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Merger Control

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Contributing Editors: Nigel Parr & Catherine Hammon
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Germany

Peter Stauber
Noerr LLP

Overview of merger control activity during the last 12 months

In 2014, Germany's Federal Cartel Office ("**FCO**") reviewed around 1,200 merger filings. Out of these transactions, a detailed review in phase II proceedings has been initiated and/or concluded in 25 cases during the last 12 months. Eight transactions were cleared unconditionally and one transaction subject to conditions and obligations. Two transactions were prohibited and a further nine were withdrawn by the parties. At the time of writing of this article, five phase II proceedings are still on-going.

Although the number of prohibitions appears low, a more realistic approach would be to count the notifications withdrawn as if the respective transactions would have been prohibited.[1] Withdrawing a notification is often preferred by the parties to receiving a prohibition decision since the latter usually generates more (unwelcome) publicity and also would explicitly establish a precedent as regards market definition or other issues that have been contentious during the phase II investigation. Furthermore, in case of withdrawal only 50% of the filing fees have to be paid by the parties, thus providing an additional financial incentive. Still, considering that of the phase II proceedings completed in the last 12 months 40% (8 out of 20) were nevertheless cleared unconditionally, one may conclude that the initiation of phase II proceedings does not equal "certain death" to the transaction, but that there is a good chance of dispelling the FCO's competition concerns.

The prohibitions issued by the FCO concerned, on one hand, the contemplated merger between two hospital operators in Southwest Germany and the takeover of the regional food retailer Kaiser's Tengelmann by its competitor Edeka on the other hand. In both cases, the commitments offered by the parties were not deemed as sufficient by FCO to eliminate the arising competition concerns.

New developments in jurisdictional assessment or procedure

On 30 September 2014, the FCO published the final version of the "Guidance on domestic effects in merger control".[2] This final version differs only insignificantly from the draft version that has been published by the FCO for public consultation in the last reporting period.[3]

The guidance, its original version dating back to 1999, helps companies assess whether a transaction is deemed to have effects in Germany and might therefore be subject to a notification obligation. In the opinion of the FCO, it suffices for the transaction having domestic effect if the target company generated turnover of at least €5m, while the other turnover thresholds are fulfilled by the purchaser.

In case a joint venture is newly established, however, this general approach is slightly restricted by the condition that the joint venture ("**JV**") generates or will probably generate

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turnover in Germany of at least €5m within three to five years after its establishment. However, the establishment of a JV will not be considered as having domestic effect if: (1) the JV is currently and will potentially not be active to a significant extent within Germany or on a geographical market of which Germany is part (e.g. worldwide or European-wide markets); and (2) the parent companies of the JV are neither actual nor potential competitors on the market on which the JV shall be active, nor are they actual or potential competitors to each other on any upstream or downstream markets.

In all other cases, the FCO is of the opinion that the likelihood of domestic effects depends on the potential spill-over effects among the parent undertakings and also on the economic significance of the JV for the parent undertakings. The FCO explicitly acknowledges that this approach of assessing domestic effects is rather complex. For this reason, the FCO suggests notifying a transaction regardless of whether the transaction actually possesses domestic effects, since the transaction will usually not raise any competition concerns and thus will receive clearance within a relatively short time frame.

Key industry sectors reviewed and approach adopted to market definition, barriers to entry, nature of international competition etc.

Rescue mergers in the print media sector

Since the last revision of the Act on Restraints of Competition by the 8th amendment package that entered into force in July 2013,[4] German law now provides two different types of a "rescue mergers", i.e. where the parties claim admissibility of the transaction on the basis of the so-called failed company defence:

First, the general type requires the parties to the transaction to prove that: (i) the target faces immediate insolvency (or is already in insolvency proceedings); (ii) after the target's insolvency-induced exit from the market its market position would accrue to the purchaser in any case; and (iii) no alternative purchaser exists.

In July 2013, an additional, sector-specific "failed company defence" has been introduced into German Law that applies only for mergers between print media publishing companies.[5] According to this provision, a merger between print media publishing houses may be granted clearance despite the creation or strengthening of a dominant market position provided that (i) the target is a small or medium-size print media publishing house, (ii) the target generated significant annual deficits in the previous three years, (iii) its existence is in jeopardy, and (iv) an alternative purchaser that would not cause similarly serious competition concerns does not exist.

