The Merger Control Review

Fourth Edition

Editor
Ilene Knable Gotts

Law Business Research

The Merger Control Review

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EDITOR'S PREFACE

Pre-merger competition review has advanced significantly since its creation in 1976 in the United States. As this book evidences, today almost all competition authorities have a notification process in place – with most requiring pre-merger notification for transactions that meet certain prescribed minimum thresholds. This book provides an overview of the process in 45 jurisdictions as well as a discussion of recent decisions, strategic considerations and likely upcoming developments. The intended readership of this book comprises both in-house and outside counsel who may be involved in the competition review of cross-border transactions.

As shown in further detail in the chapters, some common threads in institutional design underlie most of the merger review mandates, although there are some outliers as well as nuances that necessitate careful consideration when advising clients on a particular transaction. Almost all jurisdictions either already vest exclusive authority to transactions in one agency or are moving in that direction (e.g., Brazil, France and the UK). The US and China may end up being the exceptions in this regard. Most jurisdictions provide for objective monetary size thresholds (e.g., the turnover of the parties, the size of the transaction) to determine whether a filing is required. Germany provides for a *de minimis* exception for transactions occurring in markets with sales of less than €15 million. There are a few jurisdictions, however, that still use 'market share' indicia (e.g., Bosnia and Herzegovina, Colombia, Lithuania, Portugal, Spain, Ukraine and the UK). Most jurisdictions require that both parties have some turnover or nexus to their jurisdiction. However, there are some jurisdictions that take a more expansive view. For instance, Turkey recently issued a decision finding that a joint venture ('JV') that produced no effect in Turkish markets was reportable because the JV's products 'could be' imported into Turkey. Germany also takes an expansive view, by adopting as one of its thresholds a transaction of 'competitively significant influence'. Although a few merger notification jurisdictions remain 'voluntary' (e.g., Australia, Singapore, the UK and Venezuela), the vast majority impose mandatory notification requirements.

Almost all jurisdictions require that the notification process be concluded prior to completion (e.g., pre-merger, suspensory regimes), rather than permitting the transaction

to close as long as notification is made prior to closing. Many jurisdictions can impose a significant fine for failure to notify before closing even where the transaction raises no competition concerns (e.g., Austria, the Netherlands, Romania, Spain and Turkey). Some jurisdictions impose strict time frames within which the parties must file their notification. For instance, Cyprus requires filing within one week of signing of the relevant documents and agreements; and Hungary, Ireland and Romania have a 30-calendar-day time limit from entering into the agreement for filing the notification. Some jurisdictions that mandate filings within specified periods after execution of the agreement also have the authority to impose fines for 'late' notifications (e.g., Bosnia and Herzegovina, Serbia) for mandatory pre-merger review by federal antitrust authorities. Most jurisdictions have the ability to impose significant fines for failure to notify or for closing before the end of the waiting period, or both (e.g., United States, Ukraine, Greece, and Portugal).

Most jurisdictions more closely resemble the European Union model than the US model. In these jurisdictions, pre-filing consultations are more common (and even encouraged), parties can offer undertakings during the initial stage to resolve competitive concerns, and there is a set period during the second phase for providing additional information and for the agency to reach a decision. In Japan, however, the Japanese Federal Trade Commission ('the JFTC') announced in June 2011 that it would abolish the prior consultation procedure option. When combined with the inability to 'stop the clock' on the review periods, counsel may find it more challenging in transactions involving multiple filings to avoid the potential for the entry of conflicting remedies or even a prohibition decision at the end of a JFTC review. Some jurisdictions, such as Croatia, are still aligning their threshold criteria and process with the EU model. There remain some jurisdictions even within the EU that differ procedurally from the EU model. For instance, in Austria the obligation to file can be triggered if only one of the involved undertakings has sales in Austria as long as both parties satisfy a minimum global turnover and have a sizeable combined turnover in Austria.

