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Merger Control

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Germany

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Overview of merger control activity during the last 12 months

In 2013, Germany's Federal Cartel Office ("**FCO**") reviewed around 1,100 merger filings.[1] Out of the transactions notified in 2013, a detailed review in phase II proceedings has been initiated in 15 cases, while phase II proceedings in an additional five cases dating from 2012 were concluded in 2013. At the time of writing this chapter, three phase II proceedings from 2013 are still active. Accordingly, only a very small number of transactions (approx. 1.6%) have raised serious competition concerns requiring a more detailed analysis.

The phase II proceedings that have been concluded in 2013 had an average length of approx. 122 calendar days and thus are almost equal to the statutory maximum length for phase II proceedings of four months as of notification. However, this statutory maximum can be extended with the consent of the parties. The longest phase II proceeding in 2013, with 196 calendar days, concerned the contemplated acquisition of a competitively significant influence in Rhön-Klinikum AG, an operator of hospitals and health care centres in Germany, by its competitor Asklepios Kliniken. Initially, this transaction was cleared by the FCO subject to certain commitments by the parties. However, since the parties failed to fulfil a divestiture obligation, the clearance retroactively became a prohibition. With slightly over two months (69 days), the acquisition of the cash handling service provider Unicorn Geld- und Wertdienstleistungen GmbH by its competitor Ziemann Sicherheit Holding GmbH qualifies as one of the shortest phase II proceedings in the last two years.

In summary, 2013 saw only two transactions being prohibited by the FCO. One case concerned the contemplated transaction in the hospital sector between Rhön-Klinikum and Asklepios Kliniken (mentioned above). The other was the contemplated acquisition of cable network operator Tele Columbus by Kabel Deutschland. A further two transactions were only cleared subject to certain conditions, while the other phase II proceedings were concluded with unconditional clearances.

Since the beginning of 2014, the FCO unconditionally cleared an additional three transactions that have been subject to a second stage review.

New developments in jurisdictional assessment or procedure

Guidance on domestic effects in merger control

On 5 December 2013, the FCO published a draft "Guidance on domestic effects in merger control"[2] and asked for the public's comments. The consultation on the draft ended 30 January 2014 and at the time of writing of this chapter, the FCO has not yet published a final version of the guidance. The FCO's (preliminary) stance with regard to domestic effects is straightforward: If the parties to the transaction fulfil the turnover thresholds

of German law, in particular the thresholds relating to domestic turnover, it is assumed that the transaction has sufficient domestic effects. With regard to the establishment of a joint venture, domestic effects are assumed if the JV generates or will probably generate turnover in Germany of at least €5m. According to the draft guidance, the establishment of a JV will lack domestic effects only in certain, very narrowly defined cases: no domestic effects might be assumed if (1) the JV is not and will not become active 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 not competitors on the market on which the JV shall be active, nor are they actual or potential competitors to each other on any other market. 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. In connection with this, the FCO stresses that the amount of information required for a merger filing in Germany is modest and therefore parties are better advised to notify a transaction and obtain clearance without necessarily discussing the question whether the transaction actually has domestic effects.

Special rules for transactions in publishing sector

As of 1 July 2013, new rules apply to the calculation of turnover in case of concentrations between publishing houses. Previously, turnover of publishing houses had to be multiplied by the factor 20 when assessing the turnover thresholds. This special rule served the purpose of allowing the review of transactions which otherwise would have been below the radar of the FCO and thus preserving a diversified landscape of (newspaper) publishers. Now, the multiplier has been reduced to the factor 8 and thus only transactions between very small undertakings will remain outside the scope of the FCO's scrutiny.

Moreover, a special "failing company defence" has been introduced for publishing companies on the basis of which concentrations might be cleared under certain conditions even if they lead to the strengthening of a publishing house's dominant position. This exemption might be applied if the parties prove that (1) the target is a small or medium-sized publishing company that generated substantial losses in the previous three financial years, (2) its existence would be endangered without the transaction, and (3) no other alternative purchaser could be found who would have caused fewer competition concerns (Sec. 36(1)2 no. 3 ARC). The last criterion provides for a considerably lower burden of proof for the "failing company defence": in all other industry sectors the parties have to prove that the target's market share would (automatically) accrue to the purchaser in case the target becomes insolvent. It is yet unclear, however, how the FCO will apply the second prerequisite and, in particular, whether the further existence of the target will be regarded as endangered if its parent undertaking is generally able (but perhaps not willing) to provide continuous support to its failing subsidiary. Legal literature is of the opinion that the parent's financial situation may not be taken into account if the parent explicitly refuses to provide further support for plausible and objective reasons.

