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COMPETITION LAW IN GERMANY: OVERVIEW

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Essential legal questions answered in key jurisdictions

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Competition law in Germany: overview

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MERGER CONTROL

1. What (if any) merger control rules apply to mergers and acquisitions in your jurisdiction?

Regulatory framework

The German merger control rules are found in sections 35 to 43 of the Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*) (ARC). The text of the ARC (including an English translation of it) as well as various notices and information leaflets are available on the website of the Federal Cartel Office (*Bundeskartellamt*) (FCO) (*www.bundeskartellamt.de*).

Regulatory authority

The main authority responsible for the implementation of German merger control rules is the FCO. The FCO is an independent federal authority and, although it accounts to the Federal Ministry of Economics and Technology (*Bundesministerium für Wirtschaft und Technologie*), it does not receive political orders with respect to its decision making.

See box, *The regulatory authority*.

Triggering events/thresholds

2. What are the relevant jurisdictional triggering events/thresholds?

Triggering events

The following types of transactions are considered to be concentrations (*section 37, ARC*):

- The acquisition of (direct or indirect) control over another undertaking or parts thereof by one or several undertakings.
- The acquisition of all or substantial part of the assets of another undertaking.
- The acquisition of shares in a company's capital or voting rights resulting in an overall shareholding reaching or exceeding 25% or 50% respectively.
- Any other combination of undertakings enabling one or several undertakings to directly or indirectly exert a competitively significant influence on another undertaking.

The concept of "control" in German merger control law is very similar to the concept applied in EU merger control. Control can be acquired by rights, contracts or any other means which 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.

The concept of "competitively significant influence" is much broader and may also cover acquisitions of minority shareholdings of less than 25%, particularly in case of transactions involving strategic buyers.

If credit institutions, financial institutions or insurance companies acquire shares in another undertaking with a view of reselling them, this is not deemed to constitute a concentration provided that the voting rights attached to the shares are not exercised and the resale occurs within one year.

Thresholds

German merger control rules do not apply to concentrations that are subject to the EU merger control rules set out in Regulation (EC) 139/2004 on the control of concentrations between undertakings (Merger Regulation), except for particular cases set out in the EU Merger Regulation.

A concentration is subject to German merger control, if in the last completed financial year preceding the transaction all of the following criteria were met:

- The combined worldwide turnover of all participating undertakings exceeded EUR500 million.
- The turnover of at least one participating undertaking exceeded EUR25 million in Germany.
- The turnover of at least one other participating undertaking exceeded EUR5 million in Germany.

Foreign-to-foreign mergers are subject to German merger control as well, provided both:

- The above turnover thresholds are met.
- The proposed concentration will have an appreciable effect in the German territory. (In most cases a concentration will be deemed to have an appreciable domestic effect if the turnover thresholds are met.)

The concept of turnover in German merger control law is very similar to the concept applied in EU merger control. The following is noteworthy:

- Turnover figures must be calculated on a consolidated group basis excluding intra-group sales and VAT.
- As regards credit institutions, financial institutions as well as building and loan associations, the relevant turnover shall be the total amount of proceeds including, among other things, any interest income, commission earnings or share earnings.
- As regards insurance companies, the premium income has to be taken into account instead of turnover.

There are also some specific rules that must be observed when calculating turnover in the context of German merger control:

- Only 75% of the turnover resulting from the trade of goods (that is, goods which were simply bought and resold) is to be taken into account.
- As regards undertakings which are active in the publication, production and distribution of press, or in the production, distribution and broadcasting of radio and television programmes and the sale of radio and television advertising time, the relevant turnover must be multiplied by 20 for merger control purposes.

There are two *de minimis* exemptions from German merger control rules. German merger control rules do not apply and no notification is required if one of the following applies:

- The worldwide turnover of one participating undertaking was less than EUR10 million (*de minimis* company exemption). In this case, the turnover of the seller must be considered as well when calculating the turnover of the target, provided that the seller controls the target prior to the proposed transaction.
- The concentration exclusively affects a market in which goods or commercial services have been offered for at least five years and which had a market volume of less than EUR15 million in the last calendar year (*de minimis* market exemption).

According to a draft bill for the 8th amendment of the ARC (*see Question 39*), the German merger control thresholds will be modified as follows:

- The *de minimis* market exemption will be modified: transactions affecting *de minimis* markets will still be exempt from a substantive review, but they will need to be notified.
- As regards undertakings which are active in the publication, production and distribution of press (*see above*), the relevant turnover will need to be multiplied by eight (instead of 20) for merger control purposes.
- Two or more concentrations which, individually, do not meet the thresholds indicated above, but take place within a two-year period between the same parties, will be treated as one and the same concentration arising on the date of the last transaction.

