For Official Use **DAF/COMP/WP3/WD(2013)5**

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development **04-Jun-2013**

English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

DAF/COMP/WP3/WD(2013)5
For Official Use

Working Party No. 3 on Co-operation and Enforcement

DEFINITION OF TRANSACTION FOR THE PURPOSE OF MERGER CONTROL REVIEW

-- Germany --

18 June 2013

The attached document is submitted to Working Party No. 3 of the Competition Committee FOR DISCUSSION under item IV of the agenda at its forthcoming meeting on 18 June 2013.

Please contact Mr. Antonio Capobianco if you have any questions regarding this document [phone number: + 33 1 45 24 98 08 -- E-mail address: antonio.capobianco@oecd.org].

JT03340951

Complete document available on OLIS in its original format

English - Or. English

1. Introduction

1. Defining which transactions should be subject to merger control is one of the key elements of any merger control system. Over the years Germany has gained extensive experience in striving for an adequate definition of merger control thresholds and in the application of merger control. The development from the very first implementation of the Act against Restraints of Competition (ARC) in 1958 and the early introduction of a formal merger control regime in 1973 until today has been a continued process of improving the existing definitions and closing perceived loopholes. Experience repeatedly showed that just by adequate design of the affiliation between undertakings in a way that the applicable thresholds of merger control were not reached, transactions were omitted from merger control that had the potential for the same (negative) effects on competition as a merger within the meaning of the law. Companies and lawyers were always fast and creative in adapting to legal changes and developing new designs for envisaged transactions. Offering sufficient legal certainty by clear objective thresholds for notification and at the same time providing authorities with the possibility to review all types of mergers which may have a significant and negative impact on competition has therefore been a constant challenge. In view of this Germany has refined its merger control definitions several times, aiming to find the right balance between legal certainty, practicability and the effectiveness of review. Over time, a broad set of experience and case law has been accumulated.

2. This contribution will present the current definitions of transactions in Germany (2.). It will provide a brief introduction on majority shareholdings and the acquisition of control or assets (3.) before focussing on non-controlling minority shareholdings (4.)[1] and joint ventures (5.).

2. Transactions subject to merger review

3. In Germany, Section 37 ARC defines the different types of merger transactions (concentrations) for the purposes of merger control. Today, the broad categories include the acquisition of **assets** of another undertaking (Section 37 (1) No. 1), the acquisition of **control** over another undertaking ((1) No. 2), the acquisition of **shares** in another undertaking ((1) No. 3) and the acquisition of a position that allows one undertaking to exert **material influence** ("competitively significant influence") on another ((1) No. 4). As there are certain overlaps between these categories a merger will often fulfil more than one category.

4. In detail, Section 37 ACR states:

> *(1) A concentration shall arise in the following cases:*
>
> *1. acquisition of all or of a substantial part of the assets of another undertaking;*
>
> *2. acquisition of direct or indirect control by one or several undertakings of the whole or parts of one or more other undertakings. Control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking having regard to all factual and legal circumstances, in particular through:*
>
> *a) ownership or the rights to use all or parts of the assets of the undertaking,*

[1] See also the German contribution to the OECD Roundtable 2008 with case examples, available at http://www.oecd.org/daf/competition/mergers/41774055.pdfhttp://www.oecd.org/daf/competition/mergers/41774055.pdf.

b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of the undertaking;

3. acquisition of shares in another undertaking if the shares, either separately or in combination with other shares already held by the undertaking, reach:

a) 50 percent or

b) 25 percent

of the capital or the voting rights of the other undertaking. The shares held by the undertaking shall also include the shares held by another for the account of this undertaking and, if the owner of the undertaking is a sole proprietor, also any other shares held by him. If several undertakings simultaneously or successively acquire shares in another undertaking to the extent mentioned above, this shall be deemed to also constitute a concentration among the undertakings concerned with respect to those markets on which the other undertaking operates;

4. any other structural link enabling one or several undertakings to directly or indirectly exercise a competitively significant influence on another undertaking.

(2) A concentration shall also arise if the undertakings concerned had already merged previously, unless the concentration does not result in a substantial strengthening of the existing affiliation between the undertakings.

