INTERNATIONAL BAR ASSOCIATION
ANTITRUST SECTION
MERGER WORKING GROUP

FEEDBACK ON THE PUBLIC CONSULTATION DRAFT OF THE 12th AMENDMENT TO THE GERMAN ACT AGAINST RESTRAINTS OF COMPETITION ("GWB") BY THE FEDERAL MINISTRY OF ECONOMIC AFFAIRS AND ENERGY

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I. INTRODUCTION

This submission is made to the German Federal Ministry of Economic Affairs and Energy (the "**Ministry**") on behalf of the Merger Working Group ("**Working Group**") of the Antitrust Section of the International Bar Association ("**IBA**") in response to the public consultation on the draft of the 12th amendment to the German Act against Restraints of Competition ("**Draft GWB**") published on 4 June 2026, (the "**Consultation**").[1]

The IBA is the world's leading international organization of legal practitioners, bar associations, and law societies. As the "global voice of the legal profession", the IBA contributes to the development of international law reform and shapes the future of the legal profession throughout the world. It has a membership of more than 80,000 individual lawyers from over 170 countries, including Germany, and it has considerable expertise in assisting the global legal community.

The Antitrust Section includes competition law practitioners with a wide range of jurisdictional backgrounds and professional experience. Such varied experience places it in a unique position to provide a comparative analysis for the development of competition laws, including through submissions developed by its working groups on various aspects of competition law and policy. The contributions of the Working Group draw on the considerable experience of Section members in merger control law and practice around the world. [2]

The Working Group is responsible for following merger control developments in different jurisdictions across the world covering procedural, jurisdictional and substantive issues. It provides input and comments on various consultations on proposed new and reformed legislation to which the IBA's international perspective and the members' collective expertise and experience can bring significant added value.

The Working Group hopes to contribute constructively to the Consultation. The submission is made in continuity with the Working Group's submission of 3 September 2025 to the European

[1] See https://www.bundeswirtschaftsministerium.de/Redaktion/DE/Downloads/Gesetz/2026/20260529-entwurf-eines-zwoelften-gesetzes-zur-aenderung-des-gesetzes-gegen-wettbewerbsbeschraenkungen.pdf. This submission does not necessarily reflect the views of the organisations with which individual members of the Working Group or officers of the Antitrust Section are engaged or employed.

[2] Further information on the IBA is available at http://www.ibanet.org and information about the Antitrust Section and the Antitrust Section Merger Working Group is available at https://www.ibanet.org/unit/Antitrust+Section/committee/Antitrust+Section/3001.

Commission on the review of the EU merger guidelines and the Working Group's submission to be made at the end of June 2026 on the draft EU Merger Guidelines, and the positions advanced therein inform the analysis set out below.

II. COMMENTS ON SPECIFIC MERGER CONTROL RELATED ASPECTS OF THE DRAFT GWB

A. Raising the traditional merger control thresholds

The Draft GWB will raise all three turnover-based merger notification thresholds. The worldwide turnover threshold will increase from EUR 500 million to EUR 750 million, and the two domestic turnover thresholds will increase from EUR 50 million to EUR 75 million and from EUR 17.5 million to EUR 20 million, respectively. While the first two increases are by 50%, the second domestic threshold will rise by only around 14%, reflecting a deliberate decision to ensure that competitively sensitive transactions in regional markets remain subject to review. The Ministry expects the changes to reduce the number of German merger control filings by approximately 13% to 14%, or around 120 cases per year.

B. Changes to the transaction value threshold

Abandoning of subsidiarity of transaction value threshold and legal consequences

The Draft GWB transfers the transaction value threshold currently set out in § 35 (1a) GWB into the newly structured § 35 (1) GWB, thereby aligning it systematically with the turnover-based thresholds and establishing it as an equivalent, standalone notification trigger. As before, the worldwide turnover threshold of EUR 750 million and the first domestic turnover threshold of EUR 75 million apply to both notification routes. In addition, either the second domestic turnover threshold of EUR 20 million must be met, or the value of the transaction must exceed EUR 400 million. The Draft GWB states that the turnover-based and transaction value thresholds operate in parallel and are of equal rank, with no subsidiarity between them.

The elimination of the subsidiarity principle for the transaction value threshold in relation to the conventional turnover thresholds will have noticeable consequences for the assessment of transactions in mature markets. This is, according to the explanatory memorandum to the Draft GWB (see p. 34), also one of the major aims of this change.

