

## FCO Publishes Draft Guidelines on Domestic Effects in German Merger Control

On December 5, 2013, the German Federal Cartel Office (“FCO”) published a draft set of guidelines on domestic effects in merger control (the “Draft Guidelines”).<sup>1</sup>

Pursuant to the German Act against Restraints of Competition (“ARC”), German merger control law only applies to transactions that have domestic effects in Germany, even where the turnover thresholds are met (this remains the case despite a recent amendment to the turnover thresholds, which provides that transactions must involve at least two participants that are active and achieve turnover in Germany)<sup>2</sup>. This is different from the situation under the EU Merger Regulation, where any transaction that meets the turnover thresholds is notifiable, regardless of whether or not it has effects in the EU.

The Draft Guidelines seek to provide guidance on which transactions should be considered to produce domestic effects and therefore require pre-merger filing, and which do not. In doing so, they (1) identify transactions that the FCO considers clearly have domestic effects, (2) identify transactions that the FCO considers clearly do not have domestic effects, and (3) provide general guidance for the case-by-case analysis required in all other cases. The Draft Guidelines also discuss some practical considerations, and suggest that filing a precautionary notification may be more efficient in cases that do not raise substantive issues, than trying to resolve the often more complex issue of domestic effects.

The FCO invites interested third parties to comment on its Draft Guidelines by January 30, 2014 ([inlandsauswirkungen@bundeskartellamt.bund.de](mailto:inlandsauswirkungen@bundeskartellamt.bund.de)).

### **I. TRANSACTIONS THAT CLEARLY HAVE DOMESTIC EFFECTS**

The FCO assumes that transactions involving only two parties (notably the acquisition of sole control by one party over another) will always have the requisite domestic effects on the German market where the domestic filing thresholds are met, as those thresholds require both parties to be active in Germany to a meaningful extent. This interpretation leaves no room to argue that a transaction lacks domestic effects, for example because the parties are active in completely unrelated markets.

<sup>1</sup> Available in English at [http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Merkblaetter/Leaflet%20-%20Guidance%20document%20domestic%20effects%20-%20consultation.pdf?\\_\\_blob=publicationFile&v=2](http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Merkblaetter/Leaflet%20-%20Guidance%20document%20domestic%20effects%20-%20consultation.pdf?__blob=publicationFile&v=2)

<sup>2</sup> A merger notification requirement is triggered if in the last financial year (i) the parties concerned had a combined worldwide turnover exceeding €500 million, and (ii) at least one of the parties concerned had turnover in Germany exceeding €25 million, and (iii) another party had turnover in Germany exceeding €5 million.

This means that domestic effects can only be absent under the Draft Guidelines for transactions involving more than two parties (*e.g.*, the creation of joint ventures, or transactions that relate to target companies in which two or more companies hold an interest of at least 25% which are assimilated to mergers under German rules). However, the Draft Guidelines stipulate that any such transaction involving a joint venture (or target company) that generates German revenues over €5 million (or is expected to generate such turnover within the next three to five years) would have the requisite domestic effect, regardless of whether there are any overlaps between the parties.

## II. TRANSACTIONS THAT CLEARLY LACK DOMESTIC EFFECTS

The Draft Guidelines then define a category of transactions that are considered clearly to lack the requisite domestic effects, even if they meet the turnover thresholds. As noted above, this only relates to transactions involving more than two parties, notably the creation of joint ventures (or jointly owned companies). Such transactions are expected to lack domestic effects where the following cumulative conditions are met:

- The joint venture (or target company) is not and will not be active in Germany in the next three to five years (or on any wider geographic market that comprises Germany), and
- Spill-over effects between the parent companies can be excluded. This requires that:
  - None of the parent companies is actually or potentially active on the same market as the joint venture (or target company) or on any upstream or downstream market, in each case where such market geographically comprises Germany, and
  - The parent companies are not actual or potential competitors on any other market (unrelated to the joint venture) that comprises all or part of Germany.