(3) If credit institutions, financial institutions or insurance undertakings acquire shares in another undertaking for the purpose of resale, this shall not be deemed to constitute a concentration as long as they do not exercise the voting rights attached to the shares and provided the resale occurs within one year. This time limit may, upon application, be extended by the Bundeskartellamt if it is substantiated that the resale was not reasonably possible within this period.

5. All transactions that are subject to German merger control must not be implemented before clearance or before the statutory waiting periods have expired (Section 41 ARC). Transactions violating this prohibition shall not be valid. For a breach of this prohibition, the Bundeskartellamt may impose fines of up to €1 million or, in the case of undertakings, 10 per cent of worldwide group turnover (Section 81 (1) ARC). This mandatory suspension period, enforceable with a fine and combined with non-validity of the implementation, is a very important and necessary tool, considering the experiences of the Bundeskartellamt with limited or no notification obligations for some merger forms in the past (see 4. below).

6. While Section 37 ACR only defines the different types of concentrations within the meaning of the law, a transaction only has to be notified if it also fulfils all the other requirements of the merger control rule (turnover thresholds, threshold of affected market volume, effects within the geographic scope of the ARC). Transactions fulfilling these criteria have to be assessed with regard to their potential to create or strengthen an already existing dominant position (Section 36 ARC). When the substantive criteria will be changed in the 8th ARC amendment, as it is currently envisaged, a "significant impediment to effective competition" (SIEC test) will have to be analysed.

3. Acquisition of a majority of share, acquisition of control, acquisition of assets

7. With regard to the acquisition of shares (Section 37 (1) No. 3 ARC), acquiring at least 25 % or at least 50 % of the shares or voting rights in another undertaking is considered as a transaction falling under merger control.[2] Each threshold met is considered a transaction on its own.

8. That the acquisition of at least 50 % of shares should fall under merger control seems to be common ground worldwide. There may be less consensus concerning the control of non-controlling minority interests of 25 to 50 % or even less. These concepts of German merger control will be discussed in more detail in the next section.

9. While the acquisition of a majority of shares or voting rights will very often also confer control, the acquisition of control as a type of transaction for the purposes of merger control was introduced in 1999 as a complement to harmonize German with European law.[3] Consequently, this concept has been largely influenced by European merger control. According to Section 37 (1) No. 2 ARC control can be acquired through rights, contracts or any other means that, either separately or in combination, and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on another enterprise, in particular through ownership or the right to use all or part of the assets of the enterprise; or rights or contracts that confer decisive influence on the composition, voting or decisions of the organs of the undertaking. Due to experience made in the past, the concept of control was introduced as an additional type of transaction that should be subject to merger control, alongside established definitions, rather than a full substitute. The reasons are discussed in more detail in part 4 below.

10. The concept of control following the European model also leads to a slight overlap with the older German concept of the acquisition of all or of a substantial part of the assets of another undertaking (Section 37 (1) No. 1 ARC). The assets of an undertaking are all goods and rights of an undertaking with monetary value, irrespective of their type, use and potential for separate sale, provided they form the basis of an existing market position and allow the acquirer to step into the market position of the seller, thereby strengthening its own market position.[4]

4. Non-controlling minority interests

11. While there is wide global agreement that majority interests and the acquisition of control should be subject to merger control, there is no general consensus with regard to minority shareholdings. However, it is acknowledged that minority interests can dampen competition and consequently lead to higher prices (or lower quantities or quality). Like full mergers, minority interests can lead to unilateral or co-ordinated effects which may reduce competition. The acquiring party may have less incentive to compete aggressively because it shares in the losses and profits of the target. When both firms are competitors, the losses due to a price increase of one firm may be offset by gains of the other firm due to customers switching.[5] Minority shares may also facilitate collusion when they provide access to sensitive information or the ability of the acquiring company to induce the target firm to collude.

---

2 Until 1989, a distinction was made between shares and voting rights. Below 50 % of shares, voting rights were decisive, above 50 % shares voting rights and shares were treated equally. In the 5th amendment of the ARC, however, it was clarified that shares and voting rights were considered equal, irrespective of the percentage of shares acquired.

