

Information leaflet on the German control of concentrations

The statutory basis for the examination of concentrations is the Act against Restraints of Competition: ARC (Gesetz gegen Wettbewerbsbeschränkungen: GWB¹ - Section 35 et seq.). The examination of concentrations in Germany is the exclusive responsibility of the Bundeskartellamt (Federal Cartel Office). Pre- and post-merger notifications must be submitted in German. The ARC is not applicable in cases where the European Commission has exclusive responsibility under the EC Merger Regulation².

This information leaflet briefly explains key terms that are relevant to the notification of concentrations such as: thresholds, time limits, definition of a concentration, identification of participating enterprises etc., and gives an outline of merger control procedures in Germany.

Please send your pre- or post-merger notification to the following address:

Bundeskartellamt
Kaiser-Friedrich-Str. 16
D - 53113 Bonn
Tel.: (+49-228) 9499-0
Fax: (+49-228) 9499-400

The time limits only begin to run upon receipt of a complete notification at the Bundeskartellamt. The notification may be submitted by mail or facsimile. Currently it is not possible to submit an effective notification by e-mail.

¹ Gesetz gegen Wettbewerbsbeschränkungen (Act against Restraints of Competition: ARC) as published on 12 July 2005 (Bundesgesetzblatt I, p. 1954).

² Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24/1 of 2004.

If you have any further questions concerning the notification of concentrations, please write to the address above (or e-mail: info@bundeskartellamt.de).

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I. Obligation to notify

A distinction is made between two different categories of concentrations falling under the merger control provisions of the ARC: concentrations that are subject to control and those that are not. Concentrations that are subject to control must always be notified prior to being put into effect (Section 39 of the ARC). Concentrations that are not subject to control need not be notified nor is there any obligation to notify that the concentration has been put into effect.

Which category of concentration is involved in a particular case depends on the turnover of the participating undertakings.

1. Concentrations which are subject to control

A concentration is subject to control where in the last business year preceding the concentration

- the combined aggregate worldwide turnover of all participating undertakings was more than €500 million, and
- the domestic turnover of at least one participating undertaking was more than €25 million.

2. Concentrations which are not subject to control and need not be notified

A concentration is not subject to control and need not be notified where

- the concentration has no effect on the domestic market within the meaning of Section 130 (2) of the ARC³ or
- the **turnover thresholds** under 1. are **not reached** or
- the **de minimis clause** (Section 35 (2) no. 1 of the ARC, formerly known as the "affiliation clause") is fulfilled, i.e. where an undertaking which is not a controlled undertaking within the meaning of Section 36 (2) of the ARC and had a worldwide turnover of less than €10 million in the last business year, affiliates itself with another undertaking, or
- the **minor market clause** (Section 35 (2) no. 2 of the ARC) is fulfilled, i.e. where only a market is concerned in which goods or commercial services have been offered for at least five years, and which had a sales volume of less than €15 million in the last calendar year.

³ See also the Bundeskartellamt's Information Leaflet on the domestic effects of concentrations between undertakings.

The de minimis clause does not apply where the concentration leads to restrictions of competition in the field of publishing, producing or distributing newspapers or magazines or parts thereof (Section 35 (2) sentence 2 of the ARC).

According to the wording of the Act, only an undertaking which is **not a controlled** undertaking may invoke the de minimis clause. Consequently, in determining whether the de minimis clause applies, it is always necessary to consider the aggregate turnover attributable to the seller (Section 36 (2) of the ARC). It is this aggregate turnover rather than just the sold undertaking's turnover which must not exceed € 10 million.

Concentrations that affect a minor market are not subject to merger control. However, only if a concentration **exclusively** affects a minor market is it not subject to control, and therefore not subject to notification. A necessary but not sufficient condition for this is that the acquired undertaking operates exclusively on a market that is a minor market. It may, however, be open to question whether such a case might not, for example, also improve the position of the purchaser in the upstream market. In case of doubt (where turnover thresholds as described in 1. above are reached) undertakings are advised to notify a concentration prior to putting it into effect in order to avoid violating the prohibition of putting a concentration into effect and to obtain legal certainty.

PLEASE NOTE:

Concentrations that are subject to control and have been examined according to the merger control procedure must again be notified to the Bundeskartellamt after they have been put into effect. On that occasion, reference may be made to the material submitted for the initial notification of the merger project.

As regards certain sectors (trade, banking, insurance, press, broadcasting) special rules apply for the calculation of the turnover on which the obligation to notify depends (see Section V. 5 below).