In two merger control proceedings in the print media sector, the FCO had the opportunity to clarify the relationship between the general and the sector-specific "failing company defence".

The first case concerned the contemplated acquisition of seven local editions of daily newspapers in the area of Dortmund from the Funke Media Group by the company Medienhaus Lensing. Despite the fact that the transaction concerned print media publishers, the FCO first analysed whether the conditions of the general failing company defence would be met.

As the first step, the FCO established that the local newspaper editions do not qualify as "company" or even as "corporate division", i.e. as a clearly distinguishable part of a company with operations independent of other corporate divisions and clearly attributable costs and revenues. Instead, the target assets seemed to have been a result of "cherry-picking" unprofitable editions from a profitable newspaper chain with around 80 local editions in total. The FCO was therefore not convinced that the local editions were actually under the

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threat of insolvency since the seller was not able to provide sufficient proof on the target assets' financial situation and the divestment's effects on the seller's remaining business activities. Moreover, the parties failed to prove that there were no alternative purchasers, since the seller approached potential alternative purchasers only after the negotiations with Medienhaus Lensing had been finalised. Thus, the FCO refused to accept these discussions with third parties as serious attempts of finding an alternative purchaser.

In the following, the FCO examined whether the conditions for the sector-specific failing company defence were met. Similar to the above, the proof presented by the parties was deemed to be insufficient. In particular, the seller was not able to prove that the target assets had been loss-making in the previous three years due to the fact that these assets were not part of an independent, distinguishable division. Moreover, the FCO took the standpoint that the condition "small or medium-sized print media publishing house" requires a comparison with competitors in the print media industry, but not with all companies active in Germany. More importantly, however, the FCO voiced the opinion that the sector-specific failing company defence may not be applicable if one of the major print media publishing houses – such as Funke Media Group in the present case – are party to the transaction, even if on the seller's side. It remains to be seen whether a court would side with this broader interpretation of the provision.

Perhaps coincidentally, the second case concerning the failed company defence involved also Medienhaus Lensing, although on the seller's side. The transaction concerned the sale of a local newspaper to the publishing house Aschendorff. Since Aschendorff was the only (relevant) competitor in the affected area, the transaction would have led to its (quasi) monopoly. Nevertheless, the FCO granted clearance for the transaction since the parties were able to prove that the conditions of the general failing company defence were fulfilled. The local edition was independently managed and consequently had clearly identifiable and reviewable revenues and costs. Lensing as seller was also able to demonstrate that without the transaction the target would face a serious threat of insolvency and closure. Moreover, Lensing could also prove that it had searched for a purchaser already for five years and even the negotiations with Aschendorff had taken several years until signing. Accordingly, the FCO accepted that an alternative purchaser did not exist and granted clearance.

With these two cases, the FCO has both affirmed its past practice generally as well as established useful precedents for its understanding of the new sector-specific failing company defence.

<u>Mergers in the hospital sector</u>

As mentioned above, one of the two prohibitions in the last 12 months concerned the planned merger between the largest hospital centre in Esslingen (*Klinikum Esslingen*) and an operator of hospitals in the same county (*Kreiskliniken Esslingen*). According to its findings, the FCO held that the merger would eliminate competition in the region since third-party hospitals in neighbouring cities and counties, such as Stuttgart and Tübingen, are not considered as viable alternatives by patients. Furthermore, the FCO held that the efficiencies claimed by the parties could not be regarded as transaction-specific, i.e. most if not all of the efficiencies could be achieved to a similar extent by less anti-competitive alternatives. Besides, the parties were not able to demonstrate that no other structural alternatives existed, e.g. a merger with other hospital operators.

