500 million). The implementation of this test was a direct reaction to mergers like *Facebook/WhatsApp* that did not fall under the German merger control regime, as the domestic turnovers were not met.

Another change, which will likely reduce the cases notified to the FCO, related to mergers in the media industry. Turnover generated by print media need only be multiplied by a factor of four (instead of the previous factor of eight) to determine the turnover thresholds.

In the context of these changes, the FCO estimates that, on the one hand, several hundred merger control reviews each year will no longer be necessary; yet on the other hand, there will be an increase in the number of proceedings with regard to abusive behaviour (see next section). Further, another change introduced by the 10th ARC-Amendment was the increase from four to five months as of the notification submission date for the assessment of mergers in Phase II proceedings.

In addition – as a further "counterbalance" to the increased thresholds – the German legislature added a new instrument to section 39a of the ARC, under which the FCO can oblige companies by administrative act to provide notification of mergers that would not otherwise have to be notified under the threshold values (also referred to as the "*Remondis* clause"). Such administrative act requires that, *inter alia*, the FCO previously investigated the relevant industry sector pursuant to section 32e of the ARC.

Lastly, on 21st December 2020, the FCO submitted the "*Evaluation of the Commission Notice on the Definition of the Relevant Market for the Purposes of Community Competition Law*". The FCO stated that the fundamental principles of market definition as described in the "*1997 Notice*" (Regulations No. 17 and No. 4064/89) remain correct and of top priority, but that there remains room for improving the role of the market definition notice. Therefore, the FCO suggested that the new notice should reflect digitalisation, explain the role of market definition, deprioritise the small but significant and non-transitory increase in price (SSNIP) test and align the definition of geographic market with the principles behind the definition of product market.

Protecting competition in the digital economy

The changes concerning merger control under the 10th ARC-Amendment should be interpreted in light of the FCO's role in controlling and investigating abusive behaviour. The revised ARC creates a new type of mechanism that especially targets certain types of conduct of large platforms and similar companies with "paramount cross-market significance for competition".

With the recently implemented measures, the FCO may prohibit at an early stage certain types of conduct by large digital companies with the most significant influence on competition across markets, if competition in the respective market is threatened by their actions (section 19a of the ARC). As of 18th May 2021, there have already been two proceedings under this new provision; one directed against Facebook; and the other against Amazon.[1]

Further changes include (i) specifying provisions regarding the control of abusive conduct in general, (ii) the addition of internet-specific criteria, (iii) granting of access to specific market relevant data in return for adequate compensation of third-party companies that depend on access to such data, as well as (iv) the means to intervene in cases where a platform market threatens to "tip" towards one large player (also known as market tipping).

The President of the FCO, Andreas Mundt, noted that these changes are the first of their kind internationally and have positioned Germany as a global pioneer in this regard.[2] In

addition to that, the 10th ARC-Amendment serves to implement the European Competition Network (ECN) Plus Directive, as well as changes regarding administrative proceedings in competition contexts.

Amendments in German foreign trade law

As discussed in our chapter to the previous edition of *Global Legal Insights – Merger Control*, the German foreign trade law has also seen several amendments in the last year that have strengthened the foreign direct investment ("**FDI**") review process concerning the acquisition of German companies by foreign investors (especially non-EU investors).

First, the German parliament approved amending the German Foreign Trade and Payments Act (*Außenwirtschaftsgesetz*, the "**AWG**") by implementing the EU Screening Regulation, which for the first time set up a framework for screening FDI from non-EU countries that may affect security or public order in Germany.

Second, the German Federal Cabinet approved the 17th Ordinance amending the German Foreign Trade and Payments Ordinance (*Außenwirtschaftsverordnung*, the "**AWV**"). A core objective of the new regulations is to identify – based on the provisions of the EU-Screening Regulation – critical technologies that would give rise to reporting obligations under German FDI review regulations.

Regular revisions of the AWG and the AWV have led to a growing number of business acquisitions being reviewed in the last few years. This shows the increased pertinence of German foreign trade law to non-EU purchasers, including the United Kingdom in the current post-Brexit era. Hence, it is important to keep in mind that a FDI filing could be mandatory if the merger is classified as subject to FDI control under these new regulations. With regard to the timeline involved, the parties to an acquisition should keep in mind that in some cases, an FDI filing may take even longer than the merger control filing itself as both obligations exist parallel to one another and each imposes separate requirements.

