

Europe Newsletter



German Competition Law - Important changes in merger control and protection of competition in the digital economy

Yumiko Kato

I Overview

Effective January 19, 2021, the 10th amendment to the German Act against Restraints on Competition (*Gesetz gegen Wettbewerbsbeschränkungen* (GWB) - the “ARC”)¹ entered into force, introducing:

1. Higher domestic merger control thresholds;
2. New rules on prevention and abuse of dominance to protect competition in the Digital Economy; and
3. Incentives for compliance system implementation.

The main purpose of the amendment is two-fold: (i) enable and strengthen competition protections in the digital market, and (ii) make German competition law and its enforcement more effective in general. In addition, the ARC now provides further incentives for companies to implement and maintain adequate and effective compliance systems.

II Key Changes

1. Changes in Merger Control

The amended ARC introduces higher domestic merger control thresholds with the aim of reducing the large number of merger control filings in Germany. Behind this change stands the realization that the Federal Cartel Office (the “FCO”)

¹ <https://www.bundestag.de/dokumente/textarchiv/2021/kw02-de-digitalisierungsgesetz-gwb-814250>

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should concentrate on cases which may actually be problematic and require in-depth review.²

(1) Revised Threshold

Going forward, parties need to notify the FCO of a transaction if one of the two below-mentioned thresholds are passed.

A. Turnover-based Threshold

1. The combined aggregate worldwide turnover of undertakings concerned exceeds EUR 500 million (unchanged);
2. German turnover of one party exceeds **EUR 50 million** (previously EUR 25 million); and
3. German turnover of another party exceeds **EUR 17.5 million** (previously EUR 5 million).

B. Transaction-Value-based Threshold

1. The combined aggregate worldwide turnover of undertakings concerned exceeds EUR 500 million (unchanged);
2. German annual turnover of one party exceeds **EUR 50 million** (previously EUR 25 million);
3. The value of the consideration paid in return for the transaction exceeds EUR 400 million (unchanged); and
4. The target is significantly active in Germany (unchanged).

(2) Notification Orders

Under certain narrowly defined circumstances, the FCO may issue notification orders which require companies to notify a merger even when neither of the two above-mentioned thresholds have been crossed. Namely, such notification orders may be issued when **all** following conditions are met:

1. The acquirer's global turnover exceeds EUR 500 million;
2. The acquirer's share of the supply or demand in the relevant economic sector within Germany is at least 15%;
3. The target's global turnover exceeds EUR 2 million, of which more than two thirds is achieved in Germany;
4. The FCO has conducted a sector inquiry in the relevant economic sector; and
5. There are reasonable indications that future mergers could significantly impede effective competition in the German market.

(3) Extended Phase II review

The period for Phase II investigations is extended from four months to five months. Thus, merger control proceedings may take up to six months starting from the merger control filing.

(4) Closing of the notified transaction

Companies are no longer obliged to inform the FCO about the closing of a notified transaction.

(5) Minor Market/Hospital/Print Media

The FCO may not prohibit mergers if the total sales volume for an affected market is less than EUR 20 million (previously EUR 15 million) in Germany.

² In 2020, approximately 1,200 filings were submitted to the FCO. Out of those filings, only seven cases have been reviewed in Phase II investigations (two were granted clearance under conditions; three were cleared without conditions after in-depth examination, and two cases are ongoing). Of the approximately 1,400 filings in 2019, 14 cases have been reviewed in Phase II investigations.

Until at least 2027, certain hospital mergers will be exempted from merger control.
For the print media sector, the turnover multiplier has been reduced from eight to four.

2. New protections for competition in the Digital Economy

The other key element of the amendment is the modernisation of abuse control³ to respond to the concerns typically associated with, but not limited to, digitalization and the rise of large digital platforms. Traditionally, abusive conduct was punished by terminating or penalising anti-competitive practices after the fact. In Germany, the FCO may now take certain preventive measures before a company engages in abusive behavior, even if the company in question has not yet reached a dominant position. The FCO may also target companies outside of Germany if their anti-competitive conduct has an effect on the German market. The FCO may also impose interim measures against dominant undertakings if an infringement appears to be predominantly likely and the interim measure is necessary to protect competition, or the infringement constitutes an imminent threat of ‘serious harm’ to another company.

3. Credit for Compliance System

Finally, the amended ARC stipulates that the (pre-violation) implementation of adequate and effective compliance measures to prevent and detect competition law infringements shall be taken into consideration when fines are being determined.

For more information about these and the other changes to German Competition Law, please contact our antitrust team.



Yumiko Kato

Nishimura & Asahi Frankfurt & Düsseldorf offices
Attorney-at-Law (Admitted in New York)
E-mail: yu.kato@nishimura.com

Yumiko Kato is a Foreign Attorney at the Frankfurt and Düsseldorf offices of Nishimura & Asahi. She was admitted in New York in 2011. She has experience in the areas of Corporate/M&A, Antitrust/Competition and Dispute Resolution. She graduated from Georgetown University Law Center (LL.M., Rotary Foundation International Ambassadorial Scholar) in 2008 and London School of Economics and Political Science (LL.M.) in 2009.

³ The Act does not specify its application to digital markets, but the intention is to prevent anti-competitive behaviours by large digital players. See comment from Andreas Mundt, President of the FCO (FCO, January 19, 2021) available at: https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2021/19_01_2021_GWB_Novelle.pdf?__blob=publicationFile&v=2