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NEWSFLASH

Practice Group Competition

» Foreign-to-foreign Mergers:

Guidance on domestic effects in merger control – Leaflet of *Bundeskartellamt* (including general overview of requirements for merger control clearance in Germany) «

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Introduction:

Foreign-to-foreign mergers, i.e. mergers between companies based outside Germany, could be subject to a mandatory notification with the German Federal Cartel Authority (*Bundeskartellamt*) prior to closing. Whether such merger fulfils the statutory notification requirements is subject to a self-assessment of the participating companies in each individual case.

According to mandatory German law a merger must not be put into effect before the *Bundeskartellamt* has taken a clearance decision or the merger is cleared by law. Without such merger clearance the transaction or merger is null and void by law and the participating companies (including its directors) are subject to material fines.

1. Merger Control Clearance Requirements

According to German law, a transaction or merger is subject to a mandatory notification with the *Bundeskartellamt* if

(i) it leads to a concentration (i.e. acquisition of more than 25 % of shares, acquisition of (nearly) the entire assets of a company, acquisition of (joint) control of a company or creation of a joint venture),
and
(ii) the threshold requirements are fulfilled in the last business year prior to the concentration, i.e.
- combined world-wide turnover of all participating entities exceeds € 500 million,

and
- turnover of one participating company in Germany exceeds € 25 million,

and
- turnover of another participating company in Germany exceeds € 5 million,

and
(iii) the concentration has sufficient effects within Germany (*domestic effects*).

Please note that for the calculation of the relevant turnover of a participating company, the combined turnover of the entire group is decisive if the participating company is part of a group of companies.

2. Guidance Letter from *Bundeskartellamt*

In particular, given the rather low turnover thresholds in Germany compared to other jurisdictions, foreign-to-foreign transactions and mergers are more often subject to the German merger control regime than expected at a first glance.

Therefore, the *Bundeskartellamt* published a guidance letter on domestic effects in German merger control ("**Guidance Letter**").[1] The Guidance Letter is helpful to assess if a foreign-to-foreign transaction or merger has domestic effects in Germany and – if the threshold requirements are met – is subject to mandatory merger control filing in Germany.

Domestic effects (as set forth in Section 130 para 2 German Act Against Restraints on Competition) exist where a merger or a transaction is likely to have a direct influence on the conditions for competition in markets covering the territory of Germany (or parts thereof). Such influence must reach a certain minimum intensity (*appreciable effects*). At this stage the effects for competition do not have to be negative.

The Guidance Letter describes on the one-hand typical scenarios that usually have domestic effects in Germany and where a merger control clearance is required and, on the other hand, cases without such effects and where no German merger control clearance is required.

2.1 Cases that clearly have appreciable domestic effects

A transaction where both the target company and the acquiring company exceed the turnover thresholds (i.e. € 25 million and € 5 million respectively, in Germany) has clearly appreciable domestic effects in Germany.

If more than two parties are involved in a transaction or merger (e.g. forming of a joint venture), such cases have also clearly appreciable domestic effects in Germany, if the turnover achieved by the joint venture's business exceeds € 5 million in Germany.

Thus, in these two cases merger control clearance in Germany is required.

2.2 Cases in which appreciable domestic effects can be clearly ruled out

A transaction or merger where more than two companies are participating does not have domestic effects in Germany if

- the joint venture is not or is not going to be active in Germany,
  and
  not more than one of the parent companies of the joint venture is active either (i) in Germany in the same relevant product market in which the joint venture company is or is going to be active in Germany; or (ii) in the joint venture's upstream (i.e. as supplier) or downstream (i.e. as customer) markets.

2.3 Criteria for case-by-case assessment

If the rather clear-cut scenarios as set forth above are not met, an individual review of each case is required to assess whether a transaction or merger might have effects in Germany. The Guidance Letter provides criteria for a case-by-case assessment of such concentrations:

- If the joint venture company is only marginally active in Germany, such case does not have appre-

[1] *Bundeskartellamt*: "Guidance on domestic effects in merger control", published on 30 September 2014, www.bundeskartellamt.de

ciable domestic effects and, therefore, is not subject to merger control clearance. The activity of a joint venture is always not marginal if the turnover in Germany exceeds € 5 million or if the market share in Germany (or part thereof) exceeds 5 %. Please note that this "test" does not work the other way round – i.e. a turnover below € 5 million or a market share below 5 % does not automatically qualify as "not having appreciable domestic effects".

- Appreciable domestic effects can also be achieved if relevant intellectual property rights, know-how or production capacity is transferred to the joint venture in Germany.
- If the envisaged joint venture has not achieved any turnover prior to the merger, the projected sales and market share in Germany in the next three to five years are relevant for a case-by-case assessment whether appreciable domestic effects might be achieved. In practice, this will be difficult to assess and might be speculative, in particular as the Guidance Letter does not provide for more detailed assistance.
- Potential spillover effects between or among parent companies of a joint venture may result in domestic effects in Germany even if the joint venture's activities in Germany are only very limited. This is the case if at least two parent companies are (actual or potential) competitors on the same market in Germany on which the joint venture company is active abroad and/or in Germany. However, even if spillover effects are likely, they are not sufficient to lead to appreciable domestic effects if the combined market share of these parent companies is below 20 %.

According to the Guidance Letter in such cases it is clear that such a merger or transaction will most likely not have any relevant spillover effects to the parent companies on these markets.

>> Practical Advice / Procedural Guidance <<

Given the fact that the turnover thresholds for merger control in Germany are rather low compared to international standards and in view of the difficulties assessing whether a foreign-to-foreign transaction has effects in Germany, the *Bundeskartellamt* recommends to notify such cases if it is obvious that a concentration will not raise any competition concerns.

In such scenarios the *Bundeskartellamt* offered to further reduce the already limited requirements for disclosure in applications for merger control clearance in Germany.

Please note that there is no formal pre-merger notification in Germany, but the *Bundeskartellamt* is open for informal discussions in advance of a notification.

Therefore, in foreign-to-foreign transactions and mergers which might have appreciable effects in Germany, we advise to discuss this issue in advance with a German counsel who is familiar with the practises of the *Bundeskartellamt* and to allow sufficient time (one month) for a potential merger clearance procedure in Germany between signing and closing.

Practice Group Competition

Anti-trust law plays an increasingly important role for nationally and internationally active clients. Agreements that infringe anti-trust law are legally ineffective and non-enforceable, while also triggering penalties from the national and international competition authorities and damage claims from affected third parties. Our **Practice Group Competition** offers our clients support to avoid these risks and advise national and international companies in all relevant areas of anti-trust and competition law. In addition to preparing and facilitating merger control applications and comprehensive advice on anti-trust law in M&A transactions our advisory services consider anti-trust aspects and obligations when drafting and negotiating contracts (e.g. sales agreements, license agreements, research and development agreements or other co-operation agreements), also taking into account European law (in particular block exemption regulations). We also assist companies enforcing anti-trust claims (e.g. claims for damages of companies harmed by a cartel) before state courts, arbitration courts or competition authorities.

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