

# The European Antitrust Review

---

**2009**

Published by Global Competition Review  
in association with  
Latham & Watkins LLP

**GCR**  
GLOBAL COMPETITION REVIEW

# Germany Overview

**Andreas Weitbrecht and Susanne Zühlke**

Latham & Watkins LLP

The German Federal Cartel Office (FCO), which celebrated its 50th birthday earlier this year, continues to play a special role among national competition authorities. It would appear, however, that the leading position that the FCO once enjoyed as first among its peer national competition authorities has been somewhat eroded. Authorities of other major EU member states, in particular in the UK, have taken the lead over the FCO in doing cutting-edge work, while the FCO which is still very much wedded to its past practice and struggling with the 'more economic approach' practised elsewhere.

This overview gives a snapshot of the most significant developments.

## Merger control

Proposed amendment to Act Against Restraints of Competition:  
Second domestic turnover threshold

Currently, the German merger control system requires notification of any merger where the merging parties together have a turnover of €500 million worldwide, and at least one of them has a domestic turnover of €25 million. Almost any multinational company satisfies these thresholds and thus the only basis on which to conclude that a filing in Germany is not necessary usually turns on the lack of effects of the merger in Germany. The German Federal Cartel Office, in its practice has, however, taken an expansive view of domestic effects and requires notification in most cases.

Recently as part of a legislative proposal aimed at cutting bureaucracy in a large number of areas, a proposal has been put before Parliament that would introduce a €5 million domestic revenue threshold for the second company in a merger. Combined with the current €25 million domestic revenue threshold for the first merging party, this proposal would significantly cut the number of merger filings that currently are required and that are of marginal relevance for competition in Germany. The proposal would also bring the German merger control system in line with best practices and recommendations from the OECD and the International Competition Network.

The proposal, which originates from the Ministry of Economics, would considerably improve the present situation. The FCO, which stands to lose both merger filings and revenues, will not publicly oppose the change.

FCO publishes notice on notifications submitted after the transaction has been closed

Under German law, as under most systems of merger control, provided the merger thresholds are met, parties may not close a transaction prior to obtaining clearance from the FCO. Agreements in violation of this stand-still obligation are void under German law. In addition, the FCO can impose fines for a violation of the stand-still obligation. Following changes to the text of the ARC implemented with the 7th Amendment, the FCO has taken the position that it will no longer clear mergers that have been implemented prior to notification.

The office has, on 13 May 2008, published a notice in which it describes its revised approach to merger notifications in cases where

the notification is submitted after the parties have already closed the transaction. The new notice clarifies that the FCO will consider the notification of such a transaction as a notice of closing and not as a standard merger notification. It will then enter into a dissolution proceeding, which will be completed by way of an informal or formal 'no action letter', if the result would otherwise have been a clearance. The fact of late notification will be published on the FCO's website, along with the standard notice. Independently, the FCO will also consider whether fines should be imposed. The procedures on fines, and amounts of fines that can be imposed are not subject of the new notice, and remain unchanged. The new notice has two main implications.

First, the strict time line applying to the review of merger notifications does not apply in dissolution proceedings. This can lead to a significantly longer review period. Initial practical experience suggests that the FCO's review will take significantly longer, in particular in more complicated matters, while in simpler matters a no action letter can be obtained relatively quickly.

Second, as set out above, agreements in violation of the stand-still obligation are void. This raises the question whether such invalidity will be cured by a 'no-action letter'. This is important in cases where the law does not provide for a cure by other legal means (eg, entry of change of ownership into a public register). The notice does not address this issue, which is one for the courts and not for the FCO.

A pragmatic position would be to argue that a no-action letter confirms that there are no competitive concerns, hence there are no reasons to consider the transaction void, and thus the invalidity is cured retroactively, as with the clearance that was given under the old practice of the FCO. However, this view is not uncontested. At the extreme end, it is proposed that the parties need to dissolve the original transaction (possibly even including the underlying stock or asset purchase agreement, which is not caught by the invalidity), re-confirm the original transaction agreement, notify this agreement and obtain a clearance. This appears quite far-fetched and would seem to be contrary to the fact that the FCO will confirm in its no-action letter that a dissolution is not required. Other voices have argued that parties need to re-confirm at least the closing agreement or act (or both). There is considerable legal uncertainty on this point, and the question may ultimately need to be decided by a German civil court, at least for contracts that are subject to German contract and corporate law.

