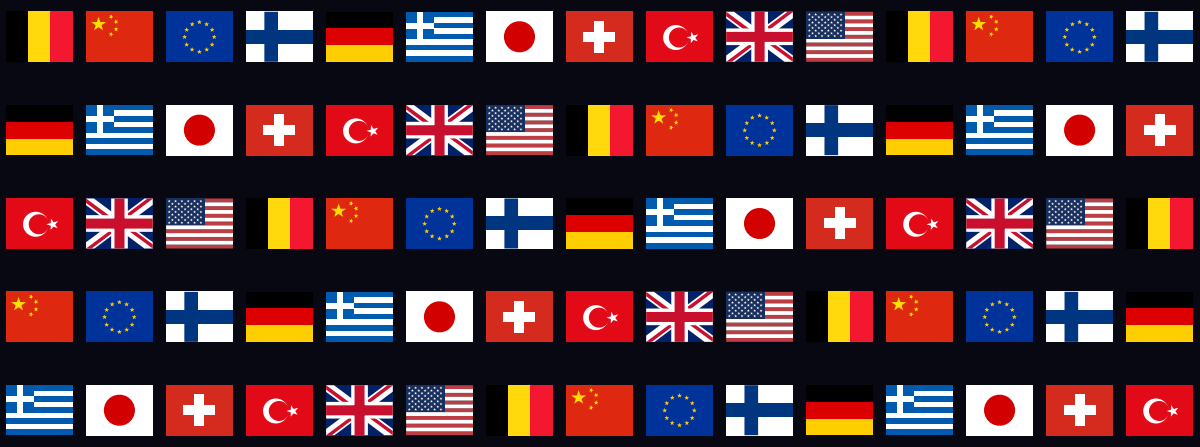
COMPETITION COMPLIANCE

Germany



LEXOLOGY
Getting The Deal Through

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Competition Compliance

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Quick reference guide containing side-by-side comparison of local insights into Competition Compliance, including key legislation; standards and guidance for compliance programmes; how to demonstrate commitment to competition compliance; risk identification, assessment and mitigation; compliance programme review; managing risk in horizontal and vertical arrangements; market dominance; merger control; joint venture agreements; leniency programmes; investigations; settlement mechanisms; corporate monitorships; and recent trends.

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Germany

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LEGAL AND REGULATORY FRAMEWORK

Key legislation

What key legislation governs competition in your jurisdiction?

German competition law is primarily governed by the Act against Restraints of Competition (ARC). In addition, articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) are applicable, if trade between the member states of the European Union may be affected. Moreover, EU Block Exemption Regulations such as Regulation (EU) 2022/720 (VBER) are directly applicable.

Law stated - 06 September 2023

Enforcement

Which authorities are charged with enforcing competition law in your jurisdiction and what is the extent of their powers?

Competition law is enforced by the Federal Cartel Office (FCO). In addition, federal states also have competition authorities that have jurisdiction to enforce competition law in regional cases (ie, where the conduct in question is limited to the territory of the respective federal state (section 48 ARC)).

The FCO has far-reaching powers under the ARC. The FCO is entitled to:

- request information and documents;
- question suspects, witnesses and experts;
- search companies' premises as well as private premises;
- seize evidence;
- terminate infringements; and
- carry out sector inquiries.

Violations of competition law or non-compliance with the FCO's requests can lead to administrative fines.

In addition, the FCO has jurisdiction to review and clear or prohibit concentrations that meet the German merger control thresholds.

Law stated - 06 September 2023

Consequences of non-compliance

What are the consequences of non-compliance with competition law?

Competition authorities can order the infringement to be terminated accompanied by redress measures to ensure competition law compliance.

In addition, competition authorities may impose fines against individuals and companies who violate competition law. An individual can be fined up to €1 million, whereas a fine against an undertaking can be up to 10 per cent of the group's worldwide turnover generated in the past financial year.

The FCO may also order the disgorgement of the gained economic benefit and require the undertaking to pay a corresponding amount of money.

Additionally, agreements that violate the cartel prohibition of section 1 or the prohibition of abuse of a dominant position are legally void. If only certain provisions of an agreement violate competition law, this may nevertheless render the entire agreement invalid, if no contrary will of the parties can be ascertained or no severability clause exists in the agreement.

Moreover, competition law infringements are recorded in the competition register. Public contracting authorities have to check the competition register before awarding a contract, and an entry in the competition registry may lead to exclusion from a contract.

Finally, companies may also face follow-on damages litigation, which has become increasingly important due to the introduction of several amendments in the ARC aimed at strengthening private competition law enforcement.

Law stated - 06 September 2023

Guidance

Do the authorities issue guidance on compliance with competition law?

The FCO issues guidance on compliance with competition law and has published various guidelines, leaflets and templates on its website, which are also partly available in English. While courts are not bound by such guidelines, they nevertheless provide a significant contribution to legal certainty, as the FCO itself is bound by these guidelines.

