The Merger Control Review

Second Edition

Editor
Ilene Knable Gotts

Law Business Research

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SECOND EDITION

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EDITOR'S PREFACE

Perhaps one of the most successful exports from the United States has been the adoption of mandatory pre-merger competition notification regimes in jurisdictions throughout the world. Although adoption of pre-merger notification requirements was initially slow – with a 13-year gap between the enactment of the United States' Hart-Scott-Rodino Act in 1976 and the adoption of the European Community's merger regulation in 1989 – such laws were implemented at a rapid pace in the 1990s, and many more were adopted and amended during the past decade. China and India have just implemented comprehensive pre-merger review laws, and although their entry into this forum is recent, it is likely that they will become significant constituencies for transaction parties to deal with when trying to close their transactions. Indonesia also finally issued the government regulation that was needed to implement the merger control provisions of its Antimonopoly Law. This book provides an overview of the process in jurisdictions as well as an indication of recent decisions, strategic considerations and likely upcoming developments in each of these. 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 outliers 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 also 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., Colombia, Lithuania, Portugal, Spain, the United Kingdom). Although a few merger notification jurisdictions remain 'voluntary' (e.g., Australia, Singapore, the United Kingdom, 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. Some jurisdictions impose strict time frames by which the parties must file their notification. For instance, Cyprus requires filing within one week of signing of the relevant documents and agreements; Brazil requires that the notification be made within 15 business days of execution of the agreements; and Hungary and Romania have a 30-calendar-day time limit from entering into the agreement for filing the notification. Many jurisdictions have the ability to impose significant fines for failure to notify (e.g., the Netherlands, Spain and Turkey). 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. Very little has changed in the US process in the three decades since its implementation, but some aspects of the US process have been adopted by other jurisdictions. For instance, Canada has recently transformed its procedure to resemble the US style of review, with a simplified initial filing, a 30-day period to issue a detailed information request and the waiting period tolled until the parties comply with the request. Germany and Canada have adopted a procedure, similar to the US, under which parties can 'reset the clock' by withdrawing and refiling the notification. Offers to resolve competitive concerns are only considered by the US after the more detailed investigation has been carried out. The US, Canadian and (although in other respects following the EU model) Swedish authorities must go to court to block a transaction's completion. Both jurisdictions can seek to challenge a completed merger, even if that transaction has already been reviewed pre-merger by the relevant authority, although in Canada, such challenges must be brought within one year of closing, while in the US there is no statute of limitations.

Most jurisdictions more closely resemble the European Union model. In these jurisdictions, pre-filing consultations are more common, 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 the agency reaching a decision. In Japan, however, 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.

The permissible 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. Other jurisdictions, such as Croatia, are still aligning their threshold criteria and process with the EU model. There remain some jurisdictions even within the EU, however, 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.

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 that in Brazil, and Brazil's CADE has worked with Chile and with Portugal. Competition authorities in Bosnia and Herzegovina, Bulgaria, Croatia, Macedonia, Serbia, Montenegro and Slovenia similarly maintain close ties and cooperate on transactions. 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.

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 Russia, at any amount exceeding 20 per cent of the target). Jurisdictions will often require some measure of negative (e.g., veto) control rights, to the extent that it may give rise to *de jure* or *de facto* control (e.g., Turkey).

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. This book should provide a useful starting point in this important aspect of any cross-border transaction being contemplated in the current enforcement environment.

Ilene Knable Gotts
Wachtell, Lipton, Rosen & Katz
New York
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Chapter 18

GERMANY

Marc Besen and Albrecht von Graevenitz[*]

I INTRODUCTION

German merger control is regulated by Sections 35 to 43 of the German Act against Restraints of Competition ('the GWB'). The German Federal Cartel Office ('the FCO') is the competent merger control authority. German merger control requires pre-merger notification and the concentration must not be put into effect prior to the approval of the FCO or the expiry of certain waiting periods.

A transaction is subject to German merger control if:

a it constitutes a 'concentration';
b certain turnover thresholds are met;
c no *de minimis* exception applies; and
d it has a domestic effect.

