Mandatory Merger Control Notifications of Minority Acquisitions – the Example of Germany

The European Commission recently began a process to identify whether an enforcement gap exists in its current merger control system. Unlike in certain EU Member States, the current Commission framework does not allow for the review of minority acquisitions (unless they cause a change of control). Although this note is not directly concerned with whether or not an enforcement gap exists, the discussion brings to the fore a topic that is often overlooked but which can have significant implications – namely the notification requirements that already exist for minority acquisitions in other jurisdictions.

Using the example of Germany, a jurisdiction that combines mandatory filing, rigorous enforcement and very low jurisdictional thresholds, this note sets out to raise awareness of the notification requirements for minority transactions today and the types of situations when corporate counsel should seek further guidance.

Other jurisdictions where minority acquisitions can require notification include the UK, Austria and Ukraine. In the UK, however, filing is voluntary – unlike in Germany, the parties can lawfully close a transaction without any notification. The UK authorities may intervene and request the parties to undo a transaction only if it substantially lessens competition.

Legal Background

In Germany, acquisitions of 25% or more of the shares or voting rights in an undertaking require notification if, in addition to having combined total sales of more than €500 million:

- one *"participating undertaking"* has sales in Germany of more than €25 million; and
- another *"participating undertaking"* has sales in Germany of €5 million or more.[1]

As will be shown below, a *"participating undertaking"* is defined broadly under German law. As a result, the notification requirements are triggered more commonly in Germany than in other Member States. **Importantly, a transaction requiring notification must not close prior to approval.**

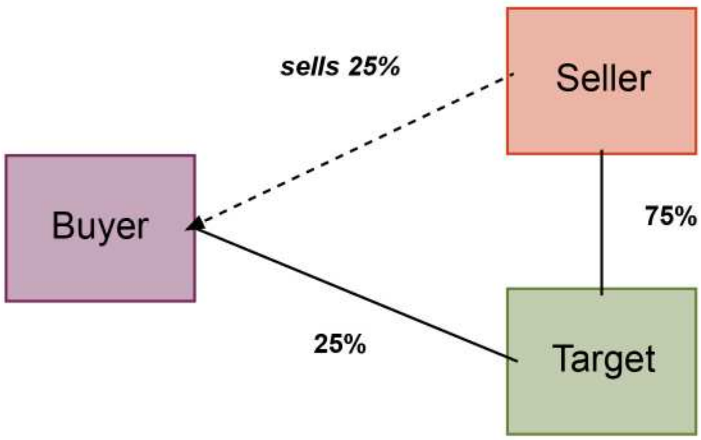
Three examples illustrate some of the transactions which may be covered by German merger control law:

- Example 1 illustrates that, unlike in almost all other jurisdictions, the seller and its turnover become relevant provided that it retains a shareholding of at least 25%;
- Example 2 highlights that even undertakings not directly involved in the transaction can become relevant; and
- Example 3 demonstrates that even an acquisition of **less than 25%** will not necessarily be free from notification requirements.

[1] There are certain *de minimis* exceptions, for instance where the target's total group has sales of less than €10 million worldwide or where the transaction affects only a market which in Germany has sales of less than €15 million. For the purpose of this article, we have ignored these exceptions.

Example 1: The Role of the Seller

Buyer (B) acquires 25% of Target (T) from its sole shareholder, Seller (S). S retains 75%. It is assumed that B has a global turnover of more than €500 million and German turnover of more than €25 million.



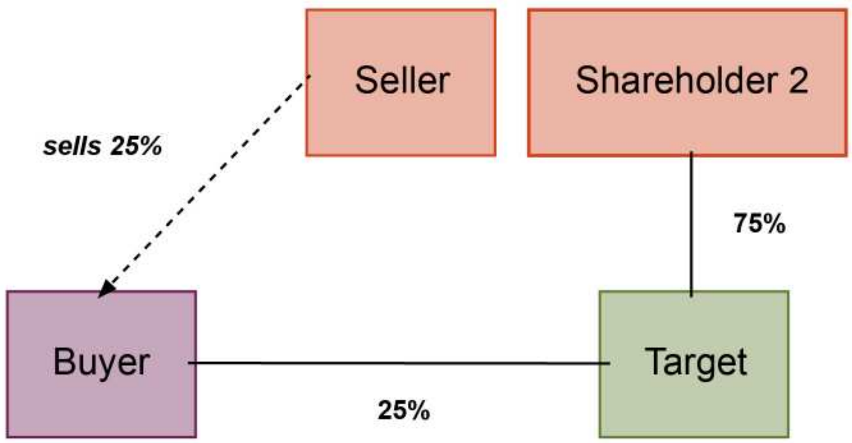
If T has more than €5 million turnover in Germany, a filing is required and the transaction must not close prior to approval. This is the most straight-forward case.