Apart from the above, the prohibition decision provides an interesting example for the importance of fulfilling all formal notification criteria of German law: The FCO was informally approached by the parties in July 2013. Following some discussions, the official

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merger notification was submitted in October 2013, then withdrawn in November 2013 once the FCO indicated it was initiating phase II proceedings, and then notified again one day later. One month later, the FCO submitted its decision to initiate phase II proceedings to the parties. However, the parties claimed to have received the notice only one day after the one-month period of phase I had passed. As a consequence, the parties submitted that the transaction has to be deemed as cleared since the notice concerning the opening of phase II proceedings must be actually delivered to the parties within the one-month period.[6] In light of this assertion, the FCO reviewed the notification in detail and established that the parties have failed to provide the turnover data as required by German law, i.e. as regards the participating undertakings' turnover worldwide, within the EU and in Germany.[7] For this reason, the FCO declared the notification incomplete with the consequence that the above-mentioned, crucial one-month period had not yet started. If the parties' notification had been complete, the FCO would not have been able to prevent and, respectively, prohibit the transaction despite its negative effects on competition in the regional hospital market. This example shows that even though German law requires very limited information for a complete notification, it can pay off to take these formal requirements very seriously.

In another case, the hospital operator Klinikum Worms has been granted clearance for acquiring the hospital Hochstift Krankenhaus. This decision is noteworthy for the reason that the same transaction had been prohibited by the FCO just two years before. As the FCO's market investigation in the second investigation showed, however, important competitors were able to strengthen their market position during this period. As a result, the target experienced a severe decline in the number of patients and was even forced to close one of its departments. Thus, under the changed circumstances the current transaction no longer raised any serious competition concerns. Even though it is commendable that the FCO was prepared to take a fresh look at the situation in the affected market, one might still wonder whether the FCO's competitive assessment two years earlier might have been too pessimistic and therefore in essence proven to be wrong after some time.

In another case, the acquisition of Klinik Tettnang by Klinikum Friedrichsfhafen also received clearance in the course of a renewed review by the FCO. The FCO held that in spite of high combined market shares it was not likely that the parties would decrease the quality of their services, as there were competitors in nearby areas which could influence the patients' behaviour. Apart from material aspects, in particular the in-depth analysis of potential economic incentives and effects of the transaction, the case also shows a certain procedural flexibility of the FCO: The transaction had been first notified at the end of 2013, with the parties withdrawing their notification in December 2014 at the end of a phase II review with a duration of almost one year. The second notification was submitted shortly thereafter with the transaction cleared within phase I. This procedural approach made it possible for the FCO to grant clearance with a simple letter, while it would have had to adopt a voluminous decision had the notification not been withdrawn and subsequently re-notified. Although this practice might lessen the FCO's workload, it also contains an aspect that might be considered as detrimental to competition: Clearance decisions taken by the FCO in phase I proceedings are not subject to appeal by competitors of the merging parties even if the competitors had enjoined the merger review proceedings, while such a third-party right to appeal exists if the FCO issues a clearance decision during phase II proceedings. Thus, the approach taken in this case is also beneficial for the merging parties since they do not need to fear further delays by an appeal, but consequently might be seen as depriving third parties of any legal redress possibilities even if the merger – from third-parties' point of view – has serious negative effects on their market position.

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Prohibition of merger in the food retail sector

The second prohibition decision concerned the contemplated takeover of the regional food retailer, Kaiser's Tengelmann by Germany-wide Edeka. In its analysis of the scope of the affected geographical market, the FCO adopted a multi-layered approach, starting from national level and then going into more and more detail and finally assessing the market situation on the level of city districts. With regard to the affected product market, the FCO continued its decision practice to include all types of food retailers (full range hyper- and supermarkets, soft discount, hard discount), but excluding specialised retailers such as beverage stores, drugstores and food craftsmen (bakeries, butcheries, etc.). However, given their increasing relevance in consumers' demand, the FCO took account of the competitive pressure exerted by organic foodstuff traders. In addition, the FCO analysed the transaction's potential effects on the demand side, i.e. the increase in Edeka's purchasing power with suppliers. In essence, the FCO found that the transaction would significantly impede effective competition in Berlin, the greater Munich area and four city areas in North-Rhine-Westphalia as well as in 11 purchasing markets of importance for food retail companies.

In order to rectify the FCO's concerns, the parties offered to divest up to 90 stores equal to approx. 17% of the target's turnover. This offer was not deemed as sufficient by the FCO, however, and thus prohibited.

Clearance of transactions in spite of high combined market shares

In a number of cases the FCO cleared a merger, although it had recognised that it significantly strengthened the market position of the parties.

