

# Appendix on the Merger Control Procedures in the United Kingdom

## A guidance note

Under the Fair Trading Act 1973, the Director General of Fair Trading has a duty to keep himself informed about actual or prospective merger situations within the United Kingdom which qualify for investigation and to recommend to the Secretary of State for Trade and Industry any action which he thinks it is expedient that the Secretary of State should take. Normally, the advice the Director General gives the Secretary of State is whether to refer a merger to the Monopolies and Mergers Commission for a fuller investigation or, if a reference appears justified, whether to accept undertakings in lieu of such reference.

A fuller explanation of the merger control process is set out in the Office of Fair Trading (OFT) publications *Mergers - a guide to procedures under the Fair Trading Act* and *Merger Submissions - a briefing note*. This guidance note is not intended as a substitute for those publications; nor is it an authorised statement of the law, so persons who think they may be affected should seek legal advice.

Special arrangements apply to newspaper mergers and to mandatory references under the Water Industry Act, 1991. The questionnaire and this guidance note do not apply to those cases.

**This guidance note explains certain terms that are relevant to the notification of a merger, such as, thresholds, time-limits, definition of a merger, etc and gives an outline of merger control procedures in the United Kingdom.**

The questionnaire sets out information which is commonly needed in the United Kingdom, France and Germany, so that companies notifying a merger in two or more of those countries can do so providing the same information to each authority. In the United Kingdom, the information will generally be sufficient for the OFT to determine whether a merger qualifies for investigation and, if so, for it to begin its investigation. In some circumstances additional information may be required before the OFT can complete its investigation.

**The questionnaire does not replace the Merger Notice, which must be used for the formal notification of proposed mergers if companies wish to take advantage of the accelerated procedures provided for in section 75A of the Fair Trading Act.**

Further information, including copies of the publications and notices referred to above may be obtained from, and completed copies of this questionnaire should be sent to:

### **The Mergers Secretariat**

#### **Office of Fair Trading**

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Field House,

Breams Buildings

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UK

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## I. When are mergers subject to notification?

In the United Kingdom there is no requirement to notify any merger to the competition authorities. However, any merger which qualifies for investigation may generally be referred to the Monopolies and Mergers Commission for investigation up to four months after it is completed (see below).

## II. Definition of a merger qualifying for investigation

A merger situation qualifies for investigation under the Fair Trading Act if it meets four criteria:

- \* two or more enterprises (that is, business activities of any kind) must cease to be distinct or there must be arrangements in progress or in contemplation which will lead to enterprises ceasing to be distinct;
- \* at least one of the enterprises must be carried on in the UK by or under the control of a body corporate incorporated in the UK (which means that a merger between two companies not resident in the UK may still qualify for investigation if either of them controls any enterprise which is carried on in the UK or by a UK company);
- \* the merger must either not yet have taken place or have taken place not more than four months before the reference is made, unless it took place without public announcement and without the Secretary of State or the Director General being told about it (in which case the four-month period starts from the announcement or the time the Secretary of State or the Director General is told); and
- \* *either*
  - \* the gross value of the world-wide assets being acquired must be more than £70 million (the assets test);
  - or*
  - \* the enterprises which cease to be distinct must supply or acquire goods or services of a similar kind and must as a result of the merger together supply or acquire at least one quarter of those goods or services supplied in the UK or in a substantial part of it (the share of supply test).

Note that for there to be jurisdiction, the Director General and the Secretary of State need only take the view that a qualifying merger situation **may** exist. It is for the MMC to determine whether a case **does** satisfy the criteria.

## III. Outline of merger control procedures in the United Kingdom

Enquiries into merger situations are initiated by the Director General of Fair Trading, who advises the Secretary of State for Trade and Industry. The Secretary of State, having received the Director General's advice, decides whether to make a reference to the Monopolies and Mergers Commission, so that it can undertake a fuller investigation. However, the Director General is able to advise whether undertakings in lieu of reference might be given by the merging companies, which would resolve the problems caused by the

merger and to negotiate their terms with the parties, in which case the Secretary of State may accept such undertakings.

If the MMC concludes that a merger referred to it does not operate against the public interest the Secretary of State must allow the merger to proceed or, if completed, be left intact. If the MMC does identify problems, the Secretary of State will then normally invite the Director General to negotiate undertakings from the merging companies which will resolve the problems, or the Secretary of State can impose remedies by Order.