Federal Supreme Court expands role of de minimis market clause

According to section 35 of the Act Against Restraints of Competition, German merger control does not extend to markets that have existed for more than five years and in which the total turnover of all players (market volume) does not exceed €15 million. The de minimis market exception is designed to exclude from scrutiny mergers that are of little importance for the overall economy and, for many years, it had been assumed that the €15 million threshold relates to the overall revenues in the German market.

However, during the past couple of years, the FCO had adopted a practice, according to which the €15 million threshold was applied to the economic market, which meant that where the geographic market was larger than Germany, such as European or worldwide, mergers in very insignificant markets would still not be caught by the *de minimis* clause.

In one of the most important decisions taken during the past few years, the Federal Supreme Court, in a judgment of 25 September 2007 (*Sulzer/Kelmix*) has reversed that practice and established the rule that the €15 million threshold is to be measured against turnover in Germany only.<sup>1</sup> Since the legislative intent of the *de minimis* clause was to exclude mergers from scrutiny by the German Federal Cartel Office that are of minor importance for the economy the German legislator, when setting the threshold at €15 million, had revenues in Germany in mind, irrespective of the geographic extent of the relevant market. Thus, the Federal Supreme Court has taken an important step to limit the FCO's expansive jurisdiction.

#### Federal Supreme Court facilitates appeal of merger prohibitions

Where a merger is prohibited by a competition authority, the merging parties often have to abandon the merger, since an appeal would take up a lot of time, during which the target company would be kept in limbo, losing credibility with customers and facing the loss of key executives, key contracts and overall corporate value. Nevertheless, parties often wish to test the legality and robustness of a prohibition decision and in many legal systems, including the European courts, the fact that a particular merger has been abandoned following a prohibition does not deprive the merging parties of the right to appeal against the prohibition decision. The situation is different in Germany where the appellant, usually the would-be acquirer, must show that it has still a legitimate interest in a pronouncement from the court, according to which the original prohibition decision should not have been taken.

The Federal Supreme Court, in a judgment of 25 September 2007 (*Springer/ProSiebenSat1*), has now decided that in merger control cases this standard is to be somewhat relaxed and in support of its reasoning cites the situation in European law. The Federal Supreme Court in particular points out that the target, which in the meantime had been acquired by a financial investor, might be brought to the market again in the near future, and that the would-be acquirer and plaintiff Springer would have a legitimate interest in knowing whether it had any chances to acquire the target at such future time.

#### Prohibition decision by the FCO in *Norddeutsche Affinerie/A-TEC*

On 27 February 2008, the Federal Cartel Office has prohibited the acquisition of a 13 per cent shareholding in *Norddeutsche Affinerie* by the competitor *A-TEC*;<sup>2</sup> according to the Federal Cartel Office, the acquisition constitutes a merger which would strengthen a dominant position of the parties on certain markets for intermediate copper products. The decision considerably enlarges the field of application of German merger control with respect to publicly quoted companies.

The FCO applies the merger concept of the 'acquisition of a competitively significant influence' (section 37, paragraph 1, item 4 of the Act Against Restraints of Competition) in cases where the acquired shares will give the acquirer a blocking minority of 25 per cent in the annual shareholders meeting of a competitor. As shareholder presence in annual meetings is often below 50 per cent, German merger control may thus be triggered where shareholdings between 10 and 15 per cent are acquired. The decision, if it were to be upheld upon appeal, would further widen the gap between European and German

merger control, requiring notifications under German merger law for transactions that meet the turnover thresholds of the European Merger Control Regulation but that do not result in the acquisition of control over the target company.

#### FCO clears large supermarket merger subject to conditions

By a decision of 30 June 2008, the FCO has cleared the formation of a joint venture between supermarket chains *EDEKA* and *Tengelmann*, which will combine under joint control their two discount chains. According to German law, the merger of the two discount chains, jointly controlled, also means that the regular supermarket businesses of the parent companies are considered to be merged.

