

THE MERGER  
CONTROL  
REVIEW

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THE LAWREVIEWS

# GERMANY

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## I INTRODUCTION

The general turnover thresholds that trigger a merger filing requirement in Germany used to be some of the lowest in Europe but the German legislator increased the two domestic turnover thresholds appreciably by way of the 10th amendment to the German Act against Restraints of Competition (ARC) in 2021 (the 10th Amendment) – from €25 million to €50 million and from €5 million to €17.5 million. The increased thresholds led to a reduction in the number of filings of about 17 per cent in 2021 and 33 per cent in 2022, compared with the case load prior to the 10th Amendment (although that reduction might partially also be a result of external events such as a cooling-off of the heated merger and acquisition markets during the pandemic and the Ukraine war). Nevertheless, the total number of filings with the Federal Cartel Office (FCO) is still significantly higher than in most other countries as the turnover thresholds remain below average considering the size of Germany's economy.

Despite the adjustment of the general turnover thresholds to a more balanced level, German merger control continues to stand out. This is particularly true when it comes to the types of transactions that are caught by the regime, which go significantly beyond the usual acquisition of control (i.e., the applicable test in the vast majority of European jurisdictions (along with the EC Merger Regulation<sup>2</sup> (ECMR) itself)). In addition, the 10th Amendment also introduced an entirely new set of thresholds based on which individual companies can, under certain conditions, be ordered by the FCO to notify any transaction in specified business sectors for a period of three years if the target company has a turnover exceeding as little as €2 million with more than two-thirds of its turnover being generated within Germany. The FCO initiated merger proceedings using this tool for the first time in relation to the recycling sector. In an attempt to widen the scope of the tool, the draft for the 11th amendment to the ARC of April 2023 (the 11th Amendment) aims to lower the €2 million threshold significantly to €500,000 and widen the criteria for the application of the relevant provisions.

Although the FCO is a very experienced authority that never shies away from taking a hard line if a transaction raises serious competition concerns, its approach is generally pragmatic and cooperative. The FCO's divisions are each responsible for certain industries; therefore, parties can generally expect decision makers with sector-specific knowledge and experience. Also, the formal requirements for submitting a complete notification in straightforward cases are less burdensome than in many other jurisdictions.

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2 Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (ECMR).

In cases that raise serious competition concerns, the FCO's approach tends to be more legalistic and focused on documentary and empirical evidence than in other major jurisdictions where economic theories increasingly appear to dominate merger reviews. Even if this is only a subtle difference – the FCO certainly employs economic theories and involves its chief economist team – it can make investigations less data-intensive. On the other hand, it can also lead to parties fearing that the authority does not sufficiently understand commercial realities.

All in all, the German merger control regime, although differing in many respects from regimes in other countries, strikes a strong working balance between an unusually wide scope of applicability on the one hand and a flexible and practical review on the other.

Regarding its industry focus, the FCO continues to show an active interest in the numerous aspects of e-commerce and online markets, big data, platform markets, network effects, online marketing and others. In addition, the FCO has initiated sector inquiries regarding recycling, e-mobility, online advertising, online shopping and, in the context of price increases partly triggered by the war in Ukraine, fossil fuels. Companies involved in transactions that require merger clearance in Germany are well advised to consider the implications of German merger control at an early stage of their contemplated transactions.

## II YEAR IN REVIEW

In 2022, the FCO conducted fewer merger reviews than in 2021. The total number of merger filings submitted to the FCO decreased from approximately 1,000 in 2021 to approximately 800 in 2022. The FCO conducted only eight in-depth Phase II reviews in 2022. Three of these were cleared subject to remedies and one merger was cleared unconditionally in early 2023. Further, one merger (between two drainage system manufacturers) was prohibited, and one other merger filing has yet to be decided. In addition, two merger filings were withdrawn by the parties during Phase II after the FCO had informed them of its competition concerns during the merger review. In cases that may raise serious competition concerns, the FCO continues to be prepared to engage in detailed pre-filing consultations (see Section IV).