German merger control captures four types of transactions constituting a 'concentration', namely the acquisition of:

a control (similar to the concept as applied at EU level);
b certain (market relevant) assets;
c shares reaching 25 per cent or 50 per cent (as the case may be) of the capital or the voting rights in the target company;
d a 'competitively' significant influence (which is a degree of influence less than control); or
e a combination of the above.

Furthermore, certain turnover thresholds must be met in the financial year preceding the transaction. The relevant 'parties' to meet the thresholds depend on the form of the transaction (e.g., the target company and the acquirer, or the joint venture and its

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parents). In cases where one party belongs to a group of affiliated companies, the turnover of the entire group has to be taken into account. The thresholds are as follows:

a aggregate worldwide turnover of all participating companies of more than €500 million;

b domestic turnover (i.e., turnover achieved in Germany) of at least one participating company of more than €25 million; and

c domestic turnover of a second participating undertaking of more than €5 million.

In certain industries these thresholds are modified, for example, certain forms of retail require only three quarters of the turnover and some activities in the press or media business have their turnover multiplied by 20 before applying the thresholds. Furthermore, special rules as to the determination of 'turnover' apply to the banking and insurance sectors.

Under certain circumstances, merger control may not apply in relation to a merger with an independent company (or group) that achieved a worldwide turnover of less than €10 million in the last financial year (a *de minimis* merger). Likewise, merger control may be excluded in relation to a market in which goods or commercial services have been offered for at least five years and in which sales of less than €15 million were generated in the preceding financial year by all the companies active on this market (a *de minimis* market).

The effects doctrine requires the transaction to have domestic effect within Germany. Once a merger involves a German target undertaking, the domestic effect is usually deemed evident by the FCO, irrespective of the location of the parent companies concerned. According to the FCO's guidance paper,[1] it assumes a domestic effect in cases where the domestic market structure is changed as a result of the transaction, even if it was completed abroad. All in all the FCO has a very broad understanding of domestic effects and has a tendency to assume competence in cases of doubt.

In contrast to the European Commission, the FCO conducts the substantive assessment of a merger on a prediction of the post-merger structure of the relevant market or markets solely by applying a market dominance test. The FCO analyses whether the relevant transaction is expected to create or strengthen a dominant position and balances this against any improvements in the condition of competition on markets other than the dominated market. The relevant geographical market for the purpose of this assessment is not necessarily restricted to Germany. Moreover, the formation of a joint venture can lead to the creation or strengthening of a dominant position of the joint venture itself or the parent companies (or both).

The FCO has published some guidance papers regarding German merger control as well as guidelines on the setting of fines,[2] such as 'Best Practices for Expert Economic Opinions' (October 2010).

1 www.bundeskartellamt.de/wDeutsch/download/pdf/Merkblaetter/Merkblaetter_englisch/99_Inlandsauswirkung_e.pdf.

2 www.bundeskartellamt.de/wEnglisch/Fusionskontrolle_e/Information_leaflets_Fus_alt.php

II YEAR IN REVIEW

In 2009 and 2010 a total of 1,985 transactions were notified, of which 162 transactions were considered not to be subject to merger control. In comparison to 2008, the number of notifications was reduced by 40 per cent in 2009 and remained at a similar level in 2010. This development is also owing to the introduction of the second domestic turnover threshold in 2009. In 2010, the FCO examined 10 transactions in Phase II of which six were cleared, three were conditionally cleared, and one was prohibited. Five notifications were withdrawn by the parties.

On 20 July 2011, the FCO published its activity report for 2009–2010, together with the federal government's statement concerning the FCO's activities. In this report, the FCO clarifies, *inter alia,* its position with regard to outsourcing projects. In the context of outsourcing a share deal is always subject to merger control (if the turnover thresholds are triggered). Asset deals, however – according to the former practice of the FCO (announced in 1995-1997) – were only covered under certain circumstances, in particular if a 'turnover' of more than €5 million was to be expected based on the assets transferred. The FCO has now revoked this practice and has announced that the 'general rules' shall apply. Therefore, the transfer of assets in the course of an outsourcing deal may still fall under German merger control. According to the FCO, it may be relevant whether – based on the assets transferred – third-party customers may be served within a certain period. Unfortunately, the FCO left open the duration of this period and merely stated that it is the 'assessment period' (which is not a determined time frame).