Such undertakings or orders may:

- \* stop a proposed merger;
- \* require the parties to dispose of shareholdings or limit the exercise of voting rights in respect of shareholdings;
- \* provide for the break-up of a company or group by the sale of assets or a subsidiary; or
- \* control the conduct of a company by, for example, prohibiting discrimination or regulating the companies' prices or charges.

### **Criteria for investigation**

The Act requires the MMC to take into account 'all matters which appear to them in the particular circumstances to be relevant' and must have regard to specified factors (s.84 of the Fair Trading Act). Hence, it is a broad test of the effect of a merger on the public interest. A primary concern is any adverse effects a merger may have on competition but it is not the only ground on which reference may be made.

### **Time limits and interim measures**

As noted above the OFT may begin an enquiry when a merger is at the proposal stage or after it is completed. The only statutory constraint is that the Secretary of State must normally make a reference to the MMC within four months of completion of the merger. Apart from this deadline, the Director General of Fair Trading and the Secretary of State are not subject to any statutory time constraints - except where companies have notified a merger using a Merger Notice, under section 75A of the Fair Trading Act, in which case the Secretary of State has a maximum of thirty five working days in which to make a reference. However, for other cases the OFT and the Department of Trade and Industry work to an informal target to take a decision in 90 per cent of cases within 45 working days of receipt of a satisfactory submission.

When a merger is referred to the MMC there are powers to stop the parties taking action which might prejudice the reference or make it more difficult to take action on the MMC's findings.

### **Publication**

When the OFT has been informed about a public merger situation it will normally immediately issue an invitation to comment through the Stock Exchange's Regulatory News Service, giving third parties 10 working days to comment. The OFT may, additionally, make separate approaches to obviously interested third parties, for comment.

## Fees

Most mergers which qualify for investigation by the MMC are subject to a fee. For proposed mergers which are notified using the Merger Notice, payment must be sent with the completed Notice. The period for consideration does not begin until the correct fee has been paid. Refunds may be made if the merger is found not to qualify.

For all other mergers which involve the acquisition of a controlling interest (normally meaning 50 per cent or more of the voting rights), the fee is payable either on the making of a reference or when the Secretary announces his decision not to refer the merger to the MMC. Fees currently are between £5,000 and £15,000, depending on the value of the gross assets being acquired.

## Some matters explained

**Control** -the Act distinguishesthree levels of control, each of which may give rise to enterprises ceasing to be distinct - ability materially to influence policy, ability to control policy and a controlling interest.

**Assets** - the assets test is met where the gross value of the world-wide assets (ie of the tangible and intangible assets, including investments and current assets together, less provisions for depreciation, renewals or diminution of value - but no deductions for other liabilities) - being taken over exceeds £70 million. The test applies to the value of the total assets of the acquired enterprises. When none of the enterprises remains under the same ownership and control - in a joint venture, for example - the value of assets 'being taken over' is interpreted as the value of all the enterprises which cease to be distinct, **except** the enterprise with the highest value assets.

**Share of supply** - if a merger does not qualify for investigation under the assets test, it may still do so under the share of supply test. This is not necessarily equivalent to the market share test, used to estimate the economic impact of a merger. The share of supply test is met if the merging enterprises:

- \* together either supply or acquire goods or services of a particular description; and
- \* will, after the merger takes place, supply or acquire more than a quarter of those goods or services, in the United Kingdom as a whole or in a substantial part of it.

The Act allows the Secretary of State a wide discretion in describing the relevant goods or services, requiring only that, in relation to that description, the parties' share of supply or acquisition is one quarter or more. In assessing the economic effects of a merger, however, the OFT (and subsequently, if a reference is made, the MMC) must determine whether the goods or services described in the share of supply test constitute a meaningful market.

**Substantial part** - has no statutory definition. The House of Lords has ruled that while there can be no fixed definition, an area must be of such size, character and importance as to make it worth consideration for the purposes of merger control.

# Appendix on the French Control of Concentrations in France

In France, the control of concentrations is governed by the provisions of Title V of amended Ordonnance No. 86-1286 of 1 December 1986. This control is exercised primarily by the Minister in charge of the Economy.

The purpose of this note is briefly to explain the main terms used on the present form with respect to French law: thresholds, time limits, definition of concentrations, firms concerned, etc., and to provide a general idea of concentration control procedures in France.