Notification

3. What are the notification requirements for mergers?

Mandatory or voluntary

Concentrations that are subject to German merger control (*see Question 2*) must be notified to the FCO.

Timing

There is no deadline for submitting pre-merger notifications to the FCO. A notification can be filed at any time before the completion of the proposed concentration, even before the signing of the transactional documents.

Formal/informal guidance

The FCO is prepared to give informal guidance before notification on the parties' request.

Responsibility for notification

All undertakings participating in the proposed concentration are responsible for submitting a notification. In practice, however, it is sufficient if only one party submits the notification on behalf of all the other parties involved.

Relevant authority

The notification should be addressed to the FCO.

Form of notification

There is no compulsory form to be used for the notification of concentrations to the FCO.

Filing fee

German merger control proceedings are subject to a fee, which is imposed by the FCO on the notifying party at the end of the proceedings. The fee amount depends on the FCO's administrative expenses as well as the economic significance of the notified transaction. The fee can amount up to EUR50,000 (EUR100,000 in exceptional cases). In cases of minor importance, the fees usually range between EUR5,000 and EUR15,000.

Obligation to suspend

A concentration that is subject to German merger control must not be implemented before the FCO has granted clearance. Any violation of this prohibition constitutes an administrative offence and results in all underlying contracts/transactions being (preliminarily) void and unenforceable under German law (*see Question 9, Implementation before approval or after prohibition*). In exceptional cases, the FCO may grant a derogation from the obligation to suspend the closing of the transaction, for example, if a suspension would severely harm the participating undertakings or third parties.

Procedure and timetable

4. What are the applicable procedures and timetable?

Initial examination proceedings (Phase I)

Upon receipt of a pre-merger notification, the FCO starts a preliminary investigation examining whether the concentration may raise substantial competition concerns in Germany and, thus, is likely to meet the conditions for prohibition. If the FCO does not identify substantial competition concerns, it issues an informal letter informing the notifying parties that the concentration is cleared and can be completed. The clearance letter is not reasoned and cannot be appealed by the participating undertakings or by third parties.

If the FCO does identify substantial competition concerns, it must inform the notifying parties that a main examination proceeding will be initiated within one month from receiving the (complete) notification. If the FCO does not notify parties of the initiation of main examination proceedings within one month, the concentration is deemed to be cleared.

Main examination proceedings (Phase II)

If the main examination proceedings confirm the existence of competition concerns, the FCO sends a written statement of objections to the notifying parties setting out the relevant issues. The parties can then submit (further) comments and/or proposals for commitments.

Phase II proceedings must be finalised within four months from receipt of the (complete) notification by one of the following:

- Unconditional clearance decision.
- Clearance decision, which is subject to conditions/commitments.
- Prohibition decision.

If no decision is taken by the FCO within the prescribed period, the concentration is deemed to be cleared under German merger control rules. However, the four-month period may be extended, provided that the notifying parties consent to it. Decisions adopted by the FCO in Phase II are formal decisions, which must be reasoned and are subject to appeal (*see Question 10*).

For an overview of the notification process, see flowchart, *Germany: merger notifications*.

Publicity and confidentiality

5. How much information is made publicly available concerning merger inquiries? Is any information made automatically confidential and is confidentiality available on request?

Publicity

The fact that a pre-merger notification has been submitted is published on the FCO's website. The following information is disclosed:

- The date of the notification.
- The identity of the participating undertakings.
- Business sector(s) affected by the concentration.
- The file number.
- The division unit in charge of the proceedings.
- Federal states (*Bundesländer*) where the parties' business seats are registered or which are affected by the concentration.
- The date of the Phase I clearance decision.
- The date of any decision (clearance/prohibition) adopted or other procedural developments (for example, extension of the investigation period, withdrawal of notification) in Phase II.

Moreover, non-confidential versions of all Phase II decisions as well as summary reports of selected cases are published on the FCO's website.

Procedural stage

The list of notified concentrations published on the FCO's website is regularly updated. Therefore, the fact that a proposed concentration has been notified becomes public relatively soon.

Automatic confidentiality

The FCO has a statutory obligation to keep information relating to individual personal data or to business secrets confidential. Consequently, business secrets and other confidential information contained in pre-merger notifications or provided by the parties in the context of a merger control proceeding are kept confidential by the FCO.

Confidentiality on request

The parties may request that certain information provided to the FCO should be kept confidential. The FCO will accept such requests if that information amounts to a business secret (*see above, Automatic confidentiality*).

