



One Year On:

**The German Law Against Restraint of Competition
and a European Merger Law Comparison**

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The information contained in this article is not intended to constitute legal advice on a particular set of circumstances. If you would like to receive further information on the above topic as it relates to your business, please contact the author at kr@fr-lawfirm.de.



Table of Contents

1.	Introduction.....	4
2.	The German Law Against Restraint of Competition	4
2.1	New Regime on Horizontal and Vertical Restraint of Competition.....	4
2.2	Abuse of Dominant Position	5
2.3	Extended Powers of German Federal Cartel Office (FCO)	6
2.4	Increased Fines	7
2.5	Private Enforcement	8
2.6	German Merger Control.....	8
2.6.1	When does the German Merger Control Law Apply?.....	9
2.6.2	Who Participates in a Concentration?.....	10
2.6.3	When are Concentrations Exempt from German Merger Control Law?.....	10
2.7	Agency and Other Vertical Agreements.....	11
3.	European Merger Control.....	11
3.1	Statutory Basis and Jurisdiction	11
3.2	Relation to German Merger Control Law.....	11
3.3	What is a Concentration According to the EC Merger Regulation?.....	11
3.4	When is a Merger Subject to the EC Merger Regulation?	12
3.5	When is a Merger not Subject to Merger Control?	13
3.6	When does the European Commission Ban a Concentration?	13
3.7	Organisation of European Merger Control Procedure	13
3.8	When Can a Merger be put into Effect?.....	14
3.9	Particularities of Joint Ventures.....	14
4.	Checklist: General Examination Sequence Merger Control.....	14



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1. Introduction

The [German Law Against Restraint of Competition \("the Act"\)](#) was enacted in 1958. The most recent amendments, taking effect on 1 July 2005, were tied to Germany's implementation of [EU Regulation 1/2003](#). The Act harmonizes German and EC competition law and provides:

- a new regime for horizontal and vertical restraints of competition;
- an increase in fines for non compliance;
- a strengthening of private enforcement options; and,
- an extension of powers for the German [Federal Cartel Office \("FCO"\)](#).

In addition, some changes were made to the rules regarding abuse of dominant positions, merger control and public procurement. The following is an examination of the provisions and workings of the amended German Act and a comparison of the German provisions with EC law.

2. The German Law Against Restraint of Competition

2.1 New Regime on Horizontal and Vertical Restraint of Competition

Section 1 of the Act was re-drafted according to Article 81 (1) of the EC Treaty. It now covers horizontal and vertical agreements alike; and both are now generally prohibited. Previously, German law made a sharp distinction between horizontal agreements (which were prohibited but which could be exempt in certain circumstances) and vertical restraints (which were generally allowed but could be prohibited individually). Under the new regime, horizontal agreements are subject to more flexible rules. On the other hand, companies will need to carefully review their distribution agreements and other vertical agreements following the reform. Agreements and practises violating Section 1 are null and void and may incur significant fines and/or trigger claims for compensation, among other penalties.



Section 2 of the Act incorporates a system of directly applicable exceptions from EC competition law under Article 81 (3) of the EC Treaty and EU Regulation 1/2003. Horizontal and vertical restraints are exempt from the prohibition in Section 1 if they fulfil certain criteria set out in Section 2 of the Act. Section 2 incorporates the same criteria as does Article 81 (3). More importantly, it provides that all EC exemptions shall apply accordingly to national cases within Germany. Horizontal agreements between small and medium-sized enterprises may also be exempt by virtue of Section 3.

German courts and competition authorities have construed Section 1 in light of EU competition Law practice. This includes an observance of European courts' jurisprudence in this area and especially the European Commission's notices and guidelines on horizontal and vertical restraints. Applying the European Commission's guidelines on horizontal co-operation agreements to purely national cases has led to some horizontal agreements being allowed which were previously prohibited under Section 1.

Under the new Act, companies must now decide for themselves whether their contractual practices are prohibited. Sections 2 to 8 of the former law on formal individual exemptions by administrative procedure have been abolished. And the administrative procedures themselves, provided in the old law, are no longer rendered. Individual exemptions obtained under the former Sections 2 to 8 will expire on 31 December 2007, at the latest. The former Sections 14 to 18 on vertical restraints have also been abolished.

2.2 Abuse of Dominant Position

Prohibitions on abuse of a dominant position (Section 19) and of unfair hindrance or discrimination by companies with relatively strong market power (Section 20) remain effective. No prior decision to that effect is required.

