



GERMANY

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1. Relevant legislation

Sections 35 to 43 of the Act against Restraints of Competition (ARC) (Gesetz gegen Wettbewerbsbeschränkungen).

English translation available at the website of the FCO:
<https://www.bundeskartellamt.de/EN/Mergercontrol/>

2. Authority

Federal Cartel Office (Bundeskartellamt)
https://www.bundeskartellamt.de/EN/Home/home_node.html

3. Types of transactions caught

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

4. Thresholds

A merger notification is required if in the last business year preceding the concentration the combined aggregate *worldwide* turnover of all the undertakings concerned was more than EUR 500 million, and the turnover of at least one undertaking concerned was more than EUR 50 million in *Germany* and that of another undertaking concerned was more than EUR 17,5 million in *Germany*.

A merger notification is also required if in the last business year preceding the concentration the combined aggregate *worldwide* turnover of all the undertakings concerned was more than EUR 500 million, and the turnover of one undertaking concerned was more than EUR 50 million in *Germany* and neither the target undertaking nor any other undertaking concerned achieved a turnover of more than EUR 17,5 million in *Germany* whilst it has substantial operations in *Germany*, and the consideration for the acquisition exceeds EUR 400 million.

There are some specific rules when it comes to calculating the relevant turnover, but the concept is very similar to the concept applied in EU merger control.

5. Exceptions

- The provisions do not apply to concentrations of public entities and enterprises arising from the territorial reform of municipalities.
- There are further exemptions for undertakings that are part of certain banking associations.

6. Notifying party(-ies)

In principle, all parties in the proposed concentration are responsible for the notification. There are cases where the seller is not considered a party. In practice it is sufficient if one party submits the notification on behalf of all the parties involved.

7. Submission deadline

There is no deadline for submitting pre-merger notifications to the FCO. A notification can be filed at any time before the completion of the proposed concentration. However, in practice timing should be planned carefully to take into account the proceedings timetable (of below).

8. Filing fee

The fee amount depends on the FCO's personnel and material expenses and the economic significance of the notified transaction:

- The maximum fee can amount up to EUR 50,000 (EUR 100,000 in exceptional cases).
- In minor cases the fees usually range between EUR 5,000 and EUR 15,000.

9. Proceedings timetable

- First phase:
After receipt of the complete notification documents at the FCO the competent Decision Division has one month to examine the proposed concentration. If the proposed concentration proves unproblematic, the Decision Division clears it informally before the expiry of the one month time limit.
- Second phase:
If the Decision Division considers further examination necessary, a formal in-depth investigation is initiated, extending the time frame to up to a total of five months of receipt of the complete notification.
- Appeal
The FCO's decision to prohibit a transaction can be appealed at the FCO within one month upon service of the decision. The appeal shall include a statement of reasons to be filed within two months from the service of the decision being appealed.. Competent court is the Higher Regional Court of Düsseldorf

10. Availability of pre-notification/informal consultation

The FCO gives only informal guidance at the parties' request before the notification. For any pre-notification information the FCO requires a nearly complete draft application.

Also the FCO is not willing to give clear advice in the pre-notification stage because it has no permission to do so.

11. Test for clearance/prohibition

The FCO will prohibit a concentration which is expected to create or strengthen a dominant position unless the participating undertakings prove that the concentration will also lead to improvements of the conditions of competition, and that these improvements will outweigh the disadvantages of dominance (Section 36 (1) ARC).

The main examination proceedings should be initiated if a further examination of the concentration is necessary. In the main examination proceedings the FCO decides by way of a formal decision whether the concentration is prohibited or cleared. Reasons are to be given also if the concentration is cleared; clearance can be granted subject to conditions and obligations.

Unlike EU merger control, the FCO by its publication does not actively solicit views from anonymous third parties, such as customers, competitors and suppliers.

12. Conditional clearance - remedies

The clearance decision can be made subject to conditions or obligations/commitments. These conditions and obligations must not aim at subjecting the conduct of the undertakings concerned to continued control.

There is a right of appeal against prohibition decisions to the Court of Appeals responsible for the district in which the FCO has its seat (the Düsseldorf Court of Appeals).

13. Stand-still obligation

A notifiable concentration must not be put into effect before

- the one-month period under Section 40 (1) sentence 1 of the ARC has expired without the FCO having initiated the main examination proceedings,
- or the five-month period under Section 40 (2) sentence 2 of the ARC has expired,
- or the FCO has cleared the concentration.

In some exceptional cases where the parties can provide important reasons for their behaviour, the FCO can refrain from the obligation to suspend the closing of the transaction.

14. Failure to notify/obtain clearance

- A failure to notify is not an infringement on its own. However, in most cases the failure to notify will be accompanied with an implementation of the merger before approval. The violation of the prohibition of putting a concentration into effect constitutes an administrative offence (Section 81 (2) no. 1 of the ARC). The fines can range from up to EUR 1 million for individuals and 10% of the worldwide group turnover, for companies.
- An incomplete or incorrect notification constitutes an administrative offence. Resulting fines may rise up to EUR 100,000 (in case of intentional violation) or up to EUR 50,000 (in case of negligence). They can be imposed on the relevant company and/or its officers.
- The FCO can also initiate a demerger proceeding in relation to notifiable concentrations that have been closed without the FCO's prior clearance or based on a notification containing incomplete/incorrect information.