The FCO identified a large number of areas in which the joint entities would have a dominant position on one of the 345 regional sales markets for supermarkets. The FCO allowed the merger to go forward only once approximately 400 supermarkets will have been divested by *Tengelmann*. The sites can only be closed if it is proven that no purchaser could be found. The FCO also put into place a requirement that the parent companies continue to purchase separately.

#### No effective interim relief in case of prohibited mergers

A decision of 8 August 2007 by the Higher Regional Court in *Düsseldorf* in the case of *Phonak/ReSound* severely limits the chances of merging parties for interim relief. The court ruled that it does not have jurisdiction to permit a merger to go forward on a temporary basis as part of giving interim relief while the matter is being litigated on the full merits. This situation is similar to the one in European law where so far no party hit with a prohibition decision has been permitted by the Court of First Instance to implement the merger on an interim basis while the appeal against the prohibition decision is pending. Under German law, the situation is even more paradoxical, since third parties wishing to attack a clearance decision can obtain interim relief against the merging parties, in joining the merger from going forward, if they can show that the clearance decision affects their rights.

#### Prohibition of foreign-to-foreign mergers

The German Federal Cartel Office continues to scrutinise – and prohibit if considered necessary – mergers that concern exclusively foreign companies, the only nexus to Germany being the fulfilment of the thresholds of German merger control and – in some cases – the presence of sales forces in Germany. In *Cargotec/CVS Ferrari*, decision of 24 August 2007, the market concerned was at least EU-wide.

According to the FCO, the planned merger, which concerned machinery used to handle freight containers at container ports, container rail terminals and other logistic stops, would have considerable effects on competition in Germany and would lead to the creation/strengthening of dominant positions on two relevant markets. The merger had been cleared by the Spanish and Austrian authorities. The Federal Cartel Office brushed aside those clearance decisions and the fact that as a result contradictory results were reached by competition authorities in the European Union.

#### Cartels

While merger control is certainly the most significant activity of the FCO, the office is also very active in enforcing the prohibition against hard-core cartels and assessing considerable fines against companies found to violate article 81 and its German equivalent. The most significant decisions are the following.

**FCO imposes €208 million fines against liquefied gas suppliers**

On 19 December 2007, the German Federal Cartel Office imposed fines totalling close to €208 million against seven suppliers of liquefied gas and their managing directors on the ground of customer protection agreements. Proceedings are still pending against four other companies. The companies are active in the supply of liquefied gas to private and commercial customers in small tanks (up to 5.6 tons) or as bottled gas. Among the companies involved are German subsidiaries of major oil and gas multinationals.

**FCO imposes €62 million fines against manufacturers of décor paper**

On 5 February 2008, the Federal Cartel Office imposed fines against three manufacturers of décor paper. The companies are the German subsidiaries of the three major European manufacturers of décor papers. They are primarily used in the furniture industry. The agreements involved the coordinated increase of prices over a period from at least August 2005 until November 2007. The three companies concerned have accepted the fines. The proceedings also involved cooperation with the Swedish competition authority, which searched the premises of one company in Sweden.

**FCO imposes €37 million fines against manufacturers of drugstore products**

The German FCO, on 20 February 2008, has imposed fines totalling approximately €37 million against four manufacturers of branded drugstore products and their managing directors for coordinating price increases and exchanging information about the state of annual discussions with retailers. The companies involved are Henkel, Schwarzkopf & Henkel GmbH, Sara Lee Germany and Unilever Germany. The proceedings were initiated on the basis of an amnesty application submitted by Colgate-Palmolive GmbH.

According to the FCO, the companies at the turn of the years 2005-2006 agreed to increase the list prices of dishwashing detergent, shower gel products and toothpaste, for brands that are almost identically positioned in price within their product areas and are therefore in close competition. In a separate infringement, the manufacturers of branded products, along with other companies active in the sector, had for several years exchanged information about negotiations with retailers. At regular meetings, a working group on body care, cleaning agents and detergents, exchanged information about new demands for rebates from retailers and contracts concluded between the contractual parties within the framework of the annual negotiations.