Rights of third parties

6. What rights (if any) do third parties have to make representations, access documents or be heard during the course of an investigation?

Representations

The FCO may consult third parties affected by the proposed concentration (such as competitors, customers or suppliers) at any stage of the investigation and ask for information about the relevant market(s) or for their comments on the proposed concentration. Upon separate application, such third parties may also be admitted by the FCO to join the proceedings as "intervening party" if their interests are materially affected by the notified concentration.

Document access

Only third parties admitted as intervening party have a right to access the file to the extent that the knowledge of the contents is necessary to assert or defend their legal interests. Drafts of decisions and preparatory documents of the FCO are not accessible. The same applies with respect to documents that contain business secrets or other confidential information of the parties.

Be heard

Only third parties admitted as intervening party have a right to be heard by the FCO.

Substantive test

7. What is the substantive test?

A concentration must be prohibited by the FCO if it leads to the creation or strengthening of a dominant market position, unless the parties can prove that it will also result in an improvement of market conditions on another market, which may outweigh the disadvantages of the market dominance.

According to the statutory definition of market dominance, a dominant market position exists if one or more companies have no competitors at all, are not subject to significant competition or are in a superior market position that enables them to act independently of competitors, customers and other market participants. When assessing a concentration, the FCO takes into account various criteria, including in particular:

- The market shares of the parties and their competitors.
- The competitive structure of the relevant market.
- Any legal or factual barriers to market entry.
- Access to customers and suppliers.
- Actual or potential competition by companies established within or outside Germany.
- Any links with other companies.

German merger control rules contain several rebuttable presumptions as to the existence of market dominance (*see Question 27*).

According to a draft bill for the 8th amendment of the ARC (*see Question 39*), the current market dominance test will be replaced by a significant impediment to effective competition test (SIEC test) similar to the concept operated under EU merger control rules.

Remedies, penalties and appeal

8. What remedies can be imposed as conditions of clearance to address competition concerns? At what stage of the procedure can they be offered and accepted?

Although the FCO can impose remedies such as conditions and obligations in Phase II decisions only, the parties can offer such remedies at any stage of the merger control proceedings. In practice, the FCO prefers to impose structural remedies, but may also accept behavioural remedies in specific cases. Remedies subjecting the parties to permanent behavioural control are prohibited by law.

Structural remedies such as the obligation to divest certain parts of the parties' business to a suitable buyer (to be approved by the FCO) are usually accompanied by arrangements ensuring the implementation and the monitoring of the proposed divestment, for example, by appointing an independent monitoring trustee (*Sicherungstreuhänder*) and/or divestiture trustee (*Veräußerungstreuhänder*). The appointment of such trustees requires the FCO's prior written approval.

On its website, the FCO has published several model texts (in German and English) for different types of remedies as well as a trustee mandate.

9. What are the penalties for failing to comply with the merger control rules?

Failure to notify correctly

An incorrect or incomplete notification of a concentration constitutes an administrative offence which may result in fines of up to EUR100,000 (in case of intentional violation) or up to EUR50,000 (in case of negligence) being imposed on the relevant company and/or its officers.

Implementation before approval or after prohibition

Closing a notifiable concentration without the FCO's prior clearance (or following a prohibition) constitutes an administrative offence, which may result in fines of up to:

- EUR1 million, for individuals.
- 10% of the worldwide group turnover, for companies.

The FCO can also initiate demerger proceedings in relation to notifiable concentrations that have been closed without the FCO's prior clearance (*section 41, ARC*). A limitation period for the initiation of such proceedings does not exist.

Failure to observe

If clearance is granted by the FCO subject to conditions precedent, it does not become effective unless the conditions are actually met.

Clearance decisions, which are subject to conditions subsequent, allow the concentration to be implemented immediately, but automatically become invalid if the conditions are not met. In such cases, the FCO may order the concentration to be dissolved.

If the clearance decision is subject to obligations and the parties fail to comply with these obligations, the FCO may issue a decision withdrawing the clearance and ordering the dissolution of the concentration.

Non-compliance with conditions or obligations ordered by the FCO constitutes an administrative offence, which may result in fines of up to EUR1 million (for individuals) or 10% of the total worldwide turnover (for companies).

10. Is there a right of appeal against any decision? If so, which decisions, to which body and within which time limits? Are rights of appeal available to third parties or only the parties to the decision?