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

Concentrations involving food retail and wholesale of daily consumer goods – *Real/Kaufland/Edeka*

Case summary

Several cases of major interest in 2020 revolved around the acquisition of more than 270 Real supermarket stores from SCP Retail S.àr.l. by three of its competitors. Two of them, namely the Edeka Group ("**Edeka**") and Kaufland (part of the Schwarz-Group, which also includes Lidl), already hold significant market shares alongside two other competitors, Rewe and Aldi. Edeka is Germany's largest food retailer with a turnover of EUR 55.7 billion (2019).[3]

On 22nd December 2020, the FCO announced that Kaufland was allowed to acquire 92 Real stores subject to conditions (originally intended: 101 stores),[4] whilst the third competitor, the Globus Group, could acquire up to 24 Real stores.[5] On 17th March 2021, the FCO issued a clearance decision allowing Edeka to acquire 45 Real stores without conditions. In this case, either six additional retail store spaces had to be carved out and given up to competitors, or other Edeka stores in the market area had to be closed (also referred to as the "piggyback remedy").

Case relevance

With regard to developments in merger control, this case is of particular interest when considered in the broader context of the steady concentration of the retail and wholesale of daily consumer goods market in Germany.[6]

In 2015, the FCO prohibited the acquisition of approximately 450 Kaiser's Tengelmann stores by Edeka. The case made prominent headlines in German (competition) news, as a ministerial approval for the acquisition was subsequently granted by the then Minister for Economic Affairs, Sigmar Gabriel, which effectively overruled the FCO's decision. However, upon an appeal by competitor Rewe against the approval of the merger, the Higher Regional Court of Duesseldorf upheld the FCO's prohibition of the merger in a preliminary ruling, rendering the ministerial approval (temporarily) invalid. In the end, Rewe and Edeka divided the stores between each other, following negotiations and re-evaluations. This was then approved by the FCO.

In view of previous concentration tendencies and judicial escalation in the *Tengelmann* case, the number of Real stores that competitors were allowed to acquire was surprising to some. However, the FCO noted that apart from a "highly concentrated procurement market", the fact that there was competition in procurement between the four leading retail chains also had to be considered in the assessment under competition law, as well as indications that the procurement markets – even though still largely national in scope – were developing into cross-border markets.[7]

Further, the EDEKA and the Kaufland clearance decisions are also noteworthy as the FCO cleared both acquisitions not only under conditions precedent, but also under conditions subsequent. If the condition subsequent was not met, the approval of the decision would lapse retroactively. In such a case, the merger would be deemed prohibited and any steps already implemented would have to be reversed. Since dissolution of a merger is very difficult to implement in practice, the FCO in general only accepts conditions precedents as remedies. The cases show, however, that the FCO is prepared to accept and find workable remedies to avoid a prohibition decision.

Agricultural trade – *RWZ/RaiWa* and *Beiselen/ATR*

Case summaries

The first merger control case relating to agricultural trade that we want to elaborate on for the purpose of this legal update concerns the acquisition of 19 retail locations of the Raiffeisen Waren-Zentrale Rhein-Main eG ("**RWZ**"), Cologne, by Raiffeisen Waren GmbH ("**RaiWa**"), Kassel, as well as the launch of a joint venture to market agricultural products and a further purchasing agreement.[8]

Both companies supply farmers and other customers with agricultural products and services in Germany, with a focus on Hesse, Thuringia and Saxony. Hence, the merger especially affected the purchase of respective agricultural products in the various regional markets.

The merger was in the end approved in a fix-it-first decision, as the parties were able to mitigate the former competition concerns of the FCO by remedies. One of these remedies was the splitting of a location at the Hanau port in Hesse between RWZ and RaiWa, creating new competition as a result. Also, RWZ sold its shares in Raiffeisen Vogelsberg GmbH in favour of a new and additional competitor.

The second merger was between ATR Beteiligungsgesellschaft mbH, Ratzeburg ("**ATR**") and Beiselen Holding GmbH, Ulm ("**Beiselen**"), which intended to pool their activities under a joint holding company for the purchase of grain and oil seeds and the sale of seeds, plant protection products and fertilisers to farmers. Whilst ATR is a company with a focus on agricultural retail trading in Schleswig-Holstein, Mecklenburg Pomerania and Brandenburg, Beiselen is a private agricultural trading company that is active throughout Germany at the wholesale level and on the retail level via a network of locations in the states of Mecklenburg Pomerania, Thuringia, Saxony and Saxony-Anhalt.[9]

According to the investigation of the FCO, the market is characterised by intense competition not only between the parties, but also by strong competitors such as HaGe Nord and Ceravis. Moreover, these competitors were – in contrast to ATR – already integrated in or closely linked with the wholesale trade. Accordingly, although the notifying parties already had a strong or even leading market position in the sale of plant protection products to farmers (in some locations), their actual market power was limited by effective competition. Furthermore, the FCO found that the crop protection demand had shrunk in the last few years, resulting in respective overcapacities. The FCO concluded that there were no indications that the existing level of competition would be significantly restricted by the merger and therefore cleared it in the first phase of merger control.