### *Recent cases*

The following overview highlights some recent key cases and developments in German merger control.

#### *RheinEnergie/Westenergie (E.ON)*

In September 2022, the FCO conditionally cleared a transaction through which RheinEnergie and Westenergie (E.ON), both utility companies in the energy sector, intended to combine certain parts of their operations.<sup>3</sup> Clearance was subject to RheinEnergie divesting a substantial part of its heating power business to a single remedy taker. Although the FCO also expressed concerns about markets other than the one for heating power business, namely the market for publicly accessible charging infrastructure, it did not request remedies to this effect. Instead, it applied a very rarely used provision in the ARC, according to which a significant impediment of competition is acceptable if the transaction also results in an

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3 Federal Cartel Office (FCO), decision of 30 September 2022, B8-134/21 – *RheinEnergie/Westenergie*.

improvement of competitive conditions that outweigh the impediment of competition. Most notably, the FCO stated that the required improvement can also be achieved by way of binding commitments through remedies.

#### *UTM/FrieslandCampina*

In a transaction involving two dairy companies, the FCO cleared the acquisition of certain divisions of FrieslandCampina by UTM subject to remedies in February 2023.<sup>4</sup> Owing to UTM's market presence with dairy products and the highly reputed brands that formed part of the acquired business, the FCO entered into an extended in-depth review of the competitive effects of the acquisition. The FCO initially notified UTM of its intention to prohibit the transaction because of competition concerns, although the actual market share increments were very limited. According to the authority, UTM's existing market shares were as much as 75 per cent in some of the affected markets. Therefore, any market share addition, no matter how small, would have impaired the existing residual competition.

Interestingly, two of the 'divestiture' remedies were accepted in the form of trademark licences for specific products to competitors. UTM keeps the brand for a broad range of products and competitors are entitled to sell certain other products under the same (well-known) brand. In addition, the remedies were designed as conditions subsequent, which allowed the parties to close the acquisition before the remedies had been completed. In essence, and following an in-depth assessment, the FCO accepted tailored remedies that fulfilled its purpose under the specific circumstances while being limited to what was necessary to address its concerns.

#### *Meta/Kustomer*

In December 2021, the FCO issued a declaratory decision in which it assumed jurisdiction over the acquisition of Kustomer by Meta after it had become clear that Meta did not consider a German merger filing to be required at all.<sup>5</sup> As Meta was subsequently forced to submit a filing to the FCO (which ended in the FCO clearing the transaction unconditionally in February 2022<sup>6</sup>), it appealed the FCO's decision to assume jurisdiction at the outset.<sup>7</sup> The court granted the appeal since it found that the transaction value threshold (see Section III.i, below), on which the FCO had based its jurisdiction, was not fulfilled. More precisely, the court considered the requirement of the target having 'significant operations in Germany' not to have been met since the German corporate customers of Kustomer accounted for only a single-digit percentage of its global customers. It was a first clarification for the still newly introduced transaction value threshold.

### III THE MERGER CONTROL REGIME

#### i Jurisdiction

The German merger control regime provides for a mandatory pre-merger filing requirement if:

- a the transaction constitutes a concentration pursuant to Section 37 of the ARC; and

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4 FCO, decision of 22 February 2023, B4-90/22 – *UTM/FrieslandCampina*.

5 FCO, decision of 9 December 2021, B6-37/21 – *Meta/Kustomer*.

6 FCO, decision of 11 February 2022, B6-21/22 – *Meta/Kustomer*.

7 Higher Regional Court of Düsseldorf, decision of 23 November 2022, Kart 11/21(V) – *Meta/Kustomer*.

- b* one of the following occurs:
- the turnover thresholds of Section 35(1) of the ARC are met;
  - the turnover and transaction value thresholds of Section 35(1a) of the ARC are met; or
  - the acquirer is subject to an injunction under Section 39a of the ARC and the target meets the turnover thresholds of Section 39a(2)<sup>8</sup> of the ARC.