The role of third parties also varies across jurisdictions. In some jurisdictions (e.g., Japan) there is no explicit right of intervention by third parties, but the authorities can choose to allow it on a case-by-case basis. In contrast, in South Africa, registered trade unions or representatives of employees are even to be provided with a redacted copy of the merger notification and have the right to participate in Tribunal merger hearings, and the Tribunal will typically permit other third parties to participate. Bulgaria has announced a process by which transaction parties even consent to disclosure of their confidential information to third parties. In some jurisdictions (e.g., Australia, the EU and Germany), third parties may file an objection against a clearance.

In almost all jurisdictions, once the authority approves the transaction, it cannot later challenge the transaction's legality. The US is one significant outlier with no bar for subsequent challenge, even decades following the closing, if the transaction is later believed to have substantially lessened competition. Canada, in contrast, provides a more limited time period for challenging a notified transaction.

As discussed below, it is becoming the norm in large cross-border transactions raising competition concerns for the US, EU and Canadian authorities to work closely with one another during the investigative stages, and even in determining remedies, minimising the potential of arriving at diverging outcomes. Regional cooperation among some of the newer agencies has also become more common; for example, the Argentinian

authority has worked with Brazil's CADE, which in turn has worked with Chile and with Portugal. Competition authorities in Bosnia and Herzegovina, Bulgaria, Croatia, Macedonia, Montenegro, Serbia and Slovenia similarly maintain close ties and cooperate on transactions. Taiwan is part of the Asia-Pacific Economic Cooperation Forum, which shares a database. In transactions not requiring filings in multiple EU jurisdictions, Member States often keep each other informed during the course of an investigation. In addition, transactions not meeting the EU threshold can nevertheless be referred to the Commission in appropriate circumstances. In 2009, the US signed a memorandum of understanding with the Russian Competition Authority to facilitate cooperation; China has 'consulted' with the US and EU on some mergers and entered into a cooperation agreement with the US authorities in 2011, and the US has also announced plans to enter into a cooperation agreement with India.

Some jurisdictions (e.g., the EU and Ireland currently) have as their threshold test for pre-merger notification whether there is an acquisition of control. Such jurisdictions will often consider relevant joint control (e.g., the EU) or negative (e.g., veto) control rights to the extent that they may give rise to *de jure* or *de facto* control (e.g., Turkey). Minority holdings and concern over 'creeping acquisitions', in which an industry may consolidate before the agencies become fully aware, seem to be gaining increased attention in many jurisdictions, such as Australia. Some jurisdictions will consider as reviewable acquisitions in which only 10 per cent interest or less is being acquired (e.g., Serbia for certain financial and insurance mergers), although most jurisdictions have somewhat higher thresholds (e.g., Korea sets the threshold at 15 per cent of a public company and otherwise 20 per cent of a target; and Japan and Russia, at any amount exceeding 20 per cent of the target). This past year, several agencies analysed partial ownership acquisitions on a stand-alone basis as well as in connection with joint ventures (e.g., Canada, China, Cyprus, Finland and Switzerland). Vertical mergers were also the subject of review (and even resulted in some enforcement actions) in a number of jurisdictions (e.g., Canada, China, Sweden and Taiwan). Portugal even viewed as an 'acquisition' subject to notification the non-binding transfer of a customer base.

Given the ability of most competition agencies with pre-merger notification laws to delay, and even block, a transaction, it is imperative to take each jurisdiction – small or large, new or mature – seriously. China, for instance, in 2009 blocked the Coca-Cola Company's proposed acquisition of China Huiyuan Juice Group Limited and imposed conditions on four mergers involving non-Chinese domiciled firms. In *Phonak/ReSound* (a merger between a Swiss undertaking and a Danish undertaking, each with a German subsidiary), the German Federal Cartel Office blocked the merger worldwide even though less than 10 per cent of each of the undertakings was attributable to Germany. Thus, it is critical from the outset for counsel to develop a comprehensive plan to determine how to navigate the jurisdictions requiring notification, even if the companies operate primarily outside some of the jurisdictions.