Rights of appeal and procedure

Only Phase II decisions of the FCO can be appealed. The appeal must be filed with the FCO in writing within one month following the date on which the decision is notified to the appellant. The decision on the appeal is taken by the Higher Regional Court (*Oberlandesgericht*) in Düsseldorf.

In addition, the parties may also apply for a special Ministerial Authorisation (*Ministererlaubnis*), granted by the German Federal Minister of Economics and Technology, if a proposed concentration has been prohibited by the FCO. Such an application must be submitted in writing:

- Within one month following the date of the service of the FCO's prohibition decision.
- If the decision is appealed, within one month following the date when the decision becomes final.

Third party rights of appeal

Third parties are only entitled to appeal FCO's decisions if they have been admitted to the merger control proceeding as intervening party (*see Question 6*).

Automatic clearance of restrictive provisions

11. If a merger is cleared, are any restrictive provisions in the agreements automatically cleared? If they are not automatically cleared, how are they regulated?

A merger clearance does not automatically clear all restrictive provisions contained in the underlying agreements, such as non-compete obligations. Such provisions can be reviewed by the FCO or any other competent competition authority under the general restrictive practices provisions of the ARC at any time (*see Question 13*). As a general rule, however, the restrictive practices provisions of the ARC do not apply to ancillary arrangements that are related and indispensable to the implementation of a concentration.

Regulation of specific industries

12. What industries (if any) are specifically regulated?

If an investor from outside the EU intends to acquire a shareholding of 25% or more in a German undertaking, the transaction may be subject to a separate examination by the Federal Ministry of Economics and Technology if it is likely to threaten Germany's public policy or security. The same applies if such a shareholding is acquired by an EU-based investor in which an investor from outside the EU holds a share of 25% or more. There is no need to notify such a transaction to the Ministry, but the Ministry may decide to start an investigation *ex officio*.

Moreover, the acquisition of a shareholding of 25% or more in undertakings active in the war weapons industry must be notified to the Federal Ministry of Economics and Technology in advance and may be prohibited for public security reasons.

In case of transactions involving media companies or companies active in the banking or insurance sector, notifications to authorities other than the FCO may be required as well.

RESTRICTIVE AGREEMENTS AND PRACTICES

Scope of rules

13. Are restrictive agreements and practices regulated? If so, what are the substantive provisions and regulatory authority?

The prohibition of restrictive agreements and concerted practices (and the applicable exemptions) are set out in sections 1 to 3 of the ARC. Sections 1 and 2 of the ARC closely resemble the EU rules on restrictive agreements and concerted practices set out in Articles 101(1) and (3) of the Treaty on the Functioning of the European Union (TFEU). Section 3 of the ARC contains an additional exemption for certain cartel agreements involving small and medium-sized enterprises.

Section 1 of the ARC prohibits agreements between companies, decisions by associations of companies or concerted practices, which have as their object or effect, the prevention, restriction or distortion of competition. In particular, this covers:

- Price-fixing.
- Bid rigging.
- Allocation of markets or customers.
- Non-compete agreements.
- Exchange of strategic information relating to, for example, prices, customers, costs or capacities.
- Exclusivity agreements.
- Resale price maintenance agreements.

The enforcement of German competition law primarily lies with the FCO. In case of restrictive agreements or concerted practices with only local or regional effect, the enforcement lies with the respective regional competition authorities (*Landeskartellbehörden*).

Only bid rigging constitutes a criminal offence, which may result in criminal sanctions imposed on the responsible individuals (*see Question 24, Personal liability*), but not on companies. Cases involving bid rigging must be partly referred (as regards the responsible individuals) to the public prosecutor by the FCO or the regional competition authorities.

14. Do the regulations only apply to formal agreements or can they apply to informal practices?

The regulations cover all kinds of agreements and concerted practices (including horizontal agreements between competitors and distribution agreements) that may have an appreciable adverse impact on the parameters of competition on the market.

Exemptions

15. Are there any exemptions? If so, what are the criteria for individual exemption and any applicable block exemptions?

There are a number of exemptions from the prohibition of restrictive agreements and concerted practices.

Section 2 of the ARC contains a general exemption for agreements and concerted practices that contribute to improving the production or distribution of goods or to promoting technical or economic progress (efficiency gains), provided that all of the following conditions are met:

- Consumers receive a fair share of the resulting benefits.
- The restrictions are indispensable to the attainment of the asserted efficiency gains.
- The agreement does not afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question.

The block exemption regulations issued on the EU level under Article 101(3) of the TFEU apply *mutatis mutandis*.

