

Procedures related to the control of concentrations in Germany

Congress on 17 May 2016
at Radisson Blue Leograd Hotel
Chisinau

presented by

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What is a concentration?

(look at 37 German Competition Act)

1. acquisition of all or of a substantial part of the assets of another undertaking;
2. acquisition of direct or indirect control by undertakings of the whole or parts of one or more other undertakings.

Control of other undertakings

by rights, contracts or any other means with regard to all factual and legal circumstances

= possibility of exercising decisive influence on an undertaking, in particular through:

- a) ownership or the right 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 bodies of the undertaking.

Acquisition of shares

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.

Other influence

4. any other combination of undertakings enabling one or several undertakings to exercise directly or indirectly a material competitive influence on another undertaking.

Previous mergers

A concentration shall also be deemed to exist 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.

Notification and Information Obligation

Concentrations shall be notified to the Bundeskartellamt prior to being implemented.

The Bundeskartellamt shall be the exclusive addressees for the receipt of notifications.

Communication channels are accessible via the Bundeskartellamt's website.

Turnover

for an obligatory notification

(§ 35 German Competition Act)

- 1. the combined aggregate worldwide turnover in the last year was more than EUR 500 million and**
- 2. the domestic turnover of at least one undertaking concerned was more than EUR 25 million and that of another undertaking concerned was more than EUR 5 million.**

No control,

- 1. when an undertaking had a worldwide turnover of less than EUR 10 million in the business year pre-ceeding the concentration, merges with another undertaking;**
- 2. when the European Commission has exclusive jurisdiction pursuant to Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings.**

The obligation to notify shall be:

- 1. upon the undertakings
participating in the concentration;**
- 2. in some cases [§ 37(1) nos 1 and 3]
also upon the seller.**

Form of concentration

The notification shall indicate the form of the concentration.

Furthermore, the notification shall contain the following particulars with respect to every undertaking concerned:

1. name or other designation and place of business or registered seat;
2. type of business etc.

Banks and insurance companies

instead of turnover, the total amount of income in the case of credit institutions, financial institutions, building and loan associations and external investment management companies and the premium income in the case of insurance companies;

Requests and information

The Bundeskartellamt may request from each undertaking concerned information on market shares, including the bases for their calculation or estimate, and on the turnover generated by the undertaking in the last business year preceding the concentration in a certain kind of goods or commercial services.

The undertakings participating in the concentration shall inform the Bundeskartellamt without delay of the implementation of the concentration.

Procedure of Control (first phase)

Prohibition only after the information by the BKartA within a period of one month from receipt of the complete notification that it has initiated an examination of the concentration (second phase proceedings).

Second phase proceedings are to be initiated if a further examination of the concentration is necessary.

Procedure of Control (second phase)

In the second phase proceedings, the BKartA shall decide by way of decision whether the concentration is prohibited or cleared. If the decision is not served upon the notifying undertakings within **a period of four months** from receipt of the complete notification, the concentration is deemed to be cleared. The parties involved in the proceedings have to be informed without delay of the date when the decision was served.

No time limit if

1. the notifying undertakings have consented to an extension of the time limit or
2. the Bundeskartellamt has refrained from issuing the notice pursuant to paragraph 1 or from prohibiting the concentration because of incorrect particulars or because of wrong information.

Prohibition on Implementation

The undertakings may not implement a concentration not cleared by the Bundeskartellamt, nor participate in implementing such a concentration, before the expiry of the time limits referred to in § 40 (1) sentence 1 and (2) sentence 2.

Ministerial Authorisation

(1) The Federal Minister of Economics and Technology will, upon application, authorise a concentration prohibited by the Bundeskartellamt if, in the individual case, the restraint of competition is outweighed by advantages to the economy as a whole resulting from the concentration, or if the concentration is justified by an overriding public interest.

Criteria for ministerial authorization

The international competitiveness of the undertakings concerned in markets outside the scope of application of this Act shall be taken into account.

The authorisation may be granted only if the scope of the restraint of competition does not jeopardise the market economy system.

Publication of Decisions

Decisions of the Competition Authority shall be published in the Federal Gazette.

Some decisions (§ 32c) may be published by the Competition Authority.

Chargeable acts (fees)

The amount of the fees shall be determined according to the personnel and material expenses of the competition authority, taking into account the economic significance of the subject matter of the chargeable act.

However, the fee rates shall not exceed:

1. EUR 50,000 in the cases of mergers (§§ 36, 39, 40, 41(3) and (4) and § 42);

If the personnel and material expenses of the competition authority are unusually high in a particular case, taking into account the economic importance of the chargeable act concerned, the fee may be increased **up to twice its amount**. For reasons of equity, the fee determined according to sentences 1 to 3 may be reduced to a minimum of one tenth of its amount.

Administrative fines (§ 81: principle)

An administrative offence is committed by whoever intentionally or negligently violates a provision.... or practices the non authorized implementation of a concentration.

**In cases of
not authorized implementations of
mergers**

the administrative offence may be
punished by a fine of

up to EUR 100,000.

In fixing the amount of the fine, regard shall be
had both to the gravity and to the duration of
the infringement.

Thank you for your attention!