The FCO has continued to develop and sharpen its position relating to market dominance on the demand side. One important example is in relation to the food retail sector. In its reviews of several mergers over the last few years, the FCO has considered that the major German food retail chains hold a very strong position with regard to their suppliers. For example, in a decision in October 2010 (*EDEKA/Trinkgut*), the FCO considered that the three biggest food retailers constituted a potential oligopoly against beverage suppliers. In February 2011, the FCO initiated a sector inquiry to investigate the competitive position of the major food retailers in Germany with regard to suppliers of certain products (i.e., on the purchasing market). Based on the FCO's figures, the four biggest food retailers in Germany hold 85 per cent of the relevant retail market. This background has already made it difficult for the major players to expand by acquiring existing retail stores – for example, EDEKA's acquisition of Trinkgut in 2010 was only cleared subject to a number of conditions, and the FCO partly blocked the acquisition of certain RATIO stores by EDEKA in 2011. While the downstream (retail) markets are not within the scope of the FCO's sector inquiry, if the current inquiry reveals an oligopolistic situation on the purchasing markets, then the FCO is likely to increase its scrutiny of major retailers acquiring competing stores.

A clearance under German merger control law does not include a clearance under antitrust law. However, decisions of the German Federal Supreme Court ('the BGH') have shown that, where parent companies of joint ventures remain active on the same market as the joint company, an infringement of competition law is presumed (this is rebuttable). On this basis the FCO, by way of a sector inquiry, has started to look deeper into 'networks' of joint ventures for asphalt among big players in the road construction industry. If the FCO finds its suspicions to be true, it may require joint ventures cleared earlier by the FCO (on the basis of merger control law) to be dissolved (on the basis of antitrust law). At the same time, the FCO (at least in relation to the concrete industry) announced that it will combine its assessment of joint ventures under merger control with an assessment under antitrust law.

The introduction of the second domestic turnover threshold in 2009 revealed a number of new legal problems. In the context of joint ventures, it was unclear whether the turnover of the operations of the joint venture needs to be allocated in full to both the joint venture and the parent companies. In its activity report 2009/2010, the FCO clarified its view that such double-allocation of turnover is not adequate.

In *Springer/ProSiebenSat.1* in 2010,[3] the BGH found a duopoly on the market for TV advertising. Similarly, in 2011, the FCO prohibited a proposed joint venture between the private broadcasters RTL and ProSiebenSat.1 aimed at creating an internet platform for catch-up television on demand.[4] The FCO was of the opinion that the joint platform would further strengthen a dominant duopoly. The FCO might have adopted a different view if the parties had opened the platform to third parties and broadcasters and had lifted the restrictions on the time of availability and quality of content. However, in response to the refusal of RTL and ProbSiebenSat.1 to make fundamental changes to the original concept of the joint venture, the FCO held that, despite its technical benefits, the project provided no guarantee that it would outweigh the expected disadvantages for competition.

In the context of mergers in the banking sector, there is uncertainty under German law as to the geographic allocation of turnover. In the FCO's activity report 2009/2010 it clarified its view that turnover should be allocated to the seat of the relevant institute or department (following the provisions at the EU level) rather than the location of the customers.

In the 1990s, the FCO cleared some concentrations in the energy sector which have been filed on the basis of agreements that were limited in time. In some of these cases the time limit is about to run out. The FCO takes the view that, in case the parties renew the agreements (or delete the time limits), a new clearance procedure will need to be conducted.

On 21 July 2011, the FCO issued Draft Guidance on Substantive Merger Control to provide guidance on whether a merger will create or strengthen a dominant position. The new guidelines are intended to replace – as of Autumn 2011 – the old paper from 2000. In the meantime, the FCO will amend the guidelines on the basis of comments received in relation to the draft. The FCO hopes companies 'can better predict which issues the Bundeskartellamt will be likely to focus on in its investigation of merger cases'. The document contains a useful overview of precedents which the FCO appears to consider important. In addition, the FCO describes 'the economic concepts underlying the respective theories of competitive harm'. Nonetheless, the document is no checklist

3 BGH, decision of 8 June 2010 – KVR4/09.

4 See Press Release: www.bundeskartellamt.de/wEnglisch/News/press/2011_03_18.php; decision only available in German under www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion11/B06-094-10_endg.pdf?navid=77

for an up-front assessment and does not prevent a thorough substantive assessment on a case-by-case basis.