For example, the FCO granted clearance to the acquisition of the Finnish shipyard STX, a cruise shipbuilding company, by a joint venture of its competitor Meyer Group and a Finnish investment firm. Following the acquisition, Meyer Group were to become market leader in terms of order value and second in terms of the number of ships built after the Italian shipbuilder Fincantieri, while STX remained with one shipyard in France. Apart from these companies, the FCO identified only two competitors active in niche areas. In spite of this, the FCO was convinced that effective competition would not be impeded by the transaction since the parties have to face a highly concentrated demand side of cruise ship operators. Further, the FCO found that given the significant costs for financing and maintaining a shipyard, the time required for building cruise ships, and customers' tendency to source ships from different suppliers, the companies have neither incentives for allocating markets and customers, nor possibilities for retaliation. For these reasons, the FCO held that the merged entity would still face sufficient competitive pressure.

Another case also illustrates how the FCO is consistently moving away from deciding solely on the basis of a market share analysis to increasingly analysing the potential economic effects of a transaction: The takeover of Veyance Technologies by Continental has been cleared by the FCO despite its finding that the merged entity would have a share of 50-60% in the market for air suspension system for heavy-duty trucks. However, the economic analysis showed that the target could not be considered as Continental's closest competitor. While Veyance Technologies' air suspension systems are built with natural rubber, a significant number of potential customers prefer synthetic rubber products and thus do not regard Veyance Technologies as an alternative supplier. The FCO further held that the merged entity would face increasing competitive pressure from new market entrants, in particular from Turkey.

New practice in the market definition of the gas sector

In connection with the acquisition of sole control over VNG Verbundnetz Gas AG by EWE

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AG, the FCO refined and amended its long-standing market definition practice of the gas sector taking due account of significant market developments.[8] First, it was established that gas producers from abroad have increased their market power and extended their operational activities into downstream markets. Similarly, other market players such as pure wholesalers as well as nationally active, integrated companies, adapted their customer base. Consequently, the FCO decided to abandon its distinction between the supply of natural gas to nationally active gas transmission companies and the gas supply to regionally active companies and pure wholesalers, respectively. In addition, the FCO no longer differentiates between market levels and gas qualities, but assumes a single, Germany-wide wholesale market. On retail level, the FCO continues to differentiate between standard load profile (SLP) customers and industrial load profile end customers, while the geographic scope of the latter is now being considered as being Germany-wide. With regard to SLP customers, the FCO further differentiates between basic supply household customers and special contract customers. This mirrors the practice that has been applied in the electricity sector for some time. In terms of geographic scope, the market for the supply of special contract customers is now defined as Germany-wide, while the market for the supply of basic supply household customers is still considered as being restricted to the area of the basic supplier's network, who consequently remains in a monopoly position. This decision continues the evolution in defining energy markets in light of the effects of market liberalisation coming to fruition.

Geographic market definition of agricultural trade markets

The FCO used the merger between BayWa and RaiWa Lobsing, two agricultural trade companies, as an opportunity to make in-depth assessment of the affected markets in order to review market definitions applied in the past. One contentious issue was the amount of self-consumption by producers of grain, and its consequences for the volume of the market for grain intake. The FCO found that on average 1/3 of grain is consumed by the producers, while previously the level of self-consumption was assumed as being around 25%. Based on this analysis, the volume of the grain intake market was lower, leading to higher market shares of the companies active on this market. The contractual and corporate connection between local and regional cooperatives has also been reviewed. The FCO found that despite widespread minority cross-shareholdings as well as the fact that both local and regional cooperatives are members of the same association, these connections are not sufficient to qualify local and regional cooperatives as affiliated undertakings for the purpose of merger control. In addition, the FCO extended its "radius approach"-based assessment for the geographic scope to the affected agricultural markets. The FCO's analysis showed that most agricultural trade companies procure grain only within a very limited radius of approx. 30km, and also that the parties to the transaction were the closest competitors in all affected markets. Accordingly, the transaction would have removed BayWa's most significant competitor and thus significantly impeded effective competition. Following this assessment, the parties withdrew their merger control notification.