The present form does not cover all the information required for a formal notification in France, within the meaning of Article 40 of the Ordonnance of 1 December 1986, as described in Article 28 of the Decree of 29 December 1986 amended by the Decree of 9 August 1995. Consequently, this form should only be used for joint inquiries concerning operations in at least two of the three following countries: Germany, the United Kingdom and France. In France, the purpose of the form is to enable the administration to give a preliminary opinion on the operation and therefore inform the parties as to the advisability of a notification. The parties can expect to receive a reply in this regard within one month of the administration's receipt of the duly completed form.

For further information, contact:

**Ministère de l'Economie, des Finances et de l'Industrie,**  
**DGCCRF**  
Bureau B3  
Télédoc 031  
59, boulevard Vincent Auriol  
75703 Paris Cedex 13  
FRANCE

Telephone: (33-1) 44 97 23 33  
Fax: (33-1) 44 97 34 67  
<http://www.finances.gouv.fr/DGCCRF/>

## **I. Controllable Concentrations in France - Controllability Thresholds**

The purpose of this section is to define the controllability criteria for an operation in France. Firms may choose to inform the administration of an operation within the bounds of the given thresholds. The main purpose of this is to dispel any doubts as to the controllability of the operation and, by way of the present form, to provide the French authority with evidence of the non-controllable nature of this concentration in France. The French authority can then pass this evidence on to the other two authorities concerned.

A concentration operation is controllable if it attains *one of the two alternative thresholds* stipulated by Article 38 of the Ordonnance of 1 December 1986:

- \* **A market share threshold:** the firms party to the operation or the subject of the operation or economically related to one of these firms hold 25% of a national goods or service market or a substantial share of such a market. This threshold is attained even if just one of the firms does business on the market and alone exceeds this threshold.

*or*

- \* **A turnover threshold:** the firms party to the operation or the subject of the operation or economically related to one of these firms together make an ex-tax turnover in France of at least seven (7) billion French francs, provided that at least two of the firms party to the concentration have made a turnover of at least two (2) billion French francs.

The fact that an operation is controllable does not make notification compulsory, since notification is optional in France. However, it does give the administration the right to investigate the operation. Such an inquiry is made regardless of whether notification has been made.

## II. The Definition of a Concentration Operation

Article 39 of the Ordonnance of 1 December 1986 defines a concentration under French law as follows:

**A concentration results from any transaction, regardless of the form, that entails a transfer of ownership or possession of all or part of the goods, rights and obligations of a firm or whose purpose or effect is to enable a firm or a group of firms to exercise, directly or indirectly, a determining influence over one or more firms.**

Here too, there are two alternative criteria. The first is the transfer of ownership or possession of all or part of the goods, rights and obligations of a firm. The second is the acquisition of a determining influence by one or more firms over another, hitherto not subject to this influence. This definition naturally includes creations of structural joint ventures and significant changes in capital holding by one or more firms.

## III. The Procedures

### 3.1 Notification

Notification of an operation is **optional** in France. Notification enables the parties to confine the inquiry to the strict procedural time limits and therefore obtain a legal safeguard for their operation. In the absence of notification, the Minister in charge of the Economy may at any time order an inquiry procedure, which is then not subject to the inquiry time limit.

Any planned operation or any operation carried out less than three months previously can therefore be notified to the Minister in charge of the Economy. Hence, notification does not necessarily have to be made prior to the operation's being carried out. It is nonetheless preferable to contact or even notify the said Minister, if that is the parties' intent, before carrying out operations.

### 3.2 The Inquiry Procedure

### 3.2.1 Inquiry Time Limits in the Event of Notification

Within **two months** of receipt of notification, provided that this is **complete**, the Minister in charge of the Economy informs the parties or their counsel as to whether he intends to refer the case to the Competition Council for opinion or whether, since the operation clearly poses no fair trading problems or such problems have been resolved by guarantees, the operation can be accepted.

In the event of referral for opinion to the Competition Council, pursuant to Article 38 of the ordonnance, the time limit is extended by four months, making a total of **six months** as of notification.

The date of receipt of the notification is the day on which the dossier is complete. This date appears on the notification receipt slip.

### 3.2.2 The Inquiry

The inquiry is always the same, regardless of whether notification has been given.