## III. CASE-BY-CASE ANALYSIS IN ALL OTHER CASES

The Draft Guidelines go on to discuss “in between” cases that fall in neither of these two categories, which require a case-by-case analysis. This analysis takes into account similar criteria to those described in II, above.

Marginal activity of joint venture in Germany. Where a joint venture has German turnover of less than €5 million, the transaction may lack domestic effects if the joint venture’s activities in Germany are “marginal”. The Draft Guidelines seem to suggest that this might be the case where, in addition to the joint venture’s limited absolute turnover, the joint venture’s market share is less than 5% and the transaction does not involve a transfer of significant resources (*e.g.*, intellectual property rights or know-how) to the joint venture.

Spill-over effects. Even where a joint venture is not (or only marginally) active in Germany, the Draft Guidelines note that spill-over effects could nevertheless result in

domestic effects. They provide, however, that this should only be sufficiently appreciable where the parents compete in Germany on the joint venture's product market or are active on any upstream/downstream market that comprises Germany, and their combined market share exceeds 10%.

The Draft Guidelines consider spill-over effects in Germany to be less likely where the parents only compete on product markets that are unrelated to the joint venture (including through horizontal or vertical relationships). However, potential domestic effects should still be assessed and will notably be assumed if the joint venture is of "economic significance" to its parent companies. To assess this, the FCO compares the joint venture's worldwide turnover with that of its parents, and considers whether the joint venture owns resources that are of strategic importance to the industry or its parent companies (*e.g.*, key technologies).

Precautionary notification. Finally, the FCO (correctly) notes that the assessment of whether a particular transaction has domestic effects may often be more complex than the actual substantive assessment of the transaction. In such cases, the FCO suggests that a (precautionary) notification may be the most efficient means to of obtaining legal certainty, as the issue of domestic effects can be left open if there are no substantive issues -- German notifications can be fairly lean in such situations. The Draft Guidelines also refer to the possibility of informal contacts with the FCO to discuss the issue.

#### IV. COMMENTS

The FCO's efforts to provide guidance on an issue that arises frequently in international transactions is generally to be welcomed. The most significant aspect of the Draft Guidelines is the recognition that the FCO continues to see domestic effects as a legal requirement for the application of German merger control rules despite the introduction of a second domestic turnover threshold. The FCO has thus refrained from copying the approach under the EU Merger Regulation, where all transactions must be notified whenever the turnover thresholds are met, irrespective of whether they could conceivably produce any effect on the European market.

However, unsurprisingly, the Draft Guidelines interpret the concept of domestic effects broadly, and in some cases perhaps too broadly. Two aspects appear worth mentioning in this regard:

- First, the Draft Guidelines consider domestic effects to arise not only if a company is active in Germany itself, but also if it is active outside of Germany in a market that geographically comprises Germany. This would mean that activities in European or global markets would always be considered to produce domestic effects in Germany, even though the companies' specific activities may be in remote parts of the world. The geographic proximity of such activities (or their practical relevance to Germany) should be taken into account in assessing domestic effects.
- Second, the Draft Guidelines place substantial importance on the concept of spill-over effects between parent companies of a joint venture. Notably, the

Draft Guidelines consider such effects to be possible where parents compete on markets that are entirely unrelated to a joint venture. The criterion of “economic significance” of the joint venture for the parent companies referred to in the Draft Guidelines appears somewhat vague. The FCO might be encouraged to extend the 10% market share threshold applied to markets related to the joint venture’s activities to cases where the parents compete in unrelated markets.

It remains to be seen whether these, and any other, aspects of the Draft Guidelines will be modified in the course of the ongoing public consultation.

Once adopted in final form, the Draft Guidelines will have a significant practical impact: the description of categories of transactions under II, above, that “clearly” do not produce domestic effects should provide a safe harbor for such transactions not to be notified. Conversely, transactions described under I, above, that the FCO considers clearly have domestic effects will have to be notified as a practical matter, as the guidance provided in this regard may well be a factor that the FCO will take into account in deciding whether to impose a fine for any failure to notify. This leaves the “in between” category described under III, above, for which parties to a transaction and their advisors will continue having to make their own determination, provided they do not opt for a precautionary notification as suggested in the Draft Guidelines.