The most significant guidance published by the FCO are the following:

- Leniency guidelines, in which the FCO provides guidance concerning the leniency programme under which it may grant immunity from or a reduction of an administrative fine by cooperating with the FCO and contributing to uncovering an anticompetitive behaviour;
- Guidelines for the setting of fines in cartel administrative offence proceedings, in which the FCO lays down principles in particular with regard to setting the amount of the fine.
- De minimis notice, in which the FCO lays down the discretionary principles establishing when proceedings related to agreements of minor importance are not initiated, as long as they do not contain so-called hardcore restrictions (such as price fixing, customer allocation, or territory allocation);
- Leaflet on cooperation for small and medium-sized undertakings (SMUs), which describes principles for cooperation for SMUs;
- Leaflet on settlement proceedings, in which the FCO explains the settlement procedure used by it in fine proceedings;
- Leaflet on German merger control (currently under revision by the FCO), in which the FCO describes the main principles of the German merger control proceedings;
- Guidelines on substantive merger control, in which the FCO lays down the principles for its approach when assessing whether mergers create or strengthen a dominant position;
- Guidance on transaction value thresholds in merger control proceedings, in which the FCO lays down the principles for its approach when assessing whether the transaction value threshold is met; and
- Guidance on remedies in merger control, which explains the requirements for remedies for transactions that raise competition concerns.

Law stated - 06 September 2023

Other legislation and relevant practices

Do any other laws outside the main competition legislation regulate competition in your jurisdiction, including any sector-specific regimes? Do they cover any other anticompetitive practices not caught by the main legislation?

The majority of sector-specific competition rules are regulated by the ARC. In the ARC, sector-specific provisions cover the agriculture sector (section 28 ARC), the energy sector (section 29 ARC), newspapers and magazines (section 30 ARC), and water management (section 31 ARC).

Outside the ARC, the German Agricultural Organisations and Supply Chain Act, which implements the EU's Unfair Trading Practices Directive 2018/633, contains sector-specific exemptions for the associations of producers of agricultural products.

In addition, there is a broad exemption from the application of competition law provisions for health insurance funds (section 69 Volume V of the German Social Security Code).

The Act against Unfair Competition protects competitors, consumers and other market participants against unfair commercial practices, such as misleading advertisements, false statements or unacceptable nuisance.

As to criminal law, violations against competition law are considered to be administrative offences that can lead to fines against undertakings and individuals involved in the misconduct. Agreements that restrict competition in tenders (collusive tendering), however, are criminal offences according to section 298 of the German Criminal Code and can lead not only to fines against the individuals involved but also to imprisonment of up to five years for individuals committing such crimes.

Law stated - 06 September 2023

COMPLIANCE PROGRAMMES

Commitment to competition compliance

How does a company demonstrate its commitment to competition compliance?

A company can demonstrate its commitment to competition compliance by implementing a compliance programme that includes a code of conduct outlining behavioural expectations, regular employee training, appointing a compliance officer or team responsible for ensuring the programme's effectiveness, an internal reporting system for potential violations, and conducting regular internal audits. Companies also often explicitly request competition compliance from their business partners, such as distributors and suppliers.

To ensure that competition compliance is taken seriously within the company, companies use 'tone from the top' approach by communicating unambiguously that competition compliance is expected from the management with all seriousness. This includes visible support of the compliance programme and principles by the top management, provision of guiding principles, management of the company evidencing their following the guiding principles of the compliance programme, consistent enforcement of compliance rules, and immediate and effective measures to mitigate identified compliance risks.

Law stated - 06 September 2023

Government compliance standards

Is there a government-approved standard for compliance programmes in your jurisdiction?

There is no government-approved standard for compliance programmes in Germany. Various ministries, however, provide guidance on specific aspects of compliance programmes. In addition, guidelines provided by the International Organization for Standardization (ISO) such as ISO 19600 can also be used when establishing a compliance management system (CMS).

Moreover, the Federal Cartel Office (FCO) provided some guidance regarding CMS in its practical guide (available in German only) on filing an application related to self-cleaning and premature deletion of an entry in the competition register. The FCO emphasised that a template-like implementation of defined standards is not necessary but rather the specific situation of a company must be taken into account. According to the FCO, an effective CMS should appropriately consider the following measures:

- Risk analysis: A company must examine which risks it is exposed to through its business activities and evaluate how it can prevent legal violations by its employees.
- Adjustments to the organisational and supervisory structures: Based on the risk analysis certain adjustments to the organisational and supervisory structure may be required.
- Commitment of the management to compliance: The unambiguous commitment of the company's management to compliance, which should be adequately communicated to employees, is an essential part of a CMS.
- Careful selection, training and monitoring of employees: Employees must be appropriately informed about the rules to comply with (eg, by individual briefings, guidelines and individually tailored training). These measures should be regularly updated, the employees' learning success should be monitored, and training should occur on a regular basis.
- Whistle-blower system: The establishment of a confidential whistle-blower system for reporting infringements is an important part of an effective CMS.
- Adequate resources and competences of responsible persons: An effective CMS requires that persons in charge are equipped with adequate resources and competences.
- Incentives for compliance and punishment for violations: Compliance should be actively demanded and violations should be punished consistently. In addition, incentives could be set for adherence to compliance requirements.
- Evaluation and adaptation of compliance measures: Regular evaluations and, if necessary, adjustments of a CMS are required.