Although the current version of the transaction value threshold does not define a lower limit beneath which the significance of a domestic activity is denied, previously and to date the Federal Cartel Office ("**FCO**") in the Joint Guidelines on the Transaction Value Threshold ("**Joint Guidelines**") envisaged that the significance of a domestic activity can be denied in cases where (i) the domestic turnover in the last business year was below the second domestic threshold of EUR 17.5 million, and (ii) the turnover achieved adequately reflects the

competitive potential of the target. This could regularly be assumed if the target is active in a mature industry which for many years has been characterized by turnover generation.[3]

This approach was consistent with the legislative intention when the transaction value threshold was introduced to German merger control in 2017. The transaction value threshold was not designed to generally lower the thresholds for a merger control assessment in Germany but to close perceived enforcement gaps in industries where competitive potential is not adequately reflected by turnover.

The explanatory memorandum for the Draft GWB (see p. 34) now makes a complete turnaround by stating that high value transactions in markets which are established and in which turnover is generally a good indicator of the competitive potential may also be competitively problematic. It is put forward that companies even in mature markets can give rise to innovations with disruptive potential for which current turnover is no sufficient indicator. It is elaborated that a consideration above EUR 400 million for a company with relatively low turnover may be a strong indicator of future disruptive market change.

This reasoning is not convincing as the lack of turnover in Germany which is expressed by not meeting the second domestic threshold does not necessarily mean that the target does not generate substantial turnover abroad and has just no focus on Germany or has only recently entered the German market. Furthermore, while there may be exceptions to the general principle that in mature markets the competitive potential is adequately reflected in the target's turnover in certain situations, *e.g.,* where the product in question is undergoing a major improvement or development, this does not merit the complete abolition of the concept.

In this context, the Working Group recalls that a high transaction value does not, in itself, evidence a competitive threat or a future disruptive market change. A consideration exceeding EUR 400 million for a target with relatively low German turnover may equally reflect the scale, productivity and accumulated know-how of a well-run business operating primarily outside Germany, the strategic value of an established brand or customer base in mature markets, or the acquirer's intention to achieve operational efficiencies and cost synergies — none of which implies a competitive concern warranting a mandatory notice to the authorities.

As the Working Group has emphasized in its submissions to the European Commission in the context of the revision of the EU Merger Guidelines, scale and scope are not in themselves factors capable of grounding a competition concern. Rather, the benefits of scale — including network effects, the ability to spread the cost of intangibles over a larger base, better access to financial markets, and the means to expand cross-border — should be recognized as potential efficiency gains rather than treated as indicators of competitive risk. Extending notification

[3] See https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaden/Guidance_Transaction_Value_Thresholds.pdf?__blob=publicationFile&v=4, mn. 65, 82.

obligations on the basis of transaction value alone, without requiring evidence that the consideration reflects genuine competitive potential beyond what is already captured by the target's turnover, risks subjecting pro-competitive scale transactions to unnecessary regulatory burden.

While the Federal Supreme Court in its *Meta/Customer* judgment only cautioned against the acceptance of a separate maturity of the market criterion but left the decision ultimately open[4], the Draft GWB now completely eliminates its relevance. As a consequence, transactions in mature markets long characterized by turnover and without any sign for (disruptive) product improvements shall also, according to the Draft GWB, be subject to an obligatory notice. This imposes disproportionate bureaucratic burdens and costs on companies (compare on the content and scope of such obligatory notice in more detail below).

The Working Group notes that the explanatory memorandum's reliance on the concept of "disruptive potential" as a justification for expanding notification obligations to mature markets lacks the evidentiary rigor that the Working Group has consistently advocated. In its submissions to the European Commission on the draft EU Merger Guidelines of 3 September 2025 and to be reiterated in the submission about the Draft EU Merger Guidelines of 30 April 2026, the Working Group emphasized that there cannot be a presumption of harm arising from mergers between innovative companies in concentrated sectors with high barriers to entry. Rather, any assessment of innovation effects must commence from a neutral starting point and consider both the positive and the negative effects of a transaction on innovation incentives — including potential knowledge spillovers, the pooling of R&D resources and the reallocation of research capacity to more productive projects. The mere assertion that a consideration above EUR 400 million signals "disruptive" competitive potential does not satisfy the evidentiary standard of concrete and objective proof that should underpin any forward-looking jurisdictional assessment. The characterization of a transaction as potentially disruptive should rest on identifiable, contemporaneous evidence — not on a structural presumption derived from the purchase price alone.

