



## GERMAN NEWS FLASH

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## New merger control rules in Germany

On 25 March 2009, German merger control rules were changed by the enactment of the Third Act to Alleviate the Burdens of Medium-Sized Businesses (*Drittes Mittelstands-Entlastungsgesetz*). This law introduces an additional threshold for domestic turnover, meaning that each of at least two parties to the transaction must have a certain minimum domestic turnover in order for merger rules to apply. It is expected to significantly reduce the number of transactions that require approval by the German Federal Cartel Office (*Bundeskartellamt*).

With the new rules, German law is now in line with the merger control regimes of many other countries as well as the EC Merger Regulation. In the past, the lack of such a second domestic turnover threshold led to a much higher number of merger filings in Germany than in other countries.

According to the revised rules, three thresholds must be met: First, the worldwide turnover of all companies involved in the transaction must be in excess of EUR 500 million in the last business year. Second, the domestic turnover of at least one company must be in excess of EUR 25 million. In addition, according to the new rules, the domestic turnover of a further undertaking involved must exceed EUR 5 million. Accordingly, from now on German merger control rules only apply to cases in which two of the undertakings involved generate turnover in Germany.

The objective of the new law is primarily to unburden small and medium enterprises by saving time, efforts and costs necessary to prepare a notification, including administrative and lawyers' fees. However, the restricted applicability of German merger control rules will also benefit foreign-to-foreign transactions performed abroad and will thus result in lower transaction costs also for major multi-filing cases. In addition to these advantages, the altered rules may in specific cases also have the effect that even transactions creating or enhancing a dominant position on the market fall out of the scope of German merger control.



## EUR 4 million fine for failure to notify a merger

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The German Federal Cartel Office recently imposed a EUR 4 million fine on the German publishing house DuV (*Druck- und Verlagshaus Frankfurt am Main GmbH*) for putting a merger into effect without notifying it to the Cartel Office.

DuV is a publishing house that publishes the “Frankfurter Rundschau” daily newspaper and several advertising newspapers in the Rhine-Main region. When examining another merger project at the beginning of this year, the Cartel Office discovered that DuV had already acquired the publishing company FSG (*Frankfurter Stadtanzeiger GmbH*) in 2001. Although it was aware of its obligation to do so, DuV had not notified this transaction to the Cartel Office for examination. Under German merger control rules, a concentration – meaning a transaction that must be notified – may not be put into effect before it has been notified to and cleared by the Cartel Office. A violation of this obligation can be punished with fines of up to 10% of the annual turnover of the entire group of companies. This is the second time in three months the Cartel Office has imposed a substantial fine for such an offence. In December 2008, it had already imposed a EUR 4.5 million fine on Mars Inc., the highest fine of this kind so far.

These decisions are particularly interesting in view of a new

administrative practice implemented by the Cartel Office in May 2008. According to this new practice, the Cartel Office will no longer accept a late notification of a concentration that was already put into effect. Instead, it will initiate a so-called unbundling procedure in order to determine whether the concentration establishes or strengthens a dominant position. If this is the case, the Cartel Office can order the dissolution of the merger.

The particular risk of the new practice results from the fact that the Cartel Office is not required to take its decision within a pre-determined time period. Under the past practice, the Cartel Office, even in the event of a late notification, had to adhere to the deadlines of the notification procedure. As a result, the decision on the merger was usually issued within one month. Under the new practice, it may take considerably more time before a decision is taken. Accordingly, the involved companies may have to wait for an extended period of time until a transaction is cleared. During this period, the merger remains without legal effect under German civil law.



## Antitrust – private action for damages

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The idea of private enforcement in case of cartel law infringements exists both in European and German law. Such private enforcement aims at enabling consumers through an effective system of remedies to claim compensation in case of cartel law infringements.

In order to encourage filing of such claims, the European Commission in 2008 issued a White Paper, i.e. a non-binding suggestion, which provides a framework for compensation for cartel law infringements. The primary objective of the White Paper is to make suggestions directed at improving the legal conditions for victims and to outline an effective system of private enforcement that complements, but does not replace enforcement by public authorities.

According to the White Paper, “any individual” that has suffered harm due to an antitrust infringement should be allowed to claim damages before national courts. Furthermore, final decisions of national competition authorities should be binding upon the national courts, so that they cannot hand down a ruling that deviates from such a decision. The White Paper further stipulates that a new limitation period of at least two years should be implemented, which is not supposed to start running before the decision of a competition authority has become final and effective.

In Germany, rules are in force already today that partly go beyond the European proposals. According to Section 33 of the German Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*), everyone affected by a breach of antitrust law is entitled to claim damages. “Everyone” in this context includes competitors, consumers as well as cartel members.

