

New Guidance on Domestic Effects in German Merger Control

Background

In Germany, a large number of transactions – in recent times, more than 1,000 each year – have to be reported to the national antitrust authority (the Bundeskartellamt) for merger control clearance. The merger clearance obligation exists if the companies concerned meet certain turnover thresholds and the transaction produces “appreciable effects” in Germany. This is notably different from the current regime at EU level, where the European Commission claims jurisdiction whenever the turnover thresholds of the European Merger Regulation are met and irrespective of any effect (or not) in the EU. Hence, in cases concerning Germany, it is important to assess correctly what amounts to appreciable effects.

The Bundeskartellamt on 30 September 2014 published a guidance note on appreciable effects in merger control (the “**Guidance**”). The Guidance analyses typical cases that have appreciable effects and where a notification is required and other cases which lack effects and where no notification is required.

Transactions that clearly have appreciable effects

Transactions with only two parties involved will always have appreciable effects if the domestic German merger control turnover thresholds are met. The German turnover thresholds require that all the undertakings concerned have more than €500 million of turnover world-wide and that at least one of the undertakings concerned has German turnover of more than €25 million and that another undertaking concerned has German turnover of more than €5 million. Where a target company or a joint venture (“**JV**”) exceeds the German domestic turnover threshold of €5 million, it is considered to be sufficiently active in Germany to give rise to appreciable effects.

JV transactions that clearly do not have domestic effects

In many JV cases, the parents of a JV satisfy the turnover thresholds but the JV is entirely active outside of Germany and has no German domestic turnover. If the parent companies neither actually nor potentially compete in the relevant product market in which the JV is active (or will be active in the case of a newly established JV) or in a domestic upstream or downstream market to that of the JV, then appreciable domestic effects can be ruled out and a notification is not required.

Case-by-case assessment in all other JV cases

In all other JV scenarios a case-by-case assessment must be carried out which focuses on the question of whether the JV’s activities have “marginal” domestic effects. Marginal effects are not normally sufficient to satisfy the criterion of appreciable effects. Effects are *not* marginal if the JV’s turnover (or expected turnover in case of a newly-established JV) in Germany exceeds €5 million or its (expected) market share exceeds 5%. However, the Guidance does not provide a clearly-defined safe harbour, as a turnover below €5 million and a market share below 5% in or within Germany do not definitively indicate marginal domestic effects. For example, appreciable effects may nevertheless arise from the transfer of significant resources to the JV such as intellectual property rights or know-how.

Appreciable effects may also arise as a result of spillover between the parent companies. Spillover may occur if the parent companies are actually or potentially active in the same product market in which the JV is active. However, if the parent companies’

aggregate market shares in the relevant market (that geographically may exceed Germany) do not exceed 20%, effects are not considered to be sufficiently important.

Procedural aspects

In situations where the transaction will clearly not raise competition concerns, rather than argue at length the non-existence of appreciable effects, the question may be left open and the submission of a simple notification may be the quickest and most pragmatic approach. The Bundeskartellamt is open to informal consultation and is also prepared to focus on the competitive assessment of the transaction and not on the assessment of appreciable effects, which may be more complex than the substantive analysis of the deal as a whole.

Importantly, the Bundeskartellamt requires less strictly a complete notification: if it is clear from the submission that a prohibition of the concentration cannot be expected, the clearance decision does not necessarily depend on the completeness of the notification provided that the notifying parties are not able to submit all documents due to conflicting foreign legal provisions or other circumstances.

Practical relevance of the Guidance

We welcome the fact that the Bundeskartellamt recognizes that a transaction must have appreciable effects in Germany in order to fall under the German merger control regime. Such a notion constitutes a business-friendly and legally sound divergence from

the legislation at EU level (which however may change in light of the EU Commission's suggestions in the White Paper 'Towards more effective EU merger control'). However, the no-domestic effects exemption can in practice only be safely applied in a few clear-cut scenarios. In other cases, where the analysis is likely to be more complex, a straight forward notification will be the quickest and most pragmatic way to obtain legal certainty, not least due to the fact that the Bundeskartellamt does not require formalistic and long notification forms.

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