

## 10th Amendment to ARC – Merger Control

### Summary of the key changes relevant to merger control

The 10<sup>th</sup> Amendment of the German Act against Restrictions of Competition (ARC) entered into force on 19.1.2020. The amendment has been labeled as the “digital ARC”, as it introduces tools to help the *Bundeskartellamt* (FCO) better enforce competition law in digital markets. However, significant changes have been made to the ARC’s merger control regime as well. Here is a quick summary of those changes:

#### Thresholds

In 2018, merger control notifications in Germany were at ca. 1,400 per year, which is relatively high compared to other countries. To reduce this number, the German legislator raised both domestic turnover thresholds significantly, i.e. from € 5m to € 17,5m and from € 25m to € 50m; corresponding changes were made to the transaction value based threshold. These changes are expected to reduce yearly notifications by more than 20%.

In addition, the “minor markets”-clause was amended. The turnover limit for the value of minor markets has been raised from €15m to €20m. However, if a concentration meets the prohibition requirements on several minor markets whose combined turnover volume is €20m or more, the concentration may still be prohibited.

#### New Tool: Notification Order

With Sec. 39a, the amendment introduced an entirely new merger control tool. The FCO can now order companies to notify every transaction in a specific

economic sector, irrespective of whether the regular turnover thresholds are met.

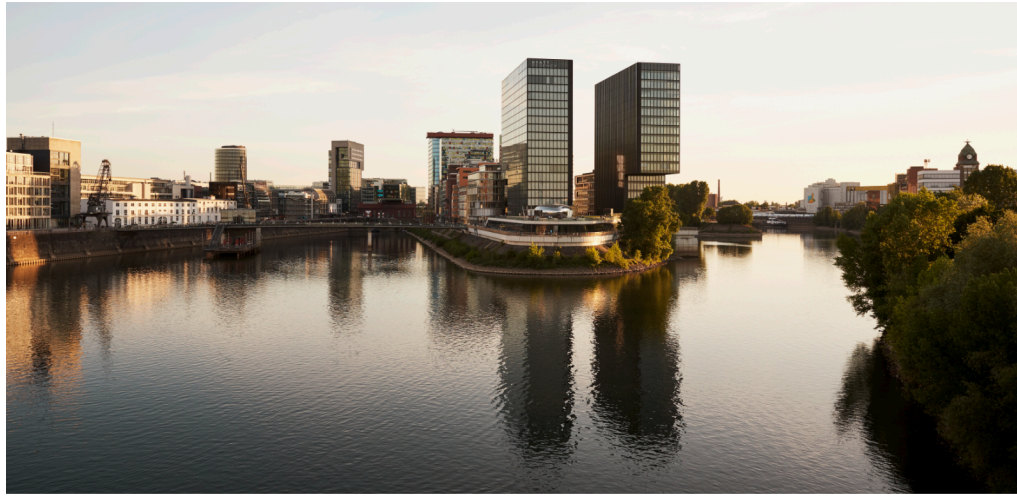
The requirements for the FCO to issue such an order are, however, substantial. *Inter alia*, the FCO must have performed a sector inquiry in the relevant economic sector beforehand. Furthermore, the company concerned must have a worldwide turnover of more than €500m and a 15% share of domestic supply or demand. Objective indications must suggest that future concentrations would significantly impede competition in Germany and the target company in question must have achieved a turnover of more than €2m and more than two-thirds of that turnover in Germany.

The competition policy concern underlying the introduction of this new tool is that (large) companies could harm competition significantly by gradually acquiring several smaller, typically regional competitors without having to notify these acquisitions to the FCO for lack of the domestic thresholds being met.

#### Turnover

Two smaller changes in relation to calculating relevant company turnover:

Turnover based on IFRS accounting will now also be sufficient for merger control purposes, but only if IFRS is the only accounting standard being used by a particular company. Otherwise, the company in question must continue to calculate its turnover based on the



"Handelsgesetzbuch" (German Trade Law), which – up until now – was the only accounting standard permitted.