For transactions that raise competition issues, the need to plan and to coordinate among counsel has become particularly acute. As discussed in the last chapter, it is no longer prudent to focus merely on the larger mature authorities, with the expectation that other jurisdictions will follow their lead or defer to their review. In the current environment, obtaining the approval of jurisdictions such as Brazil and China can be as important as the approval of the EU or US. Moreover, the need to coordinate is

particularly acute to the extent that multiple agencies decide to impose conditions on the transaction. Although most jurisdictions indicate that 'structural' remedies are preferable to 'behavioural' conditions, a number of jurisdictions in the past year imposed a variety of such behavioural remedies (e.g., China, EU, Netherlands, Norway, South Africa, Ukraine and the US). This book should provide a useful starting point in navigating cross-border transactions in the current enforcement environment.

Ilene Knable Gotts
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July 2013

Chapter 15

GERMANY

Götz Drauz and Michael Rosenthal[1]

I INTRODUCTION

Every dealmaker with experience in the EU is aware that German merger control differs from the EU's and most of the other national merger control regimes, and that these differences need to be taken seriously since the jurisdictional thresholds in Germany are low and the German competition authority, the Bundeskartellamt (rightly) has the reputation of being a very active watchdog.

However, in the recent past, the business community experienced a very welcome move of the German merger control system towards mainstream Europe, in particular with the introduction of a second domestic turnover threshold and a more economic approach adopted in the Bundeskartellamt's decision practice, as reflected in the authority's guidance paper 'Guidance on Substantive Merger Control' of March 2012.[2]

Further important changes are expected to take effect in the summer of 2013 with the 8th Amendment to the German Competition Act ('the GWB') coming into force (after an extended legislative procedure).[3] In fact, one of the main objectives of the 8th Amendment is to bring German merger control rules more in line with the rules provided for by the EU Merger Regulation.

1 Götz Drauz is a partner and Michael Rosenthal is the managing partner of Wilson Sonsini Goodrich & Rosati, LLP's Brussels office.

2 The English language version of the guidance document is available at www.bundeskartellamt.de/wEnglisch/download/pdf/Merkblaetter/2012-03-29_Guidance_final_neu.pdf.

3 The applicable merger control rules can be found under Chapter VII (Sections 35–43) of the GWB. The text, as well as comprehensive guidance materials and forms issued by the Bundeskartellamt, are available in English, French and German on the authority's website (see www.bundeskartellamt.de).

The changes include:

a substantive appraisal – introduction of the SIEC test (with the current dominance test becoming an example of a 'significant impediment to effective competition');

b jurisdictional test – deletion of the *de minimis* market exception from the filing requirement (reducing the *de minimis* market test to its role in the substantive review);

c procedure – changes to the statutory time limits (including introduction of the EU's 'stop-the-clock' possibility, automatic extension upon submission of a remedy proposal); and

d remedies – admissibility of behavioural remedies that are equivalent to divestitures in their effects (provided that 'effective control' of the remedies in each specific case is possible).

The introduction of the SIEC test should not take away much of the relevance of the recent 'Guidance on Substantive Merger Control' document, since the dominance test – as in Article 2(2) and 2(3) of the EU Merger Regulation – will continue to be used as an important statutory example of when a concentration leads to a significant impediment of effective competition.

However, the question is whether, in the future, economic analysis will play a more central role in the Bundeskartellamt's enforcement practice comparable to the reviews carried out by the European Commission and the US agencies. In any event, even after the 8th Amendment and its significant changes enter into effect, German merger control will still continue to differ in some important aspects, including:

a substantive appraisal – continued application of the presumption of dominance (based on market shares);

b jurisdictional test – continued relevance of a different concentration test (whereby certain minority shareholdings below the control threshold are systematically caught);[4]

c procedure – continued procedural flexibility as far as the formal requirements for a filing and the deadlines for the review are concerned; and

d remedies – continued use of remedies only in Phase II with a preference for upfront buyer solutions.