Case relevance

The first case illustrates the effectiveness of the approach of first withdrawing a merger notice and subsequently re-notifying it. The parties amended their original plans before the FCO cleared the merger – the first notification in July 2020 was directed towards launching three joint ventures. However, the parties withdrew the notification, as the concept of joint control was incompatible with the main legal principle of a registered cooperative to support its members. A restructured project was notified, but the notification was again withdrawn when the FCO initiated in-depth Phase II proceedings and informed the parties of its competition concerns. Thereafter, the parties entered into discussions with the FCO and found the fix-it-first solution as described above. The case further illustrates the benefits of contacting the FCO at an early stage to start discussions regarding the potential outcome of a merger.

The second case – in connection with the first case – further illustrates the attempts of undertakings in the agricultural trade sector to combine their influence (e.g. via joint ventures) to strengthen their market position – especially concerning global players at manufacturer level (the same applies to the *Unamera* case). There are a number of reasons for these attempts, such as pressure from customers for cheaper or at least constant prices, or pressure from manufacturers.

Digital platforms – The new normal

As stated above, digital platforms are of major interest for the FCO, in particular since the acquisition of WhatsApp by Facebook that was technically not subject to notification obligations (i.e. WhatsApp's turnover did not exceed the thresholds) and the implementation of the new EUR 400 million transaction value threshold.

Case summaries

Besides the two proceedings against Facebook and Amazon (see above), the FCO handled (amongst others) two interesting cases in this segment.

The first case concerned the acquisition of Lovoo (part of the Meet Group Inc. (USA)) by Parship and Elite Partner (in the portfolio of ProSieben Sat.1 group since 2016). The FCO cleared this merger in Phase I, which was legally extended to two months due to the COVID-19 pandemic. The FCO saw a further concentration in the online dating sector but did not find a considerable impairment of competition as a result of the acquisition, as the market is characterised by dynamic growth, market entries and competition from other strong competitors such as Tinder. Further, users in general often use several dating platforms at the same time (multi-homing).

The second case – which was not a merger case – concerned the set-up and implementation of the online trading platform Unamera, an online trading platform for agricultural products.

Some of the financing partners were large companies in the agricultural sector, such as BayWa AG, Getreide AG and ATR Landhandel. The FCO in this regard stated that online platforms can make trade much more efficient, but always bear the risk of resulting in price-fixing agreements or acting in a discriminative way. Therefore, the FCO gave guidance for set-ups preventing the exchange of sensitive information and to guarantee the set-up of "Chinese walls".

Case relevance

The first case was of interest, as the Phase I proceeding was extended to two months due to the COVID-19 pandemic. COVID-19 disrupted the FCO's workflow and ability to act within normal timeframes. In order to lessen this effect, the German legislator introduced changes that came into force at the end of May 2020 and extended the merger control review periods for merger notifications that were received by the FCO between 1st March and 31st May 2020.

The second case, the set-up of the Unamera platform, was of most interest as it was not notified as a merger filing to the FCO. Under German competition law, companies are able to approach the FCO to clarify any competition law issues (e.g. whether digital platforms are a tool) – besides the merger control regime – to guarantee compliance with German competition law.

Furniture retailers

Case summary

On 26th November 2020, the FCO cleared the merger of XXXLutz and the Tessner group (including Roller, tejo's, Schulenburg) after a Phase II examination, subjecting the merger only to conditions. Clearance was granted for the sales side of the planned merger, which affected the relationship between furniture retailers and end customers.

The planned merger covers 155 outlets of the Tessner group. According to the FCO's decision, 22 of the Tessner outlets cannot be acquired and one XXXLutz outlet must be sold. The parties were by far the leading suppliers in the discount sector, in particular with regard to their sales lines POCO, Mömax and Roller. The merger therefore created Germany's overall largest furniture retailer (followed by Ikea).

Case relevance

This case was of some interest as the FCO and the European Commission examined different parts of the merger.