### **Concentration**

Unlike in many other jurisdictions, German merger control not only covers the acquisition of control<sup>9</sup> (solely or jointly), but also:

- a* the acquisition of at least 25 per cent of either the capital or voting rights in another company, irrespective of whether or not the shareholding will confer control or a significant influence over the target (all existing shareholdings of all entities of the purchaser's group have to be taken into account); and
- b* the acquisition of shares or voting rights even below the threshold of 25 per cent if the transaction results in the acquisition of a 'competitively significant influence'. Competitively significant influence is less than control but generally requires the acquisition of significant influence through additional rights (plus factors), such as (1) information rights in respect of the operative business of the target, (2) the right to nominate members of the management board, the board of directors or the supervisory board, or (3) de facto blocking minority on annual shareholder meetings. This influence is competitively significant if the purchaser is or controls a competitor of the target, or if the purchaser or any of its group companies is party to a significant vertical supply relationship with the target.

### **Turnover thresholds**

The turnover thresholds<sup>10</sup> (referring to the previous full business year) are as follows:

- a* the combined worldwide turnover of all undertakings concerned exceeded €500 million;
- b* one undertaking concerned had a turnover exceeding €50 million within Germany; and
- c* at least one further undertaking concerned had a turnover in Germany exceeding €17.5 million.

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8 According to the 11th Amendment to the German Act against Restraints of Competition (ARC), this will follow from Section 32f(2) of the ARC.

9 The definition of 'control' closely follows the definition contained in the ECMR itself and the Consolidated Jurisdictional Notice under Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings.

10 Special rules apply to the calculation of the turnover of financial services providers, insurance companies, companies active in the media sector (television broadcasting, radio, newspapers and periodicals) and certain trading activities. Companies operating in the field of publication, production and distribution of newspapers and magazines are subject to a turnover multiplier.

**Transaction value threshold**

The transaction value threshold is structured similarly to the size-of-transaction test under merger control law in the United States. It will be triggered if the transaction value exceeds €400 million and the target has ‘significant’ business activities in Germany (local nexus); however, it is combined with turnover thresholds and will apply if:

- a* the combined worldwide turnover of all undertakings concerned exceeded €500 million;
- b* in Germany:
  - one of the undertakings concerned had a turnover of more than €50 million; and
  - neither the target nor any other undertaking concerned had a turnover of more than €17.5 million;
- c* the value of the consideration paid in return for the transaction is more than €400 million; and
- d* the target has significant activities in Germany.

The FCO and the Austrian Federal Competition Authority issued the joint ‘Guidance on Transaction Value Thresholds for Mandatory Pre-merger Notification’ in July 2018.<sup>11</sup> In January 2022, the authorities adapted the Guidance to the newly modified thresholds. Although the FCO does not often resort to the transaction value threshold to assume its jurisdiction, it did so in the 2020 *Paypal/Honey* case<sup>12</sup> concerning a free browser extension that automatically finds and applies promotional and discount codes in online shops, and in the above-mentioned 2021 *Meta/Kustomer* case.

**Application of reduced turnover thresholds based on FCO injunction**

The 10th Amendment provided the FCO with a tool to temporarily lower the turnover thresholds for individual undertakings in individual economic sectors to be determined by the FCO by way of an ‘injunction to notify future mergers’ (injunction). Once this injunction is imposed on an undertaking, the undertaking has to submit a merger filing for any concentration over a period of three years in which it acquires a target with a German turnover exceeding as little as €2 million with more than two-thirds of its total turnover being generated in Germany. According to the government draft for the 11th Amendment, an injunction can be imposed if the undertaking acquires a target with a turnover exceeding €500,000.