In the first stage, the **DGCCR**F (the Directorate-General for Fair Trading, Consumer Affairs and Fraud Control) investigates the operation and advises the Minister in charge of the Economy either to authorise the operation or to refer the case to the Competition Council for opinion. In the event of clearly identifiable fair trading problems likely to be easily solved, the parties may propose guarantees at this stage in order to obtain a swift decision.

In the event of referral to the **Competition Council**, the Council investigates the case based on the notification dossier and the information that it has received from the DGCCR F. It then draws up a report. The parties and the government commissioner (the Director-General of the DGCCR F) have one month to comment on this report. The Council then holds a meeting, at the end of which it comes to the opinion that it presents to the Minister in charge of the Economy. The procedure before the Council is described in articles 21 (second paragraph), 23 to 25 and 44 of the Ordonnance of 1 December 1986.

Once the Minister in charge of the Economy has received this opinion, he enters into talks with the firms, especially when it seems that measures have to be adopted to offset the restrictive trade practices.

### 3.2.3 The Decision

The Minister in charge of the Economy may either authorise the operation unconditionally or authorise it in return for guarantees by the parties. He may also prohibit the operation or authorise it conditionally in conjunction with the Minister in charge of the relevant economic sector. In the latter case, the parties may propose guarantees or be ordered to take measures to ensure or reestablish sufficient competition. The ministers may combine their decisions with requirements apt to make enough of a contribution to economic and social progress to offset the restrictive trade practices.

Decisions relating to concentrations are published in the BOCCR F (Official Bulletin on Fair Trading, Consumer Affairs and Fraud Control) along with the Competition Council's opinion where appropriate. When operations are prohibited or the decision comprises injunctions, a joint order is issued by the Minister in charge of the Economy and the Minister in charge of the relevant economic sector.

The procedure for appealing ministerial decisions is by internal administrative appeal

to the decision-making ministers and/or before the administrative jurisdiction.

## IV. Definition and Explanation of the Main Terms Used in the Questionnaire

The terms used in different laws do not necessarily carry the same definitions. It is therefore useful to define the meaning of the following terms in French legislation.

### a) The Firms Party to the Transaction or the Subject of the Transaction or Economically Related to one of these Firms

Article 38 of the Ordonnance of 1 December 1986 mentions the firms party to the transaction or the subject of the transaction or economically related to one of these firms, as well as the firms party to the operation.

The firms party to the transaction are those that have actually carried out a concentration by means of a legal transaction. A firm can be the subject of a transaction (sale of a subsidiary by its parent company or takeover). The firms economically related to one of these firms are those with which there are liens, regardless of the form of these liens (formal or informal, legal and/or economic, e.g. major debtors of the parties).

The firms party to the concentration differ depending on the nature of the operation:

- \* In the case of an acquisition, the parties are the purchaser and the seller. The purchaser is taken to mean the acquiring firm and, where appropriate, the group to which it belongs.
- \* In the case of a merger, the merged firms are taken as a whole for both the calculation of turnover and market shares.
- \* In the case of a joint venture, the turnover of the parent companies and, where appropriate, of the groups to which they belong are to be taken into account for both the calculation of turnover and market shares.

The purchaser's total turnover is taken into account for the calculation of the French thresholds. If the seller no longer does business on the market in question (directly or indirectly), either upstream or downstream, only the turnover of the sold part is taken into account to determine the turnover. The calculation of market share thresholds counts all the market shares, on markets relative to the operation, held by the groups to which the firms party to the concentration belong.

When the form asks for information on the **firms party to the concentration**, the answer must include the firms referred to in Article 38 of the Ordonnance such as defined above.

The '**associated**' firms mentioned on the common form are taken to mean the companies in which the firms party to the concentration, or their parent companies, or companies belonging to the same group either hold the majority on the executive bodies, or the capacity to appoint the executive bodies, or hold a significant share of the capital giving them a determining influence either alone or jointly.

*NB: The definition of 'economically related firms' within the meaning of Article 38 of the Ordonnance is assessed on a case-by-case basis, since the legislator's intent was to reflect the economic reality without confining definitions to forms in law. Should firms be in any doubt as to the coverage of this term, they may contact the DGCCRF for clarification.*

### b) Turnover

Article 27 of the Decree of 29 December 1986 stipulates the method for calculating turnover. The turnover to be counted is that made on the national market by the firms in question and is taken to mean the difference between the ex-tax turnover of each of these firms and the book value of their direct exports abroad.