In the following sections, we discuss the main rules and the most important aspects of the Bundeskartellamt's recent enforcement action based on the German merger control regime currently in force, with a particular emphasis on those rules and decisions that will be relevant for the business community once the 8th Amendment to the GWB enters into effect.

4 The European Commission has published a consultation paper on a possible reform of the EUMR to allow the Commission to also review the acquisition of non-controlling minority shareholdings. The consultation documents are available at: http://ec.europa.eu/competition/consultations/2013_merger_control/index_en.html.

II THE MERGER CONTROL REGIME

i Jurisdiction

The German merger control regime provides for pre-merger filings. Accordingly, a proposed concentration must not be put into effect prior to obtaining clearance (or derogation from the suspension obligation) from the Bundeskartellamt. There is no specific deadline for the notification. A (simplified) jurisdictional test consists of the following steps:

a transaction amounts to a concentration, i.e., acquisition, of:
- control;
- all or a substantial part of another undertaking's assets;
- shares constituting 25 per cent or 50 per cent of capital or voting rights; or
- competitively significant influence;

b turnover thresholds provided for by German merger control rules are exceeded:[5]
- aggregate worldwide turnover of all undertakings concerned of more than €500 million;
- German turnover of at least one undertaking of more than €25 million; and
- German turnover of a second undertaking of more than €5 million;

c no *de minimis* exception;[6] and

d domestic effect.

The Bundeskartellamt is among the most active authorities in the EU's referral system: Articles 4(4) and 4(5) of the EU Merger Regulation provide for the possibility of pre-notification referrals at the initiative of the notifying parties, while Articles 9 and 22 provide for the (often problematic) possibility of post-notification referrals triggered by the Member States – an option used by the Bundeskartellamt on a regular basis.

ii Procedure

When the jurisdictional test is met, notification to the Bundeskartellamt is mandatory and must be made prior to implementation. The filing can be made as soon as the parties to the concentration can show a good faith intention to enter into an agreement. There is no filing deadline. The fact that a filing has been received will be published on the authority's website, and the transaction thus can no longer be kept confidential.

The parties are prohibited from implementing a concentration notified to the authority before receiving clearance. Violation of this suspension obligation as well as the failure to notify at all can lead to the imposition of a fine (of up to €1 million for natural persons and up to 10 per cent of the aggregate group turnover of the undertakings

5 Special rules apply for the calculation of the turnover of financial services providers, insurance companies, companies active in the media sector (television broadcasting, radio, newspapers and periodicals) and certain trading activities.

6 There are exceptions for *de minimis* target companies and for *de minimis* markets (with the latter being removed from the jurisdictional test once the 8th Amendment to the GWB enters into effect).

concerned) and the invalidity under civil law of the contracts bringing about the concentration.

Once notified, the vast majority of cases are cleared after a Phase I inquiry (lasting one month). Under the new rules, the maximum time frame for an in-depth review, encompassing Phase I and Phase II, will be five months from the time of the complete notification. In straightforward cases, the Bundeskartellamt is generally prepared to clear the transaction 'without delay after receipt of the complete notification' well before Phase I has expired.[7]

In more difficult cases, the Bundeskartellamt must inform the notifying parties within one month of receipt of the notification that it has initiated an in-depth investigation of the proposed merger. In the absence of any such communication by the end of Phase I, the proposed merger is deemed cleared by time lapse. A reasoned decision will only be issued following an in-depth investigation in Phase II.

Third parties such as competitors, suppliers and customers of the merging parties will generally have the opportunity to comment on a proposed merger in the context of information requests issued by the Bundeskartellamt in the course of its investigation, or to submit unsolicited comments. Third parties may thus raise concerns without having to request formal admission to participate in the proceeding.