Relevance of future activities in German markets and effects doctrine

According to the Draft GWB, the transaction value threshold would also capture target undertakings that are expected to have significant activities in Germany in the future. As a result, the transaction value threshold would be extended to undertakings planning to enter the German market. For the first time, the Draft GWB would explicitly expand the domestic activity requirement to include prospective activity in Germany.

The explanatory memorandum to the Draft GWB indicates that the permissible forecast period

[4] Federal Supreme Court, decision of 17 June 2025 – R 77/22 – Meta/Kustomer, WuW 2025, p. 414, 419 seq.

depends on the circumstances of the individual case; in practice, a reliable forecast would generally be limited to a short horizon (often up to roughly two years), and three to five years would ordinarily mark the outer boundary for exceptional cases supported by clear evidence.

The Draft GWB is presented as a means to increase legal certainty, which depends on clear and predictable jurisdictional rules in merger control, so any change to the gateway for notification should avoid introducing ambiguity for businesses or the authority. Against this background, jurisdictional rules may be best set through bright-line, quantitative thresholds that use objective and easy-to-apply criteria, allowing undertakings and the authority to assess filing obligations straightforwardly and thereby supporting legal certainty.

However, the introduction of a qualitative, forward-looking criterion tied to prospective domestic activity is likely to reduce predictability and thus legal certainty for companies and advisers. In this regard, it should also be considered that the existing requirement of significant domestic activity has already given rise to litigation and interpretive controversy under the current regime; further extending it to prospective activity may broaden the area of dispute rather than narrow it.

From the acquirer's perspective, extending the regime to prospective activities could impose an additional burden as it may not always have knowledge of the target's internal plans/documents and may not know whether those documents address potential market entries/expansions to Germany up to five years down the line.

Consequently, in the interest of legal certainty, it may be preferable to confine prospective activities to cases where (i) there is a high probability, evidenced by robust and contemporaneous indicators, that material domestic activity will commence, and (ii) the expected activity is to occur within a short and verifiable timeframe.

A prospective *local nexus* extending two to five years into the future must be reconciled with the *effects doctrine*, including as reflected in § 185 (2) GWB, which requires that jurisdiction rests on substantial, direct, and foreseeable domestic effects established on the basis of concrete facts and general economic experience. Mere possibility or aspirational business plans do not clear this bar; the further the forecast from market reality, the weaker the foreseeability and the greater the risk of extraterritorial overreach. The tangibility requirement is also applicable *ex ante*: projected effects must be capable of materially altering competitive conditions in Germany, not just hypothetically touching them.

Against that standard, a "concrete likelihood" would have to be demonstrated – namely that the transaction is capable of impairing protected domestic interests within a sufficiently short forecast period appropriate to the sector. To the extent that the *local nexus* is based on future activities, strict limits should apply both to the permissible forecast period and to the evidentiary indicators relied upon to infer domestic effects. As a starting point, the forecast

horizon should be narrowly defined, for example 12 to 24 months, and extended only where innovation cycles or regulatory lead times make near-term market entry credibly and necessarily foreseeable. Illustrative examples for specific sectors, products and services should be provided to give the undertakings concerned predictability as to the circumstances in which they should expect a forecast horizon closer to five years. The burden should rest with the authority to establish foreseeability on the basis of robust and timely evidence.

Objective indicators should be specific and verifiable. Examples could include binding and budgeted roll-out plans identifying German markets and timing; firmly committed resources directed at Germany (for example for personnel, sites, distribution, marketing or localization); concluded agreements with German partners or customers; regulatory filings indicating that market entry in Germany is imminent; and usage metrics demonstrating an emerging German market presence, provided that conversion into a monetized offering is imminent. By contrast, soft indicators, such as non-binding strategy presentations or broadly worded statements of optionality, should be considered only with caution. Potential access to German users or data should not suffice in the absence of a clear path to offering products or services and competing in Germany.