Law stated - 06 September 2023

Risk identification

What are the key features of a compliance programme regarding risk identification?

A compliance programme should be based on a comprehensive analysis of the inherent risks the company is exposed to. This mainly depends on the following factors:

- Sector of activity: Is the sector particularly vulnerable to competition law violations (eg, is there a history of previous infringements in the sector?)
- Interaction with competitors: How often does the company interact with competitors and on which occasions (eg, trade association meetings, day-to-day commercial dealings, consortia or joint ventures)?
- Characteristics of the markets: How strong is the company's market position and that of its competitors? How transparent is the market? What are the main parameters for competition in the sector (eg, is it driven by innovation)? Are there other market conditions that might make competition law infringements more likely?
- Employee risk: How likely are certain employees exposed to competition law risks? Do they have contact with competitors and, if so, how frequently?

Law stated - 06 September 2023

Risk assessment

What are the key features of a compliance programme regarding risk assessment?

Once potential risks have been identified, each risk should be assessed and categorised according to how likely they are to materialise, their severity and the impact they could have on the company's business. The most severe identified risks should be prioritised and the company should specifically focus on high-risk departments within the company, such as sales and marketing departments.

Law stated - 06 September 2023

Risk mitigation

What are the key features of a compliance programme regarding risk mitigation?

An effective compliance programme should contribute to avoiding competition law infringements, identify competition risks as early as possible, and reduce the negative consequences if the infringement has already occurred. Key features of an effective compliance programme are:

- implementation of a code of conduct, competition law guidelines and checklists as well as a regular update of such guidance;
- clear communication of commitments to competition law compliance by the company's management;
- regular competition law training for employees;
- a confidential reporting and whistle-blower system for potential competition law risks;
- monitoring of contacts with competitors accompanied by legal advice (eg, checking the agenda of industry associations beforehand);
- disciplinary measures for violating competition law;
- internal audits; and
- regular evaluation of the compliance programme.

Law stated - 06 September 2023

Compliance programme review

What are the key features of a compliance programme regarding monitoring and review of business practices?

An efficient compliance programme should be regularly reviewed and updated where necessary. Adjustments to the compliance programme should take into account legal developments (eg, legislation amendments, changes in decisional or enforcement practice of competition authorities), changes and developments within the economic sector (eg, changes in the market position of the company, investigations in the industry, sector enquiries, etc), as well as incidents, identified risks, and personnel changes within the company (eg, complaints by customers or third parties, identified potential competition law violation, transferring of a high-risk area to the responsibility of another employee or department). In addition, employees should be regularly trained, and it is prudent to carry out regular internal audits in particular in high-risk areas of the company.

Law stated - 06 September 2023

Effect on penalties

Will an established competition compliance programme have any effect on penalties?

According to section 81d (1) No. 4 Act against Restraints of Competition, the company's adequate and effective precautions taken prior to the infringement to prevent and uncover infringements are to be considered when determining the amount of the fine. An effective competition compliance programme can therefore be considered as a mitigating factor. A compliance programme is considered to be effective if:

- it has led to the infringement being discovered and reported; and
- the company's management was not involved in the infringement.

In addition, the company's efforts to uncover the infringement and remedy the harm as well as the precautions taken after the infringement to prevent and detect further infringements have to be taken into account as mitigating factors as well. Thus, establishing an effective compliance programme after an infringement can also be considered as a mitigating factor.

Law stated - 06 September 2023

HORIZONTAL DEALINGS

Arrangements with competitors

How does competition law govern arrangements with competitors?

Similar to article 101 TFEU, section 1 Act against Restraints of Competition (ARC) prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices that have as their object or effect the prevention, restriction, or distortion of competition. In particular so-called hardcore restrictions are covered and prohibited by the provision, such as price-fixing, customer allocation, territorial restrictions, and production or output restrictions. Cooperation agreements between competitors such as research and development, technology transfer, specialisation in production, joint ventures, joint purchasing, and consortia agreements may also violate section 1 ARC if not exempted under directly applicable EU Block Exemption Regulations or justified. Even the mere exchange of competitively sensitive information between competitors can violate section 1 ARC.

In addition, section 21 ARC prohibits undertakings and associations of undertakings from requesting that another undertaking or association refuse to supply to or purchase from certain undertakings, with the intention of unfairly impeding those undertakings (prohibition of boycott).

Law stated - 06 September 2023

Exchanging information

Can a company exchange information with its competitors?

The mere exchange of competitively sensitive information with competitors may constitute a violation of section 1 ARC. Competitively sensitive information covers any non-public strategic information that may reduce strategic uncertainty in the market (eg, information related to prices, customers, quantities, production costs, capacities, sales, marketing plans, investments or R&D programmes). Whether or not the exchange of such information constitutes an infringement of section 1 ARC needs to be assessed for each individual case, taking into account various factors such

as the market characteristics, the sensitivity of the information exchanged, the number of participants in the exchange and their market coverage, whether or not the information is sufficiently aggregated or individualised, the age of data, the frequency of the information exchange, and whether the information is exchanged in public.

Law stated - 06 September 2023

Cartel behaviour

What form must behaviour take to constitute a cartel?