As outlined above, in conducting a substantive assessment of a transaction, the FCO assesses whether a party holds or will achieve a dominant market position. Such a market position may be based on single dominance or an oligopoly situation. In the context of its sector inquiry of the electricity markets, the FCO clarified its view that several important players on the market may be deemed individually market dominant.

The FCO is currently assessing the planned acquisition of the cable network operator Kabel Baden-Württemberg by Liberty Global Europe Holding which was referred to it by the European Commission. The FCO announced that it will focus on the licensing market, in which the cable network operators compete for licensing agreements concluded with the owners of premises with a high number of housing units. The same applies for the signal delivery market on which the cable network operators source signals (programmes) from the broadcasting groups.

To optimise German competition law and to make it more efficient, the German Ministry of Economics and Technology is in the process of conducting a review of the GWB. It presented a key issues paper on 1 August 2011. According to this paper, there are no plans to completely renew the GWB. However, in relation to merger control the following amendments may come into force on 1 January 2013:

a The prohibition criterion of the substantive dominance test shall be replaced by the SIEC (significant impediment to effective competition) test, as implemented into EU Merger Control in 2004.

b Behavioural commitments in the context of Phase II proceedings will be allowed (so far only structural commitments are possible).

c The market shares at which market dominance is assumed (currently one-third) will be increased.

d The federal government stated that the introduction of the second domestic turnover threshold in 2009 was a success in principle. However, based on a statement of the Monopoly Commission in its XVIII Biannual Report (issued in July 2010), the government sees a risk that the second domestic turnover threshold may be abused by companies artificially splitting transactions to avoid merger control. On this basis, an amendment of this legislation is being considered.

e Other than under EU merger control, German law does not provide special rules for public tenders. Given that a notification is usually published on the FCO's homepage, this may cause problems in relation to confidentiality or synchronisation with the tender process which currently needs to be resolved with the relevant panels on a case-by-case basis. This issue might be resolved.

f Under current German law, the failure to seek necessary clearance leads to invalidity of the relevant transaction. Previously, it was the general view that this invalidity could be healed by a retrospective clearance of the FCO. However, the FCO has changed its administrative practice in this respect. Now it refuses any *ex post* clearances but instead launches a de-concentration proceeding, even in cases in which the transaction does not lead to competitive concerns.

Although there are sound arguments that the invalidity can still be remedied, there remains a legal uncertainty, which the Ministry plans to clarify by amending the GWB.

g As mentioned above, merger control may not apply if a transaction concerns exclusively *de minimis* markets. The geographic scope of a *de minimis* market was debated until the BGH clarified that the scope is limited to Germany (or relevant parts thereof). Thus, only German revenues on the market concerned have to be taken into account. However, the so-called bundling theory applies according to which the turnover on neighbouring geographical or product markets in Germany has to be added if certain requirements are fulfilled. Although there are a number of court decisions in this respect, details of the bundling theory are still disputed. This has led in many cases to considerable uncertainty as to whether a transaction needs to be filed. Against this background, the Ministry intends to shift the *de minimis* market exception from formal to substantive merger control. Accordingly, a transaction would need to be notified even if only *de minimis* markets are concerned. However, in the course of the substantive assessment the FCO was not allowed to prohibit a transaction in relation to a *de minimis* market (provided that the bundling theory does not apply).

h Finally, the new GWB may include additional powers for the FCO to order unbundling. While this is not really an issue of merger control it is important as it may mean that the FCO unbundles a merger (based on general competition law) including those which it previously allowed under merger control law.

III THE MERGER CONTROL REGIME

There is no statutory filing deadline since the GWB does not specify a particular triggering event or document. A filing can be made prior to the signing of the binding transaction agreement, the letter of intent or the heads of terms. However, there should be a sufficiently clear intention among the parties to enter into the proposed transaction.

