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More documentation related to this discussion can be found at

www.oecd.org/daf/competition/extraterritorial-reach-of-competition-remedies.htm

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1. Introduction

1. As a result of globalisation and the immense growth in international trade during recent decades, more and more companies operate internationally. Their market behaviour affects competition not only in the country where they are based, but also in other domestic markets. National competition authorities are increasingly confronted with situations where foreign conduct affects domestic competition. Conversely, the interdependence of markets and the international scope of activity of the companies involved in competition law proceedings imply that the enforcement activity of national competition authorities may have an impact in other jurisdictions.

2. The enforcement activity of the Bundeskartellamt is, in principle, limited to Germany. The main task of the Bundeskartellamt is to apply and enforce the German Competition Act (GWB)¹ with a view to protecting competition in Germany. The Act applies to all restraints of competition that have an effect in Germany, even if the restraints are caused outside Germany. The Bundeskartellamt does not impose remedial measures which need to be implemented outside Germany (section II). However, the enforcement activity of the Bundeskartellamt might have, *de facto*, effects in other jurisdictions (section III). Firstly, since merger remedies need to be suitable to fully address the competition issues raised by a merger, a divestment package may need to encompass assets and resources that are necessary for a viable competitor but are not located in Germany (IIIa). Secondly, when companies decide to change their business practices or contracts terms in order to address the competition concerns of the Bundeskartellamt on vertical restraints, they might decide to apply uniform criteria in other countries as well, even if this is not required by the Bundeskartellamt, which only aims at restoring competition in Germany (IIIb). The Bundeskartellamt complies with the principles of international comity included in ECN, ICN and OECD recommendations on international cooperation in competition proceedings. International cooperation is particularly important in the context of multi-jurisdictional merger cases, in order to avoid the risk of inconsistent or overlapping remedies (section IV).

2. Territorial scope of the enforcement activity of the Bundeskartellamt

3. The Bundeskartellamt is responsible for the enforcement of the German Competition Act (GWB) in order to protect competition in Germany. German competition law includes a “domestic effects clause”: According to Section 185 (2) GWB, the Act applies to all restraints of competition, i.e. to cartels, mergers and abusive practices of dominant or powerful companies that have an effect in Germany, even if the restraints are caused outside Germany. This approach is in line with the effects doctrine of public international law, according to which national authorities have the right to intervene if foreign conduct has a relevant impact on all or part of the territory of their jurisdiction.

¹ An unofficial English version of the GWB is available at https://www.gesetze-im-internet.de/englisch_gwb/index.html.

4. As a rule, the Bundeskartellamt does not take decisions or impose remedial measures which may need to be implemented outside Germany

5. The Booking.com case² is a good example of how the enforcement activity of the Bundeskartellamt is limited to Germany. Booking.com was subject to parallel investigation in several states for the use of parity clauses. The focus of the Bundeskartellamt's investigation were German hotels and the contractual conditions between Booking.com and the hotels, which are the actual providers of accommodation services in Germany. In its decision, the Bundeskartellamt found that the clauses on rate and condition parity agreed between the hotels and Booking.com infringed antitrust law *to the extent that they concern hotels and other accommodation located in Germany* (emphasis added). The Bundeskartellamt prohibited Booking.com from continuing to implement the clauses and ordered Booking.com to remove its best price clauses from the agreements or the General Terms and Conditions underlying such agreements, *to the extent that they concern hotels and other accommodation located in Germany*.³ The Bundeskartellamt explicitly avoided taking a decision which might have affected hotels located abroad.

3. De-facto extraterritorial effects

6. The enforcement activity of the Bundeskartellamt might have, *de facto*, effects in other jurisdictions. This has been the case so far in the context of merger control (3.1) and in the context of vertical restraints (3.2).