Section 19 continues to provide (among other things) that companies will be presumed dominant if:

- one company has a market share of 1/3 (sole dominance);
 - three or less enterprises have a combined market share of 50% (joint dominance);
- or,
- five or less enterprises have a combined market share of 2/3 (joint dominance).



Other factors such as a company's financial power, access to supply or sales markets and legal and factual barriers to market entry may also lead to a dominant position. Section 20 not only applies to dominant enterprises, but also to enterprises with significant relative market power over small and medium-sized enterprises.

The most important types of abusive practices are:

- monopolistic conduct;
- predatory pricing;
- excessive pricing;
- discriminatory pricing;
- certain fidelity rebates or bonuses;
- discriminatory application of terms and conditions; and,
- refusal to supply products to third parties.

It is important to note that, according to the Act, the relevant geographical market can now extend beyond German territory. Previously, the geographic market definition was limited to German territory, regardless of the actual economic, geographic market.

2.3 Extended Powers of German Federal Cartel Office (FCO)

In addition to the extensive investigation powers which existed previously, German competition authorities may now investigate economic sectors and types of agreements where circumstances suggest that competition may be restricted. Alternatively, by imposing substantial fines and subjecting companies' actions to private compensation claims, the competition authorities may now minimise any advantages received by violating competition laws.

Further, German competition authorities can now, in certain circumstances, compel companies to take defined actions, whereas previously they were merely empowered to prohibit certain actions. Competition authorities can now also implement temporary measures. Non observance of such measures triggers substantial fines.



Another rather disguised change to the procedural law provided in the Act has had far reaching implications: Complaints against decisions by competition authorities regarding Sections 1 to 3 (Article 81) – in particular prohibitions of cartels and other horizontal co-operations or prohibitions of restraints in vertical relations, such as distribution agreements – no longer suspend the decision. Decisions are now immediately enforceable unless a court orders that they be suspended. Contraventions of such decisions also trigger substantial fines. Significantly, however, complaints against decisions on abusive practices still suspend the decisions.

2.4 Increased Fines

The Act has provided for a significant increase in the fine structure. Companies may now be fined up to 10% of their annual turnover in the preceding business year. Individuals may now be fined up to EUR 1 million.

These fines may be imposed for:

- prohibited horizontal and vertical agreements;
- abuse of a dominant position, unfair discrimination or hindrance;
- implementation of a notifiable transaction before clearance; and,
- failure to comply with an enforceable decision or interim measure ordered by competition authorities.

The Act now authorizes the FCO to lay down general administrative guidelines regarding the exercise of its discretionary powers to fix the amount of fines. By passing these guidelines, the FCO has followed more or less the European Commission, with only some differences. The FCO guidelines concern not only violations of Articles 81 and 82 of the EC Treaty and the corresponding regulations of the Act, but also violations relating to merger control.

As with the European Commission guidelines, the FCO guidelines also provide for a two step method to determining fines. The basic amount is set at a level of up to 30% of value of sales of products or services to which the legal infringement relates. However, the relevant geographic area under the FCO guidelines is restricted to Germany only.



After having determined the basic amount in the first step, the FCO will, in a second step, take both aggravating and mitigating circumstances into account when adjusting the basic amount of the fine.

If the fines determined according to the two step method exceed the 10% ceiling by the Act, the FCO will reduce the fine to its legal maximum.

2.5 Private Enforcement

Prior to the reform, Section 33 allowed for private claims for injunctions and compensation. However, compensation claims were rarely successful. The new Act recognises private enforcement and claims for compensation.

Anyone affected by a violation is entitled to claim regardless of whether the affected party is a competitor or another market participant. The claimant is no longer required to be protected by the very provision the defendant has violated. Further, the "passing-on" defence is now explicitly rejected; defendants can not argue that the claimant was able to pass on additional costs to its customers and, thus, did not suffer damages.

Private claims benefit from a shift of the burden of proof in follow-on claims. Where a competition authority finds a violation of competition laws, civil courts are bound by this finding. The claimant does not have to prove the violation again before the court. In theory, this also applies to decisions by competition authorities in other EU Member States. However, the scope of foreign decisions will often be limited to the respective jurisdiction and will not establish the violation of competition laws in Germany.

2.6 German Merger Control

Merger control rules remain broadly unchanged by the amendments to the Act. Transactions are subject to mandatory pre-merger notification and may not be implemented until the following conditions are met:

- the transaction is a "concentration" within the meaning of Section 37 of the Act;
- the turnover thresholds in Section 35 are met; and,
- the EC Merger Regulation does not apply.



Any implementation prior to satisfaction of these conditions is null and void. The FCO may impose a fine of up to 10% of the previous business year's total turnover.