The GWB does not provide a mandatory notification form. Apart from the mandatory information listed in Section 39(3) of the GWB, it does not specify which documents must be provided for notification. Usually, the FCO expects a full list of subsidiaries of the parties including a brief business description. It is common practice that the notification is signed by the legal counsel for the submitting party.

After receipt of a complete notification, the FCO has one month to examine the transaction (Phase I). If it appears unproblematic, the FCO will informally issue clearance in Phase I. The parties to a transaction do not have the legal means to speed up the review process in Phase I. However, regarding foreign-to-foreign transactions, the FCO should inform the parties without delay if the creation or strengthening of a market dominant position is obviously out of the question, and thus the transaction will not be prohibited. If further examination is considered necessary, the undertakings will be notified and the FCO will launch an in-depth investigation (Phase II).

If the limitation period of one month expires without the FCO having initiated an in-depth investigation, the FCO forfeits the capacity to prohibit the transaction. The waiting period for Phase II is four months from receipt of a complete notification. This period may be extended with the consent of all notifying parties. Within Phase II, the FCO will either clear the merger, make it subject to conditions and obligations where necessary, or prohibit it. A transaction is deemed to be cleared if a decision is not served within the set period.

Even though the timetable generally cannot be 'frozen', the participating parties can generally reset the clock by withdrawing and re-filing the notification.

Before the FCO prohibits a merger or intends to make its clearance subject to conditions or obligations, it has to inform the participating undertakings about the reasons (statement of objections) in order to give them the possibility to forward counter-arguments or to offer remedies (which are only admissible in Phase II). At least for the time being, remedies are expected to be structural (rather than behavioural) in nature. The remedies might be discussed by the FCO with third parties that have been admitted to the proceedings or other market participants. There is no particular deadline for remedies but if they are offered late in the process, the FCO may require an extension of the review period. If a structural remedy (e.g., the sale of a particular business or shareholding) has been agreed in another jurisdiction during the review process, the FCO will consider such remedies; however, it will probably not waive its demand for a formal remedy.

Historically, the FCO mostly used orders (or conditions subsequent) to enforce the remedies offered in a clearance decision. However, it seems to have changed its practice in this respect. In a number of recent cases, commitments have been included by way of a condition precedent. This imposes a number of problems on the parties given they may be blocked from completing the transaction for a long time.

In the case of a clearance combined with a condition subsequent, the parties may complete the transaction as of the day of the clearance. However, if the parties do not fulfil the conditions in the given time frame, the clearance automatically turns into a prohibition.

In the case of a prohibition or conditional clearance, the parties may lodge an appeal to the Düsseldorf Higher Regional Court, seek clearance from the Federal Ministry of Economics and Technology, or do both. The latter may grant clearance if, on the facts, the restraint of competition is outweighed by advantages to the economy as a whole, or if the concentration is justified by an overriding public interest.

Third parties may file an objection against a clearance decision to the Düsseldorf Higher Regional Court if their interests are substantially affected by the decision. Depending on the circumstances such objection may not be accepted if the third party had not been summoned to the merger control proceeding by the FCO. The objection to a clearance decision has no suspensive effect and preliminary orders are very difficult to obtain.

The filing parties and – under certain circumstances – third parties may inspect the files of the FCO. Usually, third parties that have been formally admitted to the proceedings should have access to the files.

In the context of merger control proceedings, the FCO may conduct inspections (including dawn raids) to gather relevant information or to double check information provided by the parties.

Providing incorrect or incomplete documents for notification in order to cause the FCO to refrain from issuing a prohibition or to issue a clearance decision respectively constitutes an administrative offence and may result in a fine.

The violation of the prohibition of putting the concentration into effect before clearance by the FCO entails serious legal consequences (in particular invalidity and fines). The FCO exercises its administrative discretion to impose fines for early completion. Recently, in January and May 2011, the FCO imposed fines in two cases. Similarly, in 2008 and 2009, the FCO issued decisions where undertakings who had failed to file on time were fined more than €4 million each.

The parties may apply for authorisation to put a concentration into effect prior to clearance if they show important reasons to do so. However, the likelihood of gaining authorisation from the FCO to implement the transaction is low.