Second, the multiplication factor applicable to press media companies' turnover (meant to artificially increase relevant turnover for the purposes of the turnover thresholds to cover also smaller transactions), will be reduced from a factor of 8 to a factor of 4. This – along with the increased domestic turnover thresholds – further decreases the notifiable transactions in the press sector.

#### **Timeline**

Phase II proceedings (or main proceedings "Hauptprüfverfahren") can now last up to 5 months after a complete notification has been received by the FCO. As before, the timeline increases by one additional month should the parties offer commitments to remedy any competitive concerns. In the past, the FCO had argued that there was not enough time for analysis in complex merger cases.

#### **Notification of completion**

The ARC amendment eliminates the requirement to formally notify the FCO once the notified concentration has been consummated. While this has never been an overly burdensome requirement in the past, the change nevertheless decreases administrative requirements further and can therefore only be welcomed.

#### **Special Rules for Hospital Mergers**

The amendment also introduces new special provisions for certain hospital concentrations, which can now be exempt from merger control entirely if consummated before the end of 2027. The main criterion for the exemption is the support from the Hospital Structural Fund (Krankenhausstrukturfond), opening the door to general political considerations.

#### **What to make of the changes?**

Mainly, these are good news for M&A activity. With the significantly increased domestic thresholds, a large number of transactions will fall out of the German merger control regime, thereby reducing regulatory requirements. In particular smaller private equity deals as well as consolidation in fragmented markets will benefit from this.

It remains to be seen how effective the new merger control tool in Sec. 39a will turn out to be. The idea to intervene when large companies start buying up smaller rivals and market structures change is interesting as a model of targeted (vs. broad) intervention. However, the preconditions to order certain companies to notify all concentrations in a specific sector are relatively high and one wonders if the FCO will not ultimately come too late to the party if it first has to undertake a sector inquiry.

The more targeted intervention is however not only a German phenomenon. With the European Commission actively advocating the use of Art. 22 EU Merger Regulation to get problematic cases that were previously not notifiable transferred from the Member States, there is a new dawn of uncertainty in merger control that companies need to be aware when planning any M&A.

**For any questions, do not hesitate to get in touch.**

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## Sec. 35 – Scope of Application of the Control of Concentrations

(1) The provisions on the control of concentrations shall apply if in the last business year preceding the concentration

1. the combined aggregate worldwide turnover of all the undertakings concerned was more than EUR 500 million, and
2. the domestic turnover of at least one undertaking concerned was more than EUR 50 million and that of another undertaking concerned was more than EUR 17,5 million.

(1a) The provisions on the control of concentrations shall also apply if

1. the requirements of paragraph 1 no. 1 are fulfilled,
2. in the last business year preceding the concentration
  - a) the domestic turnover of one undertaking concerned was more than EUR 50 million and
  - b) neither the target undertaking nor any other undertaking concerned achieved a domestic turnover of more than EUR 17,5 million,
3. the consideration for the acquisition exceeds EUR 400 million and
4. the target undertaking pursuant to no. 2 has substantial operations in Germany.

## Sec. 39a Invitation to register future mergers

(1) The Federal Cartel Office can order a company to register every transaction of the company with other companies in one or more specific economic sectors if

1. the company achieved worldwide sales of more than € 500 million in the last financial year,
2. there are objectively comprehensible indications that future mergers could significantly impede effective competition in the domestic sectors mentioned above and
3. the company has a share of at least 15 percent in the supply or demand for goods or services in Germany in the sectors mentioned.

(2) The obligation to notify in accordance with para. 1 only applies to transactions where

1. the company to be acquired achieved turnover of more than € 2 million in the last financial year and
2. generated more than two thirds of its turnover in Germany.

(3) An order in accordance with para. 1 presupposes that the Federal Cartel Office has previously carried out a sector inquiry in accordance with Sec. 32e in one of the economic sectors concerned.

(4) The obligation to notify in accordance with para. 1 applies for three years from the notification of the decision. The relevant economic sectors must be specified in the decision.