Similar to article 101 TFEU, section 1 ARC prohibits any agreements, decisions by associations of undertakings and concerted practices that restrain competition. Section 1 ARC is interpreted broadly and covers any concerted action such as a gentlemen's agreement irrespective of their form; it is therefore not required that the agreement is concluded in writing.

If a prohibited behaviour is a restriction of competition by object, it is irrelevant if it has a negative impact on competition. If, however, a behaviour is a restriction of competition by effect, negative effects on competition must be demonstrated.

In addition, section 21 ARC prohibits undertakings from threatening or causing disadvantages or promising or granting advantages to other undertakings to induce them to engage in conduct that, inter alia, would violate section 1 ARC or article 101 TFEU.

Law stated - 06 September 2023

Suggested precautions

What precautions can be taken to manage competition law risk when the company enters into an arrangement with a competitor?

An effective compliance programme is essential to mitigate competition law risks. This also includes training for the employees involved as well as their instruction before having contacts with competitors, so that they are aware of what needs to be considered when dealing with competitors. A company should generally seek legal advice either from their legal department or external counsel to ensure competition law compliance. It is also important that legal developments and competition authorities' decisional practice are monitored closely, so that existing agreements with competitors can be updated where necessary in a timely manner. Any exchange of confidential information with competitors should be limited to what is strictly necessary (need-to-know basis) for the cooperation in question approved by legal experts in advance. Before meetings with competitors, it is advisable to prepare an agenda, which needs to be reviewed by legal experts upfront and strictly followed by employees during the meeting. It may also be prudent to have legal experts to attend such meetings.

In addition, companies can seek consultation with the German Federal Cartel Office (FCO) and request a comfort letter from the FCO if they have a substantial legal and economic interest in obtaining such a decision with regard to a cooperation with competitors.

Law stated - 06 September 2023

Exemptions and defences

What exemptions, defences or other circumstances will allow otherwise anticompetitive agreements with competitors to escape sanction?

In specific limited cases it is possible to argue that an agreement is an ancillary restraint to a main agreement. This defence requires that the main agreement itself is in line with competition law and the ancillary restraint is strictly required to achieve the goal of the main agreement.

In addition, according to the FCO's de minimis notice , the FCO will generally not initiate proceedings on the grounds of insignificance if, in case of a horizontal agreement, the combined market share of the parties to this agreement does not exceed 10 per cent in any affected market, and, in case of a non-horizontal agreement, the market share of each of the undertakings involved does not exceed 15 per cent in any one of the affected markets. However, hardcore restrictions such as price fixing, restrictions of production, or allocation of markets or customers fall outside the scope of the de minimis notice.

Pursuant to section 2(1) ARC, which corresponds to the exemption under article 101(3) TFEU, an agreement is exempted if it leads to efficiencies that outweigh its negative effects, the imposed restrictions are indispensable to achieve these efficiencies, and the agreement does not eliminate competition in respect of a substantial part of the product in question, while a fair share of the resulting benefits is passed on to consumers.

Moreover, according to section 2(2) ARC, EU block exemption regulations (BER), such as BER for vertical agreements, R&D cooperation, specialisation agreements or technology transfer are applicable, even if they are not capable of affecting trade between the member states of the EU.

Section 3 ARC provides an exemption for agreements between small and medium-sized companies the subject matter of which is the rationalisation of economic activities through inter-firm cooperation, if the agreement does not significantly affect competition on the market and it serves to improve the competitiveness of small or medium-sized enterprises.

Law stated - 06 September 2023

VERTICAL DEALINGS

Vertical agreements

How does competition law govern vertical arrangements with commercial partners?

Vertical agreements restraining competition, such as resale price maintenance, territorial and customer restrictions, or non-compete clauses are covered by section 1 Act against Restraints of Competition (ARC). The assessment of whether a vertical restriction is prohibited by section 1 ARC or may be exempted from the prohibition is similar to the assessment under EU laws. In particular, the Vertical Block Exemption Regulation (EU Regulation 2022/720) is directly applicable, even if the agreement in question does not affect trade between the member states of the European Union. The European Commission's Vertical Guidelines serve as an important guidance for the assessment of admissibility of vertical agreements, even though they are not binding for German courts or the German Federal Cartel Office (FCO).

In recent years, the FCO has been stepping up its enforcement against vertical restraints of competition, mainly focusing on hardcore restrictions, in particular resale price maintenance, and restrictions in connection with digital markets and digital platforms.

Law stated - 06 September 2023

Exemptions and defences

What exemptions, defences or other circumstances will allow otherwise anticompetitive vertical agreements or restrictions to escape sanction?

The Vertical Block Exemption Regulation (EU Reg 2022/720, VBER) is directly applicable, even if the agreement in

question does not affect trade between the member states of the European Union. Thus, a vertical agreement that fulfils the exemption requirements under the VBER is exempted from the prohibition of section 1 ARC.

In addition, pursuant to section 2(1) ARC, which corresponds to the exemption under article 101(3) TFEU, a vertical agreement restraining competition is exempted if it leads to efficiencies that outweigh its negative effects, the imposed restrictions are indispensable to achieve these efficiencies, and the agreement does not eliminate competition in respect of a substantial part of the product in question, while a fair share of the resulting benefits is passed on to consumers.