**FCO imposes fines of approximately €10 million against manufacturers of luxury cosmetics for market information exchange**

On 10 July 2008 the FCO has imposed fines of just below €10 million against manufacturers of high-quality perfumes and other cosmetics products, such as Chanel, Estée Lauder, L'Oréal, Shisaido and Yves Saint-Laurent Beauté. According to the FCO, the companies, since at least 1995, have met in the 'castle round' to exchange numerous kinds of internal company data. Many major suppliers of luxury cosmetics products were represented in this 'castle round'. The market information system, according to the FCO, violates German and European competition law as it concerned the exchange of information on turnover, product launches and other competitively relevant business data, with market information clearly being attributable to the individual companies.

**Energy**

In parallel to the activities of the European Commission, the FCO has also devoted significant resources to the energy field. The following proceedings are of particular significance.

**FCO opens proceeding against 35 gas companies on grounds of possibly excessive gas prices**

The new section 29 of the Act Against Restraints of Competition, which entered into force in December 2007, allows the FCO to intervene against distributors of electricity and natural gas where they are dominant and in particular allows the FCO to control their prices. In response, the FCO has recreated a 10th Decision Making Board which exclusively deals with this task.

On 5 March 2008, it initiated abuse proceedings against approximately 35 gas suppliers on the grounds that they are charging excessive gas prices to household and small commercial customers. A preceding nationwide survey of the prices charged by all established gas suppliers has, according to the FCO, shown that in some cases there are price differences between 25 and 45 per cent and more between the companies. Involved in the proceedings are companies from all regions in Germany, municipal and rural suppliers, independent municipal utilities as well as providers which are subsidiaries of the four major gas companies in Germany.

**FCO limits duration and quantities of long-term gas supply contracts**

In parallel to a practice of the European Commission, the German Federal Cartel Office has objected to long-term supply arrangements of German gas suppliers where these supply contract runs longer than a four-year period.<sup>3</sup> The Federal Cartel Office, in 2006, had ruled against the leading German gas supplier E.ON Ruhrgas, which is dominant on a number of German gas markets, and had prohibited the conclusion of supply contracts where these contracts had a duration of more than four years. The conditions imposed were the following: contracts that cover more than 80 per cent of the purchasers' requirements cannot run longer than two years, whereas contracts that cover between 50 and 80 per cent of a purchaser's annual needs are allowed to run for a maximum duration of four years. This decision, which was based on articles 81 and 82 of the EC Treaty and their German equivalents, has been upheld by the Higher Regional Court in Düsseldorf on the basis of article 81 of the EC Treaty and its German equivalent and the order of the Federal Cartel Office was made effective immediately.

Despite the fact that an appeal against this judgment is still pending before the Federal Supreme Court, the Federal Cartel Office during 2008 has received commitments from all German gas suppliers, both on the national and the regional level, to conform their contracts to these principles; the Cartel Office has made these commitments binding according to section 32b paragraph 1 of the Act Against Restraints of Competition (a provision that mirrors article 9 of Regulation 1/2003).

**FCO conducts sector inquiry into retail distribution of gasoline**

The FCO also has initiated an inquiry into the state of competition in retail markets for petrol and diesel fuel. The extensive inquiry, which was started at the beginning of June 2008, before the summer travelling season, followed numerous complaints by consumer organisations and information provided by independent gas station operators. Operators of independent gas stations accuse the large multinational fuel companies of applying margin-squeezing practices, charging wholesale suppliers prices that are higher than their own respective retail prices charged at the filling stations.

The sector inquiry follows the comprehensive study of the retail gasoline market undertaken in the merger between Shell and HPV. In this decision of 7 March 2008, the FCO, after a phase II inquiry, found that the German gas station market is characterised by a dominant oligopoly of five integrated oil companies (Shell, BP, ConocoPhillips/Jet, Exxon Mobil and Total). A first interim report is to be published by the end of this year.

### Pharmaceutical markets – over-the-counter medicines

Again in parallel to the activities of the European Commission, which has opened a sector inquiry into the pharmaceutical industry, the FCO has also developed a certain focus on the pharmaceutical industry. Given the national focus of the FCO's activities, this focus is on the distribution level.

