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GERMAN COMPETITION LAW UPDATE

German Federal Court Confirms That Only The German Market Volume Is Relevant For Purposes Of The *De Minimis* Market Clause Under German Merger Control Rules

Cologne/Frankfurt/Brussels
February 5, 2008

In December 2007, the German Federal Court (*Bundesgerichtshof*) published a recent decision confirming that the market volume for purposes of the so-called *de minimis* market exception (*Bagatellmarktklausel*) under German merger control rules must be calculated on the basis of the German market volume even where the geographic market is broader than Germany (German Federal Court, order of September 25, 2007 – KVR 19/07 – Sulzer/Kelmix). The *de minimis* market exception exempts from German merger control transactions insofar as they concern markets with a volume of less than €15 million (and provided the relevant goods or services have already been offered on such market for at least five years).

I. <u>ONLY GERMAN MARKET VOLUME RELEVANT FOR DE MINIMIS CALCULATION</u>

The application of the exception had been in dispute since the German Federal Cartel Office (*Bundeskartellamt*, "FCO") had changed its prior interpretation of the relevant clause in the German Act Against Restraints of Competition, and commenced calculating the market volume on the basis of the actual geographic market also in cases where such market extended beyond Germany. Under its new interpretation of the clause, the FCO had first in the DuPont/Pedex case (decision of March 15, 2006 – B3 – 136/05) and later in the Sulzer/Kelmix case (decision of February 14, 2007 – B5 – 10/07) assumed jurisdiction over the transactions concerned by calculating the market volume for purposes of the clause on the basis of the actual geographic market for the products in question. That market was in each case considered to be European-wide with a volume of more than €15 million, while the market volume in Germany was below the €15 million threshold. The Düsseldorf Court of Appeals overruled the FCO in both cases (for more details on the decision in the DuPont/Pedex case see Alert Memorandum of January 15, 2007) and held that only the German market volume was relevant for these purposes, even in cases where the actual geographic market extended beyond Germany.

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As that volume was in both cases below €15 million, the FCO was held to have lacked the power to prohibit the transactions. The FCO filed further appeals against both decisions before the German Federal Court and continued its restrictive application of the *de minimis* market clause.

While the DuPont/Pedex case became moot, the German Federal Court has now upheld the decision of the Düsseldorf Court of Appeals in an interim proceeding in the Sulzer/Kelmix matter. There, the parties had consummated the merger at the end of 2006 following the decision by the Düsseldorf Court of Appeals in DuPont/Pedex. The FCO subsequently ordered the dissolution of the transaction and the parties requested, and obtained, interim relief against the dissolution order from the Düsseldorf Court of Appeals (decision of March 5, 2007 – VI-Kart 3/07 (V) - Sulzer/Kelmix). The Federal Court has now rejected the FCO's further appeal against that decision of the Düsseldorf Court of Appeals, confirming that the calculation of the market volume for purposes of the *de minimis* clause must be limited to Germany.

While the Federal Court's decision was rendered in an interim measures proceeding (where the Court is called upon to conduct only a summary examination of the legal issues), the Court used language clear enough to make the FCO announce that it would discontinue its narrow approach to the *de minimis* market clause with immediate effect. The FCO apparently also dropped the main proceeding in the Sulzer/Kelmix matter, so that the issue can be considered settled for practical purposes.

Consequently, German merger control rules remain inapplicable to transactions insofar as they concern markets with a volume of less than € 15 million. That volume must be calculated as regards sales in Germany even if the actual geographic market extends beyond Germany (and is for example EEA- or worldwide). This should result in a reduction of the number of transactions requiring notification in Germany.

II. <u>"BUNDLING" OF RELATED MARKETS PERMISSIBLE IN LIMITED CIRCUMSTANCES ONLY</u>

In its decision, the Federal Court also addressed the issue of "bundling" *de minimis* markets, *i.e.*, adding up the sales volumes for purposes of the *de minimis* clause of two or more separate geographic or product markets that individually have volumes of less than € 15 million but together exceed the threshold. While the Federal Court confirmed that such bundling was permissible as a matter of principle, it stressed at the same time that it should be exceptional and only done in a limited number of clearly defined circumstances. The Federal Court noted that it had in the past approved the FCO's bundling of markets that had been artificially separated by the parties to the transaction, of neighboring geographic markets, and of closely vertically related markets.

While the Federal Court in the Sulzer/Kelmix decision did not rule out in principle the possibility to bundle also separate product markets, it confirmed the Court of Appeals' decision also insofar as it held that the FCO's bundling of two *de minimis* product markets in the Sulzer/Kelmix case had been erroneous. The Federal Court referred in this regard to the Court of Appeals' factual assessment that the structure of the two markets concerned differed in various respects (different market shares, barriers to entry, limited supply-side substitutability *etc.*). Importantly, the Federal Court also expressly noted that the requirements for any bundling of separate product markets would need to be clearly defined since the parties to a transaction must be able to easily and reliably assess whether a transaction is notifiable or not. The Court did not, however, specify what these requirements would be. Until the FCO clarifies the circumstances under which it intends to bundle neighboring product markets when applying the *de minimis* market clause, some legal uncertainty will thus remain. Nevertheless, the decision appears a clear sign to the FCO that the Federal Court will not accept an overly restrictive application of the *de minimis* market clause in this regard either.

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