If, however, T's turnover is below the €5 million threshold, the analysis does not end here. In most jurisdictions, including the EU, the seller's turnover is taken into account only if the deal leads to joint control, i.e. the seller can still veto strategic decisions such as the budget or the appointment of senior management. German competition law, however, does not examine whether or not joint control exists. It is sufficient that, following the transaction, the seller continues to hold 25% or more of the target's shares or voting rights. Section 37 (1) (3) of the German competition act assumes a "fictitious" concentration between all parents that hold at least a quarter of the company's shares or voting rights. In our example above, there are therefore considered to be two transactions – namely (1) between B and T and (2) between B and S. If either transaction (1) or (2) exceeds the thresholds, **both** require notification.

In this case, therefore, approval prior to closing will be required if either T **or** S has a turnover of more than €5 million in Germany. Clearly, this increases the likelihood that a filing will be triggered.

Example 2: The Role of the Shareholders

The rule we have just described is not limited to the seller but applies to all companies that, post-transaction, hold a share (or voting rights) of 25% or more in the target. In Example 2, it is again assumed that B has a global turnover of more than €500 million and German turnover of more than €25 million.



As in Example 1, approval prior to closing will be required if T has a turnover of more than €5 million in Germany. In addition, by virtue of the "fictitious concentration" explained above, as an undertaking holding a (minimum) 25% stake in T, Shareholder 2 is also taken into consideration even though it plays no active role in the transaction. German law will create a "fictitious concentration" between B and Shareholder 2. S, as it no longer has a shareholding in T, will not be considered.

Therefore, if either T **or** Shareholder 2 has a turnover of more than €5 million in Germany, notification will be required.

Example 3: Acquisitions Below 25%

The next example considers the acquisition of a shareholding or voting rights of less than 25%. German law contains a catch-all provision that extends merger control to all acquisitions in which a "competitively significant influence is gained", provided that additional factors (so called "plus factors") are present that make the situation comparable to an acquisition of 25% or more of the shares or voting rights. This catch-all provision – and the rather broad interpretation by the German competition authority and courts – has created a significant level of uncertainty.

The so-called "plus factors" can include, for example, anything that may give the acquirer the possibility of influencing the target. In November 2008 (in *A-TEC Industries AG/Norddeutsche Affinerie AG (NA)*) the acquisition of 13.75% of the target's share capital was found to constitute a concentration for these purposes. The German Federal Cartel Office (FCO) found that additional influential factors existed resulting from the consistently low voting presence at the target's annual general meetings. In light of this low voting presence, the shares held by A-TEC were found to successfully represent a blocking minority, akin to a 25% share acquisition. Furthermore, NA's other shareholders had little expertise or long-term strategic interest in the copper sector and, therefore, no personal interest in influencing its competitive behaviour. These factors led to the conclusion that a stake of 13.75% enabled A-TEC to execute a competitively significant influence over NA.

Implications for Non-Notification

Due to the extensive filing requirements in Germany, which capture transactions that would not be subject to merger control in most other jurisdictions, it is not uncommon for filing obligations there to be overlooked. The list of mergers recently notified to the FCO, available online, invariably includes at least one transaction notified after closing.[2] Although notification post-closure does not always lead to a sanction (and this can often be avoided), the risk of a fine of up to 10% of total worldwide turnover can never be excluded. Moreover, there are civil law consequences of non-notification, namely that the transaction is invalid until approved by the FCO. This can be particularly problematic when a missed filing is discovered during the course of the buyer's due diligence in a subsequent transaction.

Conclusion

The question of whether or not the Commission should take a more active role in reviewing minority acquisitions remains open to discussion, but one certainty exists: awareness of the mandatory obligation to file in jurisdictions where such requirements are already extensive, such as Germany, needs to be raised to avoid the sanctions imposed for contravening merger control regulation.

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[2] See notified mergers at http://www.bundeskartellamt.de/wEnglisch/News/zusammenschluesse_EW3DnavidW2640.php; the cases notified after closing are marked with an asterisk. They are, however, not dealt with under the normal notification procedure.