Further exemptions exist with respect to:

- Certain cartel agreements between small and medium-sized companies (*section 3, ARC*).
- Certain agreements in the agricultural sector (*section 28, ARC*).
- Resale price maintenance agreements in the publishing sector (*section 30, ARC*).

Exclusions and statutes of limitation

16. Are there any exclusions? Are there statutes of limitation associated with restrictive agreements and practices?

Exclusions

According to the FCO's Notice No. 18/2007 on the Non-Prosecution of Cooperation Agreements of Minor Importance (*de minimis* Notice), the FCO generally refrains from investigating infringements of German or EU competition rules if both of the following conditions are met:

- The undertakings' combined market share in the affected markets does not exceed:
  - 10% (horizontal agreement); or
  - 15% (vertical agreement).
- The agreement does not contain a hard-core restriction, such as price-fixing or market sharing.

Statutes of limitation

The limitation period for violations of section 1 of the ARC is five years from the termination of such infringement. The limitation period is suspended if a German competition authority, the EU Commission or the competition authority of any EU member state opens an investigation with respect to that agreement or concerted practice.

Notification

17. What are the notification requirements for restrictive agreements and practices?

Notification

It is not possible to notify an agreement or a concerted practice to the FCO or the competent regional competition authority with a view to obtaining an exemption. Companies need to assess themselves whether a specific agreement or concerted practice may qualify for an exemption.

While companies may ask the FCO or the competent regional competition authority to adopt a formal decision stating that, on the basis of the information provided, there are no grounds to take action (*section 32c, ARC*), the issuance of the formal decision is at the competition authority's sole discretion.

Informal guidance/opinion

Companies can ask the FCO or the competent regional competition authority for informal guidance, for example, by way of informal letter.

Responsibility for notification

It is not possible to notify (*see above, Notification*).

Relevant authority

It is not possible to notify (*see above, Notification*).

Form of notification

It is not possible to notify (*see above, Notification*).

Filing fee

It is not possible to notify (*see above, Notification*). In the case of section 32c decisions, the FCO or the competent regional competition authority may impose a fee of up to EUR7,500 on the applicant.

Investigations

18. Who can start an investigation into a restrictive agreement or practice?

Regulators

The FCO and any competent regional competition authority can start an investigation on their own initiative (for example, following third party complaints).

The regulators can choose between two types of procedure when investigating alleged infringements of German or EU competition rules: an administrative procedure and a fining procedure. In practice, the competent competition authority usually decides to start a fining procedure in cases of an alleged hard-core cartel or another serious infringement of German or EU competition rules. The fining procedure aims at the imposition of fines against the companies and individuals involved. Consequently, the level of protection of the rights of defence granted under the applicable procedural rules is higher than in the context of an administrative procedure that merely purports to prohibit an alleged infringement of German or EU competition rules.

Third parties

Third parties can try to prompt an investigation by lodging a complaint. However, it is at the discretion of the FCO or the competent regional competition authority to decide whether an investigation will be started following such a complaint.

19. What rights (if any) does a complainant or other third party have to make representations, access documents or be heard during the course of an investigation?

Representations

In the context of fining proceedings, third parties do not have any rights to make representations. In the context of administrative proceedings, only third parties who have been admitted to join the proceedings as intervening party are entitled to make representations.

Document access

During fining proceedings, third parties do not have any rights to document access. During administrative proceedings, only third parties who have been admitted to join the proceedings as intervening party are entitled to access the competition authority's files.

Be heard

In relation to fining proceedings, third parties do not have any rights to be heard. When it comes to administrative proceedings, only third parties who have been admitted to join the proceedings as intervening party are entitled to be heard.

20. What are the stages of the investigation and timetable?

There is no specific timetable for conducting an investigation into alleged violations of German competition rules, neither in the case of a fining procedure nor in the case of an administrative procedure (*see Question 18*). In practice, the competent competition authority starts with a preliminary assessment of the restrictive agreement or concerted practice. If the preliminary assessment does not reveal (substantial) competition issues, the investigation is closed and the parties are informed accordingly. If, however, the authority considers the evidence obtained to be sufficient, a formal statement of objections is issued setting out the basis of its provisional findings and the evidence relied on. The parties then have the opportunity to make representations and to offer appropriate commitments before the competition authority issues its final decision. The duration of an investigation may vary from a few months to several years.

Publicity and confidentiality

21. How much information is made publicly available concerning investigations into potentially restrictive agreements or practices? Is any information made automatically confidential and is confidentiality available on request?

Publicity

The mere fact that an investigation into potentially restrictive agreements or concerted practices has been started is not made public by the competent German competition authority on a regular basis, but the FCO may issue press releases confirming dawn raids, for example, with respect to specific business sectors. On termination of an investigation, non-confidential versions of the final decisions or case reports are occasionally published on the FCO's website.