C. Introduction of a new Phase 0 (reporting obligation)

The 12th amendment to the GWB provides exclusively[5] for mergers that meet the transaction value threshold for a new reporting obligation ("*Anzeigepflicht*"; see § 35 (1) no. 2 lit. b, 39 (1) sentence 2 Draft GWB). This new procedure is designed as mandatory "Phase 0" and is systematically placed before Phase 1. The FCO shall inform the parties within two weeks of receipt of a complete notice if a full-fledged notification can be waived (§ 39 (8) Draft GWB). The standard for the FCO's assessment is very broad. The merger control assessment proceeds with Phase 1 and a full-fledged notification if it cannot *prima facie* be ruled out that a Phase 2 may be initiated regarding the planned transaction. In this regard, the explanatory memorandum to the Draft GWB states that a waiver of a further assessment can only be granted if the transaction is obviously uncritical.

Because the reporting obligation is mandatory, the parties cannot avoid this additional procedural step even where they themselves assume from the outset that the transaction will require a full-fledged notification. In such cases, Phase 0 does not replace or streamline Phase I, but merely adds a further mandatory step before the ordinary review process begins. In practice, this means that all transactions that are not entirely straightforward are likely to proceed to a full-fledged notification. This would include transactions that could ultimately have been cleared quickly within the ordinary Phase I period, but that do not meet the high

[5] That the new obligatory notice shall only be required in cases where only the transactional threshold is satisfied, becomes apparent from the explanatory memorandum and the overall *telos* of the Draft GWB. However, it may merit a brief clarification that the mandatory notice is not necessary in cases where the transaction value threshold is met in addition to the primary turnover based thresholds.

threshold of being obviously uncritical at the Phase 0 stage.

Content of the notice is legally (§ 39 (7) Draft GWB) and factually extensive

The content of the obligatory notice ("*Anzeige*") shall formally be reduced as opposed to a full-fledged notification ("*Anmeldung*"). The explanatory memorandum to the Draft GWB uses the term "streamlined" (p. 1) and estimates the effort for a company to amount to only one third of the work for the preparation of a full-fledged Phase 1 notification (p. 24).

When analyzing the legally required information (§ 39 (7) Draft GWB), the information and documents mentioned in the explanatory memorandum to the Draft GWB and the additional information which the parties to a concentration will feel obliged to present in the notice to put the FCO in the position to decide on a waiver of the full-fledged notification, this does not seem to be a realistic assessment.

Already the mandatory information (see § 39 (7) Draft GWB) includes the details laid out in § 39 (3) sentence 2 nos. 1 to 3 and no. 6 GWB, in particular, (i) the name and place of business and registered seat, (ii) the type of business as well as (iii) the turnover on a worldwide, EU-wide and national level for the companies concerned. By reference to § 39 (3) sentence 3 GWB which shall also be applicable in case of a notice, the information on the name and type of business must also be provided for every undertaking affiliated with the undertakings concerned and the turnover information for each undertaking concerned and for the affiliates in their entirety.

In addition, the notice must identify all current and anticipated activities in which horizontal or vertical relationships exist between the target and the other parties involved, including their affiliates, as well as a description of the strategic and economic rationale for the transaction. In this regard the explanatory memorandum to the Draft GWB (p. 39) lists supporting documents which the FCO will require to underpin this part of the notice. Such documents include (i) decision-making proposals for the relevant corporate bodies responsible for the investment decision, (ii) minutes of relevant meetings of those bodies, (iii) documentation on the company valuation or the purchase price determination, as well as (iv) analysis or presentations prepared in connection with the decision-making process. The compilation of such information and documentation is, from experience, especially burdensome and time consuming for the parties. In addition, the parties to a transaction usually do not submit such documents without comment but rather do explain them and put them in the relevant context, which creates further effort and cost. Also, follow-up questions on the documents may arise which may be difficult to answer within the very limited time period of two weeks foreseen for the FCO's assessment to continue or to end the proceedings.

These requirements may in practice extend the obligatory information burden beyond the current regime, because parties would have to collect, review, explain and contextualize

internal deal documents already at the preliminary Phase 0 stage.

Essentially the only major element, which is not obligatory, according to the explanatory memorandum, is information on affected markets and the market position of the undertakings concerned. The impact of this limitation is, however, very limited for two reasons (i) information on market shares is also in case of a Phase 1 notification only obligatory if the combined market shares of the parties exceed 20% in Germany or a substantial part of it; (ii) it may still be necessary to explain the markets and also the market position in the notice to allow the FCO to decide within the two weeks period that no full-fledged notification is required. As the waiver will in essence not be granted if it cannot be *prima facie* ruled out that further scrutiny for the merger will be required, parties are factually forced to provide a lot of information and context upfront.