In 2008, a further milestone was set when the Higher Regional Court (*Oberlandesgericht*) in Düsseldorf admitted a claim filed by a company called Cartel Damage Claims (CDC). CDC had bought the claims from different damaged customers and filed a collective damages claim. CDC alleged that the customers suffered damages in the amount of EUR 152 million, because they had paid too high

prices due to a hardcore cartel in the cement sector. CDC did not have to prove the existence of the cartel, because this had already been determined by the Cartel Office in 2003, when it fined the members of the hardcore cartel with a total of EUR 702 million. The court has not yet handed down a final ruling, but a successful outcome of this case from the point of view of the claimants could be regarded as a landmark for the future enforcement of collective damages claims and would show that private enforcement in this respect is no longer merely a theoretical matter.



## German Federal Court decides on stand-still period for mergers

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According to a recent decision of the German Federal Court of Justice, the rule that notified concentrations may not be put into effect during the stand-still period, i.e. the period between the notification and clearance of the merger, applies to all mergers, irrespective of whether the transaction will actually give rise to competition concerns.

In the case decided by the court, the participating undertakings (the Faber group and the Werhahn group) sought interim relief against a decision of the Cartel Office prohibiting the transaction. They argued that the transaction concerned a minor market, i.e. a product market with a sales volume of less than EUR 15 million, and was thus not subject to merger control rules. It was argued that consequently the ban on putting a concentration into effect as set out in Section 41 of the German Act against Restraints of Competition was not applicable. The Higher Regional Court Düsseldorf granted the requested interim relief, thus allowing the parties to execute the transaction.

The Federal Court of Justice overruled this decision, reasoning that the prohibition of putting a concentration into effect applies to all notified mergers, irrespective of whether a minor market is concerned or whether the transaction will actually lead to a dominant market position. The stand-still period remains in place until the prohibiting decision of the Cartel Office has either become legally binding or is annulled. Whether or not a minor market is actually concerned is an issue that needs to be clarified in the court proceedings. Otherwise, it may not be possible to reverse the effects an executed transaction might have on the competitive conditions in a market.

The highest German civil court has thus emphasized that the prohibition of putting a concentration into effect is one of the important principles of German merger control.



## State aid: German measures for banks in crisis and other temporary schemes

The European Commission has published several Communications to support Member States in the current financial and economic crisis, for example regarding access to finance (17/12/2008), recapitalisation of financial institutions (5/12/2008) and the treatment of impaired assets in the EU banking sector (25/02/2009). In October 2008, the European Commission published guidelines on how Member States can best support financial institutions while respecting EU state aid rules. EU state aid rules require that measures taken do not give rise to disproportionate distortions of competition, for example by discriminating against financial institutions based in other Member States or allowing beneficiary banks to unfairly attract new additional business solely as a result of the government support.

On 15 January 2009, the German authorities notified to the Commission a guarantee to be granted by the German Special Fund for Financial Market Stabilization (*Sonderfond Finanzmarktstabilisierung - SoFFin*). The Commission found the measure to be in line with its "Guidance Communication" on state aid to overcome the current financial crisis. The approved guarantee aims at providing collateral for a bond in the amount of EUR 6.7 billion issued by *Sicherungseinrichtungsgesellschaft deutscher Banken mbH - SdB* and subscribed by the member banks and subscribed by the member banks of the Association of German Banks (*Bundesverband deutscher Banken*). SdB is a newly created banking entity of the German private banking industry, which supports the Deposit Protection Fund of the German private commercial banks

in processing the compensation payments. The SoFFin-guarantee enables the subscribers to refinance the bond via the German Central Bank.

The Deposit Protection Fund of the German commercial banks fully secures the deposits of each and every customer at the private commercial banks up to a ceiling of 30% of the relevant liable capital of each member bank. The aim of the bond-issue is to pre-finance the future incoming payments, which the Deposit Protection Fund will receive from the insolvency assets of the insolvent Lehman Brothers Bankhaus AG and its parent company, the US-based investment bank Lehman Brothers Holdings Inc. The pre-financing will provide more financial manoeuvring room to the Deposit Protection Fund with regard to the compensation of the depositors of Lehman Brothers Bankhaus AG and potential additional future compensation or support measures to avoid banking insolvencies. The measure is supposed to increase the confidence in the German private banking sector and the effectiveness of its Protection Fund.

The European Commission has also authorised other German measures, for example a EUR 15 billion loan programme (*KfW Sonderprogramm 2009*), a framework scheme (*Bundesregelung Kleinbeihilfen*) allowing to provide to firms in difficulties aid of up to EUR 500 000 per undertaking as well as a temporary scheme (*Bundesregelung niedrigverzinsliche Darlehen*) allowing authorities at federal, regional and local level, including public development banks, to grant reduced interest rates on loans.

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