GLI GLOBAL LEGAL INSIGHTS

Merger Control

2022

11th Edition

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

glg global legal group

CONTENTS

Germany

Dr Christian Bürger, Dr Maxim Kleine & 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**") reviewed around 1,000 merger filings in 2021, of which less than 2% (14 out of 1,000) entered into an in-depth Phase II review.

In comparison to 2020, there were a total of about 200 fewer merger filings (and about 400 fewer in comparison to 2019), but five more Phase II proceedings.

With regard to Phase II proceedings, the following stands out: three Phase II proceedings were cleared without conditions; and one proceeding with conditions. In five cases, the parties withdrew their application and four cases are still pending.[1]

The decrease of merger filings in Germany is in line with the intention of the 10th Amendment to the German Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*, the "**ARC**"), as of which the turnover thresholds of the undertakings concerned were significantly higher. Nevertheless, the FCO stated that the 10th Amendment of the ARC "has not really led to the expected reduction of the authority's workload". This may be the result of the FCO commencing a few proceedings with new tools that were implemented by the 10th ARC Amendment. The FCO therefore more often focuses on undertakings with extraordinary market power, especially in the big-tech segment.

New developments in jurisdictional assessment or procedure

10th ARC Amendment

Merger control – Thresholds

As of 19th January 2021, the 10th Amendment to 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 such as *Facebook/WhatsApp* that did not fall under the German merger control regime, as the domestic turnovers were not met. The size of transaction test has been applied in a number of cases. Therefore, the FCO, together with the Austrian *Bundeswettbewerbsbehörde*, issued guidelines for the size of transaction test.[2]

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.

Phase II proceedings

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.

Remondis clause

A "counterbalance" to the increased thresholds is the new instrument to § 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").

The *Remondis* clause applies if the acquirer has a Germany-wide share of more than 15% of sales in the affected economic sectors, the target company achieved revenues of at least EUR 2 million in the last business year and at least two-thirds of its total turnover in Germany, and if there are objectively viable indications that future concentrations could considerably impair effective competition in Germany. For this obligation to apply, the FCO must first carry out a sector inquiry in one of the affected economic sectors.

Protecting competition in the digital economy from abusive behaviour

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 (§ 19a of the ARC). As of April 2022, there have already been several proceedings under this new provision, directed against Alphabet/Google,[3] Meta/Facebook,[4] Amazon[5] and Apple.[6]

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; and (iv) the means to intervene in cases where a platform market threatens to "tip" towards one large player (also known as market tipping).

Further amendments to German foreign trade law

As discussed in our chapter to the previous edition of *Global Legal Insights – Merger Control*, 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).

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

Secondly, 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 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 be aware 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. Further, FDI filings may be of greater interest over the next few years due to Russia's aggression against Ukraine. In some cases – which has already been seen – even the question and circumstances with regard to the positioning in favour or against sanctioning Russia might in some way influence decisions.

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

Examining the *Remondis* clause in the waste management sector

With the filed acquisitions of the Rethmann Group, the waste management sector in Germany had two in-depth Phase II proceedings in 2021. In both cases, the Rethmann Group planned to acquire smaller companies in said sector in the North Rhine Westphalia area in Germany. While the first merger was cleared in June 2021, a second filing was withdrawn in December 2021[7] after the FCO informed the parties of its market concerns.

On this basis, in 2022 the FCO initiated a (further) sector inquiry in the German waste management sector, in order to update some of the FCO's findings from the sector inquiry into household waste collection in 2021.

This additional sector inquiry is of significant interest, as with it the FCO examines preconditions for an extended obligation to notify future takeovers (§ 39a ARC) in regard to the Rethmann Group.

Case relevance

The two Phase II proceedings in combination with the (second) market inquiry show that the waste sector in Germany is in the spotlight of the FCO. The waste sector is compared to markets such as tech, around Google, Amazon, and Facebook; although less popular, it is of the same interest with regard to competitive aspects.

The fact that the FCO ruled out preconditions for an extended obligation to notify future takeovers (§ 39a ARC) in regard to the Rethmann Group shows that the tools of the 10th ARC Amendment are not only for international players and international market leaders, but also more regional markets where players seem to have market power throughout Germany.