3 See 6th amendment of the ARC (GWB).

4 BGH (Federal Court of Justice), decision of 10 October 2006 - KVR 32/05 - National Geographic.

5 Such effects may be measured using, for example, the Upward Pricing Pressure Test (UPP Test).

12. The merger control rules of the ARC allow the review of non-controlling minority interests in cases of an acquisition of shares of (more than) 25 % or a transaction resulting in material influence which is significant for competition. This establishes a two-pronged approach: there is one "clear" threshold of 25 % shares or voting rights and one targeted approach ("soft" threshold) of material influence. The concept of acquisition of minority shares is older than that of material influence, but both have been developed and amended several times, providing a large body of case law and experience. To better understand these concepts and their importance in German merger control, a brief overview of the historic development will be given, which may also provide useful information for other jurisdictions contemplating changes in their merger control regulations.

4.1 Historic development

13. When the ARC was first introduced in 1958 it already defined a merger control threshold of the acquisition of 25 % of shares as a form of concentration, but without the power to prohibit a merger which was introduced in 1973. The background for this definition was a rule in the German Stock Corporation Act that a majority of 75 % is required for specific decisions made by a stock company, so that a shareholder with more than 25 % of shares or voting rights will be able to block such decisions.

14. In 1980 experience with resourceful circumventions of the 25 % threshold by companies led to the first introduction of an additional definition of concentration, according to which already the acquisition of less than 25 % shares (or voting rights) would be considered a concentration, provided the acquirer would – through contract, statutes or decision – acquire a position that a shareholder with more than 25 % shares or voting rights has in a stock company (Section 23 (2) No. 2 sentence 4 ARC – old version). According to the courts this would not require the exact same position as a holder of shares in a stock company with a blocking minority. The acquisition of a similar position – taking all relevant circumstances into account – would fulfil the requirements.[6]

15. However, this still left too many loopholes to capture all mergers with potentially negative effects. Ten years later, another definition of concentration was introduced, adding as concentration any other form of structural link between undertakings (i.e. not falling under the established definitions), as far as the link enables one or several undertakings to exert material influence on another undertaking which would be significant for competition (Section 23 (2) No. 6 ARC – old version).[7] It was, however, at first exempted from the ex-ante merger control as well as notification obligations (and only subject to ex-post control including a mandatory ex-post notification). With the 6th amendment of the ARC in 1999 (and the introduction of the acquisition of control) all forms of concentrations were made subject to ex-ante control. The acquisition of a position comparable to that of a shareholder with blocking minority was abandoned, as these types of concentrations were considered by the legislator to either fall under the new definition of acquiring control (Section 37 (1) No. 2 ARC) or that of acquiring material influence (Section 37 (1) No. 4 ARC).[8] The latter concept remained mainly unchanged until today.

---

6 BGH, decision of 10 November 1987 - KVR 7/86 - "Singener Wochenblatt".

7 BGH, decision of 21 December 2004 - KVR 26/03 - "trans-o-flex".

8 The courts confirmed that, since that was the legislator's intention, acquiring a position comparable to that which a shareholder with more than 25 % shares or voting rights has in a stock company, is one specification of material influence (see OLG Düsseldorf, decision of 12 November 2008, VI-Kart 5/08 (V) - A-TEC/Norddeutsche Affinerie).