A transaction is considered a concentration in cases of:

- acquisition of (a substantial part of) the assets of another company;
- acquisition of direct or indirect sole or joint control over another company;
- acquisition of participation resulting in overall participation of at least 25% or 50%; or,
- acquisition of a competitively significant influence over another company (this may exist even where participation is below 10%).

A transaction meets the turnover thresholds if: (i) the combined aggregate world-wide group turnover of all participating companies exceeds EUR 500 million; and, (ii) the group domestic turnover in Germany of at least of one participating company exceeds EUR 25 million. Further *de minimis* exemptions may apply.

A concentration is prohibited if it creates or strengthens a dominant position. A clearance decision can be subject to structural conditions and obligations.

The FCO has one month (the first stage) or four months (the second stage) to decide on a case. Mergers are only prohibited after the second procedural stage. Significantly, only decisions rendered in the second stage of proceedings (prohibitions or clearances) may be subject to judicial review.

2.6.1 When does the German Merger Control Law Apply?

Whether a concentration of enterprises is subject to merger control is a question for either German law, European Community law or the law of a third country (e.g. U.S. anti-trust law). German merger control law does not apply if the concentration of enterprises comes under the provision of European law, making it subject to European Community merger control. The principle is known as a "one-stop-shop"; meaning that EC merger control law will prevail, as far as it applies, over all EC national merger controls. The examination of concentrations in Germany is the exclusive responsibility of the FCO.



2.6.2 Who Participates in a Concentration?

Participating undertakings are, for example:

- in the case of the acquisition of the assets of another undertaking (by merger or otherwise): the acquirer and the seller, the seller however participating only insofar as the transferred assets are concerned; in the case of a merger, the undertakings that are merged; or,
- in the case of the acquisition of shares: the acquirer/s and the undertaking in which shares are acquired. If this undertaking is affiliated to other undertakings, those undertakings are also deemed to be participating undertakings.

2.6.3 When are Concentrations Exempt from German Merger Control Law?

A concentration is exempt from German merger control provisions if:

- the concentration has no effect on the German domestic market;
- the concentration does not reach the turnover thresholds for mergers subject to control (see above at 2.6);
- an undertaking which is not a controlled undertaking and had in the last business year a world-wide turnover of less than EUR 10 million, affiliates itself with another undertaking (known as the *de minimis* clause); or,
- where a market is concerned in which goods or commercial services have been offered for at least five years and which had a sales volume of less than EUR 15 million in the last calendar year (this is known as the minor market clause).

A controlled undertaking is a legally separate, independent enterprise over which another enterprise (a controlling enterprise) can directly or indirectly exert dominant influence (known in German as a *beherrschender Einfluss*). The dominant influence must originate from corporate arrangements. Influence potential occurs if one enterprise holds the majority of shares in another enterprise. For the examination of the *de minimis* clause, the aggregate turnover of the selling enterprise is decisive.



2.7 Agency and Other Vertical Agreements

Vertical restraints of competition fall under Section 1 of the Act. As provided by the EU Block Exemption Regulation on Vertical Restraints of Competition, vertical restraints are in principle, exempt from the prohibition if the parties involved have a market share of no more than 30%. Furthermore, the vertical agreement must not contain so called "black clauses", covering for example the fixing of prices and any export / re-import prohibitions. Notwithstanding this, the Act now allows agreements on maximum retail prices to the detriment of the dealer as well as arrangements for most favoured customer treatment. Under the Act, restricting a supplier from competing is generally permitted, whereas restraining a dealer from competition is permitted only for the term of the respective vertical agreement, such term not to exceed five years.

3. European Merger Control

3.1 Statutory Basis and Jurisdiction

European merger control law is codified in the [Control Regulation \(EC\) 139/2004 of 20 January 2004 on the Control of Concentrations Between Undertakings](#) ("EC Merger Regulation"). The EC Merger Regulation gives the European Commission jurisdiction to investigate defined mergers.

3.2 Relation to German Merger Control Law

Concentrations that do not come under the jurisdiction the EC Merger Regulation but which fulfil the requirements for notification and reporting according to the German Act remain under the exclusive merger control jurisdiction of the German FCO.