Finally, the "*de minimis*" exemption becomes applicable also to concentrations in the publishing sector. Accordingly, the acquisition of a publishing company with an annual worldwide turnover of less than €1.25m will not be subject to merger control.

Transactions on minor markets subject to merger control review

Prior to the 8th amendment package to the ARC, a transaction was not subject to German merger control if the transaction affected a market in which goods or commercial services had been offered for at least five years and the total sales turnover generated by all market participants did not exceed €15m in Germany in the last financial year. As of 1 July 2013 this exemption has been retained, albeit only as part of substantive merger control. Accordingly, a transaction affecting such a minor market needs to be notified with the FCO; but the FCO is not entitled to issue a prohibition decision, even if the transaction fails the SIEC test (Sec. 36(1)2 no. 2 ARC). Although this might seem to broaden the scope of German merger control, in practice most transactions concerning such minor markets have been notified anyway since the parties often lacked clarity on the correct delineation of the affected market and thus uncertainties remained on the applicability of the exemption.

Calculation of turnover for minor markets

Another question concerning the aforementioned minor market exemption has been clarified by the Higher Regional Court of Düsseldorf in its decision concerning the (prohibited) merger between Lenzing AG and Kelheim Hygiene Fibres GmbH.[3] The court held that for the purpose of applying said exemption, the turnover of the parties had to be calculated on the basis of all sales that have a sufficient competitive connection to Germany. In the opinion of the court, such connection exists not only in case of sales to customers having their seat in Germany, but also in case of turnover generated from sales agreements concluded with central procurement organisations outside of Germany insofar as actual deliveries are made to Germany.[4] Accordingly, parties to a transaction may not rely simply on the customer's seat for the geographical allocation of turnover. Instead, sales turnover generated from sales to procurement co-operations and in connection with framework procurement agreements will have to be reviewed and perhaps re-allocated, depending on the location of the actual deliveries. The foregoing only applies, however, if deliveries are made directly to locations other than the seat of the central procurement organisation. In case the goods are delivered to the central procurement organisation, its seat would remain relevant, however. Further, it needs to be noted that the court's decision applies to the turnover calculation for the purpose of the minor market exemption, while its applicability for the general turnover thresholds is not explicitly stated. Even though the court reasons that a narrow interpretation of the minor market exemption is necessary in order to limit the number of transactions falling outside the scope of German merger control, it does not appear likely that the court would approve of a different allocation method in case of the regular domestic turnover thresholds. Accordingly, it seems advisable to apply this allocation standard also in all other cases where the parties' domestic turnover is of relevance for German authorities' and courts' jurisdiction.

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

Out of the 20-odd transactions that have been or are currently reviewed in phase II proceedings, six transactions and thus almost one third concern(ed) the hospital sector. The FCO unconditionally cleared three transactions,[5] one transaction was prohibited,[6] while two transactions are still under review.[7] Although the FCO is aware that Germany tends to have too many hospitals and that many of them, in particular hospitals operated by municipalities, are loss-making and lack sufficient funding, the FCO has so far refrained from watering down its substantive review. In general, hospital markets are still qualified as regional markets and thus the parties' market position is analysed separately for each hospital on the basis of their

respective catchment area, as evidenced by highly detailed official statistics of the German health care system.

The other phase II proceedings concerned a variety of industries: cash handling services, manufacturing and sale of ice cream, mutual savings banks, wholesale of sanitary, heating and air-conditioning equipment, and the manufacturing and sale of fluid fittings for the aerospace industry. Only in one transaction affecting the market for cash handling services was clearance made dependent on certain divestment obligations.

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 (second stage). This structure has been left unchanged by the 8th amendment package. Given that the FCO has considerable leeway in conducting its investigation, this does not mean that the second stage needs to last for the whole statutory maximum time period.

Furthermore, the 8th amendment package has not brought fundamental changes to the FCO's approach to behavioural remedies either. Both the current as well as the previous provisions provide for the general rule that remedies must not make it necessary to permanently monitor the merging parties' behaviour (Sec. 40(3)2 ARC). Still, remedies that affect the parties' market conduct are not explicitly forbidden. Accordingly, in a case concerning the conditional clearance of the merger between Liberty Global/Unity Media and Kabel Baden-Württemberg, the Higher Regional Court of Düsseldorf did not object to remedies that had behavioural components – such as the waiver of certain exclusivity rights and the encryption of the base cable signal – for this very reason.[8] However, the court held that these remedies did not have a sufficient structural effect and could therefore not be taken into account to diffuse the competition concerns raised by the transaction.[9] While the FCO also accepted an exceptional termination right in favour of the housing companies as an additional remedy, the court held that the mere possibility to terminate the agreements with the cable network operators was not sufficient. Instead, the FCO should have analysed the likelihood that the housing companies will make use of this possibility and thus allow competing cable network operators to compete for the provision of cable services. The court stressed in particular that the housing companies had only limited incentives to exercise the exceptional termination right, since all costs associated with the cable network were passed on to the tenants. In addition, the FCO allowed the merging parties to request compensation fees in case the contract was terminated, thus limiting the potential incentive of exercising the termination right.