Automatic confidentiality

The FCO and the regional competition authorities have a statutory obligation to keep information relating to individual personal data or to business secrets confidential (*see Question 5*). In the context of fining proceedings, however, the defendant's lawyer is entitled to full access to the competition authority's files, including to documents containing business secrets or other confidential information. In the context of administrative proceedings, the right to access the competition authority's files may be restricted to those parts of the file that do not constitute business secrets of third parties.

On termination of an investigation, third parties' (for example, potential victims of a cartel) lawyers are entitled to request access to the competition authority's files. In practice, however, the FCO generally refuses such applications insofar as individual personal data, business secrets, leniency applications or evidence provided by the leniency applicants are concerned.

Confidentiality on request

The parties may request that certain information provided to the FCO or the competent regional competition authority should be kept confidential. The competition authorities will accept such requests where possible (*see above, Automatic confidentiality*).

22. What are the powers (if any) that the relevant regulator has to investigate potentially restrictive agreements or practices?

The FCO and the regional competition authorities have extensive powers to investigate potentially restrictive agreements or practices, including powers to:

- Carry out unannounced searches on (business or residential) premises (dawn raids).
- Seize objects (including documents and IT devices) of potentially probative value for the investigation.
- Request the disclosure of specific documents or information (in administrative proceedings only).

Settlements

23. Can the regulator reach settlements with the parties without reaching an infringement decision? If so, what are the circumstances in which settlements can be reached and the applicable procedure?

There are various forms of settlements that may be reached between the competent competition authority and the parties.

In the context of administrative proceedings, the parties may offer commitments to the authority. If the authority finds that the alleged violation of competition law would be terminated by way of those commitments, it may declare such commitments to be binding for the addressee of the decision.

In the context of fining proceedings, the competent competition authority may also agree on a settlement which usually comprises a full or partial admission of the facts by the defendant in exchange for a reduction of the fine imposed on the defendant or its officers or both. Unlike in the EU, there is no formal procedure regarding settlements in German law.

Penalties and enforcement

24. What are the regulator's enforcement powers in relation to a prohibited restrictive agreement or practice?

Orders

The FCO and the competent regional competition authorities can:

- Order the companies to bring a restrictive agreement or concerted practice to an end.
- Impose additional measures that are necessary to effectively bring the infringement to an end.
- Adopt interim measures in urgent cases where there is a risk of serious and irreparable damage to competition.

Fines

Administrative fines of up to 10% (intentional violations) or up to 5% (in case of negligence) of a company's worldwide group turnover in the last business year can be imposed on companies that have participated in restrictive agreements or concerted practices. The FCO has issued detailed guidelines on the calculation of fines.

Personal liability

Administrative fines of up to EUR1 million (intentional violations) or up to EUR500,000 (in case of negligence) can be imposed on officers who have participated in restrictive agreements or concerted practices. Bid rigging constitutes a criminal offence and can be punished by imprisonment for up to five years or the imposition of a criminal fine on the respective officer.

Immunity/leniency

Immunity from and reduction of administrative fines are available to individuals and corporate entities under the FCO's 2006 Leniency Notice. In case of bid rigging, however, the Leniency Notice is not binding on the public prosecutor and the criminal courts. (For more details, see *Cartel leniency in Germany: overview*.)

Impact on agreements

Those provisions of an agreement which violate applicable competition rules are null and void. In the absence of an appropriate severability clause this may result in the entire contract being void.

Third party damages claims and appeals

25. Can third parties claim damages for losses suffered as a result of a prohibited restrictive agreement or practice? If so, what special procedures or rules (if any) apply? Are class actions possible?

Third party damages

Third parties (in particular, direct or indirect buyers) can claim damages for losses resulting from intentional or negligent violations of German or EU competition rules.

Special procedures/rules

Designated district courts (*Landgerichte*) have jurisdiction to rule on cartel damages actions, irrespective of the amount of damages claimed. In follow-on actions, the courts are bound by the finding that an infringement of competition rules has occurred to the extent that such a finding was made in a final decision by the FCO, the EU Commission or a competition authority in any EU member state.

Class actions

German law does not provide for class actions. However, potential claimants can transfer their claims to a third party who may then bring an action based on such bundled claims in its own name and at its own expense. In the German cement cartel case, such a bundling of claims has been deemed admissible by the Federal Supreme Court (*Bundesgerichtshof*).