4.2 Acquisition of minority shares

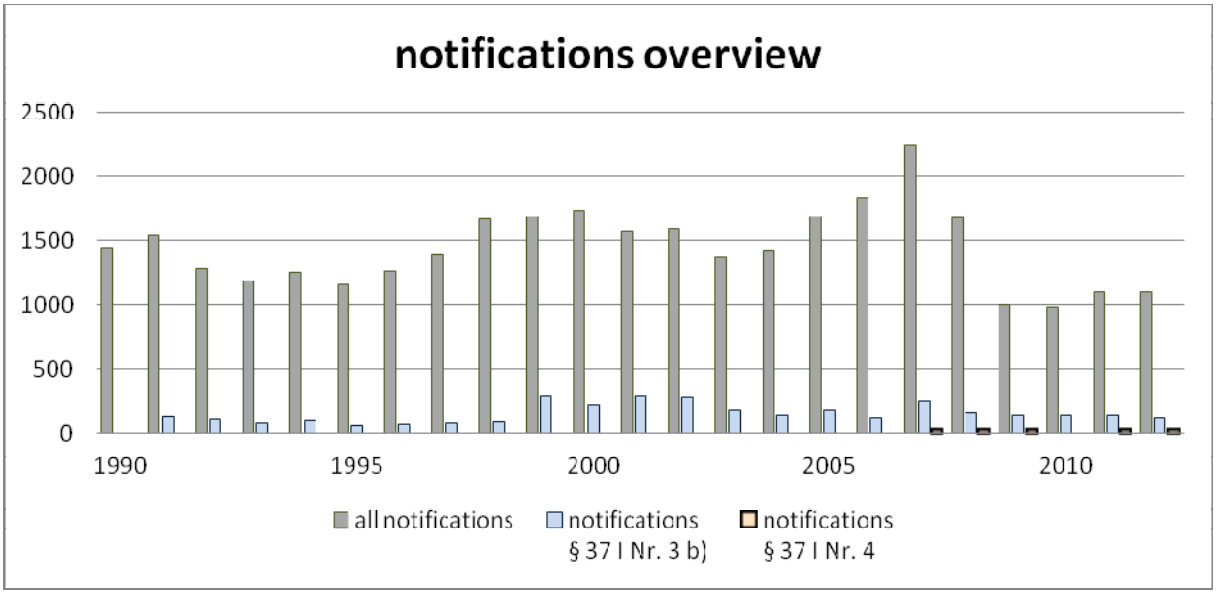
16. According to Section 37 (1) No. 3 in its current form an acquisition of shares in another undertaking constitutes a concentration if the shares, either separately or in combination with other shares already held by the undertaking, reach 50 % or 25 % of the capital or the voting rights of the other undertaking. Each threshold that is met constitutes a concentration on its own in the sense of the law.

17. The acquisition of minority shares below 50 % and above 25 % is a long established concept in German merger control. It was maintained after the introduction of the "acquisition of control" definition in 1999 to keep the possibility to assess the acquisition of minority shares below the threshold of "control" as well as the established case law. The legislator feared that otherwise a lowering of the level of protection might result, which could not be justified from a competition policy perspective.[9]

18. The acquisition of shares in general constitutes around 75 % of all notified merger transactions and is by far the most important type of merger transaction falling under merger control in Germany. The acquisition of minority shares plays a much smaller but nevertheless significant role.

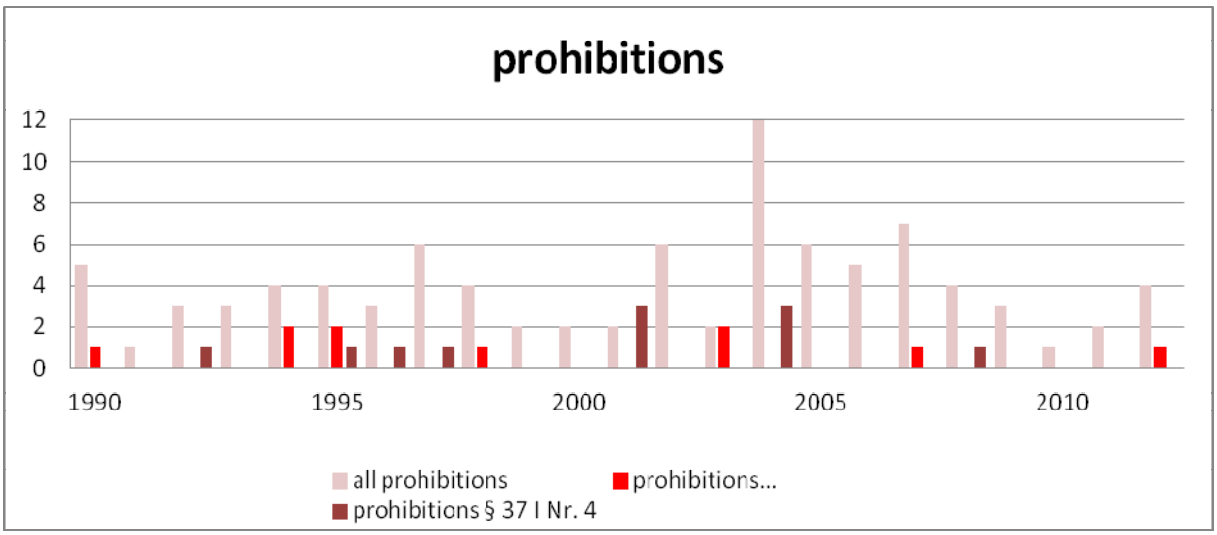
19. As shown in graph 1 and 2 below, the acquisition of minority shares (Section 37 (1) No. 3b) on average constitutes around 10 % of all notifications (graph 1) and also approximately 10 % of all prohibitions in phase II merger proceedings (graph 2).

