

CLIENT UPDATE

GERMANY REFORMS ITS COMPETITION AND MERGER CONTROL LAW

FRANKFURT

Thomas Schürle
tschuerrle@debevoise.com

Daniel Wiedmann
dwiedmann@debevoise.com

A German merger control and competition reform passed by the two houses of German Parliament earlier this month. The reform will (i) further align German merger control rules with EU law; (ii) strengthen the powers of the German Federal Cartel Office (“FCO”) and (iii) lift the threshold for the presumption of market dominance. Further notable changes concern the area of private enforcement as well as specific industry sectors. The reform is expected to enter into force in the coming weeks.

MERGER CONTROL

Substantive appraisal. The test for a prohibition of mergers changes from “market dominance” to “significant impediment of effective competition” (“SIEC”). The previous dominance test, *i.e.*, the creation or the strengthening of a dominant market position, will remain in place as one example of an impediment of competition. The new test mirrors the one under the EU Merger Regulation. Applying this test, the European Commission so far has prohibited far less mergers than the FCO. It remains to be seen whether the adoption of the SIEC test will also lead to fewer prohibitions when applied by the FCO, in particular given the different underlying normative concepts of competition policy at both levels.

The SIEC test could both strengthen as well as limit the FCO's power of intervention, depending on facts. On the one hand, the SIEC test permits a prohibition of transactions involving non-dominant firms in certain market situations – for example, if a merger between non-dominant firms reduces the competitive pressure on the market leader in certain oligopolistic market situations. On the other hand, the FCO may no longer be in a position to prohibit dominant firms from acquiring minor competitors if the impediment of competition is not significant. It remains to be seen to what extent the FCO will take the interpretation of the SIEC test under the EU Merger Regulation by the EU Court of Justice and the European Commission into account.

Public takeover bids. In order to facilitate transactions involving listed companies, public takeover bids or a series of transactions in securities may be implemented prior to clearance, provided that the transaction is notified to the FCO without delay and the acquirer does not exercise the voting rights attached to the securities in question or does so only on the basis of an exemption granted by the FCO.

Two-year rule. If the same parties enter into two or more transactions concerning the acquisition of parts of a company within a two-year period, these transactions will be treated as a single transaction. The turnover thresholds will apply to the transactions as a whole, to ensure that parties cannot avoid a notification obligation by slicing a deal into staged transfers each falling below the relevant turnover threshold.

Review period. The FCO may suspend the statutory review period by issuing a formal information request if a party did not completely, or timely, respond to a previous information request (“stop-the-clock”). Further, the review period will be extended by one month if a party offers remedies for the first time.

Minor market exemption. Transactions solely concerning a minor market will no longer be exempt from German merger control. However, if the FCO's review confirms that only a minor market is concerned, it may not prohibit the transaction. Minor markets are markets on which goods or commercial services have been offered for at least five years and which had a sales volume of less than €15m in Germany in the last calendar year.

Elimination of legal uncertainty. Transactions consummated in breach of the suspension rule retroactively become legitimate if they are notified to the FCO subsequently and the FCO closes the respective divestiture proceeding.

PROCEDURAL AND ENFORCEMENT POWERS

Fines against legal successors. To close a loophole that permitted companies to escape from fines by transferring the business to a successor entity, the FCO may now impose fines on certain successor entities by operation of law. Under German law, and different from EU competition law, only the legal entity may be held liable that committed the infringement, subject to few certain exceptions. This has led to problems in situations in which such an entity no longer existed at the time the FCO issued its fining decision. In a recent landmark ruling, the German Federal Court of Justice found that an extension of such an entity's liability to a legal successor is only possible if both entities are essentially identical from an economic perspective. The amendment empowers the FCO to impose fines on legal successors in certain cases if the fine does not exceed the value of the assets transferred and the level of the fine that the transferring entity would have been exposed to. By contrast, if the entity liable for the infringement continues to exist, *e.g.*, if assets are transferred by means of singular succession or in certain cases of partial successions, no fine can be imposed on the successor. Note that while the attribution of liability is linked to a specific legal entity, the fine is generally determined on the basis of the corporate group's total revenue.

Remedies. In order to stop a continuing infringement, the FCO can also impose structural remedies, *e.g.*, order a divestiture. It may also order the retribution of benefits derived from infringing behavior, such as benefits which are the result of excessive prices charged by a monopolist.

Information duties. If the FCO intends to impose a fine, legal persons must provide it with certain turnover information. The right to remain silent will not be available in such situations.

DOMINANCE

The market share threshold for a (rebuttable) presumption of a dominant market position will be increased from 33.3 to 40 percent. Market dominant companies are subject to a prohibition of abusive and discriminatory practices. In addition, as mentioned above, the dominance test will continue to be relevant as regards the substantive appraisal of mergers.

PRIVATE ENFORCEMENT

Standing of consumer and industry associations. Consumer and industry associations, representing suppliers or customers, will have standing to bring certain types of private

actions, in particular, request cease-and-desist orders and disgorgements of economic benefits for the benefit of the German Federal budget.

SECTOR-SPECIFIC RULES

Press media mergers. Companies operating in the field of publication, production and distribution of newspapers and magazines are subject to higher notification thresholds as the applicable turnover multiplier has been lowered from 20 to 8. In addition, a specific failing firm defense has been introduced, subject to lower requirements.

German health insurance funds. Mergers of statutory health insurance funds will be subject to German merger control law, subject to certain exceptions. An application of further rules, such as rules on the abuse of a dominant position, has been rejected by the Federal Council.

Public sector undertakings. Under the amendment, public sector undertakings will be exempt from certain competition rules. The rules governing abusive conduct will not be applicable to public sector levies and charges, and the merger control rules will not apply to mergers of public sector undertakings within the context of a reformation of regional structures within the public administration.

Please feel free to contact us with any questions:

Thomas Schürrie
+49 69 2097 5140
tschuerrle@debevoise.com

Daniel Wiedmann
+49 69 2097 5251
dwiedmann@debevoise.com