#### FCO fines Bayer for resale price maintenance

Since 2004, German pharmacies have been free to set their own prices for non-prescription pharmaceuticals (OTC medicines); an exception only exists where the costs of such medicines are reimbursed by health insurance companies). Bayer Vita, a subsidiary of Bayer AG, had concluded with normal pharmacies so-called target agreements in which inter alia they were promised an additional discount for positioning Bayer products as premium products. In order to earn the partnership bonus, the pharmacies essentially had to observe Bayer's non-binding price recommendation; while price campaigns limited in time were tolerated, permanently low prices would jeopardise the partnership bonus. Approximately half of the German pharmacies were involved.

The FCO, on 28 May 2008, fined Bayer Vita €10.34 million for these practices. In calculating the fine, the FCO took into account the fact that Bayer had cooperated following a dawn raid and been of considerable assistance in the fact-finding process. Likewise Bayer has discontinued its practice and has announced that it will not appeal the fine. Individual pharmacies, with approximately half of the 21,000 pharmacies involved, were not fined.

#### Fines against pharmacists and pharmacists associations

In the same vein, the FCO, on 8 January 2008, assessed fines totalling €615,000 in two separate proceedings: Pharmacist associations on the state and federal level as well as some manufacturers were fined €465,000 for implementing a programme designed of speech events where pharmacists were encouraged to observe recommended retail prices for OTC medicines and eight pharmacists in the city of Hildesheim were fined a total of €150,000 for participating in a joint advertising campaign that featured unified prices for the advertised products.

#### Television and broadcasting rights to sports events

Interesting proceedings were also concluded, which are pending in the television industry and with respect to broadcasting rights to sports events.

#### FCO imposes €260 million fines against private television companies RTL and ProSiebenSat1

On 30 November 2007, the German Federal Cartel Office imposed fines totalling €260 million against the two major private broadcasting groups RTL and ProSiebenSat1. The Cartel Office concluded that subsidiaries responsible for selling advertising time had concluded anti-competitive discount agreements with media agencies or advertisers directly. The discounts concerned the 'proportional' or 'share' discounts. Under these agreements, the media agencies are granted substantial discounts and other refunds if they place certain (large) proportions of their advertising budget with the respective broadcasting group.

Due to these discounts, the media agencies have a strong economic incentive to place a high proportion of their advertising budget with the two large marketing companies rather than with smaller broadcasters, especially since discounts are granted retroactively for the entire purchase, that is, not limited to the amount in excess of certain thresholds. This incentive effect forecloses the television advertising market to smaller or less powerful broadcast-

---

## LATHAM & WATKINS<sup>LLP</sup>

---

Werbungstrasse 50  
Hamburg 20354  
Germany  
Tel: +49 40 41 40 30  
Fax: +49 40 41 40 31 30

Reuterweg 20  
Frankfurt 60323  
Germany  
Tel: +49 69 6062 6000  
Fax: +49 69 6062 6060

**Andreas Weitbrecht**  
andreas.weitbrecht@lw.com

**Susanne Zühlke**  
susanne.zuehlke@lw.com

www.lw.com

Latham & Watkins' global antitrust and competition practice regularly advises and represents leading corporations on the full scope of competition law issues, including mergers, acquisitions and joint ventures, litigation, abuse of dominance investigations, cartel enforcement, counselling and criminal grand jury matters. Using a global network of experienced and leading competition law practitioners across 28 offices worldwide, our global antitrust and competition practice features more than 150 qualified practitioners who regularly work across jurisdictional borders and are fully aware of both the local and international dimensions of competition issues. The members of our global antitrust and competition practice live and work in the world's major antitrust jurisdictions and offer an integrated team approach to international competition matters that attract the scrutiny of multiple antitrust enforcement regimes.

Latham & Watkins maintains a premier antitrust team in the US, with internationally recognised trial lawyers who have successfully litigated some of the most complex and sophisticated antitrust cases in US history. Our well-established US teams offer unrivalled skill in litigation, antitrust and technology issues and government relations/merger clearance, as well as extensive cartel defence experience. We are also one of the few firms in Europe with experienced, local attorneys, expert in all aspects of European competition law. Our teams in Europe handle the full spectrum of European and national competition law, regularly appearing before the European Commission, EU courts in Luxembourg, member state authorities and national courts in matters ranging from proposed mergers and joint ventures, cartel investigations, alleged abuses of dominance, state aid, sectoral investigations and licensing issues. Our attorneys also counsel on industry deregulation, and advise on other areas of EC law such as freedom of establishment and services, and free circulation of goods.

ers. Secondly, the discounts are granted in the form of retroactive quantity discounts, which have negative effects on competition of their own. Both companies have announced that they accept the fines and have introduced new discount systems that meet the requirements of the FCO.