II. Concentrations covered by the ARC

The following transactions are deemed to be concentrations within the meaning of the ARC (**Section 37 (1) Nos. 1-4 of the ARC**):

- (1) the **acquisition of** all or of a substantial part of **the assets** of another undertaking (see Section V. 3 below);
- (2) the **acquisition** of direct or indirect **control** by one or several undertakings of the whole or parts of one or more other undertakings. Control is 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, in particular through
 - a) ownership or the rights to use all or part of the assets of the undertaking,
 - b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of the undertaking (see Section V. 4);
- (3) the **acquisition of shares** in another undertaking if the shares, either separately or together with other shares already held by the undertaking, reach or exceed
 - **50 per cent** or
 - **25 per cent**of the capital or the voting rights of the other undertaking. The shares held by the undertaking 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 is deemed to also constitute a concentration among the acquiring undertakings with respect to those markets on which the other undertaking operates;
- (4) any other combination of undertakings enabling one or several undertakings to directly or indirectly exert a **competitively significant influence** on another undertaking;

A concentration also arises if the participating undertakings had already merged previously, unless the concentration does not result in a substantial strengthening of the existing affiliation between the undertakings (Section 37 (2) of the ARC).

If credit institutions, financial institutions or insurance undertakings acquire shares in another undertaking for the purpose of reselling them, this is not 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 ("**banking clause**"). This time limit may, upon application, be extended by the Bundeskartellamt if the undertakings can substantiate that the resale was not reasonably possible within this period (Section 37 (3) of the ARC).

III. Outline of merger control procedure in Germany, time limits for decisions and prohibition of putting a concentration into effect

1. Criteria for instituting proceedings

The Bundeskartellamt 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) of the ARC). Please refer to Section 19 (2) and (3) of the ARC for an explanation of the term dominance.

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

An application for authorisation may also be filed with the Federal Minister of Economics and Technology if, in a specific case, the restraint of competition is outweighed by advantages to the economy as a whole, or if the concentration is justified by an overriding public interest (Section 42 of the ARC).

2. Time limits and prohibition of putting a concentration into effect

2.1 Course of proceedings

In cases that are subject to merger control the Bundeskartellamt has, in principle, four months after receipt of the complete notification to examine the concentration, i.e. it may prohibit the merger within this period. It must, however, inform the notifying undertaking within one month of receipt of the notification (so-called "one-month letter") that it has initiated an examination of the concentration (main examination proceedings). The main examination proceedings should be initiated if a further examination of the concentration is necessary (Section 40 (1) sentence 2 of the ARC). In the main examination proceedings the Bundeskartellamt 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 (Section 40 (3) of the ARC). These must not aim at subjecting the conduct of the participating undertakings to a continued control. Decisions issued in the main examination proceedings will be published (Section 43 (2) no. 1 of the ARC).

PLEASE NOTE:

The periods for decision-making do not begin to run until a complete notification has been received.

2.2 Prohibition of putting a concentration into effect

A notifiable concentration may not be put into effect before

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

A violation of this prohibition of putting a concentration into effect constitutes an administrative offence (Section 81 (2) no. 1 of the ARC). Moreover, legal transactions violating this prohibition are of no effect (Section 41 (1) sentence 2 of the ARC). The Bundeskartellamt may, upon application, grant an **exemption from the prohibition of putting a concentration into effect** if the participating undertakings put forward important reasons for this, in particular to prevent serious damage to a participating undertaking or to a third party (Section 41 (2) of the ARC). The exemption may be granted at any time, even prior to notification, and may be made subject to conditions and obligations.

The Bundeskartellamt seeks to conclude as speedily as possible examination proceedings under Section 40 that do not lead to a prohibition. If it is clear from the information submitted to the Bundeskartellamt, or already available to it, that a dominant position is not likely to be created or strengthened within the meaning of Section 36 (1) of the ARC, the Bundeskartellamt will inform the notifying undertakings without delay after receipt of the complete notification that the conditions of prohibition are not met and that the concentration may be put into effect.

2.3 Notification that a concentration has been put into effect

A concentration must be notified without delay after it has been put into effect (Section 39 (6) of the ARC). A violation of this obligation to notify also constitutes an administrative offence (Section 81 (2) no. 4 of the ARC).

