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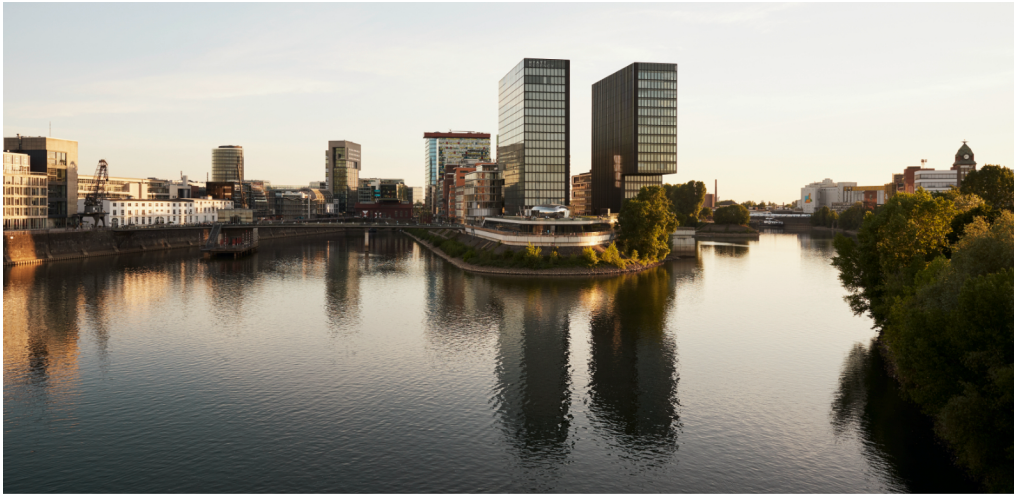

10th Amendment to ARC – Merger Control

Summary of key changes

Changes to the German Act against Restraints of Competition (ARC) are imminent. The legislator has recently published a government draft of the law expected to come into force in early 2021. The amendment has been labled the "digital ARC", as it introduces tools to help the *Bundeskartellamt* (Federal Cartel Office - FCO) better enforce competition law in digital markets.

However, not all changes concern enforcing competition law on digital markets. There have been significant changes to the merger control regime as well. Here is a quick summary of these particular changes:

Thresholds
The German legislator aims at reducing the amount of merger control notifications to the FCO. In 2017/2018, notifications where at 2,686, which is relatively high compared to other countries.

To reduce the number of merger control notifications going forward, both of the domestic turnover thresholds will be raised by €5m (i.e. from €25m to €30m and from €5m to €10m). Similarily, in relation to the transaction value-based thresholds, the turnover threshold of €5m will also be raised to €10m. It is expected that these changes reduce total notifications by approx. 20%.

The so-called "*Anschlussklausel*"-exception, that allowed certain smaller transactions to fall outside of the scope of German merger control, will be elimated, as raising the second domestic threshold to €10m essentially excludes any further applications.

In addition, the "minor markets"-clause will also be amended. The turnover limit for the value of minor markets will be raised from €15m to €20m. However, if a concentration meets the prohibition requirements on several minor markets concerned which combined are valued at €20m or more, the concentration can still be prohibited.

Turnover
Two smaller changes are planned in relation to calculating relevant company turnover:

Turnover based on IFRS accounting will also be sufficient for merger control purposes. Before, technically, turnover had to be calculated based on the "Handelsgesetzbuch" (German Trade Law), which of course continues to be possible as well.

Second, the multiplication factor applicable to press media companies' turnover (meant to artificially increase relevant turnover for the purposes of turnover thresholds to cover also smaller transactions), will be reduced from a factor of 8 to a factor of 4.

Timeline
A further change is envisaged for Phase II proceedings ("*Hauptprüfverfahren*"), where the timeline will be extended from four months to five months after a complete notification has been received by the FCO. In the past, the FCO had argued that there was not enough time for analysis in complex merger cases.

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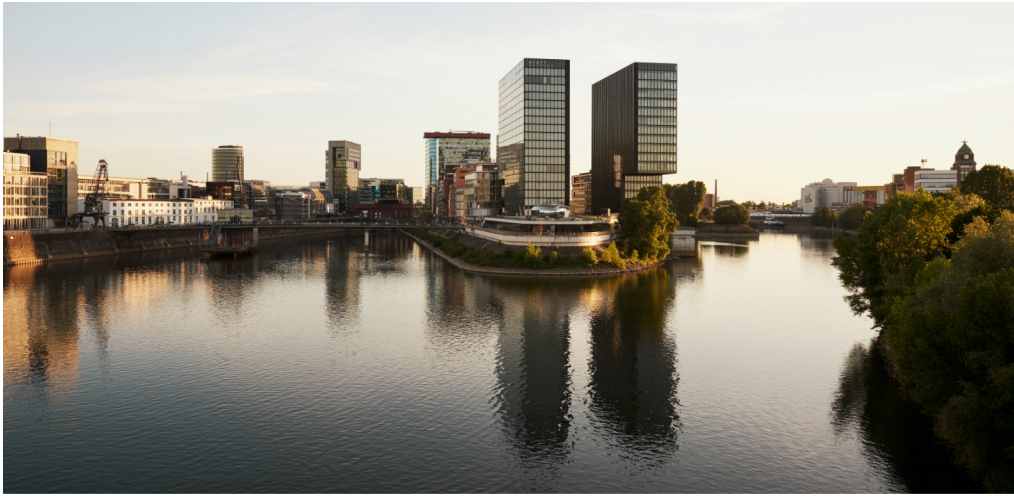

New Tool: Notification Order
With Sec. 39a, the amendment introduces an entirely new merger control tool. Once in force, the FCO can order companies to notify every transaction in a specific economic sector irrespective of whether turnover thresholds are met.