The turnover calculated is for *all activities together* and not just the turnover on the markets affected by the operation. The reference period is the last closed accounting year. In the event of a marked change since that year, the firms supply the appropriate additional information.

The turnover of banks is taken to mean the gross banking revenue over the last closed accounting year.

The turnover of insurance firms is the value of the gross premiums issued over the last closed accounting year.

### c) **Market Shares**

The markets affected within the meaning of the present form are those on which the firms party to the concentration do business.

The market shares in question are always those in France. Nevertheless, when the markets concerned are local (e.g. distribution and products that cannot travel, such as ready-mixed concrete), local market shares must also be provided. These market shares are used to check whether the controllability thresholds for concentration operations have been attained. The firms must also provide their market shares, even those below the 25% threshold, for related markets upstream and downstream of the market(s) directly affected by the concentration operation.

When the parties consider that the relevant geographical market is larger than the national market, they may supply the information on the market they deem to be economically appropriate. These data are then used in the competition analysis.

NB: Should firms be in any doubt as to the definition of relevant markets, they may contact the DGCCRF for clarification.

The calculation of market shares is made, when possible, in terms of value using the ratio:

$$\frac{\text{ex-tax turnover made in France by the firms}}{\text{value of the national visible consumption of the product (or products or service(s) making up the relevant market)}}$$

When it is not possible or not appropriate to calculate the value, the data are provided in terms of volume.

# Guidance notes relating to German merger control

In Germany, the statutory basis for the examination of mergers is the GWB (Sections 23 et seq. of the ARC<sup>1</sup>). The examination of mergers in Germany is the exclusive responsibility of the Bundeskartellamt. Merger notifications in Germany must be made in German.

**This guidance note briefly explains central terms that are relevant to the notification such as: thresholds, time-limits, definition of a merger, identification of participating enterprises etc. and gives an outline of merger control procedures in Germany.**

The questionnaire sets out the information that is required for a notification to be deemed complete. When the answers to the questions have been received by the Bundeskartellamt, the notification is considered complete and the merger control proceeding can be instituted, with the periods set for dealing with the case starting to run.

This guidance note summarises the main aspects to be considered in connection with the notification of mergers and acquisitions in Germany.

However, should you need any further information to enable you to answer the questions concerned or to notify a merger, please contact the address mentioned below. Please send the notification to the following address:

**Bundeskartellamt**  
Mehringdamm 129  
D-10965 Berlin  
Germany

Tel.: (+49-30) 69580-0

Fax: (+49-30) 69580-400

<http://www.bundeskartellamt.de/informat.htm>

## I. When are mergers subject to notification? - Thresholds

As regards the duty of enterprises to inform the Bundeskartellamt (hereafter BKartA) about mergers and acquisitions, a distinction is made between three different categories of mergers coming under the merger control provisions of the ARC:

**Which category of merger is involved in a particular case depends mainly on the turnover of the participating enterprises.**

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<sup>1</sup> Act against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen) as published on 20 February 1990 (Bundesgesetzblatt I, p. 235)

**(1) Mergers that are subject to control and must be notified to the BKartA prior to completion (pre-merger notification).**

A merger is subject to pre-merger control (Section 24a of the ARC), if

- \* one of the enterprises participating in the merger recorded a turnover of at least DM 2,000 million in the last completed business year; *or*
- \* at least two of the enterprises participating in the merger each recorded a turnover of DM 1,000 million or more in the last completed business year, *or*
- \* the merger is to be brought about under the law of a Land by legislation or other governmental act.

**(2) Mergers that are subject to control and must be notified to the BkartA after completion (post-merger notification).**

- \* A merger is subject to post-merger control, if the participating enterprises (including associated enterprises) during the last completed business year preceding the merger recorded a combined turnover of over DM 500 million (Section 23 (1) of the ARC).