Moreover, the ARC contains specific exemptions for agreements between small and medium-sized companies (section 3 ARC) and for the agricultural sector (section 28). These exemptions are not applicable in relation to article 101 (1) TFEU (ie, if an agreement not only has a domestic effect but also may affect trade between the member states).

Furthermore, the leniency programme is also applicable to vertical restraints of competition.

Law stated - 06 September 2023

DOMINANT POSITION

Determining dominant market position

Which factors does your jurisdiction apply to determine whether a company holds a dominant market position?

Pursuant to section 18 (1) Act against Restraints of Competition (ARC), an undertaking is considered to be dominant if it either has no competitors, is not exposed to substantial competition, or has a paramount market position in relation to its competitors. When assessing whether a company holds a dominant position various factors are taken into account. Section 18 (3) ARC contains a non-exhaustive list of relevant factors, such as the company's market share, its financial strength, its access to supply and sales markets, the actual or potential competition it faces, and the potential possibility of its customers to switch to alternative providers. The company's market share on the relevant markets remains the prevailing factor when assessing its market position. In particular, section 18 (4) ARC stipulates a rebuttable presumption that an undertaking holding a market share of at least 40 per cent is considered to be dominant. Similarly, a body of undertakings is presumed to be dominant if a maximum of three undertakings have a combined market share of at least 50 per cent, or a maximum of five undertakings have a combined market share of at least two-thirds.

For multi-sided markets and networks section 18 (3a) and (3b) ARC contains a non-exhaustive list of further relevant factors, such as network effects, switching costs for users, and data access. For intermediaries on multi-sided markets, section 18 (3b) ARC stipulates that in particular the importance of the intermediary services for accessing supply and sales markets shall be taken into account.

The prohibition of abusive conduct does not only apply to undertakings holding a dominant position. Section 20 (1) ARC also extends the scope of prohibition to companies with relative market power. A company has a relative market power if other undertakings as suppliers or purchasers of a certain type of goods or commercial services are dependent on it in such a way that sufficient and reasonable possibilities for switching to third parties do not exist. In addition, it is required that there is a significant imbalance between the power of such companies and the countervailing power of their customers.

Moreover, section 19a ARC regulates the prohibition of certain abusive conduct for companies with paramount significance for competition across markets. The provision aims primarily at 'big tech' companies and the Federal Cartel Office (FCO) so far has only initiated proceedings under this provision against Facebook, Google, Amazon, Apple and Microsoft. For the assessment of whether a company has a paramount significance, various factors are considered such as its dominant position, financial strengths and access to other resources and data, its vertical

integration, and the relevance of its activities for third-party access to supply and sales markets as well as its related influence on the business activities of third parties. The proceedings under section 19a ARC are twofold. In a first step, the FCO must declare that an undertaking has a paramount significance for competition across markets. Once final, such a decision is valid for five years. In a second step, the FCO can prohibit certain measures listed in section 19a (2) ARC.

Law stated - 06 September 2023

Abuse of dominance

If the company holds a dominant market position, what forms of behaviour constitute abuse of market dominance?

Under German law, any abuse of a dominant position is prohibited. Similar to article 102 TFEU, section 19 (2) ARC contains a non-exhaustive list of conduct that is considered to be abusive, such as unfair impediment, discrimination without objective justification, exploitative abuse, refusal to grant access to essential facilities including data, and requests to grant advantages without objective justification.

The FCO's focus lies particularly on the digital sector. It initiated proceedings against 'big tech' companies under the new section 19a ARC and already declared Meta (Facebook), Alphabet (Google), Amazon and Apple to have a paramount significance across markets. The decisions against Meta and Alphabet are final. In the Meta/Oculus case, the FCO reached an agreement with Meta that for use of the VR headset a Facebook account is no longer needed. The proceeding is not yet concluded, however, as the FCO also examines whether and how data processed in the context of different Meta services are combined. The outcome of the proceeding also depends on the ruling of the European Court of Justice (ECJ), where a proceeding regarding Facebook's data processing terms is pending after being referred to the ECJ by the Higher Regional Court of Düsseldorf.

Law stated - 06 September 2023

Exemptions and defences

What exemptions, defences or other circumstances will allow a dominant company's otherwise abusive conduct to escape sanction?

Certain conduct of a dominant company may be objectively justified, and therefore not prohibited. In order to assess whether this is the case, legitimate interests of each party are considered and weighed against each other. In this context, the objective of the ARC directed at the freedom of competition must be taken into account.

Law stated - 06 September 2023

MERGER CONTROL

Competition authority approval

Does the company need to obtain approval from the competition authority for mergers and acquisitions? Is it mandatory or voluntary to obtain approval before completion?

A transaction that constitutes a 'concentration' under German law and meets the relevant thresholds has to be notified to the Federal Cartel Office (FCO) and must not be completed before a clearance is obtained. All parties to the transaction are responsible for notifying a notifiable transaction.