3.1. Merger control: The need for suitable divestitures

7. Under German competition law, mergers have to be notified only if they have sufficient effects within Germany. The domestic turnover thresholds of at least two companies involved in a merger ensure that the Bundeskartellamt examines only mergers with a sufficient nexus to Germany.⁴

8. When addressing the competition concerns raised by a merger involving foreign companies, the Bundeskartellamt, as a first step, always examines whether a prohibition of a separable part of the transaction that affects Germany would be possible. If the competition concerns cannot reasonably be addressed without including foreign businesses in the prohibition, the merger must be prohibited, provided that the prohibition conditions are met and no suitable commitments are possible.⁵ Because of the increasing

² B 9-121/13.

³ B 9-121/13, recitals 1, 2 and 3.

⁴ The 9th Amendment to the German Competition Act provides for a new merger control threshold based on the transaction value: A transaction must be notified in Germany if the value exceeds EUR 400 million and the target has significant activities in Germany. The Bundeskartellamt is working on guidelines, in cooperation with the Austrian Federal Competition Authority (BWB) that recently introduced a similar threshold, which also discuss the issue of how significant activity is defined.

⁵ This was confirmed by the Düsseldorf Higher Regional Court in the Phonak/ReSound case: According to the Court, in that case it would have been impossible to meaningfully restrict the prohibition to an inland part of the merger. OLG Düsseldorf 26.11.2008, VI-Kart 8/07, WuW/E DE-R 2477, 2489 ff – Phonak/ReSound.

international integration of large companies, a sensible separation between domestic and foreign businesses is rather the exception than the rule. Should it be possible to clear a merger with remedies, the international scope of activity of the merging parties may imply that the remedial measures imposed by the Bundeskartellamt cannot be limited to assets located in Germany.

9. Divestiture remedies are in general better suited to remove competitive concerns, as they help to avoid harmful effects to competition in the first place. A major advantage in comparison with other types of remedies is that, once implemented, divestments do not require any continued further monitoring or intervention by the competition authority. For these reasons, the remedy practice of the Bundeskartellamt is characterised by divestments in the vast majority of cases.

10. The parties to the merger cannot be required to offer remedies that go beyond what is necessary to prevent or eliminate the competitive harm created by a merger in Germany. This does not exclude that, in particular cases, it may be necessary for a divestment remedy to extend beyond the areas that are strictly affected by the merger.⁶

11. As a rule, the divestment package has to be an existing, stand-alone business that is equipped with all the necessary resources to compete effectively and on a permanent basis with the merging parties. In practical terms, this means that all the assets (e.g. production facilities and IP rights), personnel, as well as all the relevant business relations with suppliers and customers have to be transferred with the divestment business.⁷ In particular, in order to ensure that the divestment business is readily marketable and competitive, in individual cases it may be necessary to include in the divestment package:

- activities on a neighbouring product or geographic market or in neighbouring facilities provided that the divestment business, which operates in the area that raises competition concerns, is only economically viable if combined with the neighbouring activities;
- specific functions, e.g. central functions which a purchaser may not readily substitute, especially in situations in which one group company provides particular services to all the other companies within the same group;
- additional business units, which are not directly connected to the competition issues raised by the merger, but which have to be included in order to ensure that the divestment package is a strategic fit for possible purchasers; for example, profitable market entry may require a minimum scale of activities.⁸

12. The requirements placed on a divestment business in order for it to be effective mean that, depending on the circumstances of each individual case, the divestment package might also include assets and activities that are located outside Germany.

13. An example can illustrate this situation. In 2005 the Bundeskartellamt cleared the merger between two foreign companies, Smiths Group Limited (UK) and MedVest Holdings Corporation (USA) subject to commitments.⁹ MedVest was the parent company of the Medex Group. Medex was a worldwide manufacturer of medical devices, which also had a German subsidiary with Medex GmbH. Smiths Medical Holdco Limited was a

⁶ Guidance on Remedies in Merger Control, May 2017, recital 17.

⁷ Guidance on Remedies in Merger Control, May 2017, recital 40.

⁸ Guidance on Remedies in Merger Control, May 2017, recital 54.