**(3) Mergers that are not subject to control but must nevertheless be notified to the BKartA after completion (notification).**

A merger needs only to be notified after completion, if the turnover thresholds of category 1 or 2 are reached but one of the two following clauses applies:

The so-called **affiliation clause** (Section 24 (8) No. 2 of the ARC), which is applicable:

- \* if an enterprise which is not a controlled enterprise and in the last completed business year recorded a turnover of not more than DM 4 million, affiliates itself to another enterprise; *or*
- \* if an enterprise which is not a controlled enterprise and in the last completed business year recorded a turnover of not more than DM 50 million affiliates itself to another enterprise with a turnover of less than DM 1,000 million;<sup>2</sup>

or the so-called **minor market clause** (Section 24 (8) No. 3 of the ARC), which is applicable:

- \* if the merger exclusively affects a minor market, i.e. a market in which goods or commercial services have been supplied for at least five years and which in the last calendar year had a turnover of less than DM 10 million.<sup>3</sup>

**Please note that mergers that have been examined according to the pre-merger control procedure must again be notified to the BKartA after being completed.**

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<sup>2</sup> According to the wording of the Act only an enterprise *which is not a controlled enterprise* may invoke the *affiliation clause*; on the other hand, "partial affiliation" is possible. Consequently, in determining whether the affiliation clause applies, it is always necessary to consider the total turnover attributable to the seller. It is total turnover rather than just the sold firm's turnover which must not exceed DM 4 million and DM 50 million respectively.

<sup>3</sup> According to the *minor market clause* the BKartA cannot prohibit a merger on the ground of domination of a minor market. But only if a merger exclusively affects a minor market is it not subject to control, and therefore possibly not subject to notification. In case of doubt (where category 1 turnover thresholds are reached) enterprises are advised to notify a merger prior to completion in order to avoid violating the ban on completion of a merger and to obtain legal certainty.

Reference may be made to the material submitted for the initial notification of the merger project.

## II. Definition of a merger transaction

The following transactions are deemed to be mergers within the meaning of the ARC (for details see Section 23 (2) Nos. 1-6 of the ARC):

- (1) Acquisition of all or of a substantial part of the assets of another enterprise;
- (2) acquisition of shares or voting rights in another enterprise, provided the shares alone or together with other shares already held by the acquiring enterprise
  - amount to 25 per cent or
  - amount to 50 per cent or
  - secure the enterprise a majority interest.

If several enterprises successively or simultaneously acquire shares in another enterprise to the extent mentioned above, this is also deemed a merger of the participating enterprises (joint venture) as regards the markets in which the other enterprise operates.

The acquisition of shares through which the acquirer obtains the legal position held in a joint stock company by a shareholder owning more than 25 per cent is also deemed a merger;

- (3) agreements by which a group of affiliated companies is formed or enlarged, profit transfer agreements, or agreements by which a plant is leased or otherwise transferred to another enterprise;
- (4) bringing into existence a situation where at least half of the members of the supervisory boards, the boards of management, or any other managing bodies of enterprises consist of the same persons (interlocking directorates);
- (5) any other combination of enterprises as a result of which one or several enterprises are able directly or indirectly to exercise a controlling influence on another enterprise;
- (6) any combination of enterprises as described in No. 2, 4 or 5, where the relevant criteria are not met but as a result of which one or several enterprises are able to exercise, either directly or indirectly, a competitively significant influence on another enterprise.

**PLEASE NOTE that notwithstanding the above-mentioned notification duties, mergers coming under No. 6 above are *never* subject to pre-merger control, but constitute mergers coming under post-merger control (Section 24a (1) sentence 2 of the ARC), provided that the relevant turnover thresholds are reached.**

A merger is not deemed to occur if the participating enterprises are already combined and if the transaction does not result in a substantial strengthening of the existing relationship (Section 23 (3) sentence 1 of the ARC).

## III. Outline of merger control procedures in Germany

## 1. Criteria for instituting proceedings

The BKartA will prohibit a merger if it is likely that a market dominating position will be created or strengthened as a result of the merger, unless the participating enterprises prove that the merger will also lead to improvements in the conditions of competition and that these improvements will outweigh the disadvantages of market domination (Section 24 (1) and (2) of the ARC).

There is a right of appeal to the Court of Appeals<sup>4</sup> in Berlin against prohibition decisions (Section 62 of the ARC).

An application for authorisation may also be filed with the Federal Minister of Economics, e.g. if the merger is justified by a predominating public interest (Section 24 (3) and (4) of the ARC).