Pursuant to section 37(1) Act against Restraints of Competition (ARC), a transaction constitutes a 'concentration' where:

- all or a substantial part of the assets of another undertaking are acquired;
- direct or indirect (factual) control is acquired by one or several undertakings;
- at least 25 per cent or 50 per cent of the shares and/or voting rights in another undertaking are acquired; or
- an undertaking acquires material competitive influence over another undertaking (ie, where the acquirer's shareholding is below 25 per cent but where it has so-called 'plus factors' such as a seat on the board or specific consent rights that make its position comparable to an investor owning at least 25 per cent).

A 'concentration' that is not subject to EU merger control is notifiable in Germany if in the last business year preceding the concentration:

- all parties generated combined worldwide turnover of more than €500 million;
- at least one party generated more than €50 million in Germany; and
- another party generated more than €17.5 million in Germany.

In addition, a 'concentration' is notifiable if the following 'transaction value threshold' is met. This is the case if in the last business year preceding the concentration:

- all parties generated combined worldwide turnover of more than €500 million;
- at least one party generated more than €50 million in Germany;
- neither the target nor any other further party generated €17.5 million in Germany;
- the consideration for the acquisition exceeds €400 million; and
- the target has substantial operations in Germany.

The 'transaction value threshold' aims in particular at 'killer acquisitions' in the digital and pharmaceutical sectors and at deals where the target's market position and competitive potential is not fairly reflected by its turnover.

In addition, the FCO may order by formal decision that a company has to notify future transactions in specific sectors if the requirements in section 39a ARC are fulfilled.

Law stated - 06 September 2023

Timing

How long does it normally take to obtain approval?

Once a complete notification is submitted, the FCO has one month (Phase I) to review and either clear the transaction or enter into an in-depth investigation (Phase II). If within the Phase I review period the FCO does not make a decision, a transaction is deemed to be cleared automatically. There is no fast-track procedure in Germany. The FCO may, however, clear a transaction that does not raise competition concerns well before the expiration of the review period, depending on the workload of the Decision Division in charge.

If the FCO needs to further examine the transaction and initiates Phase II proceedings, the review period is five months from receipt of the complete notification. The review period is extended by one month if a notifying party submits a remedy proposal for the first time. In addition, the Phase II review period can be extended if the notifying parties and

the FCO agree to an extension.

Law stated - 06 September 2023

Impact of merger clearance

Does merger clearance by the authority constitute confirmation that the terms in the documents comply with competition law?

Merger clearance only relates to merger control proceedings and does not constitute a confirmation that respective agreements (which are usually not submitted to the FCO unless requested) are in line with competition law. The FCO may therefore initiate investigations to address any further competition concerns.

Law stated - 06 September 2023

Exchanging information before completion

Are there limits on the information that can be exchanged with the other party before completion of a merger?

A notifiable concentration must not be consummated before a clearance by the FCO has been obtained (stand-still obligation). An exchange of competitively sensitive information may be considered to be a violation of this obligation.

In addition, parties to the transaction remain independent undertakings until the concentration has been completed. The cartel prohibition of section 1 ARC therefore applies, limiting the admissible information exchange between the parties if they are competitors.

Pre-closing information exchanges of competitively sensitive information should therefore be treated very carefully, in particular if parties to the transaction are actual or potential competitors. The information exchange should be limited to what is strictly necessary for the due diligence process. For highly sensitive information, parties should also consider establishing 'clean teams', members of which should be subject to strict non-disclosure rules and either be external advisers or at least employees from non-operational departments who are not involved in day-to-day operational activities.

Law stated - 06 September 2023

Failure to file

What are the consequences for failure to file, delay in filing and incomplete filing? Have there been any notable recent cases?

If parties fail to notify, the FCO may impose fines on each party of up to 10 per cent of their respective group's worldwide turnover in the last financial year. In addition, any agreements and legal transactions implementing a concentration before a clearance has been obtained are considered legally void.

If an incomplete filing is submitted, the clock for the merger control review period does not start to run. The FCO usually does not fine companies for submitting an incomplete notification, but may do so in particular if the incomplete notification was misleading.

Law stated - 06 September 2023

JOINT VENTURES

Competition authority approval

Are joint ventures required to seek clearance from the competition authority?

The establishment of a joint venture requires a merger control clearance from the Federal Cartel Office (FCO), if the relevant thresholds are met. A joint venture is established if at least two undertakings have at least 25 per cent of the shares in another undertaking, and the turnover generated by each parent company as well as by the joint venture have to be taken into account when assessing a potential filing requirement. There is no full-function requirement under German law. Therefore, joint ventures that carry out ancillary functions for their parent companies may also be subject to merger control review.

The establishment of a joint venture may also violate the cartel prohibition of section 1 Act against Restraints of Competition (ARC). It is up to the parties to self-assess whether this is the case. In the case of doubt, the parties may request a 'comfort letter' from the FCO pursuant to section 32c ARC, in which the FCO confirms that subject to new findings there are no grounds to take action. The comfort letter does not include an exemption from the prohibition of section 1 ARC and is not binding for courts. However, it may have a significant influence on their assessment.

Law stated - 06 September 2023

Joint venture arrangements

When will joint venture arrangements fall within the scope of competition law?