The requirements for the FCO to be able to issue such an order are, however, substantial. *Inter alia*, the FCO must have performed a sector inquiry in the relevant economic sector beforehand. Furthermore, the companies required to notifiy must have a worldwide turnover of more than €500m and a 15% share of domestic supply or demand. Objective indications must suggest that future concentrations would significantly impede competition in Germany and the target company in question must have achieved a turnover of more than €2m and more than two-thirds of its turnover in Germany.

The competition policy concern underlying the introduction of this new tool is that (large) companies may harm competition significantly by gradually acquiring several smaller and possibly regional competitors without having to notify these acquisitins to the FCO for lack of the domestic thresholds being met.

Ministerial Authorisation
If the FCO prohibits a concentration, companies can seek to override the prohibition by way of a ministerial autorisation. This process has been subject to more and more scrutiny in recent past, with court cases and public discussions on whether ministerial authorisations are subject to political misuse.

Two major changes are due, making it more difficult for companies to attain a ministerial authorisation in the future.

For one, companies will need to show that any restraint of competition resulting from the concentration is outweighed by advantages to the economy as a whole. In addition, the concentration must be justified by overriding public interest. Under the current regime, either one of these requirements is sufficient.

A possibly even more deterring change to the law is the additional requirement that companies must also have unsuccessfuly sought a remedy against the FCO's prohibition decision before applying for a minsterial authorisation. That remedy can be either (1) an application for an interim order or for an order of suspensive effect, or (2) an appeal against the decision itself.

Notification of completion
The amendment eliminates the requirement to formally inform the FCO once the notified concentration has been consummated. While this has never been an overly burdensome requirement, the change in law nevertheless decreases administrative requirements further and can therefore only be welcomed.

Special Rules for Hospital Mergers
Surprisingly, the amendment also introduced new rules for certain hospital concentrations, which can now be exempt from merger control entirely, if consummated before the end of 2025. The main criterion for the exemption is backing support from the Hospital Structural Fund (*Krankenhausstrukturfond*), opening the door to general political considerations.

This exemption comes as a surprise, as the FCO has an impressive track record of scrutinising hospital mergers to ensure competitiveness in an otherwise highly regulated health care sector.

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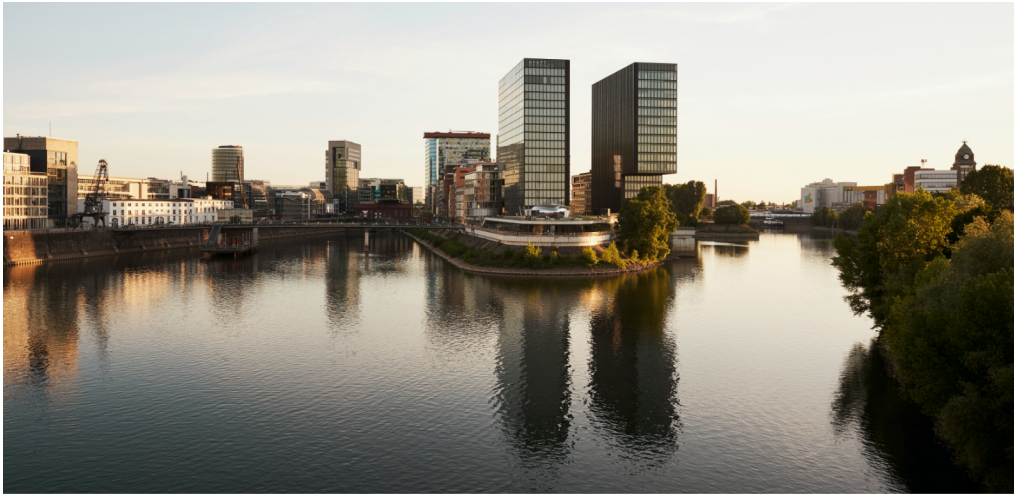

What to make of the changes to the German merger control regime?
The amendment can be seen as broadly sensible and a regulatory improvement for companies. This is particularly true for the changes to the merger notification thresholds, with a good number transaction due to fall outside of the scope of German merger control in the future.

As to the new merger control tool, it remains to be seen how effective it will be. The idea to intervene when large companies start buying up smaller rivals and market structures change is interesting as a model of targeted (vs. broad) intervention. However, the preconditions to order notification of all concentrations in a specific sector are relatively high and one wonders if the FCO will not ultimately come to late to the party, if it first has to undertake a full fledged sector inquiry. It seems the legislator feels uneasy about certain concentrations that remain unseen and unscrutinised to the detriminent to competition.

Overall, the trend towards more intervention is not a German phenomenon. With the European Commission actively advocating the use of Art. 22 EU Merger Regulation to get problematic cases that were previously not notifiable transferred from the Member States, there is a new dawn of uncertainty in merger control that companies need to be aware when planning any M&A.

For any questions, do not hesitate to get in touch.

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