An injunction can be imposed on a company if the following criteria are met:

- a* the FCO has conducted a market investigation in the economic sector or sectors in which it would like to impose an injunction on an undertaking;
- b* the worldwide turnover of the undertaking addressed by the injunction exceeded €500 million in the previous business year (according to the draft for the 11th Amendment the worldwide turnover has to exceed €50 million);
- c* there is an indication that future mergers involving the undertaking addressed by the injunction would restrict competition in Germany in the economic sectors determined in the injunction; and

11 ARC, Section 35(1a) and Austrian Cartel Act, Section 9(4) (see [www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaden/Leitfaden\\_Transaktionsschwelle.html](http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaden/Leitfaden_Transaktionsschwelle.html) (accessed 22 June 2022)).

12 FCO, decision of 17 December 2019, B6-86/19 – *Paypal/Honey*.

- d* in the economic sectors determined in the injunction, the undertaking has a share of at least 15 per cent in the supply or demand of products or services in Germany. The draft of the 11th Amendment aims to eliminate the requirement for the companies concerned to have a strong nationwide market position in order to be able to address impending competition problems in regional markets.

According to the legislative documentation, an indication according to point (c), above, can, for example, be deduced (1) from sector inquiry findings or from the fact that (2) a dominant undertaking has formed a pattern of consecutively acquiring smaller competitors, (3) an undertaking in a sensitive economic sector or an already concentrated market acquires a potentially threatening newcomer or (4) there are complaints by competitors, customers or consumers.

According to the FCO, it does not expect to impose more than one or two injunctions per year, so it remains to be seen whether and to what extent this new tool will affect German merger control. At the time of writing, the FCO had not yet imposed any injunction of this kind, which explains the various amendments envisaged in the draft of the 11th Amendment to widen the scope of this tool. In preparation for its potentially first injunction, in January 2022, the FCO initiated a market investigation into the waste management sector to analyse whether the Rethmann Group and Remondis meet the above conditions.

### ***Other***

If the same parties enter into two or more transactions concerning the acquisition of parts of a company within a two-year period, these transactions will be treated as a single concentration. The thresholds will apply to the transaction as a whole, to ensure that parties do not circumvent a notification obligation by slicing a deal into staged transactions, each falling below the relevant threshold.

If the transaction also exceeds the turnover thresholds of the ECMR (see the European Union chapter), a notification has to be made to the European Commission only, without the need for an additional review in Germany (the ‘one-stop shop’ principle). However, if a transaction meets the ECMR turnover thresholds but does not qualify as a concentration under the ECMR (e.g., in the case of a non-controlling interest above 25 per cent or a non-full-function joint venture), German merger control remains applicable.

### ***Exemption***

The ARC provides for two exemptions. A filing will not be required if:

- a* the concentration has no ‘domestic effects’ or, in other words, no impact on the German market. Given that the German merger control regime requires the involvement of at least two undertakings generating turnover in Germany, this exemption is relevant to joint venture cases only when both joint venture partners generate turnover in Germany, but not the joint venture itself; or
- b* the concentration concerns the merger of hospitals or individual specialities of hospitals in different geographical locations and additional formal requirements are met. Although such concentrations do not require clearance, they do require a formal notification after completion of the merger.

Even though it is not an exemption from the formal filing requirement but rather a restriction of the FCO's scope for assessing competition concerns, there is still an exemption when assessing mergers affecting *de minimis* markets (i.e., markets in existence for more than five years, with total turnover of less than €20 million in Germany in the previous calendar year).<sup>13</sup> Mergers meeting the exemption criteria need to be notified if they meet the relevant thresholds but cannot be blocked to the extent that *de minimis* markets are affected.

## ii Consequences of completion without merger clearance

Concentrations that are subject to merger clearance in Germany must not be completed prior to having obtained clearance.<sup>14</sup> The consequences of infringing the filing obligation are threefold.

A transaction that is completed before having obtained clearance is deemed to be invalid as far as Germany is affected. In particular, the acquisition of shares in German companies and the acquisition of assets located in Germany are invalid until clearance is obtained. In addition, intellectual property rights of the target are unenforceable in Germany. To remedy a legally defective acquisition and to obtain retroactive effect, the parties are required to submit a post-completion notice containing all details required in a pre-merger notification. The FCO will then assess the competitive issues triggered by the proposed transaction directly as part of a 'merger dissolution procedure' without any statutory deadlines running.