Joint ventures may be caught by the prohibition of section 1 ARC, as they may lead to coordination effects between the parent companies. Such coordination effects are in particular likely in the case of cooperative joint ventures (ie, where the joint venture is active in the same market as its parent companies and the parent companies retain their activities in this market).

A concentrative joint venture, on the other hand, is less problematic and not caught by section 1 ARC if the joint venture is a full-function joint venture that has all essential corporate functions and provides market-related services not exclusively or predominantly at an upstream or downstream level for the parent companies, and the parent companies are not active on the relevant product markets of the joint venture.

Law stated - 06 September 2023

LENIENCY

Leniency programmes

Is a leniency programme available to companies or individuals who participate in a cartel or other anticompetitive conduct in your jurisdiction?

A participant in a cartel may benefit from the leniency programme, which is incorporated in sections 81h–81n Act against Restraints of Competition (ARC).

Leniency can only be granted upon application. A cartel participant can contact the Federal Cartel Office (FCO) to initially declare its willingness to cooperate (marker) in order to be assigned a place in the queue for leniency that are granted in the order in which the applications are received. The FCO will then set a reasonable period within which an applicant shall submit its leniency application. During the proceedings the FCO does not disclose the identity of applicants to third parties but may, however, disclose it during the proceedings to other cartel participants.

For leniency to be granted, an applicant must fulfil the following requirements:

- disclose its knowledge of and role in the cartel;
- end any involvement in the cartel, unless the FCO considers specific activities to be necessary to preserve the integrity of its investigation;
- genuinely, continuously, and expeditiously cooperate with the FCO until the conclusion of the enforcement proceedings, in particular by providing all information and evidence related to the cartel, answering questions, and making members of staff available for questioning; and
- while contemplating filing a leniency application:
  - not destroy, falsify or conceal information or evidence; and
  - not disclose either the contemplated leniency application or its contemplated content (disclosure to other competition authorities is not precluded).

If an applicant meets these requirements, is the first to submit evidence that allows the FCO to obtain a search warrant for the first time, and has taken no steps to coerce other cartel participants to join or remain a member of the cartel, the FCO will grant immunity to this cartel participant. If the abovementioned requirements are met, but the FCO were already in a position to obtain a search warrant, the FCO will generally refrain from imposing a fine if the cartel participant is the first to submit evidence that makes it possible to prove the offence for the first time.

If immunity cannot be granted, the FCO may reduce the fine by up to 50 per cent if the submitted information represents significant added value for the purpose of proving the offence. The reduction depends on the usefulness of the information and evidence and the point in time at which the leniency applications are filed.

Law stated - 06 September 2023

Beneficiaries of leniency

Can the company apply for leniency for itself and its individual officers and employees?

A company can apply for leniency for itself and all its individual officers and employees, who then also have to fulfil the leniency requirements and in particular fully and continuously cooperate with the FCO.

Law stated - 06 September 2023

INVESTIGATION

Commencement of investigation

How is an investigation into a suspected breach of competition law started?

The Federal Cartel Office (FCO) may start an investigation when it is made aware of a possible infringement. There are various ways how this may happen (eg, via leniency application; complaints or hints by customers, competitors, or third parties; sector enquiries carried out by the FCO); and anonymous whistle-blower tool. In addition, the FCO uses innovative measures such as algorithms to screen the markets and public tenders for suspicious patterns.

Law stated - 06 September 2023

Limitation period

What are the limitation periods for investigation of competition infringements?

The limitation period in proceedings for anticompetitive agreements and abuse of dominant market position is five years. The limitation period for other infringements is three years. The limitation period starts to run once the infringement has ceased. An ongoing infringement is considered as a single and continuous infringement, and therefore an infringement cannot become time-barred unless it has been terminated.

Law stated - 06 September 2023

Information-gathering powers

What powers does the competition authority have to gather information?

The FCO has extensive powers to gather the required information. It can send a simple request, in which case the addressee is not obligated to respond. If the FCO does not receive the requested information it may issue a formal request for information in which case the addressee, which can also be a third party, is generally required to respond as long as the formal request is proportional and does not require a confession of a crime or administrative offence. Non-compliance with a formal request can be fined by the FCO. In addition, the FCO may interview employees or third parties. After obtaining a search warrant, it may also carry out dawn raids and seize documents and data storage media.

Law stated - 06 September 2023

Dawn raids

For what types of infringement will the competition authority launch a dawn raid? Are there any specific procedural rules for dawn raids?

The FCO usually launches a dawn raid in cartel investigations. The FCO abides by procedural rules for criminal investigations and is in particular required to obtain a specific search warrant issued by a court. The FCO may search any premises in which it expects to find relevant information, as long as they are covered by the search warrant. This includes the company's premises, but can also cover cars or employees' private apartments.

Law stated - 06 September 2023

Dawn raids – rights and obligations

What are the company's rights and obligations during a dawn raid?

The authorities are in particular authorised to:

- examine all books and business documents, irrespective of the form or medium they are available on, and obtain access to any information that is accessible by the person subject to the search;
- seal business premises, books and documents of any kind for the duration and to the extent necessary for the search; and
- request from all representatives or members of staff of the undertaking or association of undertakings information that might facilitate access to evidence, and explanations with regard to facts or documents that might be connected to the subject matter and purpose of the search, and record the answers.