With regard to the aforementioned decision it is important to note that the FCO's conditional clearance has been appealed by competitors of the merging parties who were not satisfied with the clearance and the remedies imposed, respectively. The decision further highlights the court's willingness to scrutinise both the FCO's decision in its substance as well as the suitability and effectiveness of any remedies. It thus appears that merging parties might sometimes be better advised to restrain themselves in negotiating remedies since otherwise they risk the conditional clearance being set aside on appeal for being too generous. However, the last word is not spoken yet since the merging parties appealed to the Federal Court of Justice to have the Higher Regional Court's ruling set aside.

An instructive example for dealing with competition concerns in order to avoid remedies is provided by the acquisition of 40 hospitals and 13 health care centres by the Fresenius

Group (Helios Kliniken) from Rhön-Klinikum AG. At first, the Fresenius Group attempted to acquire Rhön-Klinikum AG as a whole by initiating a public takeover bid for at least 90% of Rhön's shares. However, competing hospital operators purchased small, but sufficient amounts of shares on the stock market and thus rendered the takeover bid ineffective. In its second attempt, Fresenius and Rhön agreed on the takeover of 43 hospitals and 15 health care centres by way of an asset deal.[10] During the second stage investigation, the FCO voiced competition concerns relating to the acquisition of certain hospitals and health care centres. In order to secure an unconditional clearance by the FCO, the parties to the transaction agreed during the second stage investigation to exclude the problematic assets from the scope of the transaction, thus rendering the FCO's competition concerns obsolete. Of course, such an approach will work only for certain types of transactions where the target (and its assets, respectively) may be easily partitioned in order to generate a "tailor-made" transaction structure eligible for unconditional clearance. Nevertheless, this case shows that with a sufficient amount of flexibility, parties may achieve most of their initial goals. Another interesting side note is the fact that the merger review of this transaction lasted 120 calendar days and thus exactly for the statutory maximum of four months applicable to phase II proceedings without remedies.

The sale of certain publishing assets by the Axel Springer Group to the Funke Medien Group shows certain similarities: initially, the parties notified the contemplated asset deal as a single transaction. Right from the start it was clear that the transaction would require a second stage review. Following initial deliberations with the decision division in charge of the review, the parties withdrew their notification and subsequently submitted three separate notifications relating to certain parts of the contemplated transaction. The part relating to the acquisition of certain daily newspapers, advertising newspapers and women's magazines subsequently obtained unconditional clearance within less than two weeks.[11] The second part concerned the acquisition of various TV programme guides which raised the serious competition concerns. After slightly more than five months, the FCO granted clearance to the transaction subject to the condition that certain TV programme guides that were to be acquired from the Axel Springer Group as well as other TV programme guides published by the acquiring Funke Medien Group have to be sold to an independent third party. The third part of the original transaction, namely the establishment of two joint ventures for the sale of advertising space and the distribution of newspapers and magazines, is still being reviewed by the FCO. This case too demonstrates the benefits of a "piecemeal" approach which may allow the parties to secure closing for at least part of a transaction while others are being subjected to an in-depth review. Again, it has to be acknowledged that partitioning a transaction might not be useful or even possible in all cases. In particular, in the case of major transactions requiring merger review in various jurisdictions, partitioning a transaction in a certain way to alleviate competition concerns that arise in one jurisdiction may not be suitable to address competition concerns in another jurisdiction.

Key policy developments

The most important development during 2013 was the entering into force of the 8th Amendment Package to the Act against Restraints of Competition on 1 July 2013. In addition to the changes set out above, the amendment package brought about the following changes in German merger control:

- The previous market dominance test has been replaced by the SIEC test (significant impediment of effective competition), i.e. the same test as applied under the EMCR. As part of the SIEC test, however, the FCO will still review the parties' combined market share

level and will assume a significant impediment of effective competition if the transaction leads to the creation or strengthening of a market-dominant position (Sec. 36(1)1 ARC). Even though the adoption of the SIEC test signals a further convergence to the practice of the European Commission, both the legislator and the FCO stress that the substantive test of German merger will remain "national". Accordingly, even though the FCO will probably take into account the decision practice of the Commission as well as of the ECJ, differences might remain. In particular, the legislator explicitly stated that adopting the SIEC test will not lead to the possibility of referrals to the ECJ for its interpretation. Furthermore, the guidelines of the Commission will not bind the FCO in any legal sense. This issue appears to be more of academic relevance, however, since the FCO's own guidelines for the assessment of market dominance under the SIEC test contain only slight differences to the Commission's approach, if any.