The parties are subject to fines that can theoretically amount to up to 10 per cent of the parties' worldwide group turnover in the previous business year. In practice, the fines have been well below this threshold but can still be significant depending on the circumstances.

Finally, infringing the filing obligation – if detected – can seriously affect the parties' relationship with the authority, which will make future filings much more difficult.

## iii Procedure

There is no filing deadline. The filing can be made as soon as the parties to the concentration can show a good faith intention to complete the transaction.

There is also no official filing form that needs to be completed. Instead, German notifications are submitted in the form of a letter that has to include certain information required by law and can, since the implementation of the 10th Amendment, be submitted online (by German attorneys).

The fact that a filing has been received (including the names of the parties and a brief description of the affected markets) will be published on the FCO's website shortly after the submission of the filing.

The German merger control regime also provides for a potential stop-the-clock, with an automatic extension of the deadlines, upon submission of a remedy proposal, similar to that which occurs under the EU merger control regime. Once notified, the vast majority of cases are cleared after a Phase I inquiry lasting a maximum of one month. In straightforward cases, the FCO is generally prepared to clear the transaction even well before expiry of the

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13 ARC, Section 36(1), No. 2.

14 In line with the European Union's merger control rules, the eighth amendment introduced an exception to the suspension obligation according to which public takeover bids or a series of transactions in securities may be implemented prior to clearance, provided that the transaction is notified to the FCO without delay and the acquirer does not exercise the voting rights attached to the securities in question, or does so only on the basis of an exemption granted by the FCO.



Phase I one-month waiting period. Although this is entirely within the discretion of the FCO and also depends on the workload of the case handler, it is not uncommon to receive early clearance after two or three weeks, or even earlier.

The maximum time frame for an in-depth review, encompassing Phase I and Phase II, was extended through the 10th Amendment from four months to five months from the time of receipt of the complete notification to take into account the increasing complexity and required economic scrutiny of mergers. The five-month period is extended to six months if remedies are offered. With the parties' consent, the time frame can be extended further without any given limit.

In cases that give rise to competition concerns, the FCO must inform the notifying parties within one month of receipt of the complete notification that it is initiating an in-depth investigation of the proposed transaction. In the absence of any communication prior to the end of Phase I, the proposed merger is deemed to be cleared by time lapse (which never occurs in practice). Phase I clearances are communicated by standard clearance letters merely informing the parties that the requirements for a prohibition are not met without containing any substantive reasons or competitive assessment. A reasoned decision will only be issued following an in-depth Phase II investigation. Unlike Phase I decisions, Phase II decisions are published by the FCO (in confidential versions agreed with the parties) and can be appealed before the Higher Regional Court of Düsseldorf.

In the case of a prohibition decision, the parties also have the option to apply for an overruling approval by the Federal Minister for Economic Affairs and Climate Action if the negative effects of the merger on competition are outweighed by benefits to the economy as a whole or if the merger is justified by an overriding public interest. The ministerial decision may include conditions imposed on the parties. Following the *EDEKA/Kaiser's Tengelmann* ministerial authorisation and the dispute about the lack of transparency, the ninth amendment of the ARC provided for a faster and more transparent procedure. In November 2021 and February 2022, the new German government announced a review of the conditions of an overruling approval. However, the draft for the 11th Amendment to the ARC does not yet contain any proposal in this regard.

Third parties, such as competitors, suppliers and customers of the merging parties, generally have the opportunity to comment on a proposed merger in the context of information requests issued by the FCO in the course of its investigation, or to submit unsolicited comments and concerns.

Additionally, third parties whose economic interests will be substantially affected by an FCO decision may formally intervene in the proceedings upon application and admission by the authority. Once admitted, third-party interveners have the right to be heard, to submit comments on the proceeding and to have access to the non-confidential part of the authority's file. They also have the right to appeal the FCO's decision.