Graph 1 – § 37 (1) all notifications, No. 3b) 25 % shares, No. 4 material influence



[9] See the reasoning of the government in 1989, Reg.-Begr. 1989, p. 43.

Graph 2 – § 37 (1) all notifications, No. 3b) 25 % shares, No. 4 material influence



4.3 Material influence

20. The concept of the acquisition of a material influence (Section 37 (1) No. 4 – originally Section 23 (2) No. 6 – was introduced as a subsidiary fall-back clause to enable the review of concentrations that do not reach the established thresholds, but may nevertheless have a significant effect on competition.

21. Section 37 (1) No. 4 states that any other (structural) link between undertakings that is based on a share in another company and enables one undertaking to exercise a material influence on another which is significant for competition, also constitutes a concentration within the meaning of the law. In practice, only acquisitions by competitors or companies operating on an upstream or downstream level of the value chain are covered. Generally, the influence one undertaking can exert on another is deemed significant to competition when it allows the acquiring party to influence the competitive behaviour of the target in such a way that it is likely to reduce competition between the undertakings, to a degree that they will no longer act independently on the market.[10] It can also suffice that the target will adapt its competitive behaviour in the interests of the acquirer or that the majority shareholder will take the interests of the minority shareholder into account, even if he does so only as far as it does not conflict with his own interests.[11]

22. The assessment of a material influence which is significant for competition always has to take all relevant factors into account. Since its introduction in 1989, the concept was continuously improved and refined in the case law, giving shape to an initially less obvious threshold. Necessary conditions for a material influence which is significant for competition are a corporate link (e.g. shares, mandates, contractual rights) and a set of additional factors with significance for competition. These additional factors can be special voting or veto rights;[12] specific information rights;[13] options or pre-emption rights;[14]

10 See the reasoning of the government in 1989, Reg.-Begr. 1989, p. 20.

11 BGH, NJW-RR 2001, 762; BGH, decision of 21 December 2004 - KVR 26/03 - "trans-o-flex".

12 BKartA,decision of 3 July 2000 – B8-29/00 „Stadtwerke Neuss"; BKartA, decision of 26 August 2003 – B8-83/03 „RWE/Wuppertaler Stadtwerke".

13 BGH, decision of 21 November 2000 – KVR 16/99 – „Minderheitsbeteiligung im Zeitschriftenhandel".

14 BKartA – merger clearance decision 1998, see Activity report 1997/98, p. 111. Available at: http://dip21.bundestag.de/dip21/btd/14/011/1401139.pdf.

economic dependency;[15] or parallel interests.[16] Rights to nominate members of the advisory board, board of directors or management play a particularly important role.[17] The legislator and literature take the position of a shareholder with more than 25 % shares or voting rights in a German stock company (Section 23 (2) No. 2 sentence 4 ARC – old version) as a benchmark for the overall importance of influence and/or rights that a shareholder will have in order to meet the threshold of Section 37 (1) No. 4. In practice it will be extremely rare that shares below 10 % would be connected with a sufficient amount of rights or other plus factors that would meet the threshold of material influence.[18]

23. It is in the nature of things that a more targeted threshold conveys less legal certainty and can be more complex to apply than a clear cut objective threshold, like a certain percentage of shares. However, this is not only true for thresholds like "material influence", but also for others like "acquisition of control" or "significant lessening of competition" and jurisdictions all over the world seem to have been able to overcome initial uncertainties with the development of sufficient case law. In Germany, the legislator explicitly decided against lowering the threshold of 25 % shares to a clear-cut 10 % of shares rule, but intended to introduce a more targeted fall-back clause. The concept of "material influence" was first introduced as ex-post control, enabling the Bundeskartellamt and the courts to gain case experience and develop a set of case law. The change to ex-ante control with the according prohibition of implementation in 1999 was made as the ex-post control proved to be less efficient and quite problematic. To provide for more legal certainty for companies the Bundeskartellamt for a brief period communicated that it would consider a material influence which is significant for competition to exist when shares of 20 % or more were acquired and that only for acquisitions below 20 % of shares would additional factors be needed.[19] This approach was however not followed by the courts so that the Bundeskartellamt soon made it clear that all cases would be analyzed on a case-by-case basis, taking all relevant factors into account, without being able to provide more certainty through any specific thresholds.