- Previously, German law provided for the presumption that an undertaking with a market share of one third is market-dominant. This threshold has been increased to 40% (Sec. 18(4) ARC). The presumptions for market dominance by groups of undertakings remained unchanged, however: if three or fewer undertakings have a combined market share of 50% or more and, respectively, if five or fewer undertakings have combined market share of two thirds or more, each one of these undertakings is presumed to have a market dominant position (Sec. 18(6) ARC).
- Similar to Article 5(2)2 EMCR, subsequent transactions taking place within a period of two years between the same parties will now be treated as a single concentration arising on the date of the last transaction (Sec. 38(5)3 ARC). If the relevant turnover thresholds are exceeded by this combination, the combined transaction will be subject to German merger control.
- Generally, a notifiable transaction which has been implemented prior to obtaining clearance by the FCO is deemed provisionally void. The amendment package now explicitly clarifies that the transaction documents become retroactively valid once the parties have informed the FCO of the transaction and the FCO has closed the subsequent divestiture proceedings with or without remedies (Sec. 41(1) no. 3 ARC). The question of the transaction documents' legal validity has been disputed, since the termination of a divestiture proceeding has not had the same legal effects as an explicit clearance decision.
- German law now allows implementing a public bid prior to clearance (Sec. 41(1a) ARC). However, the parties to the transaction must notify the FCO at their earliest convenience and must not exercise the voting rights and, respectively, only to the extent explicitly allowed by the FCO for the purpose of preserving the value of the purchaser's investment. This provision is an almost identical copy of the European provision (Art. 7(2) EMCR).
- The provisions concerning the time period of phase II review proceedings have also been slightly amended, mirroring the provisions of the EMCR. In case that the undertakings concerned offer commitments in order to obtain clearance from the FCO, the phase II review period is extended by one month. Moreover, the review period is suspended if a party to the concentration has not provided information requested by the FCO in due time or in sufficient manner, which also is inspired by the EMCR.

Reform proposals

Following the 8th Amendment Package to the ARC, there are currently no concrete reform proposals at legislative level that would affect the merger control regime. In their coalition

agreement, the parties forming the federal government agreed only on the rather general undertakings: they pledged to assess the effects of the 2013 reforms, to analyse the necessity of streamlining procedural rules concerning the competition authorities' investigations and their judicial review, and to make it easier for publishing companies to cooperate in economic areas. Furthermore, the government intends to strengthen the possibilities for the private enforcement of antitrust claims, in particular compensation claims for antitrust violations.

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Endnotes

1. FCO, press release dated 27 December 2013, available via: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2013/27_12_2013_Jahresr%C3%BCckblick.html.
2. See press release http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2013/05_12_2013_Inlandsauswirkungen.html. The English convenience translation of the draft guidance is available at http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Merkblaetter/Leaflet%20-%20Guidance%20document%20domestic%20effects%20-%20consultation.pdf?__blob=publicationFile&v=2.
3. Higher Regional Court of Düsseldorf, decision dated 15 May 2013, file no. VI-Kart 10/12 (V), NZKart 2013, 299 – *Lenzing/Kelheim*.
4. *Ibid*.
5. Universitätsklinikum Heidelberg / Krankenhaus Bergstraße gGmbH (file no. B3-129/12); Kliniken des Main-Taunus-Kreises GmbH / Klinikum Frankfurt Höchst GmbH (file no. B3-17/13); Fresenius / Rhön-Kliniken II (file no. B3-109/13).
6. Asklepios Kliniken Verwaltungsgesellschaft mbH / Rhön-Klinikum AG (file no. B3-132/12).
7. Kreiskliniken Esslingen / Klinikum Esslingen (file no. B3-135/13; under review since 12 November 2013); Klinikum Friedrichshafen / Klinik Tettnang (file no. B3-168/13; under review since 23 December 2013).
8. Higher Regional Court of Düsseldorf, decision dated 14 August 2013, case no. VI Kart 1/12 (V), WuW DE-R 4059 – *Liberty Global/Kabel BW*.
9. *Ibid*.
10. This structure has been chosen in order to avoid the necessity of an approval by Rhön's general meeting which would have required the consent by at least 90% of the shareholders. The number and economic relevance of the hospitals and health care centres subject to the asset deal has been chosen in accordance with precedents of the Federal Court of Justice concerning the powers of a company's management to dispose of assets without approval by the annual general meeting.
11. Funke Mediengruppe AG / Axel Springer AG / Hamburger Abendblatt, Berliner Morgenpost, advertising newspapers and women's magazines (file no. B6-97/13).

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