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ANTITRUST UPDATE

Merger Control: Germany facilitates implementation of M&A transactions

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On Friday 13 February 2009, the German Bundesrat, the upper house of the German parliament, passed the *Dritte Mittelstands-entlastungsgesetz* ("**MEG**")[1] , the objective of which is to relieve small and medium-sized companies in Germany of regulatory burdens. One element of the MEG concerns the amendment of the German merger control regime. In general, a pre-merger notification by the companies, and the authority's clearance will be required, if the worldwide turnover of the companies concerned is greater than EUR 500 million, one party has a turnover in Germany of more than EUR 25 million, and the other party has a turnover in Germany of more than EUR 5 million. In this respect, the MEG will not only relieve small and medium-sized companies of the notification obligation but also international corporations acquiring businesses with insignificant activities in Germany. The amendment is expected to enter into force in the next few days.

Legal situation pre amendment

German pre-merger control clearance was required with regard to transactions where in the last fiscal year the companies concerned exceeded a worldwide turnover of EUR 500 million, and at least one company concerned generated more than EUR 25 million in Germany. There were only a limited number of exceptions to this general requirement, such as if the merger had no domestic effect; if a so-called minor market was concerned or if one of the undertakings involved did not generate total worldwide revenues of more than EUR 10 million.

The applicability of German merger control imposed – usually on the acquirer – the obligation to notify the transaction to the Federal Cartel Office ("**FCO**"), and parties had to wait to close the deal until clearance from the FCO had been obtained. The filing obligation and suspensory effects also had to be taken into account in the transaction process where a "non-German deal" was concerned, i.e. where the deal was implemented abroad and had only negligible effects on the competitive structure of the German market.

Necessity for amendment

Whilst, for example, EU merger control applies two cumulative turnover thresholds in order to filter out transactions without sufficient impact in the EU, German merger control was applicable as soon as only one of the undertakings concerned had revenues of a certain size in Germany. This particularity plus the fact that the FCO used to apply the no-domestic-effects exemption restrictively[2], led the FCO to frequently seize jurisdiction even though the competitive effects in Germany were marginal or – in a not insignificant number of cases – the deal did not even have real nexus to the domestic market.

Therefore, in cases where one company (usually the acquirer) had a presence in Germany with domestic turnover of more than EUR 25 million, almost each and every transaction technically had to be notified. In order to avoid a breach of the suspension obligation, and the risk of fines, most companies decided to notify by way of precaution, although it was often difficult to convey to company representatives the motivation of the FCO to investigate cases with marginal impacts on the domestic market, especially because most transactions with their focal point abroad received unconditional clearance in the first phase.[3]

Besides the financial burden of filing fees and legal fees, parties had to factor the timing of the German clearance process into the transaction planning (although it is recognized that the FCO was prepared to clear unproblematic transactions speedily). The accumulation of several merger control regimes which provide for different formalities and time limits can delay even unproblematic mergers or potentially lead to their withdrawal. Not least the FCO had to dedicate non-negligible resources to assess, clear and administer these cases.

It is indeed the International Competition Network, the international body devoted exclusively to competition law enforcement and whose members represent national and multinational competition authorities, that recommended that "notification should not be required unless the transaction is likely to have a significant, direct and immediate economic effect within the jurisdiction concerned. This nexus to the jurisdiction should be measured by reference to the activities of at least two parties to the transaction in the local territory".[4]

Second domestic turnover threshold

By means of the MEG, an additional turnover threshold will complement the jurisdictional test. Hence, besides the worldwide turnover threshold of EUR 500 million, at least one of the undertakings concerned will have to generate more than EUR 25 million and the other party more than EUR 5 million in Germany in the last fiscal year.

Practical Consequences

The amendment will enhance legal certainty. The previous uncertainty in relation to borderline cases where it was not clear-cut whether or not the domestic effects doctrine – as interpreted by the FCO – was available will disappear. Fail-safe notifications or precautious "information letters" companies may have sent in the past to the FCO regarding a transaction which was considered not to produce domestic effect will no longer be necessary.

The number of transactions which will have to be notified to the FCO should be noticeably reduced – probably by around one third.[5] Companies which generate more than EUR 25 million in Germany shall no longer be obliged to automatically include the notification requirement in the transaction planning. At least one obstacle to closing will be abolished. The amendment will also reduce bureaucracy and financial burdens for the companies involved, and it will free-up FCO resources that it might wish to allocate to other enforcement units (such as those fighting against cartels).

However, also in relation to small and medium-sized companies, German merger control continues to be applicable to many more transactions than merger control regimes in most other EU countries. This is because the notion of 'concentration', which is the triggering event for the application of merger control, includes the acquisition of a minority stake of 25 percent, or even the acquisition of a competitively significant influence below the 25 percent stake.

Conclusion

The introduction of a second domestic turnover threshold into German merger control law will facilitate the process and implementation of M&A transactions with effects in Germany. The double turnover threshold will lead to further harmonization of the German merger control system with merger control regimes at EU level and most other EU countries. It will also relieve small and medium-sized companies, but equally internationally operating corporations with not insignificant business activities in Germany of regulatory hurdles.

If you have any questions or require specific advice on any matter discussed in this publication, please contact one of the lawyers listed below:

Dr. Jens Peter Schmidt
Partner, Brussels, Cologne
Brussels
T: +32 2 502 5517
Cologne
T: +49 221 57 71 100
jpschmidt@mayerbrown.com

Christof Gaudig
Partner, Cologne
T: +49 221 57 71 115
cgaudig@mayerbrown.com

[1] *Third Act to Alleviate the Burden for small and medium-sized companies, see http://dip21.bundestag.de/dip21/btd/16/104/1610490.pdf.*
[2] *Leaflet of the German Cartel Office concerning the interpretation of the term domestic effect within the meaning of Section 130 (2) of the ARC.*
[3] *Report of the FCO on his activities in 2005/2006, see http://dip21.bundestag.de/dip21/btd/16/057/1605710.pdf./16/057/1605710.pdf.*
[4] *Point I.C. of the recommended Practices for Merger Notification Procedures, see http://www.internationalcompetitionnetwork.org/media/archive0611/mnprecpractices.pdf.*
[5] *Estimate reproduced in the MEG's preamble.*