The company should ask for the FCO's search warrant and representatives of the company are allowed to accompany the officials during the search. The company should also ask the officials to wait before beginning the search until their attorneys have arrived. While the officials are, in principle, not obliged to do so, they are often prepared to wait for a certain time, in particular if they are allowed to move freely in the meantime and can already secure evidence, by, eg, sealing offices. At the end of the search, the FCO is required to hand over a protocol and an inventory of seized objects. Companies may ask the officials to copy certain seized documents, in particular if they are required for business operations, though the officials may refuse such request.

Law stated - 06 September 2023

Refusal to cooperate

What are the penalties and other consequences for refusing to cooperate with the authorities during an investigation?

The FCO may fine individuals up to €100,000 and undertakings up to 1 per cent of a group's worldwide turnover in the last financial year for the following conduct:

- failure to respond to a request of information or to respond to such request correctly, completely, or in time;
- failure to surrender documents completely or in time;
- failure to appear for questioning;
- failure to present business documents for inspection and examination or to present them completely or in time;
- refusing the examination of business documents or access to business premises and properties;
- refusing a search of business premises or objects used for business purposes;
- breaking any seal that has been affixed by officials;
- refusing to disclose information requested during the search that could facilitate access to evidence; or
- not providing explanation on facts or documents that might be connected to the subject matter and the purpose of the search.

Law stated - 06 September 2023

SETTLEMENT

Settlement mechanisms

Is there any mechanism to settle, or to make commitments to regulators, during an investigation?

The Federal Cartel Office (FCO) decides at its discretion whether it initiates an administrative procedure or a fine procedure and may also change its decision during the course of proceedings. In an administrative proceeding a company can offer remedies that address the FCO's competition concerns to terminate the infringement and avoid a final order.

Fine proceedings can be concluded by reaching a settlement with the FCO, which can shorten and expedite proceedings. Settlement discussions can be initiated by both parties. If there is a general willingness to terminate the proceedings by settlement, the FCO informs the party of the facts or the infringement it is accused of and proposes an amount of fine which will not be exceeded if settlement is reached. If an agreement is reached, the proceedings will be terminated with a so-called short decision, which contains significantly less information than the detailed fine decision.

By reaching a settlement a fine can be reduced by up to 10 per cent irrespective of an application for leniency and may therefore lead to an additional reduction of the fine.

Law stated - 06 September 2023

Impact of compliance programme

What weight will the authorities place on companies implementing or amending a compliance programme in settlement negotiations?

Implementing or amending an effective compliance programme can be considered as a mitigating factor when calculating the amount of the fine.

Law stated - 06 September 2023

Corporate monitorships

Are corporate monitorships used in your jurisdiction?

Corporate monitorships are not used in Germany.

Law stated - 06 September 2023

Statements of facts

Are agreed statements of facts in a settlement with the authorities automatically admissible as evidence in actions for private damages, including class actions or representative claims?

When a settlement is reached the FCO will issue a so-called short decision. Once it becomes final, findings therein regarding the infringement (as in other final fine decisions) are binding for civil courts in follow-on damage litigation.

Law stated - 06 September 2023

UPDATE AND TRENDS

Recent developments and future reforms

What were the key cases, decisions, judgments and policy and legislative developments of the past year? Are there any proposals for competition law reform in your jurisdiction?

On 6 July 2023, the German Bundestag approved the 11 th Amendment to the Act against Restraints of Competition. The bill will still likely enter into force this year.

The 11 th Amendment will introduce the following key changes:

- New intervention mechanism (new sections 32e and 32f): The mechanism will allow the Federal Cartel Office (FCO) to remedy significant and continuous malfunctioning of competition identified in a sector inquiry. Potential remedies can include behavioural or quasi-structural measures, orders on how to conduct companies' business relationships with other companies, and orders to establish separate business divisions. Finally, as an ultima ratio the FCO will be able to impose unbundling on dominant companies to eliminate a significant, ongoing, or repeated malfunctioning of competition. In addition, the FCO will have the powers to oblige companies in certain markets to notify almost every transaction after a sector inquiry, if the acquirer generated more than €50 million in Germany and the target company generated €1 million in the last financial year.
- Simplified disgorgement of benefits (new section 34): Benefits from antitrust violations will be disgorged more

easily in the future. There will be a presumption that a company has obtained a benefit of 1 per cent of its domestic turnover affected by the found antitrust violation.

- Procedural provisions for enforcement of the Digital Markets Act (DMA): The 11th Amendment introduces new procedural rules to enable the FCO to support the European Commission in enforcing the DMA and ensures effective private enforcement of the DMA.

Law stated - 06 September 2023

Jurisdictions

Belgium	Fieldfisher
China	Zhong Lun Law Firm
European Union	O'Melveny & Myers LLP
Finland	Eversheds Sutherland (Finland)
Germany	Debevoise & Plimpton
Greece	Law Offices Papaconstantinou
Japan	Mori Hamada & Matsumoto
Switzerland	Niederer Kraft Frey
Turkey	ACTECON
United Kingdom	Winston & Strawn LLP
USA	Winston & Strawn LLP