2.4 Fees

A fee is charged for the notification of concentrations that are subject to merger control (Section 80 (2) sentence 2 no. 1 of the ARC). The amount of the fees is determined according to the personnel and material expenses of the cartel authority, account being taken of the economic significance of the concentration. In principle, the fee will not exceed € 50,000 (Section 80 (2) sentence 2 no. 1 of the ARC); it may in exceptional cases be doubled (Section 80 (2) sentence 3 of the ARC).

IV. Contents of a complete notification

1. Information requirements

In order to be complete, pre-merger notifications must contain the information listed in Section 39 (3) of the ARC, in particular:

1.1 Information relating to the concentration

The pre-merger notification must identify the undertakings that intend to merge. Furthermore, the form of concentration must be indicated (Section 39 (3) sentence 1 of the ARC); insofar as the concentration is based on contracts, it is expedient to enclose certified copies or photocopies of such contracts. When shares are acquired, the size of the interest acquired and the total interest held must be indicated. Furthermore, the owner of the remaining shares must be indicated.

1.2 Information relating to the undertakings

- (a) Regarding *each domestic and foreign undertaking participating in the concentration as well as affiliated domestic and foreign undertakings* (for a definition of the terms "participating undertaking" and "affiliated undertaking" see Section V.1 and 2 below) the following particulars must be given:
- name, registered seat and type of business. The type of business must be stated as accurately as possible (e.g. "manufacture of builders' hardware"

instead of "metalworking"), and the stage of the economic process should also be indicated (e.g. production, wholesale trade);

- intra-group relationships as well as control relationships among and interests held by the affiliated undertakings;
- (b) Regarding *each participating group of undertakings, i.e. each undertaking and its affiliated undertakings*, the following particulars must be supplied under Section 39 (3) sentence 2 nos. 3 and 4 of the ARC:
- the **turnover** in **Germany, the European Union** and **worldwide**;
 - the **market shares**, including the basis for their calculation or estimate, **if** in the area of application of the ARC or a substantial part thereof the combined shares of the participating undertakings amount to **at least 20 per cent** ;
- (c) a person authorised to accept service in Germany, if the registered seat of the undertaking is not located in the area of application of the ARC.

Thus, turnovers and market shares must only be indicated for each undertaking participating in the concentration and its affiliates *as a whole*, but need not be given for each affiliated undertaking separately. It is, however, advisable to provide a separate statement of the data relating to the undertakings that are directly involved in the concentration. If a considerable part of the turnover is achieved abroad, it may also be useful to include a breakdown of turnover into domestic and foreign sales.

As regards the calculation of market shares, there may be uncertainty in individual cases as to the market definition and the domestic market shares of the other participating undertakings. To ensure completeness of the pre-merger notification, it is therefore advisable to supply data on significant market shares even if it is doubtful that the 20 per cent threshold is exceeded.

The pre-merger notification should also contain an outline of how the participating undertakings are **interlinked**, i.e. the undertakings in which the participating undertakings, either separately or in combination, hold 10% or more of the voting rights or shares should be indicated. In addition, any undertakings holding a similar interest in the participating undertakings should be stated.

The Bundeskartellamt asks the notifying undertakings to indicate already in the pre-merger notification in which other countries the merger project is intended to be notified or has already been notified (**multiple filings**).

PLEASE NOTE:

It is helpful to include a copy of the annual report, if available, provided it contains detailed information on the various points mentioned above.

2. Legal consequences of violating the prohibition of putting a concentration into effect and of non-compliance with the pre- or post-merger obligation to notify

An administrative offence is committed by any person who intentionally or negligently violates the prohibition of putting a proposed merger into effect or participates in its implementation (Section 81 (1) No 1 of the ARC). The administrative offence may be punished by a fine of up to € 1 million (Section 81 (4) sentence 1 of the ARC). If a fine is imposed on an undertaking or an association of undertakings, the fine for each undertaking or association of undertakings participating in the infringement may not, beyond the above-mentioned amount, exceed 10 per cent of its total turnover in the preceding business year (Section 81 (4) sentence 2 of the ARC).

Any person who contrary to Section 39 (1) intentionally or negligently fails to notify a planned concentration correctly or completely or in time, or contrary to Section 39 (6) intentionally or negligently fails to make a notification that a concentration has been put into effect correctly or completely or in time, commits an administrative offence which may be punished by a fine of up to €100,000 (Section 81 (2) No 3 or 4 in conjunction with Section 81 (4) ARC).