Third parties whose economic interests will be substantially affected by a decision of the Bundeskartellamt may, however, formally intervene in the proceedings upon application and admission by the authority. Once admitted, these intervenors have the right to be heard, to submit comments on the proceeding and to have access to the non-confidential part of the authority's file. They also have the right to appeal.

iii Substantive assessment

The substantive test carried out by the Bundeskartellamt under the existing merger control rules is whether the proposed transaction would lead to 'the creation or strengthening of a dominant position'. As discussed above, this dominance test will be replaced (or rather complemented) by the EU's SIEC test following the entry into effect of the 8th Amendment to the GWB.

According to its 'Guidance on Substantive Merger Control' of March 2012, the Bundeskartellamt first distinguishes between three broad categories of mergers: horizontal, vertical and conglomerate mergers. For each of these three categories, the German competition authority then distinguishes again between single and collective dominance.

For a finding of single and collective dominance, the revised German merger control regime will provide for the following – rebuttable – presumptions:

a a single undertaking has a share of at least 40 per cent of the market;
b three or fewer undertakings possess an aggregated share of at least 50 per cent of the market; or
c five or fewer companies hold a combined market share of at least two-thirds.

7 See Section 2.2 of the Bundeskartellamt's information leaflet on German merger control, available at www.bundeskartellamt.de/wDeutsch/download/pdf/Merkblaetter/Merkblaetter_englisch/06MerkblattzurDeutschenFusionskontrolle_e.pdf. In the absence of any mandatory form to be used, the notification of such cases can be brief.

However, in the Bundeskartellamt's more recent decision practice, these presumptions play only a very limited role, with the authority reviewing the competitive effects brought about by the proposed merger in their overall context. The cooperative aspects of joint ventures will, in addition, be examined under the rules relating to anti-competitive agreements (Section 1 of the GWB).

A merger that leads to the creation or strengthening of a dominant position (or, after the 8th Amendment takes effect, to an SIEC), will not be prohibited if the requirements of the balancing clause are met (i.e., if the companies show pro-competitive effects on a different market that outweigh the negative effects on the affected market). In order to be taken into account, the pro-competitive effects presented by the parties must be of a structural nature.[8]

When the Bundeskartellamt reaches the preliminary conclusion that a concentration raises competition concerns, in Phase II, the parties have the possibility of offering commitments with a view to securing conditional approval. Conditions precedent (in which case the merger may not be implemented until the condition is satisfied), such as upfront buyer solutions, are generally preferred by the Bundeskartellamt.

The type of remedy that is most likely to be accepted by the Bundeskartellamt is a divestiture that removes the competition concerns by creating a new competitive entity or strengthening an existing competitor of the merging parties. In cases where such a structural remedy is not possible, the parties face a very difficult time to convince the authority to accept any other remedy solution.

III YEAR IN REVIEW

i Jurisdiction

Domestic effect

Foreign-to-foreign transactions meeting the jurisdictional thresholds are subject to German merger control legislation unless the concentration has no effect on the German domestic market. It is highly advisable to discuss any claimed absence of such 'domestic effects' with the authority during informal guidance discussions. This is particularly true since the introduction of a second domestic turnover threshold in spring 2009.

In *EMC/Cisco*, the parties narrowly escaped a fine for gun jumping when they did not notify their joint venture distributing integrated data centres, which was originally only active in the US. The Bundeskartellamt, in its case summary, found that the parties had violated the filing obligation but refrained from imposing a fine in light of the insignificant effects of the joint venture on the markets in Germany.

De minimis ***market exception***

Until the 8th Amendment enters into effect, the *de minimis* market exception will continue to be relevant. According to this exception, a concentration is not reportable

8 See Section F of the Bundeskartellamt's 'Guidance on Substantive Merger Control' of March 2012, available in English at www.bundeskartellamt.de/wEnglisch/download/pdf/Merkblaetter/2012-03-29_Guidance_final_neu.pdf.

when each of the relevant markets has been in existence for at least five years and has a total annual sales volume of less than €15 million. The exception is narrowly construed and, during pre-notification discussions, parties are well advised to discuss its scope with the Bundeskartellamt.