International cooperation on merger

In the year-long review of the contemplated merger between Tokyo Electron and Applied Materials, both manufacturers of semiconductors and other equipment necessary used by computer chip manufactures, the FCO cooperated with other national agencies, the US Department of Justice amongst others. Similarly to competition authorities in Singapore and Israel, the FCO also granted clearance to the transaction. Its market analysis showed that the parties' products belong to 40 separate product markets in total. However, only 18 of the 40 product markets were subject to material review by the FCO, since the other 22

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markets qualified for the "*de minimis*" market exemption under German law.[9] Competition concerns were initially identified only with respect to one market, but as a result of an in-depth analysis the FCO concluded that the parties would still face sufficient competitive restraints by the remaining competitors. Furthermore, taking into account other market participants' submissions, the FCO also reviewed the potential conglomerate effects of the transaction. In conclusion, the FCO was convinced that the merging parties would not have incentives and opportunities for abusive tying and bundling strategies, since customers do usually not source equipment *en bloc* and, more importantly, have distinctive preferences for the best technological solution rather than products of certain suppliers. Furthermore, the number of potential customers is not only small, but these customers are large companies with correspondingly high countervailing buying power.

Approach to remedies (i) to avoid second stage investigation and (ii) following second stage investigation

First of all, it has to be noted that the FCO may not accept remedies within phase I proceedings, but only within the main investigation proceedings (phase II). Against this statutory background, the parties to a merger may avoid phase II proceedings only by structuring the transaction in a way, insofar as possible, by which possible competition concerns are removed prior to notification, and thus ensuring (or rather, increasing) the likelihood of receiving clearance within phase I. In case the parties face difficulties in identifying the precise nature and scope of potential competition concerns, it is not uncommon to initiate informal pre-notification discussions with the FCO and, respectively, withdrawing a notification after the authority's concerns have been identified in order to take rectifying measures prior to a subsequent second notification.

In general terms, the FCO is still strongly opposed to behavioural remedies, not least because German law provides that remedies must not make it necessary to permanently monitor the merging parties' behaviour.[10] Accordingly, remedies need to have reasonably verifiable, structural long-term effects.

If the merger removes a significant (close) competitor, as for example in the case of the acquisition of Kaiser's Tengelmann by Edeka mentioned above, the remedy package must be strategically meaningful, i.e. providing the potential acquirer(s) with immediate and viable market access. In the opinion of the FCO, this condition was not fulfilled in the Kaiser's Tengelmann/Edeka merger. One major point of criticism in particular was that the offer did not sufficiently address the competitive concerns on the level of city districts. For example, the parties' offer included stores in areas concerning which the transaction did not raise any concerns, but did not contain any divestment offers for the problematic areas in North-Rhine Westphalia. Similarly, several of the stores offered for divestment had already been closed by the parties or are due to close in the near future. Only with regard to the purchasing markets was the divestment offer considered to be sufficient. The FCO further stated, though, that it could have granted clearance to the transaction if the remedy package would have encompassed a more significant part of Kaiser's Tengelmann's outlets in the areas in which serious competition concerns arose.

Following a prohibition decision, the merger parties have two options if they intend to overcome the FCO: The parties may either seek legal redress in court, in particular if they are of the opinion that the FCO's conclusions are legally unsound. Alternatively, the parties may ask for authorisation of the transaction by the Federal Minister of Economics and Energy, who may overrule the FCO if the restraint of competition is outweighed by

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advantages to the economy, or if the concentration is justified by an overriding public interest.[11] Within the last 40 years, only 21 applications for ministerial authorisations have been made, out of which only two applications have been approved unconditionally and a further six applications only in part or subject to conditions.[12] According to press reports, the current application by Kaiser's Tengelmann and Edeka stresses that their merger would preserve approx. 16,000 employees which would otherwise be under threat. Following the application, the Federal Minister of Economics and Energy must ask for an expert opinion by the Monopoly Commission, an independent advisory body of the federal government, as well as the opinion of the Ministry of Economics and, respectively, competition authorities of those German states (*Bundesländer*) in which the parties to the transaction have their corporate seat. The proceedings for ministerial authorisation shall be concluded within four months, but this is not a strict deadline and thus some proceedings in the past were concluded only after eight months, for example.

Key policy developments

The past 12 months did not see major key policy developments. As the 8th Amendment Package to the Act against Restraints of Competition entered into force only in July 2013, there are currently no plans for statutory changes in the area of merger control.