3.3 What is a Concentration According to the EC Merger Regulation?

Decisive for a concentration according to the EC Merger Regulation is the control of another undertaking. Here, control is the possibility to exert a dominant influence on the actions of this undertaking. According to the EC Merger Regulation, a concentration is deemed to arise where a lasting change of control results from either:

- the merger of two or more previously independent undertakings;
- the acquisition by one or more persons already controlling at least one undertaking, or the acquisition by one or more undertakings, whether by purchase of securities or assets, by contract or by other means, of direct or indirect control of the whole or of part of one or more undertakings; or,



- the creation of a joint venture which performs the function of an autonomous economic entity on a lasting basis. The enterprise performs all functions of other enterprises in the market, typically comprising research and development, production and sales, and also disposes of the necessary resources, personnel, assets and intellectual property rights (this is known as a "full function joint venture").

Minority shareholders are only deemed to create a concentration if the acquiring enterprise gains the possibility to exert a dominant influence on the undertaking. This depends on the circumstances of each individual case.

3.4 When is a Merger Subject to the EC Merger Regulation?

All mergers with a so called "Community dimension" are subject to EC merger control. A merger has a Community dimension if the following turnover criteria are met:

- the combined aggregate world-wide turnover of all the undertakings participating is more than EUR 5 billion; and
- the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million; (this is known as the *de minimis* threshold); and,
- not more than 2/3 of its Community-wide turnover is achieved within one and the same Member State. In all other cases, the merger is deemed to have national significance only. So called "pure foreign mergers" are also subject to European merger control if the aforesaid turnover thresholds are met.

In addition the following turnover thresholds are applied to avoid multiple notifications:

- the combined aggregate world-wide turnover of all the undertakings concerned is more than EUR 2.5 million (reduced world-wide turnover threshold); and
- the aggregate Community-wide turnover of at least two of the undertakings concerned is more than EUR 100 million (this is known as the *reduced de minimis threshold*); and
- not more than 2/3 of the Community-wide turnover of the undertakings concerned was achieved in one and the same Member State; and



- the combined aggregate turnover in at least three Member States of all the undertakings concerned is more than EUR 100 million; and
- in each of the last three of these Member States, the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million.

3.5 When is a Merger not Subject to Merger Control?

If the participating undertakings achieve more than 2/3 of their Community-wide turnover (not world-wide aggregate turnover) in one and the same Member State no jurisdiction is afforded to the EC Commission. This is also the case if the thresholds triggering a merger control are exceeded. In these instances, the relevant national merger control law is applied.

3.6 When does the European Commission Ban a Concentration?

Like the German Act, the European merger control looks to the decisive test of whether a dominant market position is created or strengthened to determine the presence of a concentration. This test takes place in four phases:

- First, the product and territorial market affected by the concentration must be defined as a substantial part of the European market;
- second, it must be determined whether the participating undertakings gain or strengthen the market power;
- if it is disputed, whether in addition, a significant obstacle to competition is to be examined;
- finally, the existence of market domination must be examined to determine whether there are any justifying reasons (e.g. if the conditions for *Sanierungsfusion* (restructuring) exist or if the concentration is necessary for technical and economic progress), if such is to be of benefit to the consumer.

3.7 Organisation of European Merger Control Procedure

The three phases of the European merger control procedure are as follows:

- **Pre-Proceeding** talks can be held with the EC Commission on the merits of the concentration.
- **First Examination Phase.** Here the EC Commission normally decides within one month after receipt of the complete notification. This decision can either result



in a rejection of the application because the thresholds triggering the merger control are not met or can be cleared (e.g. because certain promises by the undertakings are made or the second examination phase is certain. This is the case if the EC Commission has substantial concerns about the concentration).

- **Second Examination Phase.** Here, the EC Commission normally decides within four months after commencement of the merger control proceedings. The decision can either result in clearance of the merger (with or without restraints), its prohibition or the dismantling of a merger already in effect.

3.8 When Can a Merger be put into Effect?

Concentrations are prohibited from being put into effect until receipt of the EC Commission's final decision. This prohibition can be extended until certain promises by the undertakings are fulfilled or can be suspended from the very beginning.

3.9 Particularities of Joint Ventures

All foundations of full function joint ventures above the thresholds which trigger a merger control are deemed to be mergers. All full function joint ventures under the thresholds triggering the merger control and half function joint ventures are not subject to the European merger control but must be considered according to general anti-trust regulations.

4. Checklist: General Examination Sequence to Determin Merger Control

To clarify whether a merger control is subject to the German Act or the European Merger Regulation, the following five part test is useful:

1.	Is there a "merger" according to the German Act?
2.	Is there also a "merger" according to the EC Merger Regulation?
3.	Is the concentration subject to merger and reporting responsibilities according to the German Act?
4.	Is the concentration also of Community wide relevance according to the EC Merger Regulation?
5.	Is creation or strengthening of market domination expected according to the German Act? Is strengthening of a dominant position expected according to the EC Merger Regulation?