Accordingly, although affected-market information may not formally be required in every case, parties will often have to provide at least a preliminary explanation of the relevant horizontal and vertical relationships, including market positions and, where available, market shares. Without such information, it will be difficult in practice to persuade the FCO within the two-week period that a Phase 2 review can safely be excluded.

Against the above background there seems to be a high likelihood that the notice proceedings fall short of achieving the goal of an efficient and unbureaucratic review of mergers which fall in the scope of the transaction value threshold. In fact, the preparation of the notice appears to be equally if not even more time consuming than the preparation of a (precautionary) notification for a Phase 1.

For that reason, parties may be incentivized in practice to prepare a complete Phase 1 notification from the outset, rather than first preparing a Phase 0 notice and then duplicating work if the FCO requires a full-fledged notification. This risk may be reinforced by the possibility that any subsequent notification may be considered incomplete, thereby creating additional timing uncertainty.

Mandatory Phase 0 imposes disproportionate burdens on merging parties

In many cases it will likely be impossible for the FCO to decide on a waiver of the full-fledged notification. This is underlined by the fact that the explanatory memorandum on the Draft GWB (see p. 38) states itself that this period "*does not allow for substantive investigations or extensive enquiries*". As a consequence, it seems very doubtful that the obligatory Phase 0 will lead to more efficient proceedings and a reduced bureaucratic burden for the parties. In fact, it may rather extend Phase 1 proceedings by another two weeks.

This may be particularly problematic for transactions that would in any event have been cleared within approximately two weeks in Phase I, because Phase 0 would not shorten the review but

would instead add a separate preliminary step before the same assessment can be completed.

While the explanatory memorandum to the Draft GWB (p. 38) claims that the obligatory Phase 0 shall avoid precautionary filings to reduce the number of notifications with the FCO the Working Group sees a high risk that the mandatory character of the notice in combination with the high hurdles to waive the full-fledged notification creates disproportionate costs and effort for the merging parties. This appears all the more likely as the hurdle for the FCO to waive a full-fledged notification is high and the decision to ask for such notification has neither to be substantiated nor is it subject to legal remedies.

Quantitative impact likely underestimated

When the transaction value threshold was introduced, the explanatory memorandum to the 9th amendment to the GWB anticipated that only three cases per year would fall under § 35(1a) GWB.[6] This was not realistic and did not take into account that, particularly in non-European countries, there are many more transactions in which the transaction value exceeds EUR 400 million. This is underpinned by the report pursuant to § 43a GWB on the evaluation of the transaction value threshold, according to which 30 informal inquiries were submitted to the FCO between 2017 and 2019, and 28 notifications were filed, of which 10 were withdrawn and 18 were cleared. Furthermore, even these figures do not fully reflect the additional transactions in which the companies had to determine internally or together with their external legal advisors whether an informal inquiry or precautionary notification to the FCO would be merited and decided against it.

Considering that the significant domestic activity is now broadened by an alignment with the domestic effects concept in § 185 (2) GWB and furthermore extended to expected future activities, the number of 30 notices per year estimated in the explanatory memorandum (see p. 27) seems to be underestimated.

It is very doubtful that the new obligatory notice system is preferable to the previous system where the companies and their legal advisors decided based on an internal assessment whether or not to file a (precautionary) notification.

Development of consistent case practice

The explanatory memorandum to the Draft GWB identifies the development of a consistent body of case practice as a key objective of the new mandatory Phase 0. However, given that Phase 0 decisions on the request of a full-fledged notification are not substantiated by a reasoning and also the mere elapsing of the two weeks deadline may be sufficient to clear the merger, the argument seems to be flawed. It is not apparent how the system shall foster

[6] See Explanatory Memorandum to the 9th Amendment to the GWB, BT-Drucks. 18/10207, p. 45.

predictable standards for undertakings given that the mandatory notices do not generate publicly assessable legal analysis by the FCO.

The Working Group encourages the Ministry to assess the proposed changes to the German merger control framework in the light of international best practice in jurisdictional design. In its submissions to the European Commission, the Working Group has advocated alignment with the approaches of other major jurisdictions, including the FTC/DOJ 2023 Merger Guidelines, the CMA framework, and the ICN Recommended Practices for Merger Analysis. The same principle applies at the national level: jurisdictional expansion should be justified against international comparators, and the introduction of novel qualitative or forward-looking jurisdictional criteria should be tested against the standards of predictability and administrability that characterize established merger control regimes worldwide.

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