## 2. Time-limits and ban on completion of a merger

### 2.1 *Transactions subject to pre-merger control*

In cases of pre-merger control the BKartA has, in principle, four months after receipt of the complete notification to examine the merger, i.e. within this period it may prohibit the merger. It must, however, inform the notifying enterprise within one month from receipt of the notification that it has entered into an examination of the merger project (so-called "one-month letter", Section 24a (2) of the ARC).

Violation of the above ban on completion of a merger is deemed to constitute an administrative offence (Section 38 (1) No. 8 of the ARC). Moreover, any legal transactions contravening the ban on completion are of no effect (Section 24a (4) of the ARC).

### 2.2 *Transactions subject to post-merger control*

As regards transactions that are subject to merger control after completion, the BKartA may take a decision within one year after receipt of the complete notification of the merger (Section 24 (2) sentence 2 of the ARC). Notification of the merger must be filed immediately after it has been completed. Non-compliance with the notification duty is also an administrative offence (Section 39 (1) No. 1 of the ARC, see IV.2. below).

**PLEASE NOTE: The periods for decision-making do not begin to run until a *complete* notification has been received (see questionnaire).**

### 2.3 *Publication in the Federal Gazette*<sup>5</sup>

When a notification has been received, the following is published in the Federal Gazette: information about the form of the merger as well as firm name, registered office and type of business of the participating enterprises (Section 10 (1) No. 4 of the ARC).

### 2.4 *Fees*

A fee is charged for the notification of mergers that are subject to merger control

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<sup>4</sup> Kammergericht

<sup>5</sup> Bundesanzeiger

(Section 80 (2) sentence 2 Nos. 1 and 3, (3) of the ARC). The cost of publication in the Federal Gazette must also be reimbursed (Sections 80 (9) of the ARC, 10 (1) No. 4 of the Administrative Expenses Act<sup>6</sup>).

### **3. Legal consequences of non-compliance with the notification duty**

Any person who wilfully or negligently fails to immediately file a notification or who furnishes false or incomplete information commits an administrative offence which may be punished by a fine of up to DM 50,000 (Section 39 (1) Nos. 2 and 3 of the ARC). In addition, the period within which a decision may be taken does not begin to run before a complete notification has been filed.

An administrative offence is also committed by any person who, contrary to the legal prohibition, completes or participates in the completion of a notifiable merger project (Section 38 (1) No. 8 in conjunction with Section 24a (4) of the ARC). The administrative offence may be punished by a fine of up to DM 1 million (Section 38 (4) of the ARC). Moreover, legal transactions that contravene the ban on completion of a merger are ineffective.

## **IV. Explanation and definition of important terms used in the questionnaire**

If the merger has already been completed, the date of the completion (e.g. the date of a required entry in the Commercial Register<sup>7</sup>) must be indicated.

In the notification requirements certain terms are used in a strictly defined sense which is not always identical with the meaning of those terms in other legislation. This applies, in particular, to the following terms:

### **1. Participating enterprises**

What enterprises are deemed to participate in a merger depends on how the merger is brought about. Merger participants are, e.g.,

- \* in the case of acquisition of all or of a substantial part of the assets (by amalgamation or otherwise): the acquirer and the seller, the seller participating only insofar as the transferred assets are concerned; in the case of amalgamation, the enterprises that are amalgamated;
- \* in the case of acquisition of shares: the acquirer/s and the enterprise in which shares are acquired. If this enterprise is linked with other enterprises within the meaning of Section 23 (2) of the ARC, those enterprises are also deemed to be participating enterprises;
- \* in the case of agreement with other enterprises: the parties to the agreement;
- \* in the case of interlocking directorates: the enterprises which have a number of the same persons on their boards;
- \* in the case of other combinations of enterprises: the enterprises which are able to exercise a controlling influence and the enterprise exposed to that influence;
- \* in the case of combinations of enterprises exercising a competitively significant

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<sup>6</sup> Verwaltungskostengesetz

<sup>7</sup> Handelsregister

influence: the enterprises which are able to exercise a competitively significant influence and the enterprise exposed to that influence.

## 2. Associated enterprises

The following are deemed to be enterprises associated with a participating enterprise (Section 23 (1) sentence 2 of the ARC):

- \* controlled or controlling enterprises (Section 17 of the Joint Stock Companies Act<sup>8</sup>);
- \* affiliated companies<sup>9</sup> (Section 18 of the Joint Stock Companies Act);
- \* enterprises which are controlled by the participating enterprise alone or jointly with others, and - vice versa - enterprises which are able to exercise a controlling influence on the participating enterprise.