In the context of the Rethmann takeover, it is of importance to point out a statement by the FCO's president, Andreas Mundt,[8] as this might also apply to other cases and shows one of the FCO's current "focuses":

> "In some sectors large companies buy a great number of small companies without the FCO being able to examine such takeovers. This situation results in growing concentration outside of the FCO's control. We fear that this might apply to the numerous acquisitions by Rethmann/Remondis in the waste management sector. The lawmaker gave us the possibility to examine smaller takeovers precisely in such cases, provided that we conduct a special sector inquiry. We have now initiated such an inquiry with a view to waste management and the specific market position of the Rethmann Group."
>
> "Especially the waste management sector is characterised by regional markets on which the municipalities as opposite market side often have little choice. If smaller competitors, mostly small and medium-sized companies, are acquired one by one without merger control, this can result in an overall structural competition issue. If a company is able to achieve a dominant position by way of such acquisitions, its market power is consolidated. We must confront this development by consistently applying merger control."

The new § 19 a ARC – Section for big tech

As stated above and in the section "Protecting competition in the digital economy" in last year's chapter, the FCO is reviewing the companies Apple, Google, Amazon, and Meta/Facebook with particular interest. Therefore, the following cases must be emphasised.

Amazon, Google, and Facebook – Case summaries

In December 2020, the FCO initiated abuse proceedings against Meta/Facebook due to the linkage between Oculus and Facebook's network.[9] With the new mechanisms introduced by the 10th ARC Amendment, the FCO then announced in January 2021 – only nine days after the 10th ARC Amendment came into effect – that it is extending the scope of its proceedings, also examining whether Facebook is subject to the new rules applying to undertakings of paramount significance for competition across markets (§ 19a ARC).

The same step was undertaken by the FCO in May 2021 with regard to the undertakings Amazon, Apple, and Google (see above).

The FCO's man interest in acquisitions by the aforementioned undertakings is illustrated by the case *Meta/Kustomer*. In January 2022, the European Commission decided that Meta Platforms Inc./Facebook is permitted to take over Kustomer, a US software company which specialises in customer service and supporting the management of customer relationships. The FCO followed this decision on 11th February 2022.[10] The FCO's president Andreas Mundt stated that the FCO had "focused on the significance of the acquisition for Meta's overall strategy", but ultimately had to "acknowledge with a certain stomach-ache that the effects of the takeover would not have justified a prohibition under the applicable antitrust law".

Case relevance

The FCO's activities and its circumstances reflect its focus on the activities of big market players, especially in the digital sector.

Also, insecurities regarding the need for an official filing have been displayed by the first move of the FCO to request an official filing in the *Meta/Kustomer* case. To this extent, parties have had to be extra cautious with regard to the obligation to notify the FCO of a planned merger since the reform of the merger control regime in 2021. The fact that in

particular Meta/Facebook, Amazon, and Google are in the spotlight of the FCO leads to the conclusion that tech firms able to build up "infrastructure" in the advertising markets have the possibility to strengthen their *per se* dominant market position, due to the fact that many other providers of online services rely on the advertising services.

The FCO's activities in the tech sector field are proof of the statement by the FCO's president that, in fact, the 10th Amendment of the ARC "has not really led to the expected reduction of the authority's workload", as discussed above. It proves that the FCO shifts its workload to markets in which it sees significant market power of undertakings, in most cases not only in the markets affected, but also in the infrastructure around the markets.

Petrol stations – A market to watch

Case summary

The EG Group (servicing service stations under the brand "Esso") planned the acquisition of the OMV Group, another provider of service stations in Germany. The EG Group operates 959 service stations in Germany and is one of the country's leading service station operators, alongside BP ("**Aral**"), Shell and Total. OMV's affected service station network comprised 285 service stations exclusively in southern Germany.

According to the results of the FCO's extensive investigations, a complete takeover of OMV's service station network would have led to a significant increase in EG's market power in some markets. Therefore, the FCO's decision is subject to the condition precedent that 24 EG Group service stations and 24 OMV service stations in the problematic markets must be sold to third parties before final approval.

The planned merger was initially notified to the European Commission. Following a corresponding application, the European Commission referred the examination of the project to the FCO.

Case relevance

This case was of interest because of two characteristics of the decision itself.

First, the notification had originally been filed with the European Commission, which then referred the examination of the transaction to the FCO. This is common practice between the European Commission and the FCO. Parties should consider this procedural variation when planning a transaction.

Second, the condition precedent that 24 EG Group service stations and 24 OMV service stations in the problematic markets must be sold to a third party stresses a point made in our chapter in last year's edition: the restructuring of acquisitions, and even in some cases, parts of the acquisition, may not be implemented as planned. This case shows – and the same applies to the cases *Edeka/Real* and *RWZ/RaiWa*, as also discussed in last year's chapter – that the FCO in some cases is willing to permit a transaction if the circumstances allow adjustment of the affected markets. The condition precedent to sell 24 EG Group service stations could, as such, be seen as an adjustment of markets, in which EG has a strong market position even without the service stations of OMV.