On 24 September 2014 the FCO published the final report concerning its sector inquiry into the food retail sector.[13] Sector inquiries are a good means of reviewing the market conditions and making policy decisions without taking measures in concrete cases. Over the last three years the FCO had examined the food retail sector and concluded that it must take action to prevent a further worsening of the competitive conditions in a highly concentrated market. Consequently, the FCO had used its findings from the sector inquiry also in the review of the aforementioned Edeka/Kaiser's Tengelmann merger.

With regard to merger control procedures in the food retail sector, the FCO stated that acquisitions of food retailers in Germany by one of the large food retailer groups (Edeka, Rewe and the so-called Schwarz Group) will usually require an in-depth competitive assessment, also with regard to the purchasing markets. This applies especially to transactions involving the acquisition of networks or parts of networks from companies exerting significant competitive pressure on regional sales markets and procurement markets. The FCO also stated that it will focus on the SIEC test introduced to German law with the 8th amendment package, which enables restrictions of competition to be prevented even in those cases where the parties to the merger do not jointly achieve the highest market shares in the markets affected.

Reform proposals

There are currently no concrete reform proposals at legislative level that would affect the current merger control regime in Germany.

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Endnotes

1. As with every general rule, exceptions apply: The notification concerning the acquisition of the Frauenthal Automotive business by Boler/Hendrickson has been withdrawn during phase II after the parties excluded a joint venture from the scope of transaction. This structural change not only removed an overlap in the parties'

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activities that caused the competition concerns, but also (retroactively) eliminated the FCO's competence for review since the parties to the transaction no longer fulfilled the turnover thresholds of German merger control.

2. An English version of the guidance is available at the following address: http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Merkbl%C3%A4tter/Merkblatt%20-%20Inlandsauswirkungen_2014.pdf?__blob=publicationFile&v=2.
3. We have reported on the draft version of these guidelines in the 3rd edition (2014) of this book.
4. For more details concerning the contents of the 8th amendment package to the ARC, please refer to the chapter on Germany in the 3rd (2914) edition of this book.
5. Section 36(1) no. 3 ARC.
6. Section 40(1) 1st sentence ARC.
7. Section 39(3) no. 3 ARC.
8. The press release of the FCO can be found at http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2014/23_10_2014_EWE-VNG.html.
9. *Cf.* Section 36(1) no. 2 ARC. Pursuant to this provision, the FCO is not entitled to prohibit a transaction if it leads to the strengthening or creation of a dominant position on a market with an annual volume of less than €15m within each of the last five years prior to the transaction.
10. *Cf.* Section 40(3) 2nd sentence ARC.
11. Section 42(1) ARC.
12. An overview is published at: http://www.bmwi.de/BMWi/Redaktion/PDF/Wettbewerbspolitik/antraege-auf-ministererlaubnis,property=pdf,bereich=bmwi2012,sprache =de,rwb=true.pdf.
13. The report is published (in German) at: http://www.bundeskartellamt.de/Sektoruntersuchung_LEH.pdf?__blob=publicationFile&v=7.

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Peter Stauber, LL.M.
Tel: +49 30 2094 2011 / Email: peter.stauber@noerr.com
Peter Stauber is an associated partner with Noerr LLP. He joined the firm in 2007 and is based in its Berlin office, but has also spent more than two years in the firm's Budapest office. His practice covers all aspects of European, German and Hungarian competition law. Peter has vast experience in handling merger control proceedings with the European Commission, the competition authorities of Germany and Hungary and in coordinating multi-jurisdictional filings worldwide. He also advises companies on compliance matters, internal investigations, antitrust proceedings and the private enforcement of competition claims. His clients are particularly from the energy and raw materials, media, construction materials, consumer goods, automotive and machinery and travel sectors. He studied in Berlin, Budapest, Leuven and Dresden. Chambers Global 2015 acknowledges him as one of the "Leaders in their field / Corporate M&A: Competition" for Germany and Hungary.

Noerr LLP

Charlottenstrasse 57, 10117 Berlin, Germany
Tel: +49 30 2094 2011 / Fax: +49 30 2094 2094 / URL: http://www.noerr.com

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