\* \* \*

For additional information, please do not hesitate to contact [Stephan Barthelmess](#) or [Till Müller-Ibold](#) in the Firm’s Brussels Office, or [Dirk Schroeder](#), [Romina Polley](#), [Silke Heinz](#), or [Tilman Kuhn](#) in the Firm’s Cologne Office.

CLEARY GOTTLIEB STEEN & HAMILTON LLP

## Office Locations

### NEW YORK

One Liberty Plaza  
New York, NY 10006-1470  
T: +1 212 225 2000  
F: +1 212 225 3999

### WASHINGTON

2000 Pennsylvania Avenue, NW  
Washington, DC 20006-1801  
T: +1 202 974 1500  
F: +1 202 974 1999

### PARIS

12, rue de Tilsitt  
75008 Paris, France  
T: +33 1 40 74 68 00  
F: +33 1 40 74 68 88

### BRUSSELS

Rue de la Loi 57  
1040 Brussels, Belgium  
T: +32 2 287 2000  
F: +32 2 231 1661

### LONDON

City Place House  
55 Basinghall Street  
London EC2V 5EH, England  
T: +44 20 7614 2200  
F: +44 20 7600 1698

### MOSCOW

Cleary Gottlieb Steen & Hamilton LLC  
Paveletskaya Square 2/3  
Moscow, Russia 115054  
T: +7 495 660 8500  
F: +7 495 660 8505

### FRANKFURT

Main Tower  
Neue Mainzer Strasse 52  
60311 Frankfurt am Main, Germany  
T: +49 69 97103 0  
F: +49 69 97103 199

### COLOGNE

Theodor-Heuss-Ring 9  
50688 Cologne, Germany  
T: +49 221 80040 0  
F: +49 221 80040 199

### ROME

Piazza di Spagna 15  
00187 Rome, Italy  
T: +39 06 69 52 21  
F: +39 06 69 20 06 65

### MILAN

Via San Paolo 7  
20121 Milan, Italy  
T: +39 02 72 60 81  
F: +39 02 86 98 44 40

### HONG KONG

Cleary Gottlieb Steen & Hamilton (Hong Kong)  
Hysan Place, 37<sup>th</sup> Floor  
500 Hennessy Road  
Causeway Bay  
Hong Kong  
T: +852 2521 4122  
F: +852 2845 9026

### BEIJING

Twin Towers – West (23<sup>rd</sup> Floor)  
12 B Jianguomen Wai Da Jie  
Chaoyang District  
Beijing 100022, China  
T: +86 10 5920 1000  
F: +86 10 5879 3902

### BUENOS AIRES

CGSH International Legal Services, LLP-  
Sucursal Argentina  
Avda. Quintana 529, 4to piso  
1129 Ciudad Autonoma de Buenos Aires  
Argentina  
T: +54 11 5556 8900  
F: +54 11 5556 8999

### SÃO PAULO

Cleary Gottlieb Steen & Hamilton  
Consultores em Direito Estrangeiro  
Rua Funchal, 418, 13 Andar  
São Paulo, SP Brazil 04551-060  
T: +55 11 2196 7200  
F: +55 11 2196 7299

### ABU DHABI

Al Sila Tower, 27<sup>th</sup> Floor  
Sowwah Square, PO Box 29920  
Abu Dhabi, United Arab Emirates  
T: +971 2 412 1700  
F: +971 2 412 1899

### SEOUL

Cleary Gottlieb Steen & Hamilton LLP  
Foreign Legal Consultant Office  
19F, Ferrum Tower  
19, Eulji-ro 5-gil, Jung-gu  
Seoul 100-210, Korea  
T: +82 2 6353 8000  
F: +82 2 6353 8099