#### German FCO intervenes in marketing of broadcasting rights to Bundesliga football

The FCO is currently reviewing the central marketing of broadcasting rights for Bundesliga football, which is marketed by the Bundesliga rather than by the individual teams. The agreement between Bundesliga and private broadcasting company Kirch foresees that free-to-air TV would most likely not be possible on Saturdays (the day on which most Bundesliga matches are played) before 10pm. This provision is to ensure that pay-TV has exclusive rights on late Saturday afternoon and Saturday evening before 10pm, creating an incentive for viewers to subscribe to the respective pay-TV channel. According to the FCO, this arrangement does not sufficiently benefit consumers and therefore does not meet the requirements of article 81(3) of the EC Treaty.

The issues are hotly debated in Germany, since the Federal Cartel Office is being seen as coming down on the side of public TV broadcasters, one of which currently broadcasts highlights of the games on Saturday between 6pm and 8pm.

#### Notes

- 1 Judgments of the Federal Supreme Court can be found at [www.bundesgerichtshof.de](http://www.bundesgerichtshof.de).
- 2 Decisions of the FCO can be found on the FCO's website at [www.bundeskartellamt.de](http://www.bundeskartellamt.de). With respect to all significant rulings the FCO issues a press release that is usually available not only in German but also in English and French.
- 3 See the commitment decision of the European Commission of 11 October 2007 against Distigaz, summarised at OJ C 9 of 15 January 2008, page 8.

## About the Authors



**Andreas Weitbrecht**

Latham & Watkins

Andreas Weitbrecht, a German *Rechtsanwalt*, is widely regarded as a pre-eminent member of the German and EC competition bars. Partner of the Brussels office and former office managing partner, and also former co-chair of the firm's global antitrust and competition practice, Mr Weitbrecht focuses his practice on EU and German competition law. He advises multinational companies on all issues of competition law, particularly with respect to merger control and cartel enforcement matters. In addition, he has represented clients in numerous competition matters before the European Commission and the German Federal Cartel office and before the European and German courts.

In addition to his role as a law practitioner, Mr Weitbrecht teaches Competition Law at Treves University. His extensive publication experience covers various subjects on European and German competition law, in particular regular reports on developments under articles 81 and 82 of the EC Treaty, and also in the field of merger control.

He is recommended by numerous publications as an expert in European and German competition law. ■



**Susanne Zuehlke**

Latham & Watkins

Susanne Zuehlke is partner in the Brussels office of Latham & Watkins and a member of the firm's global antitrust and competition practice. She is a German and New York qualified lawyer, and is registered as a foreign lawyer with the Brussels Bar. Ms Zuehlke has been practising competition and trade law in Brussels, Berlin and Frankfurt since 1999. She is fluent in both German and English, and speaks French.

Ms Zuehlke advises clients on all aspects of global merger control, coordinating global filings and representing clients in EU and German merger control proceedings. In addition, Ms Zuehlke advises clients on EU and German antitrust law, inter alia on EU antitrust issues in commercial agreements and business practices, on compliance programmes, and in global cartel investigations. Ms Zuehlke also advises clients on all aspects of EU State aid law and also on the application of the EU trade laws (anti-dumping and anti-subsidy), and represents clients in appeals brought in the European Courts in Luxembourg.

She was named one of the top 40 antitrust lawyers under 40 in

the world in the recent survey by *Global Competition Review* (GCR, May 2008). In the *JUVE Handbook 2007/2008*, the leading German reference to business lawyers, Ms Zuehlke is named a 'frequently recommended' attorney for antitrust.

She frequently publishes articles on issues of EU competition law, and is a member of the American Bar Association and the German-American Lawyers Association. ■