The FCO is among the most active authorities in the European Union's referral system: Paragraphs 4 and 5 of Article 4 of the ECMR provide for the possibility of pre-notification referrals at the initiative of the notifying parties, while Articles 9 and 22 provide for the (often problematic) possibility of post-notification referrals triggered by Member States – an option used regularly by the FCO. With respect to the European Commission's updated guidance on the application of Article 22 of the ECMR, the president of the FCO (Andreas Mundt)

has communicated publicly that the FCO will only make use of the possibility of referral requests based on Article 22(1) of the ECMR if the FCO itself has jurisdiction over the transaction in question (see the *Meta/Kustomer* case in Section II).

#### iv Substantive assessment

The FCO principally applies the same substantive test as the European Commission; that is, whether the proposed transaction would lead to a significant impediment of effective competition (SIEC), in particular, by means of the ‘creation or strengthening of a dominant position’.

According to its Guidance on Substantive Merger Control of March 2012, the FCO first distinguishes between three broad categories of mergers: horizontal, vertical and conglomerate. For each of these three categories, in line with the European Commission’s Horizontal and Non-Horizontal Guidelines, the FCO distinguishes again between single and collective dominance.

For a finding of single and collective dominance, the German merger control regime provides for the following – rebuttable – presumptions: a single undertaking has a share of at least 40 per cent of the market; three or fewer undertakings possess an aggregate share of at least 50 per cent of the market; or five or fewer companies hold a combined market share of at least two-thirds.

However, in the FCO’s decision-making practice, these presumptions generally have a very limited role, with the authority reviewing the competitive effects brought about by the proposed merger in their overall context. In practice, the presumptions primarily provide an indication as to whether a deal requires closer scrutiny.<sup>15</sup>

In addition, the cooperative aspects of joint ventures will be examined under the rules relating to anticompetitive agreements (ARC, Section 1).

A merger that leads to an SIEC will not be prohibited if the requirements of the balancing clause are met (i.e., if the companies show pro-competitive effects in a different market that outweigh the negative effects on the affected market). For the pro-competitive effects presented by the parties to be taken into account, they must be of a structural nature. When the FCO reaches the preliminary conclusion that a concentration raises competition concerns, the parties can offer commitments in Phase II to secure conditional approval. Conditions precedent (i.e., conditions that must be satisfied before the actual merger may be implemented, such as up-front buyer solutions) are generally preferred by the FCO.

The type of remedy most likely to be accepted by the FCO is a structural remedy, namely a divestiture that removes the competition concerns. Even if a structural remedy is not possible, the parties are likely to face resistance from the authority in accepting any other remedy solution. Although behavioural remedies are not generally impermissible, they are only (reluctantly) accepted if they are equivalent to divestitures in their effects and do not require constant monitoring by the FCO. Not surprisingly, therefore, it continues to be difficult to convince the authority not to insist on structural remedies as a condition precedent. In addition, certain transactions may not only require clearance by the FCO but also other regulatory approvals based on special rules for – among other things – foreign

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15 However, see FCO, decision of 13 January 2022, B1-137/21, *ACO/BIRCO*.

investments, telecommunications or media. These rules apply in addition to the general merger control regime, are administered by special agencies and authorities, and can impose suspensory clearance requirements as well.

#### **IV OTHER STRATEGIC CONSIDERATIONS**

The wide concept of reportable transactions under the German merger control regime, which also covers non-controlling minority interests below 50 per cent and in certain cases even below 25 per cent, regularly results in companies being required to notify transactions in Germany even though no other competition authorities are competent to review the transaction. Despite the far-reaching German merger control regime, there is still room for transaction structures that do not trigger a German merger filing requirement; for example, it may be a suitable strategy to first merge new businesses before they are acquired by an investor if solely the investor would trigger the relevant merger control thresholds.