⁹ B4-227/04

subsidiary of the Smiths group with business activities in the medical products sector, which was represented in Germany through the subsidiary Smiths Medical Limited. The merger would have led to the creation of a dominant position for Smiths in the market for devices to measure blood pressure (monitoring sets) in Germany. The merger was approved under the condition that Smiths Group Limited transferred all tangible and intangible assets of its worldwide business for monitoring sets into a separate company, which should subsequently be sold to a third party. The Bundeskartellamt established that “all tangible and intangible assets used by Smiths Group Limited exclusively for the monitoring sets business, as well as all mixed-use assets, which are primarily used by or necessary for the monitoring sets business, must be transferred”.¹⁰ Therefore, in practice, the Bundeskartellamt imposed remedies involving assets that were not located exclusively in Germany.

3.2. Vertical restraints: Spill-over effects of the Bundeskartellamt’s decisions

14. The enforcement activity of the Bundeskartellamt might, indirectly, affect jurisdictions other than Germany. In the last years the Bundeskartellamt concluded several proceedings against internationally operating companies, which, in response to the concerns raised by the Bundeskartellamt about vertical restraints in their distribution systems, decided to change their practices and/or contractual terms not only in Germany, but also throughout the EU.

15. In 2013 the Bundeskartellamt terminated its proceedings against Amazon after the company agreed not to enforce price parity clauses on its Marketplace platform. In these proceedings the Bundeskartellamt cooperated with the British competition authority, the (at the time) Office of Fair Trading, within the scope of the ECN. In order to meet the concerns of the authorities, Amazon offered to abandon the clauses EU-wide.

16. In 2014, the Bundeskartellamt closed its proceedings against adidas AG (adidas) after the company had amended its conditions for online sales. The conditions for online sales, which were introduced in 2012, included a far-reaching prohibition for retailers to sell via the large online market places eBay and Amazon Marketplace, as well as other platforms such as Rakuten.de, Yatego.de, Hitmeister.de and meinPaket.de. In response to the Bundeskartellamt’s competition concerns, adidas submitted an amended version of its conditions of sale for e-commerce, in which it completely abandoned its ban on sales via online market places. It also clarified that all authorised retailers were free to use adidas brand related terms as search words for search engine advertising such as Google AdWords. Also in this case, adidas applied the new conditions for online sales not only in Germany, but throughout the EU.¹¹

17. In July 2016, the toys manufacturer LEGO agreed to change its discount system in such a way that online retailers would be able to obtain the same level of discount as brick-and-mortar retailers. According to LEGO's previous discount system retailers could only obtain the highest number of discount points through sales in offline stores because several criteria applied exclusively to the brick-and-mortar trade, e.g. number of metres of available shelf space. This meant that even retailers which fulfilled LEGO's conditions in online sales in many cases obtained lower discounts than those which were exclusively

¹⁰ B4-227/04, p.2.

¹¹ http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2014/02_07_2014_adidas.html

active in offline sales. The company agreed to change its discount policy not only in Germany, but also in the rest of the EU.¹²

18. In these cases, the Bundeskartellamt's investigations had, *de facto*, an extraterritorial effect. However, the Bundeskartellamt did not request remedial measures which extended beyond Germany. The companies decided to change their policy at their own will in order to have uniform conditions and contractual terms in the whole EU.¹³

4. International cooperation

19. In an increasingly globalised economy cooperation among competition authorities is crucial to ensure consistent decisions and effective remedies, and to avoid the risk of double jeopardy.

20. The Bundeskartellamt cooperates with other competition authorities within the European Competition Network (ECN) and the International Competition Network (ICN). Within the ECN, competition authorities make use of the opportunities for information exchange and assistance in investigations. The ECN helps to ensure consistency in competition cases with the EU. An early warning system was introduced in 2016 which allows the discussion of ongoing cases that raise novel issues at the earliest possible stage. It also facilitates early case allocation and/or the coordination of novel cases with cross-border effects, run by several authorities.