Regional markets – Still significant

Case summary

In the ready-mix concrete sector, the FCO – as always – in another Phase II review considered regional markets. In this special case, the FCO assumed a travel time of approx. 40 minutes around the ready-mix concrete plants concerned. This is FCO standard practice (see, for example, our case summary of *RWZ/RaiWa* in last year's edition). As part of its case study,

the FCO examined in detail whether the merger would create opportunities or incentives for the ready-mix concrete companies, which are vertically integrated into cement groups, to restrict competitive pressure amongst themselves. For this purpose, an extensive survey of customers and competitors was carried out. As a result, it can currently be assumed that competition will not be eliminated by the acquisition.

Case relevance

Although this case is of low economic significance, it illustrates that the FCO – despite the globalisation of transport routes – is still investigating many regional markets. These findings apply not only to this case, but also to *EG Group/OMV* and the acquisitions by Rethmann Group.

Regional markets are therefore of special interest for the FCO, especially when filings to the European Commission are referred to the FCO (*EG Group/OMV*).

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.[11] 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).[12]

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 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.

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 may even be indicated that the parties should or might restructure their mergers.

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, after 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 merger control. This especially applies with regard to the Free Democratic Party and the Alliance 90/The Greens, two new parties to have joined the government.

* * *

Endnotes

1. FCO, press release 22nd December 2021: https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2021/22_12_2021_Jahresrueckblick.pdf?__blob=publicationFile&v=2.
2. Guidance on Transaction Value Thresholds for Mandatory Pre-merger Notification (§ 35 (1a) GWB and § 9 (4) KartG): https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaden/Leitfaden_Transaktionsschwelle.pdf?__blob=publicationFile&v=2.
3. FCO, press release 5th January 2022: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/05_01_2022_Google_19a.html;jsessionid=63455A486C2F1D23A2F1A86FC2A36989.1_cid378?nn=3591568.
4. FCO, press release 28th January 2021: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/28_01_2021_Facebook_Oculus.html.
5. FCO, press release 18th May 2021: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/18_05_2021_Amazon_19a.html;jsessionid=240C9AFBED96950882D6421543C6B6B7.2_cid378?nn=3591568.
6. FCO, press release 21st June 2021: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/21_06_2021_Apple.html;jsessionid=0B43EBC60D05F4D952BA45EDF5E687C0.2_cid378?nn=3591568.
7. FCO, press release 14th December 2021: https://www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilungen/2021/14_12_2021_TSR_RMR.html.
8. FCO, press release 19th January 2022: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/19_01_2022_Remodnis_39a.html;jsessionid=2FDAF2D891FCEA355336E68DD71A0F30.1_cid387?nn=3591568.
9. FCO, press release 10th December 2020: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2020/10_12_2020_Facebook_Oculus.html?nn=3591568.
10. FCO, press release 11th February 2022: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/11_02_2022_Meta_Kustomer.html.
11. FCO, Guidance – Substantive Merger Control, effective 29th April 2012: https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitlinien/Guidance%20-%20Substantive%20Merger%20Control.html;jsessionid=E6C062EE55114BBF3004FA9797E46E6E.1_cid378?nn=3590470.
12. FCO, Guidance on Remedies in Merger Control, effective 30th May 2017: https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitlinien/Guidance%20on%20Remedies%20in%20Merger%20Control.html;jsessionid=E6C062EE55114BBF3004FA9797E46E6E.1_cid378?nn=3590470.

Dr Christian Bürger
Tel: +49 221 33 660 608 / 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 Maxim Kleine
Tel: +49 40 500 360 640 / Email: mkleine@goerg.de
Dr Maxim Kleine advises domestic and international clients in antitrust law matters. He has broad experience in advising clients in antitrust investigations by authorities and in merger control proceedings. He regularly represents clients in antitrust investigations before authorities and courts and defends clients against antitrust follow-on damage claims before courts. Furthermore, Maxim regularly guides clients through merger control procedures and coordinates both the strategy and filing before national, EU and international merger control authorities.

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 22 133 660 0 / URL: www.goerg.de

www.globallegalinsights.com

Other titles in the **Global Legal Insights** series include:

AI, Machine Learning & Big Data
Banking Regulation
Blockchain & Cryptocurrency
Bribery & Corruption
Cartels
Corporate Tax
Employment & Labour Law
Energy
Fintech
Fund Finance
Initial Public Offerings
International Arbitration
Litigation & Dispute Resolution
Mergers & Acquisitions
Pricing & Reimbursement

GLI GLOBAL LEGAL INSIGHTS