As an exception, this merger project was not examined by one single competition authority, but by the FCO in Germany (with regard to its effects on the sales side) and the European Commission as the European competition authority (with regard to the procurement markets). Due to the turnover of the parties, the overall merger project would have to be notified to the European Commission. As the planned concentration mainly affects Germany, the parties to the merger filed an application with the European Commission to have the case examined by the FCO (request for referral). However, since the procurement markets can be expected to cover an area beyond Germany's borders, as, e.g., furniture can also be purchased by the parties outside of Germany, the European Commission's referral of the merger control case to the FCO in late January 2020 only concerned the retail markets affected (relationship between furniture retailers and end customers). The European Commission's proceeding is still ongoing.

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

Official guidance issued by the FCO

The FCO has published official guidance on merger control; the first document was published in 2012 ("Guidance – Substantive Merger Control"), and explains the analytical approach taken by the FCO in assessing whether mergers create or strengthen a dominant position.[10] The second document, published in 2017 ("Guidance on Remedies in Merger Control"), illustrates the requirements that need to be met for the FCO to clear an otherwise problematic concentration subject to conditions and obligations (remedies).[11]

Pre-notification discussion/fix-it-first

As already discussed in the previous editions of this guide, the FCO is always available for prior discussions of a merger where complex legal or circumstantial issues may occur. In our experience, the FCO is always ready to work with the parties and clarify uncertainties in order to speed up the proceedings. Thus, it is usually helpful to have informal contact with the FCO prior to the official notification of the merger, if the concentration raises serious competition concerns or involves open legal questions.

In some cases, this may even result in fix-it-first solutions. An example of this is the above-mentioned *RWZ/RaiWa* case. In such cases, the merging parties conclude a legally binding agreement with the purchaser and might even transfer the divestment business before the FCO issues the decision. If the FCO subsequently clears the merger, the purchaser does not need to be approved by the authority again. Fix-it-first solutions are only accepted if they are tailored to solve the competition issues identified in the merger proceedings.

Withdrawing a merger notification and subsequent re-notification

Another approach is to withdraw the notification when it is necessary for the parties and/or the FCO to further investigate the relevant markets, then to notify the merger once again when the investigation has been completed. Parties have more time to prepare their legal and financial arguments without immediately entering into Phase II. This approach also provides an opportunity for the parties (at least temporarily) to avoid the involvement of interested third parties. It is in particular for this reason that the withdraw-and-file-again approach is challenged by academics. In some cases, it might even be indicated that the parties should or might restructure their mergers (see the *RWZ/RaiWa* merger above).

Key policy developments

On 20th April 2021, the FCO, the UK Competition and Markets Authority and the Australian Competition and Consumer Commission agreed on a joint statement on merger control,[12] highlighting that "*there is a common understanding across competition agencies on the need for rigorous and effective merger enforcement*" – also in times of a pandemic.[13] The agencies met virtually to discuss joint challenges for merger control in their countries. Based on their mutual understanding, these challenges can be seen particularly in connection to the digital economy, continuous globalisation and impact of the COVID-19 pandemic. The overall agreement regarding the purpose and the intensity of merger control is that consistent merger enforcement is the key to preserving competition and diversity, especially in times of growing concentration in several markets. Furthermore, the agencies' heads agreed that the circumstances caused by the pandemic should not result in a weakening of the standards against which mergers are assessed. However, it was commonly acknowledged that it might be necessary to take the short-term impacts of the pandemic into account when assessing the merger, given that businesses claim such circumstances in a substantiated way.

Reform proposals

There are currently no known further proposals to reform merger control procedures after the 10th ARC-Amendment (and after the aforementioned amendments of the German foreign trade law).

However, as September 2021 will not only see the next federal elections for the German parliament and government but also the end of the era of government under Angela Merkel's leadership, the new government and parliament may see the need to further adapt German economic and legal politics and frameworks, including for merger control.

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Endnotes

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Dr. Christian Bürger
Tel: +49 221 33660 608 / Email: cbuerger@goerg.de
Dr. Christian Bürger offers advice to national and international companies as well as organisations on all questions of European and German antitrust law. He has many years of experience conducting merger control proceedings, antitrust and abuse cases, antitrust claims for damages as well as compliance systems and employee training.

Dr. Tobias Teichner
Tel: +49 40 500 360 642 / Email: tteichner@goerg.de
Dr. Tobias Teichner represents clients before the German Federal Cartel Office and the European Commission, as well as before German and European Courts. In particular, he advises on merger control cases, represents companies in cartel and abuse of dominance proceedings and counsels on cooperation and distribution agreements.

GÖRG Partnerschaft von Rechtsanwälten mbB

Kennedyplatz 2, 50679 Cologne, Germany
Tel: +49 221 33660 0 / URL: www.goerg.de

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