If an enterprise holds 50 per cent of the shares of another enterprise, the BKartA as a rule assumes that the enterprise is able to (co-)exercise a controlling influence on the other enterprise.

## 3. Substantial part of the assets

A substantial part of the assets within the meaning of Section 23 (2) No. 1 of the ARC means not only parts of the assets which, in terms of quantity, are sufficiently large in relation to the seller's total assets; rather, a part of the assets is substantial whenever it has a significance of its own as regards production, distribution targets and current market conditions and whenever it consequently appears to be a unit that can be separated from the seller's other assets. Such a unit can be an establishment (e.g., an outlet of a food chain operator) or a division (e.g., the industrial sewing machines division of a mechanical engineering firm).

## 4. Turnover

### 4.1 *Basis of calculation*

Turnover is determined on the basis of Section 277 (1) of the Commercial Code<sup>10</sup>. Value-added tax and excise duties are to be left out of account.

Turnover recorded abroad is to be included; turnover in a foreign currency is to be converted into Deutsche Mark at the official annual middle rate<sup>11</sup>. Where the turnover is given for several linked enterprises together, revenues from the supply of goods and services between those enterprises (intra-group revenues) are to be excluded.

### 4.2 *Industry-specific provisions*

Insofar as the operations of an enterprise consist of *trade* in goods, only three-fourths of the turnover are to be taken into account. No trade turnover in this sense is involved if the goods produced or processed by an enterprise are purchased and resold by another enterprise associated with it.

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<sup>8</sup> Aktiengesetz

<sup>9</sup> Konzernunternehmen

<sup>10</sup> Handelsgesetzbuch

<sup>11</sup> see Deutsche Bundesbank: Die Währungen der Welt

In the case of *insurance companies* the premium income is substituted for the turnover. Premium income means income from insurance and reinsurance business including amounts ceded to reinsurers.

In the case of *credit institutions* and *building and loan associations* one-tenth of the total assets is substituted for the turnover. If data have to be given for several associated credit institutions or building and loan associations together, amounts recorded as participations in associated enterprises are to be deducted from the balance sheet total. If the total turnover of a group of enterprises which among other enterprises also comprises a credit institution or a building and loan association is stated, the balance sheet total of the credit institution or the building and loan association is to be added to the other turnover, but only to the extent of one-tenth.

As regards enterprises whose operations wholly or partially consist of *publishing*, producing or distributing *newspapers or magazines* or parts of them, twenty times the amount of the turnover is to be taken into account. One-fourth is then to be deducted from revenues resulting from the *distribution of newspapers or magazines*, as is done in the case of other trade turnover.

**PLEASE NOTE: Where the actual turnover is reduced or multiplied as a result of special cartel law provisions, or total assets are to be taken into account instead, this must be expressly stated.**

## 5. Market shares

The parties must give their domestic market shares insofar as they reach at least 20 per cent in the area of application of the ARC or a substantial part thereof, including the basis of their calculation or estimate.

The basis for calculating market shares is the entire area of application of the Act (Federal Republic of Germany). If an enterprise does not operate in the entire territory of the Federal Republic or its market position shows considerable regional differences, it is necessary besides the market shares for the entire area of application also to give data in respect of the shares in the individual regional markets.

For the market share calculation, the most recent statistical information is to be used and the basis of its calculation or estimate stated. The market share calculation may be based on sales in terms of quantity or value. It is expedient to calculate the market share both ways and present the pertinent calculations.

Only those goods or commercial services are to be attributed to a market which in the buyers' view are substitutable in terms of characteristics, use and price. A detailed breakdown of the markets for the calculation of the market shares to be indicated does not prejudice the enterprises as regards the determination of market dominating positions.

As regards the calculation of market shares, there may be uncertainty in a particular case as to the market definition and the domestic market shares of the other participants. For the sake of completeness of the notification, it is therefore *advisable* to supply data on significant market shares even if it is doubtful that the 20 per cent threshold is exceeded.

**Turnovers and market shares must be indicated only for each enterprise participating in the merger** including the enterprises associated with it as a whole. A separate statement of the data relating to the enterprises that are directly involved in the merger is, however, convenient.