Although pre-filing contacts are neither mandatory nor generally expected by the FCO, they can be very helpful in addressing and overcoming potential competition issues early on or in securing a Phase I clearance where otherwise the FCO would have to open a Phase II review simply to have enough time to assess the transaction. Such pre-filing contacts are handled by the FCO on a strictly confidential basis and are only shared with other competition authorities with the parties' approval.

The FCO has a close involvement with, and a leading role in, both the European Competition Network and the International Competition Network, whose chair is Andreas Mundt, the president of the FCO. The close communications between the authorities require a coherent and consistent merger filing strategy by the parties in cases that are subject to merger filings in multiple jurisdictions.

Empirical and documentary evidence are an important part of German merger control. Although the German merger control rules do not provide for a mandatory submission of internal documents prepared in connection with a transaction, such documents can be requested in an information request and reviewed by the FCO during the course of the merger review. Thus, utmost care is required when drafting internal documents in preparation for the transaction and presenting it to either boards or investors; in particular, when it comes to the expected effects of the transaction. In transactions that might give rise to competition concerns, all relevant draft documentation should be thoroughly prepared by involving operations and management and, ideally, should be reviewed by in-house or external antitrust counsel before finalisation to avoid any negative effects on obtaining merger clearance.

The FCO acts independently and free from political influence. Attempts to lobby or even to exercise political influence almost always prove to be counterproductive.

As third-party interveners can play a strong part in merger proceedings, it can be an attractive proposition to become an intervener to challenge (certain parts of) the transaction, resulting in remedies that may form attractive acquisition opportunities.

#### **V OUTLOOK AND CONCLUSIONS**

The 10th Amendment has intensified the FCO's already prevailing focus on internet, online and big data issues. This trend continues in the draft of the 11th Amendment, which creates a separate investigative power for the FCO with respect to possible infringements of Articles 5

and 6 of the European Digital Markets Act.<sup>16</sup> In its February 2022 competition policy agenda up to 2025, the Federal Ministry for Economic Affairs and Climate Action stressed that digital markets are complex, with business models and technologies evolving permanently, and announced its intention to strengthen German merger control through additional headcount and information technology infrastructure.<sup>17</sup> FCO president Andreas Mundt has even raised the idea of Germany requiring a stricter merger control regime for large digital companies such as Google, Amazon, Meta and Apple and suggested a lowering of thresholds for such companies or a shift of the evidential standard concerning the SIEC test. Against this background, transactions involving digital businesses and big data should be thoroughly prepared for close scrutiny, in particular with regard to the assessment of customer data, network effects and innovations. Confidential pre-filing contacts may be recommended to avoid delays and obstacles during the actual review process.

In April 2023, the government proposed a draft for the 11th Amendment, which is likely to pass the legislative process. The draft provides for a new intervention instrument with which the FCO can put a stop to disruptions of competition following a sector inquiry. To date, the FCO – unlike the United Kingdom’s Competition and Markets Authority – cannot take any measures to address concerns identified as part of a sector inquiry. One aim of the draft amendment is to rectify this inability of the FCO to take actions as a result of sector inquiries; for example, obligations to establish open standards, to grant access to interfaces, to set up an effective complaint management system, to change supply relationships, to separate company divisions organisationally and – as *ultima ratio* – to order ownership unbundling.

The FCO will remain active in requesting referrals back from the European Commission to national level if the main effects of the transaction are to be expected in Germany. In contrast, the FCO has clearly stated that, unlike other EU Member States such as France, Belgium or the Netherlands, it will not submit transactions to the European Commission in application of Article 22(1) of the ECMR where the FCO does not have jurisdiction over the transaction itself.

As regards substantive reviews, although the role of economists will continue to grow (considering the extension of the Phase II deadline from four months to five months), it is also likely that these will remain less relevant than in other jurisdictions, with documentary and empirical evidence remaining important factors in investigations.

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16 Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act).

17 ‘The competition policy agenda of the Federal Ministry for Economic Affairs and Climate Action up to 2025’ (Bundesministerium für Wirtschaft und Klimaschutz, 21 February 2022), Section 8.