26. Is there a right of appeal against any decision of the regulator? If so, which decisions, to which body and within which time limits? Are rights of appeal available to third parties, or only to the parties to the agreement or practice?

Rights of appeal and procedure

Decisions of the FCO and the regional competition authorities are subject to appeal to the competent Higher Regional Courts. An appeal must be addressed to the respective competition authority within two weeks (fining proceedings) or one month (administrative proceedings) following the date on which the decision has been notified to the appellant.

Third party rights of appeal

In the context of fining proceedings, third parties do not have any rights of appeal. In the context of administrative proceedings, only third parties who have been admitted to join the proceedings as intervening party have the right to appeal decisions of the competition authority.

MONOPOLIES AND ABUSES OF MARKET POWER

Scope of rules

27. Are monopolies and abuses of market power regulated under administrative and/or criminal law? If so, what are the substantive provisions and regulatory authority?

The relevant provisions regulating the abuse of market power are contained in sections 19 to 21 of the ARC:

- Section 19 prohibits the abusive exploitation of a dominant position by one or several undertakings. Section 19 mirrors Article 102 of the TFEU.
- Section 20 prohibits unfair hindrances and discriminatory behaviour. This prohibition also covers certain types of (unilateral) conduct by undertakings with relative or superior market power including, for example, discriminatory conduct towards small and medium-sized companies.
- Section 21 prohibits boycotts and other forms of retaliation against undertakings.

The enforcement of German competition law primarily lies with the FCO. In the case of abusive behaviour with only local or regional effect, the enforcement lies with the respective regional competition authorities.

28. How is dominance/market power determined?

An undertaking is dominant if (*section 19(2), ARC*):

- It has no competitors or is not exposed to any substantial competition.
- It has a paramount market position in relation to its competitors.

Two or more companies are dominant, if both of the following apply:

- No substantial competition exists between them with respect to certain kinds of goods or commercial services.
- They jointly satisfy the conditions for dominance outlined above.

The following rebuttable presumptions exist (*section 19(3), ARC*):

- Dominance is presumed to exist if an undertaking holds a market share of at least one-third. According to a draft bill for the 8th amendment of the ARC, the relevant market share threshold will be raised to 40%.

- Dominance by multiple companies is presumed where three or fewer undertakings have a combined market share of at least 50%, or where five or fewer undertakings have a combined market share of at least two-thirds.

29. Are there any broad categories of behaviour that may constitute abusive conduct?

The behaviour of a dominant company is typically considered to be abusive if the undertaking, as a supplier or buyer:

- Impairs other undertakings' ability to compete in a manner affecting competition and without any objective justification.
- Demands payment or other business terms, which differ from those that would very likely arise if effective competition existed.
- Demands less favourable payment or other business terms than it demands from similar buyers in comparable markets without any objective justification.
- Refuses to allow another undertaking access to its own networks or other infrastructure facilities against adequate remuneration, provided that without such concurrent use, the other company is unable to operate as a competitor on the upstream or downstream market.

Exemptions and exclusions

30. Are there any exemptions or exclusions?

Formal exemptions do not exist. There are several similar rules regulating the behaviour of dominant undertakings in specific business sectors (for example, in the energy and telecommunications sectors). To a certain extent, those specific regulations may exclude the application of sections 19 and 20 of the ARC.

Notification

31. Is it necessary (or, if not necessary, possible/advisable) to notify the conduct to obtain clearance or (formal or informal) guidance from the regulator? If so, what is the applicable procedure?

There is no formal notification and clearance process. However, it is possible to get informal guidance from the FCO and the regional competition authorities.

Investigations

32. What (if any) procedural differences are there between investigations into monopolies and abuses of market power and investigations into restrictive agreements and practices?

This is the same as for investigations into restrictive agreements and practices (*see Questions 18 to 21 and Question 23*).

33. What are the regulator's powers of investigation?

See *Question 22*.

ONLINE RESOURCES

W *www.bundeskartellamt.de*

Description. Official website of the FCO which provides information on German and EU competition law, on the FCO's activities, on the FCO's internal structure and so on. Some of the documents are also available in English and French.

Penalties and enforcement

34. What are the penalties for abuse of market power and what orders can the regulator make?

See *Question 24*.

Third party damages claims

35. Can third parties claim damages for losses suffered as a result of abuse of market power? If so, what special procedures or rules (if any) apply? Are class actions possible?

Third party damages

See *Question 25*.

Special procedures/rules

See *Question 25*.

Class actions

See *Question 25*.

EU LAW

36. Are there any differences between the powers of the national regulatory authority(ies) and courts in relation to cases dealt with under Article 101 and/or Article 102 of the TFEU, and those dealt with only under national law?