21. Because of the increasing number of multi-jurisdictional mergers, cooperation is particularly important in the context of merger control if remedies are required in several jurisdictions. In May 2017 the Bundeskartellamt published a guidance document on remedies (the Guidance),¹⁴ which also addresses the issue of international cooperation on remedies design and implementation in multi-jurisdictional merger cases.¹⁵ The principles included in the Guidance are based on ECN, ICN and OECD recommended practices for international cooperation in merger proceedings.¹⁶ The Guidance suggests that, if concentrations are examined in several jurisdictions, an extension of the time limits on the basis of consent expressed by the merging parties can enable the competition authorities involved to examine the concentration in parallel procedures and to cooperate closely in the interest of achieving consistent results in their proceedings. The Guidance emphasizes that inconsistent remedies should be avoided whenever possible. Effective cooperation among authorities can be facilitated if the parties provide each of the relevant

¹² http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/18_07_2016_Lego.html

¹³ http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2013/26_11_2013_Amazon-Verfahrenseinstellung.html

¹⁴ Guidance on Remedies in Merger Control, May 2017. <https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitlinien/Guidance%20on%20Remedies%20in%20Merger%20Control.html>

¹⁵ Guidance on Remedies in Merger Control, May 2017, para 112.

¹⁶ See ICN, Merger Working Group, Practical Guide to International Enforcement Cooperation in Mergers, 2015; Recommended Practices for Merger Notification and Review Procedures, 2002-2006; as well as EU Merger Working Group, Best Practices on Cooperation between EU National Competition Authorities in Merger Review, 2011. See also OECD Recommendation concerning International Co-operation on Competition Investigations and Proceedings, 2014.

competition authorities with waivers of confidentiality in which they express their consent to an exchange of documents and confidential information between the competition authorities involved.¹⁷

22. The extent of cooperation between the Bundeskartellamt and other competition authorities varies depending on the circumstances and ranges from simple informal calls to exchange views to more standardized procedures, especially within the ECN. This also applies in the case of remedies.

23. The General Electric/InVision case is an excellent example of formal and successful cooperation between competition authorities. In 2004 the Bundeskartellamt cleared the planned acquisition of InVision Technologies, Inc., Newark (USA) by the General Electric Company, Fairfield (USA) subject to conditions.¹⁸ The project was also examined by other competition authorities in Europe and USA. The Bundeskartellamt worked in close cooperation with the US Federal Trade Commission (FTC). The Bundeskartellamt and the FTC reached an agreement not only on the respective remedies and time limits, but also on the nomination of a security trustee to prevent potentially conflicting remedies from the very beginning. It was also in the interest of the undertakings concerned to ensure smooth negotiations between the competition authorities leading to an agreement on the clearance conditions. The parties supported this process by waiving their right to the confidentiality of business secrets in the documents that were exchanged at an early stage.

5. Conclusion

24. The main task of the Bundeskartellamt is to protect competition in Germany. German competition law applies to all restraints of competition that have an effect in Germany, even if the restraints are caused outside Germany. As a rule, the Bundeskartellamt does not impose remedial measures that affect other jurisdictions. However, the enforcement activity of the Bundeskartellamt might *de facto* have extraterritorial effects. On the one hand, in order to ensure that a divestment business maintains its competitiveness, which is closely linked to its economic viability, value and marketability, merger remedies might need to involve assets and resources that are not strictly located in Germany. On the other hand, in order to address the competition concerns expressed by the Bundeskartellamt, companies might decide to change their practices or contractual terms not only in Germany, but in other countries as well. The Bundeskartellamt regularly cooperates with competition authorities around the world on the basis of bilateral agreements or within international networks. Cooperation among competition authorities is crucial, among other things, to avoid the risk of inconsistent and overlapping merger remedies.

¹⁷ See ICN, Waivers of Confidentiality in Merger Investigations, 2005.

¹⁸ http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2004/19_08_2004_GE_InVision_eng.html