3. Foreign concentrations

If a foreign concentration project is notified and the Bundeskartellamt is satisfied that, due to foreign legal provisions applicable to the concentration or for other reasons, the undertakings are prevented from supplying all particulars requested prior to putting the concentration into effect, the Bundeskartellamt will not make clearance of the concentration conditional upon the completeness of the notification filed, provided that it is clear from the data furnished or available to it that the concentration project is unlikely to be prohibited (see also the General Directive of the Federal Minister of Economics of 30 May 1980 (Federal

Gazette No. 103/80 of 7 June 1980). In any case the notification that the concentration has been put into effect has to be made upon completion.

V. Explanation and definition of important terms

The provisions governing notifications use certain terms in a strictly defined sense. This applies, in particular, to the following terms:

1. Participating undertakings

Whether or not an undertaking is deemed to participate in a concentration depends on how the concentration is created. Participants in the concentration are, e.g.,

- in the case of the *acquisition of the assets* of another undertaking (by merger or otherwise, Section 37 (1) no. 1 of the ARC): the acquirer and the seller, the seller participating only insofar as the transferred assets are concerned; in the case of a *merger*, the undertakings that are merged;
- in the case of the *acquisition of control* (Section 37 (1) no. 2 of the ARC): the undertakings which are able to exert decisive influence and the undertaking exposed to that influence;
- in the case of the *acquisition of shares* (Section 37 (1) no. 3 of the ARC): the acquirer/s and the undertaking in which shares are acquired. If this undertaking is affiliated to other undertakings within the meaning of Section 36 (2) of the ARC, those undertakings are also deemed to be participating undertakings;
- in the case of any other *combination of undertakings exercising a competitively significant influence* (Section 37 (1) no. 4 of the ARC): the undertakings which are able to exert a competitively significant influence and the undertaking exposed to that influence.

2. Affiliated undertakings

The following are deemed to be enterprises affiliated to a participating undertaking and are to be considered a single undertaking within the meaning of Section 36 (2) of the ARC:

- controlled or controlling companies (Section 17 of the Joint Stock Companies Act⁴) and group companies⁵ (Section 18 of the Joint Stock Companies Act).

⁴ Aktiengesetz

⁵ Konzernunternehmen

- undertakings which are controlled solely or jointly by the participating undertaking, and - vice versa - undertakings which are able to exert decisive influence on the participating undertaking.

If an undertaking holds 50 per cent of the shares of another undertaking, the Bundeskartellamt as a rule assumes that the undertaking is able to (jointly) exert decisive influence on the other undertaking.

3. Substantial part of the assets

A substantial part of the assets within the meaning of Section 37 (1) no. 1 of the ARC means not only parts of the assets which, in terms of quantity, are sufficiently large in relation to the seller's total assets. Rather, a part of the assets is substantial whenever it has a significance of its own as regards production, distribution targets and current market conditions and whenever it consequently appears to be a unit that can be separated from the seller's other assets. Such a unit may be an establishment (e.g., an outlet of a food chain operator) or a business unit (e.g., the industrial sewing machines division of a mechanical engineering firm), a trademark or the publishing and title rights of a newspaper.

4. Control

The ARC has adopted the concept of acquisition of control used in EC law, i.e. control means the possibility of exercising **decisive influence** on an undertaking.

As a rule this is the case if the acquirer can decisively influence **strategic business policy decisions** or the **composition of the supervisory or administrative boards** of the target undertaking.

Control within the meaning of Section 37 (1) no. 2 of the ARC may be acquired by **one or several undertakings**; an affiliation need not exist among the acquirers. It suffices for joint control if the undertakings are able, by virtue of their joint business policy, to co-ordinate and implement their own competitive interests in relation to one another or vis à-vis the controlled undertaking, e.g. by means of pooling agreements, stricter voting requirements in the shareholders' meeting or because a uniform influence is guaranteed on the basis of long-term shared interests. Where several undertakings acquire joint control over another undertaking, all jointly controlling undertakings and the target undertaking are deemed participants in the concentration. For example, a concentration is deemed to be subject to merger control where five

undertakings, each with a turnover of € 150 million, form a joint venture, with each acquiring a 20 per cent interest, provided they agree that all important decisions have to be made with an 81 per cent majority of votes.

A change from joint control to sole control also constitutes a concentration. For example: A and B hold shares of 60 and 40 per cent respectively in a joint venture. All important decisions have to be made by a two-thirds majority (i.e. the joint venture is jointly controlled by A and B). The subsequent acquisition by A of B's 40 per cent of the shares is deemed a concentration subject to merger control within the meaning of Section 37 (1) no. 2 of the ARC. The same applies to a change in control from three to two undertakings.