In *Beckton Dickinson/Safety Syringes*, the Bundeskartellamt confirmed that the reference point is the (hypothetical) German market, even if the actual geographic market is wider. This is not only true for the calculation of the €15 million threshold, but also applies to the question of whether the relevant markets have existed for five years. In *Lenzing/Kelheim*, the courts also confirmed that, in the event of doubt, the authority is correct to insist on a filing ('*in dubio pro* notification').

Referrals

Parties to a merger in the EU must pay particular attention to strategic questions concerning possible referrals and the significant consequences of a referral request on the timeline of the deal and its substantive review. In the past, the Bundeskartellamt frequently requested referrals of mergers under review by the Commission in sectors with national sensitivities (e.g., in the telecoms, media and energy sectors).

For example, in *Liberty/KBW*, the Commission agreed to refer the review of the acquisition of German regional cable operator KBW by Liberty Global Inc to the Bundeskartellamt. The referral request by the German authority added significant time to the clearance timetable, resulting in a total duration of approximately eight months from the time of notification to the Commission until (conditional) clearance by the Bundeskartellamt.[9]

ii Procedure

Fines

In January 2013, the Bundeskartellamt imposed a fine in the amount of €90,000 for the filing of an incomplete notification concerning the planned acquisition of Tummel by Tönnies (which was prohibited in November 2011). The fine was issued for not disclosing a majority shareholding in a competitor that the authority, according to its press release, found 'highly relevant' for the assessment of the merger.

In 2011, the Bundeskartellamt fined Interseroh €206,000 for gun-jumping in a case that did not raise any competition concerns. This was the second time in 2011 that the authority imposed a fine for implementing a merger without prior approval (after having settled the divestiture proceeding that, as a matter of policy, is initiated by the German competition authority in gun-jumping cases[10]).

9 Vodafone has just launched a €7.7 billion offer for Kabel Deutschland. Again, a referral request under Article 9 EUMR may be expected.

10 See the Bundeskartellamt's Notice regarding the treatment of post-merger notifications (available in German at www.bundeskartellamt.de/wDeutsch/download/pdf/Merkblaetter/Merkblaetter_deutsch/Mitteilung_zur_Behandlung_nachtraeglich_angemeldeter_Zusammenschluesse.pdf).

Interestingly, this seems to be one of the first cases in which a 'voluntary' notice of a merger implementation without prior approval triggered a fine. Interseroh apparently came forward on its own initiative and reported the infringement of the suspension obligation. In the past, the Bundeskartellamt would not have imposed a fine in such a case, at least if the merger raised no concerns.

Procedure for assessment of cooperative aspects

Unlike under the EU Merger Regulation (in the case of full-function joint ventures), the Bundeskartellamt analyses the risk that a joint venture may lead to anti-competitive coordination between the parent companies (beyond the scope of the concentration) not necessarily as part of the merger control review but in a separate proceeding under Section 1 GWB – which may lead to significant delays (see, e.g., *Agronovita JV and Macquarie/OGE*).

Under Section 1 GWB, anti-competitive effects are generally presumed by the German competition authority if at least two of the parents and the joint venture are active on the same product and geographic markets. In these instances, the Bundeskartellamt is particularly concerned about the information exchange resulting from the cooperation between the parent companies (see the authority's recent decision in *Brenntag/CG Chemikalien/CVH Chemie-Vertrieb*).

Unlike the EU Merger Regulation, which only applies to the creation of full-function joint ventures, German merger control rules also require the notification of non-full function joint ventures that provide only support services to the parent companies. Accordingly, last year's strategic alliance between General Motors and Peugeot-Citroen was not notifiable to the European Commission but to the Bundeskartellamt (which cleared the alliance on 26 October 2012).

iii Substantive assessment

Roadmap for substantive merger reviews

The issuance of the 'Guidance on Substantive Merger Control' document in March 2012 was a remarkable development as – even prior to the introduction of the SIEC test by means of the 8th Amendment to the GWB – it effectively already moved German merger review more in line with the European Commission's review under the EU Merger Regulation.