24. The particular importance of the fall-back clause of "material influence" becomes clear when looking at the case distribution. While cases concerning material influence are, on average, considerably less than 1 % of all notifications (graph 1), these cases make up around 10 % of all prohibitions in phase II merger investigations (graph 2). This might underline that companies seem to be well aware which cases might give rise to competition concerns and are trying to target their engagement right below the line where it would be a clear-cut case of a transaction.

5. Merger control of joint ventures

25. The creation of a joint venture can also be subject to merger control in Germany. The merger control provisions not only apply to full-functioning joint ventures but also to joint ventures that do not perform all the functions of an autonomous economic entity. Transactions creating joint ventures can fall under merger control not only with regard to the joint acquisition of control (Section 37 (1) No. 2), but also with regard to the acquisition of at least 25 % shares (Section 37 (1) No. 3) and even the possibility to jointly exert material influence on another undertaking (Section 37 (1) No. 4). Moreover, it might be worth noting that the ARC also treats the acquisition of at least 25 % of shares in one company by several

15 BKartA, decision of 23 July 1992 – B5-42/90 "Gillette/Wilkinson".

16 BGH, decision of 21 November 2000 – KVR 16/99 – „Minderheitsbeteiligung im Zeitschriftenhandel"; BKartA, decision of 19 November 2002 – B8-144/02 „E.ON/Stadtwerke Straubing".

17 BGH (Federal Court of Justice), decision of 21 December 2004 - KVR 26/03 - "trans-o-flex"; OLG Düsseldorf, decision of 12 November 2008, VI-Kart 5/08 (V) - A-TEC/Norddeutsche Affinerie; BKartA, decision of 28 February 2001 – B8-279/00 "easyplus".

18 OLG Düsseldorf, decision of 6 July 2005 "Bonner Zeitungsdruckerei".

19 BKartA Activity report 1997/98, p. 122.

undertakings as a distinct concentration among the undertakings concerned with respect to those markets on which the joint venture operates. Applying these rules to joint ventures provides adequate possibilities to capture the risk of spill-over effects between the parent companies of a joint venture. A clear demarcation whether the creation of a joint venture should be treated under structural merger control or rather "behavioural" control of agreements, which may sometimes be difficult in other jurisdictions, is not required in Germany. Section 1 ARC (Prohibition of Agreements Restricting Competition) is applied alongside merger control, while not being bound by the same deadlines. According to the German experience, this approach has been practical and initiates the control of potentially harmful transactions at an early stage.

6. Concluding remarks

26. When defining thresholds for merger control the legislator always has to consider the costs of "casting a wider net" for companies and competition authorities. It aims to limit the burden of notifications of merger proposals that will clearly have no impact on competition while allowing the review of all cases with potentially negative effects.

27. Limiting the costs of notification to a reasonable level can also be achieved by the features of the notification system itself. Information requirements for notifications to the Bundeskartellamt are very low and mergers that clearly do not cause any competition concern can be cleared very quickly without additional information. Another feature of the German system that limits the scope of the merger control regime relates to the size of the participating undertakings and the required nexus to the German jurisdiction. It ensures that only cases of a certain potential impact on competition in Germany have to be notified and assessed.

28. As the case statistics of the Bundeskartellamt show, the percentage of notified transactions concerning minority shares or material influence is relatively low (graph 1). While the percentage of minority share notifications equals the percentage of all prohibitions for these types of transactions, the percentage of prohibitions of cases concerning material influence exceeds the percentage of notifications by factor 10 (graph 2). The German experience shows that these cases often require deeper review because companies have a clear perception which transactions may raise significant concerns and aim to structure them in a way to avoid the thresholds. Even if a "wider net" may lead to additional costs for companies and authorities, these seem to be small compared to the costs for society if a merger transaction with significant negative impact on competition could not be assessed by the competition authority.