In the case of companies listed on the stock exchange, the acquisition of a **safe majority of votes in the shareholders' meeting** constitutes a significant case of acquisition of control. This will as a rule be the case when it can be gathered from the attendance records of the last three shareholders' meetings that the voting rights acquired will suffice to enforce the decisions of the shareholders' meeting. Even if the transaction falls short of the threshold of Section 37 (1) no. 3a of the ARC, e.g. where the shareholding is increased from 25 to 45 per cent, it still constitutes a concentration.

5. Turnover

5.1 Basis of calculation

Turnover is determined on the basis of Section 277 (1) of the German Commercial Code⁶ (Section 38 (1) of the ARC). Value-added tax and excise taxes are not taken into account. Turnover achieved abroad is to be included. Turnovers are to be stated in euro. Turnover in a foreign currency is to be converted into euro at the official annual mean rate of the European Central Bank (see: <http://www.ecb.int> - Publications – Periodical Publications – Monthly Bulletin – Euro area statistics: Table 10 Exchange Rates). Where the turnover is quoted for several affiliated undertakings together, revenues from the supply of goods and services between those undertakings (intra-group revenues) are not taken into account. The turnover must be stated **at the time of notification**, taking into account **all the companies in a group of undertakings**.

⁶ Handelsgesetzbuch

5.2 Industry-specific provisions

If the operations of an undertaking consist of trade in goods, only three quarters of the turnover is to be taken into account. There is no trade turnover in that respect if the goods produced or processed by an undertaking are purchased and resold by another undertaking affiliated to it (Section 38 (2) of the ARC).

In the case of insurance undertakings the premium income is taken into consideration in place of turnover. Premium income means income from insurance and reinsurance business including the portions ceded for cover (Section 38 (4) sentences 2 and 3 of the ARC).

In the case of credit institutions, financial institutions and building and loan associations the turnover is replaced by the total amount of the **proceeds** referred to in Section 34 (2) sentence 1 no.1 a-e of the Ordinance on the Rendering of Accounts of Credit Institutions of 10 February 1992 (Federal Law Gazette I p. 203)⁷ minus value added tax and other taxes assessed directly on the basis of such proceeds (Section 38 (4) sentence 1 of the ARC). Turnovers of undertakings subject to (jointly exercised) decisive influence are to be added in full.

As regards undertakings whose operations wholly or partially consist of the publication, production or distribution of newspapers, magazines or parts thereof and the production, distribution and broadcasting of radio and television programmes and the sale of radio and television advertising time, twenty times the amount of the turnover is to be taken into account (Section 38 (3) of the ARC).

PLEASE NOTE:

If the actual turnover is **reduced** or **multiplied** as a result of special cartel law provisions, or **proceeds** are given or included instead, **this must be expressly stated.**

6. Market shares

The parties must quote their domestic market shares where these amount to at least 20 per cent in the area of application of the ARC or in a substantial part thereof, and include the basis of their calculation or estimate for each participating undertaking and the undertakings affiliated to it.

⁷ Verordnung über die Rechnungslegung der Kreditinstitute vom 10. Februar 1992 (BGBl. I S. 203)

The entire area of application of the Act against Restraints of Competition (i.e. the Federal Republic of Germany) is taken as the basis for calculating market shares. If an undertaking does not operate in the entire territory of the Federal Republic or its market position is characterised by considerable regional differences, it is necessary to indicate the shares held in the individual regional markets in addition to those held in the entire area of application.

In the market share calculation the most recent statistical information is to be used and the basis of the calculation or estimate is to be stated. The market share calculation may be based on sales either in terms of quantity or in terms of value. It is useful to calculate the market share both ways and present both calculations.

Only those goods or commercial services are to be attributed to a market which in the buyers' view are substitutable in terms of characteristics, use and price. The presentation of a more detailed breakdown of the markets in the calculation of the market shares does not prejudice the undertakings in determining a dominant position.

When calculating the market shares, uncertainty may arise in individual cases as to the market definition and the domestic market shares of the other participants. To ensure the completeness of notifications, it is therefore advisable to supply data on significant market shares even if it is doubtful whether the 20 per cent threshold is exceeded.

Turnovers and market shares must be indicated for each enterprise participating in the concentration. The turnover and market shares of undertakings affiliated to these enterprises are to be included in this sum and need not be indicated separately. It is, however, useful to provide a separate statement of the data relating to the undertakings that are directly involved in the concentration.