There are no substantial differences between the powers of the FCO or the regional competition authorities in relation to cases dealt with under Articles 101 or 102 of the TFEU and those dealt with only under German law.

JOINT VENTURES

37. How are joint ventures analysed under competition law?

The creation of a joint venture or the acquisition of a shareholding in an existing joint venture may qualify as a concentration under German merger control rules if it results in two or more shareholders each holding a share of 25% or more in the joint venture. The same applies if two or more shareholders acquire joint control of the joint venture. In those cases, the acquisition is subject to German merger control if the turnover thresholds are met irrespective of whether the joint venture constitutes a full-function joint venture in the meaning of the Merger Regulation.

In addition, the creation of a joint venture may also be reviewed under the rules regulating restrictive agreements.

INTER-AGENCY CO-OPERATION

38. Does the regulatory authority in your jurisdiction co-operate with regulatory authorities in other jurisdictions in relation to infringements of competition law? If so, what is the legal basis for and extent of co-operation (in particular, in relation to the exchange of information)?

The FCO co-operates with the EU Commission and national competition authorities of other EU member states within the framework of the European Competition Network (ECN). Such co-operation includes the exchange of information, the coordination of investigations, and so on. In addition, the FCO co-operates with other competition authorities on the basis of bilateral agreements, for example, with the Department of Justice and the Federal Trade Commission in the US.

PROPOSALS FOR REFORM

39. Are there any proposals for reform of competition law?

Once the draft bill for the 8th amendment of the ARC is adopted, several rules of the ARC will be changed, in particular with respect to merger control (*see Questions 2, Thresholds, 7 and 28*). The draft bill was temporarily blocked by the Federal Council of Germany (*Bundesrat*) in 2012, but it is expected that the German parliament (*Bundestag*) and the Federal Council will agree on a joint bill sometime in 2013.

THE REGULATORY AUTHORITY

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Outline structure. The FCO comprises 12 independent decision-making departments (*Beschlussabteilungen*), nine of which are in charge of competition law enforcement in specific economic sectors (including merger control). The remaining three decision-making departments specialise in the prosecution of hard-core cartels. The decision-making departments are supported by a specialised team of economists, among others.

A detailed organisational chart listing the respective areas of competence is available on the FCO's website.

Responsibilities. The FCO is the regulatory authority responsible for the enforcement of German and EU competition law, including the control of concentrations and the investigation and prosecution of anti-competitive agreements and practices, as well as of abuses of market powers.

The FCO is an independent authority which is accountable to the Federal Ministry of Economics and Technology.

Procedure for obtaining documents. A particular procedure for obtaining documents from the FCO does not exist. However, the text of the relevant legal provisions, information leaflets, further guidance documents as well as decisions issued in individual cases are published on the FCO's website. Most of these documents are in German, but some documents are also available in English and French.

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Areas of practice. German and EU competition law.

Recent transactions. Has recently advised and represented clients in cartel cases relating to the following goods and markets:

- Trucks (EU investigation).
- Mountings for windows and glass doors (EU investigation).
- Elevators and escalators (EU investigation).
- Pre-stressed steel (EU investigation).
- Bathroom fittings and fixtures/sanitary fittings (EU investigation).
- Choline chloride (EU investigation).
- Propane gas (German investigation).
- Automatic doors (German investigation).
- Fire insurance (German investigation).
- Pharmaceutical wholesale (German investigation).

Languages. German, English

Professional associations/memberships. American Bar Association, Section of Anti-trust Law; Association of German Anti-trust Lawyers (*Studienvereinigung Kartellrecht e.V.*); Association of Anti-trust Lawyers in Munich (*Kartellrechtsforum München e.V.*); Association of Anti-trust Lawyers in Frankfurt (*Kartellrechtsforum Frankfurt e.V.*).

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BUNTSCHECK
Rechtsanwaltsgesellschaft mbH

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We are a leading independent law firm specializing in German and EU antitrust law and regulatory issues.

Our core competencies include the

- representation of corporate clients in merger control proceedings
- representation of corporate clients and/or senior management in cartel investigations by German and EU competition authorities
- representation of claimants and defendants in complex private antitrust litigation
- counseling on antitrust issues resulting from distribution systems, co-operations, joint ventures, etc.

What we stand for:

- premium antitrust counseling
- creative, tailor-made solutions
- personalized client service
- strict quality control
- tailor-made infrastructure designed for the handling of complex cartel investigations/leniency applications, litigation and merger control proceedings

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