Merger control proceedings are independent of other potential administrative proceedings which may become necessary in the course of a transaction (e.g., clearance of the Federal Ministry of Economics and Technology under foreign investment law; clearance of media control authorities). Thus, it may well be that several clearances need to be sought in Germany for the same transaction.

The activities of the FCO (and other authorities dealing with competition issues) are monitored by the Monopoly Commission, a special body created to advise the federal government. The Monopoly Commission has, however, no direct jurisdiction over individual cases.

IV OTHER STRATEGIC CONSIDERATIONS

Although in many jurisdictions merger control does not apply to the acquisition of a minority shareholding, the set-up of a non-full-function joint venture, or the acquisition of certain assets (e.g., in the course of an outsourcing project), German merger control may well be applicable.

If, in addition to the FCO, other jurisdictions have authority over a merger transaction, it needs to be noted that the FCO is relatively active in the European and international organisations of merger control authorities. In the case of a multi-jurisdictional filing, it makes sense to coordinate the presentation of a transaction in the different filings to avoid contradictions.

Merger control proceedings at EU level tend to exclude the authority of the FCO. However, in some cases it may be strategically advantageous for the FCO rather than the European Commission (or *vice versa*) to take authority over a specific transaction. Under certain circumstances, a referral from one authority to the other is possible and happens in practice. Modifications of a transaction may influence which authority has jurisdiction.

Merger control decisions are issued by one of the FCO's nine panels dealing with merger control. Each panel specialises in a few industries and acts independently from the rest of the FCO. In the case of special situations, it may make sense to contact the relevant panel before providing a formal filing. Usually, the panels are open to informal and confidential up-front discussions.

The FCO continues its restrictive practice in relation to the failing firm defence. It recently announced that it will accept this defence only if:

a the target is expected to fail if not taken over;

b there are no alternatives with less harm for competition; and *c* the market share allocated to the failing firm is expected to be transferred to the acquirer even if the transaction does not take place.

A notification made for precautionary reasons is an option in practice; however, it may entail negative consequences. In a recent court decision it was found that parties to a transaction having filed a merger control notification may be caught by the prohibition to complete before a clearance, even if it turns out later that the merger control regime was not applicable at all.

V OUTLOOK AND CONCLUSIONS

The focus for the next year will be the renewal of the GWB as described above. In particular a shift towards the SIEC test will allow the FCO to apply even more of an economic approach in its substantive assessment. Current uncertainties as to the formal scope of merger control are expected to reduce.

The FCO has announced that it will issue further guidance in relation to commitments which may be expected in the course of a Phase II merger control proceeding, and the parallel application of antitrust law and merger control law in relation to joint ventures.

Finally, it should be noted that the FCO will further prioritise cartel detection in the near future. In July 2011, the FCO has set up a third division solely dedicated to cartel prosecution. By this step, the FCO has reacted to the rise in the number of cartel investigations which have particularly been triggered by the multitude of leniency applications the FCO receives.

Appendix 1

ABOUT THE AUTHORS

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Marc Besen is a partner at Clifford Chance LLP. He works in the Düsseldorf office and specialises in EU and German competition law. In particular, he advises companies during the implementation of merger control proceedings at the German Federal Cartel Office and the European Commission and coordinates worldwide multi-jurisdictional filings. In addition, he focuses on cartel investigations as well as on issues of compliance systems, contractual implementations of competition and antitrust law requirements, joint ventures, licensing agreements and on distribution law across a wide range of industry sectors. This includes, in particular, the pharmaceutical, medical device, biotech, food and chemicals sectors, in respect of which he also advises on regulatory matters.

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Albrecht von Graevenitz has been with Clifford Chance LLP since 2000. He is counsel in the Frankfurt office. Mr von Graevenitz focuses on European and German competition law matters. His practice includes giving advice regarding mergers and acquisitions, joint ventures, outsourcing, restructuring, distribution and sourcing, as well as cartel and market dominance issues. He represents clients before the European Commission and the German competition authorities, and in litigation matters in front of the German and EU courts. In addition, he deals with regulatory and civil law as well as contractual matters. Mr von Graevenitz has experience in a wide range of industrial sectors, including energy, IT/electronics, banking, telecommunications, media, construction and consumer goods/retail.

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