According to the Bundeskartellamt, the guidance document is aimed at merely summarising the approach used by the agency 'over the last years' in reviewing a merger. In reality, however, it lays out an analytical framework which, so far, was not reflected in the German competition authority's decisions but rather follows the 'roadmap' used by the European Commission in its guidelines and decisions.[11]

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11 For a detailed discussion of the Commission's substantive review under the EU Merger Regulation distinguishing between horizontal, vertical and conglomerate effects, see: *Rosenthal/Thomas, European Merger Control*, CH Beck/Hart Publishing (2010), pp. 83 et seq.

Significance of market shares

The Bundeskartellamt's guidance document emphasises that 'the value of market shares as an indication of the merging parties' market position and market power depends largely on the conditions prevailing on the individual market in question'. However, the importance of market shares in the agency's practice varies significantly from one case to another and should generally not be underestimated.

In the past year, cases where high market shares were successfully rebutted by the parties included *DMK Eis/Rosen Eiskrem* (existence of spare capacity and countervailing buyer power), *Fresenius/Fenwal* (existence of strong customers with multi-sourcing strategies and particularities of bidding markets) and *Akzo/Metlac* (existence of strong competitors and customers pursuing multi-sourcing strategies).

In *Pernod Ricard/Ratos*, a merger between the two best-known aquavit brands in Germany, the parties escaped high market shares by successfully including several other beverages in the relevant market. According to its press release, the Bundeskartellamt not only found that there is 'substitutability between aquavit and various other spirits' but also took note of new market entries and the substantial sales volumes of private labels.

However, the latest chapter of Germany's cable TV saga resulted in the prohibition of Kabel Deutschland's attempted takeover of Tele Columbus. According to the Bundeskartellamt, the disappearance of Tele Columbus as a competitive alternative in the affected regions would have strengthened the nationwide duopoly of KDG and Unitymedia KabelBW on the national TV services market.

As in a number of other TV cable cases in the past, when faced with a narrow market definition and high market shares, the parties were unsuccessful in their efforts to invoke the balancing clause. The Bundeskartellamt found that any improved internet and telephony service offerings were too weak to outweigh the substantial worsening of structures and competition in the supply of TV services.

Failing firm

In *FAZ/Frankfurter Rundschau*, the Bundeskartellamt cleared the acquisition of the publishing business of the insolvent daily newspaper Frankfurter Rundschau by its local competitor Frankfurter Allgemeine, finding the (narrowly construed) conditions for the failing firm defence to be met: in the absence of the merger, the target would have been forced out of the market, there were no less anti-competitive alternatives and the assets of the failing firm would have exited the market.

Remedies

Unlike in most cases with remedies (for example, the recent *Asklepios/Rhön-Klinikum* decision) the Bundeskartellamt, in *One Equity Partners/Linpac RTP*, issued one of its relatively rare conditional clearance decisions where it did not insist on a condition precedent but used a condition subsequent for the divestment – allowing the merger

to be put into effect immediately following the clearance decision (which would only become invalid upon the failure of the parties to satisfy the condition).[12]

In its case summary, the Bundeskartellamt stressed that the exceptional circumstances of the case – namely the structuring of the divestment remedy as an auction and the sufficiently concrete interest by a number of potential buyers – made a timely divestment of the affected business unit likely, thereby allowing the authority to choose this less burdensome condition.

IV OTHER STRATEGIC CONSIDERATIONS

i Acquisition of minority shareholdings

One distinguishing feature of German merger control is that the notification requirement is also triggered in cases of the acquisition of minority shareholdings, namely the acquisition of at least 25 per cent of the target company's capital or voting rights or 'any other combination of undertakings enabling one or several undertakings to directly or indirectly exercise a competitively significant influence on another undertaking'.

