

Under Section 130 (2) of the Act against Restraints of Competition (ARC), the Act is applicable to all restraints of competition having an effect within the area of application of the Act, i.e. in Germany, also if they were caused outside the area of application of this Act.

The term "restraints of competition" in Section 130 (2) of the ARC sums up the restraints of competition regulated in the relevant provisions of the Act. For an interpretation of the term **domestic effect** within the meaning of Section 130 (2) of the ARC, the protective purpose of the relevant provision of the Act to be applied in each case must be considered (see Federal Supreme Court (BGH) decision of 12 July 1973, WuW/E "Ölfeldrohre", Section 98 (2) of the old version of the ARC). The purpose of merger control (Sections 35 ff of the ARC) is to cover business concentration because it may impair competition¹. With regard to Sections 35 ff of the ARC, the restraint of competition within the meaning of Section 130 (2) of the ARC is the **merger** as such. In the context of Section 130 (2) it is not necessary to prove that the conditions of competition in the domestic market have deteriorated.

The different categories of domestic effect of mergers completed abroad will be described in I. below. According to the version of the ARC that came into effect on **1 January 1999** a certain **domestic turnover** (under Section 35 (1) no. 2 of the ARC) has to be present in addition for German merger control to apply (see II. below). **With mergers in which the acquired undertaking achieves the relevant domestic turnover, a sufficient domestic effect within the meaning of Section 130 (2) of the ARC is as a rule considered to be present.** Therefore, a more detailed examination of the domestic effect will be necessary in future only if a merger was wholly or partly completed abroad.

Finally, a number of procedural law peculiarities of mergers completed abroad will be discussed (III. below).

NOTE

Whether domestic effects are present depends on the **circumstances of the case concerned**. This leaflet merely provides initial guidance. It is therefore advisable to discuss the question of domestic effect in advance with the competent Decision Division or the General Policy Division.

¹ See Bundeskartellamt information leaflets on merger control and on European merger control as well as the common form for the notification of mergers in France, the United Kingdom and Germany (see III. below).

I. Domestic effects within the meaning of Section 130 (2) of the ARC

There are two basic categories:

- mergers completed within Germany, i.e. the target is located in the Federal Republic of Germany
- mergers completed abroad, i.e. the target is located abroad

1. Mergers **completed within Germany** (e.g. acquisition of assets or shares of a domestic undertaking, formation of a joint venture in Germany) always have domestic effects - irrespective of the location of the parent companies concerned; this is also true if the acquirer or party to the joint venture belongs to a foreign group. As regards the domestic subsidiaries of the participating undertakings, a merger completed abroad is considered to have been completed in Germany, since Section 36 (2) of the ARC applies irrespective of whether the location is in the national territory or abroad.

Example: ESSO AG, Hamburg, acquires all shares or assets of Deutsche Shell AG, Hamburg.

2. **Mergers completed abroad** have domestic effects if the structural conditions of competition in Germany are affected.

a) Domestic effects are present in particular if **both** undertakings had already been operating **in the Federal Republic** before the merger. This condition is met if they operate through subsidiaries, affiliated companies, branch establishments or importers. The Federal Cartel Office assumes domestic effects also to be present where, although **only one party** had so far operated in Germany, it is *likely* that goods will be supplied to Germany as a result of the merger, the merger will enhance the know-how of a participating undertaking that operates in Germany, industrial property rights will accrue to the latter or the financial strength of the participating undertaking that operates in Germany will be strengthened.

Future supplies by a foreign participant to the Federal Republic are likely if there are production links with the domestic participant (upstream or downstream stage in the production process) or links affecting the range of products. Whether such future supplies to the Federal Republic are likely usually depends on whether goods of the same or a similar kind are already covered by trade between the countries involved and whether there are no technical and administrative trade barriers to such supplies.

Example: Allied Signal Inc., Morristown, N.J., USA, acquires all shares of Astor Holdings Inc., Raleigh, N.C., USA (both having no branch establishments in Germany, but supplying the German market with industrial wax).

- b) A merger completed abroad between two undertakings which are located abroad and have no domestic subsidiaries or branch establishments may also have domestic effects if the **domestic market structure is changed** as a result of the merger.

Example: Austrian Airlines, Vienna, acquires the assets of Tyrolean Airways, Innsbruck; the latter also operating German routes.

As regards the formation of a **joint venture**, the domestic effect primarily depends on the relevant product and geographic markets on which the joint venture operates. There are domestic effects not only if the joint venture is to operate in the German market, but also if it starts operating abroad but the relevant geographic market is the world-wide or Europe-wide market.

Example: Mahle GmbH, Stuttgart; Cofap, Sao Paulo, Brazil; the joint acquisition of a majority interest in Metal Leve S.A. Industria e Comercio, Sao Paulo was subject to notification (all parties operating in Germany).

II. Domestic turnover of at least DM 50 million

Since 1 January 1999 the merger control provisions are applicable only if in addition **at least one** - i.e. the acquiring undertaking, the target or a jointly formed undertaking - of the undertakings participating in the merger (including companies affiliated within the meaning of Section 36 (2) of the ARC) had a **domestic turnover of more than DM 50 million** in last business year preceding the merger (Section 35 (1) no. 2 of the ARC). Whether this requirement is met by a domestic or foreign undertaking participating in the merger is irrelevant.

Whether the new criterion is met has to be examined **in addition to** whether domestic effects within the meaning of Section 130 (2) of the ARC are present. If none of the participating undertakings meets the DM 50 million criterion, the merger is not subject to control and no further examination of domestic effects is required. By contrast, domestic effects are invariably assumed to be present, if the acquired undertaking has a turnover of at least DM 50 million in Germany. The examination for the presence of domestic effects within the meaning of Section 130 (2) of the ARC will in future assume significance of its own if the acquirer has a domestic turnover of at least DM 50 million and the target or joint venture is located abroad.

Example: Brenntag AG, Mühlheim; the acquisition of a share in Chemproha Dordrecht, Netherlands would not have been notifiable under the amended ARC either. While Brenntag AG has a domestic turnover of more than DM 50 million, the German subsidiaries of Chemproha B.V. were not acquired nor did the merger change the competitive structure of the domestic market for industrial chemicals in any other respects.

III. Specific procedural law aspects of mergers involving foreign parties

If one of the participating undertakings is located outside Germany, the notification must name a **person authorised to accept service in Germany** (Section 39 (3) no. 6 of the ARC).

The Federal Cartel Office will not make clearance of foreign mergers conditional upon the **completeness** of the **notification** filed if

- it is satisfied that foreign legal provisions applicable to the merger or other reasons prevent the notifying party from supplying all necessary particulars prior to putting the merger into effect and
- it is clear from the data submitted to the Federal Cartel Office, or already available to it, that the merger is unlikely to be prohibited.

These relaxed procedures for foreign mergers are based on the General Directive of the Federal Minister of Economics of 30 May 1980 (Federal Gazette No. 103/80 of 7 June 1980).

NOTE

In any case the notification that the merger has been put into effect has to be made upon completion (Section 39 (6) of the ARC).

In co-operation with the competition authorities of France and the United Kingdom, the Federal Cartel Office has prepared a common form for mergers to be notified in two or more of these countries. This form can be obtained in German, French or English from the Federal Cartel Office or from the internet (<http://www.bundeskartellamt.de>). The notification to the Federal Cartel Office must be made in German, however.