As a result of this catch-all clause, unlike in the vast majority of merger control regimes across the globe, transactions can be notifiable with the Bundeskartellamt well below the 'control' threshold. Since the competitively significant influence test is broadly construed by the German competition authority, merging parties are faced with a significant degree of uncertainty regarding the notifiability of their minority shareholdings.

A 'significant influence' is found in cases where the minority shareholder's interests will (post-transaction) need to be taken into account by the target company's other shareholders and management. According to the authority's decision practice, as a rule of thumb, the acquisition of a financial interest of less than 20 per cent (without any additional rights attached) generally does not grant such influence.

There is no safe harbour, however, as exemplified by the Bundeskartellamt's *Asklepios/Rhön-Klinikum* and *A-TEC/Norddeutsche Affinerie* decisions, where the authority found a competitively significant influence through a minority shareholding of only 10.1 per cent and 13.75 per cent respectively.[13] Generally, it is in cases where 20 per cent or more (up to 25 per cent) are acquired that a 'significant influence' is not unlikely.

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12 Unlike in Germany, traditionally the European Commission rarely insisted on upfront buyer solutions. However, the signal from, in particular, *UPS/TNT*, is clear: parties to difficult horizontal mergers are faced with tough standards for efficiency claims and remedies when trying to address the Commission's concerns. In the absence of a viable efficiency defence, the Commission's increasingly rigid approach to remedies is unwelcome news. For the future, the timely negotiation of upfront buyer solutions with the Commission seems to be of critical importance.

13 In *Asklepios/Rhön-Klinikum*, due to particularities in Rhön-Klinikum's articles of association, the owner of 10 per cent acquired a similar right to block decisions as an owner of 25 per cent of the shares would hold under the German Stock Corporation Act. In *A-TEC/Norddeutsche Affinerie*, the target companies' shares were widely dispersed, the attendance rate at shareholder

Finally, the significant influence needs to be of 'competitive' relevance. As a general rule, this criterion will only be met in the case of horizontal and vertical but not in the case of conglomerate mergers. Accordingly, for example, the test will not be met where the minority interest is acquired by a financial investor that does not yet control another company active in the same or vertically related market or markets as the target company.

V OUTLOOK AND CONCLUSIONS

Even prior to the introduction of the SIEC test in 2013, the Bundeskartellamt has been slowly but steadily moving its substantive review under German merger control rules more in line with the European Commission's review under the EU Merger Regulation. The German authority's 'Guidance on Substantive Merger Control' largely follows the analytical framework used by the European Commission in its guidelines and decisions.

The different terminology used by the Bundeskartellamt results from the continued applicability of the dominance test and is of limited (if any) practical relevance. However, a question of practical relevance is the extent to which the Bundeskartellamt will be willing and (given its limited resources) able to embrace the economic analysis underlying significant parts of the Commission's approach.

Once the SIEC test has entered into effect, another important issue will be the extent to which the Bundeskartellamt will be willing to rely directly on the body of guidelines and decisions issued by the Commission under the EU Merger Regulation. Interestingly, in the legislative process of the 8th Amendment so far, the Bundeskartellamt has insisted on a 'genuine' interpretation of the future SIEC test by itself and the German courts.

In conclusion, while we think that the analytical framework for the substantive review will be very similar, the Bundeskartellamt is unlikely to move to a full effects-based review as carried out by the Commission under the EU Merger Regulation. Instead, the Bundeskartellamt is likely to keep giving particular weight to familiar concepts such as market structure and market shares.

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meetings was historically very low and the acquisition of the 13.75 per cent share would have resulted in A-TEC holding by far the most significant interest in its competitor Norddeutsche Affinerie. On appeal, the decision was upheld.

Appendix 1

ABOUT THE AUTHORS

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Götz Drauz's practice is focused on EU and German competition law. He has represented companies in some of the most significant merger matters. Named an 'elite' practitioner by *Global Competition Review*, Mr Drauz is recognised in all the principal directories as a leading competition lawyer. Prior to entering private practice, he served at the European Commission for 25 years, most recently as the deputy director-general for competition and previously as the head of the merger task force.

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