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AGENCY DECISION-MAKING IN MERGER CASES: FROM A PROHIBITION DECISION TO A CONDITIONAL CLEARANCE

-- Note by Germany --

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More documents related to this discussion can be found at www.oecd.org/daf/competition/agency-decision-making-in-merger-cases.htm

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-- GERMANY --

Abstract

1. Remedies have proved to be a major instrument for the effective implementation and enforcement of merger control rules in Germany. The Bundeskartellamt assesses the remedies with a view to whether they are suitable, necessary and proportionate. Remedies have to completely remedy the competitive harm identified in the Bundeskartellamt's investigation in a timely manner. This is the case if the remedies completely prevent the expected negative impact on market conditions and market structures or at least reduce the anticompetitive effects of the merger to an acceptable degree that does not meet the requirements for a prohibition.

2. The Bundeskartellamt has no discretion when deciding whether or not to accept commitments. If the commitments fully and effectively remedy the competition problems, clearance subject to remedies has to be granted under the principle of proportionality. If the proposed commitments are not sufficient to remedy the competition issues with the required degree of certainty, the Bundeskartellamt must prohibit the merger.

3. The Bundeskartellamt has recently published a guidance document on remedies for public consultation. The Guidance describes the most important types of remedies, explains the requirements remedies have to fulfil in order for the Bundeskartellamt to accept them, sets out the procedure in which remedies are implemented. Additionally, the Guidance incorporates the Bundeskartellamt's case practice and experience, as well as the case law of the Court of First Instance (Düsseldorf Higher Regional Court) and the German Federal Court of Justice.

1. Introduction

4. The prohibition of a merger imposes far-reaching restrictions on the companies concerned. While in some cases this is the only way to avoid impeding effective competition, leading to higher prices, lower output or less innovation, in many cases appropriate remedies may be a preferable alternative.

5. With the help of remedies the parties can modify their merger project post-notification in such a way that the merger has no longer to be prohibited. Remedies enable companies to realize the expected benefits of a merger to the greatest possible extent, even if they cannot obtain an unconditional clearance. This is a viable option in many cases where the acquisition of the target company only raises competition concerns with regard to individual parts of its business activities, which can be separated from its other activities. Selling the relevant business to an appropriate independent third party is often sufficient to prevent any competition problems arising from the concentration.

6. The Bundeskartellamt has recently published a guidance document on remedies for public consultation (from now on “the Guidance”).¹ The Guidance describes the most important types of remedies, explains the requirements remedies have to fulfil in order for the Bundeskartellamt to accept them, sets out the procedure in which remedies are implemented. Additionally, the Guidance incorporates the Bundeskartellamt’s case practice and experience, as well as the case law of the Court of First Instance (Düsseldorf Higher Regional Court) and the German Federal Court of Justice.

2. Remedies in German merger control

2.1 *The procedure*

7. The Bundeskartellamt examines and assesses between 1,000 and 1,200 mergers annually, of which the vast majority does not raise any competition issues. A high number of mergers have a positive impact on competition, e.g. M&A transactions may allow merging parties to attain economies of scale and to realize other synergies as well. However, in particular in the context of markets that are already to some degree concentrated, mergers can also have negative effects on market structure by increasing the market power of a single or several companies active on the relevant market.

8. The Bundeskartellamt prohibits a (notifiable) concentration if it significantly impedes effective competition (SIEC test), in particular if it can be expected that the merger will create or strengthen a dominant position.² Even if these requirements are met, the concentration may be permitted if the merging parties prove that the concentration also leads to improvements in the conditions of competition and that these improvements outweigh the harm to competition.³

9. Should the Bundeskartellamt express strong reservation against the merger, the parties can propose commitments⁴ to remedy the competition concerns. If, according to the assessment of the Bundeskartellamt, these commitments are suitable, the concentration can then be cleared (subject to conditions and obligations).

10. Commitments can generally be submitted at any stage of the procedure. However, the scope and content of the commitments can generally only be negotiated once the Bundeskartellamt’s investigations on the likely competitive effects of the concentration have been completed. This stage of the Bundeskartellamt’s investigations is usually marked by the authority’s statement of objections. In some cases, it may also be possible to finalise the negotiations about the commitments after the preliminary competition concerns have been orally communicated to the merging parties. In most cases, merging parties are only willing to propose remedies once they have received the statement of objections.

11. In principle, it is for the parties to the merger to propose suitable commitments. In appropriate cases, the Bundeskartellamt may, however, suggest to the parties which remedies would be suitable and necessary in the particular case.

¹ Guidance on Remedies in Merger Control, 7.10.2016.
<http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitlinien/Guidance%20on%20Remedies%20in%20Merger%20Control.html?nn=3591568>.

² Section 36 (1) sentence 1 Gesetz gegen Wettbewerbsbeschränkungen (GWB) or German Competition Act. See also Bundeskartellamt, guidance document on substantive merger control (2012), which explains in detail the circumstances in which a dominant position is created or strengthened by a merger. The guidance document was published prior to the introduction of the SIEC test. Being a standard key example for an SIEC, the dominance test is still relevant in the context of the SIEC test. The Bundeskartellamt plans to revise the aforementioned guidance document to reflect the changes in the law. In particular, scenarios covered by the SIEC test, but not the dominance test, will need to be addressed.

³ Section 36 (1) sentence 2 no. 1 GWB.

⁴ The terms “remedies” and “commitments” are used indifferently in this paper.

12. In cases in which a remedy proposal is submitted, the time limit for the assessment of the case is extended by one month. The available time for investigation is, however, limited and this has to be taken into account when deciding on the scope and depth of investigation that is required of the Bundeskartellamt to examine the suitability of remedy proposals. Since the merging parties usually have access to the information necessary to assess whether the remedies are suitable to address the competition problems caused by the merger, it is in their own interest to cooperate closely with the Bundeskartellamt in the context of the assessment. This is even more important if remedy proposals are submitted at a late stage of the merger control proceedings.

2.2 *The assessment*

13. As far as the parties propose commitments, the Bundeskartellamt assesses the remedies with a view to whether they are suitable, necessary and proportionate.

14. The information gathered in the proceeding regarding the relevant markets represents an important basis for the assessment of whether the proposed commitments are suitable to eliminate the competition problem identified by the Bundeskartellamt. Additionally, market tests of the proposals play a particularly important role in the assessment: Important customers and competitors as well as third parties admitted to the proceedings (as an intervening party) are usually asked to provide their views on different aspects relating to the suitability of the commitments proposed and their likely impact on the affected markets.⁵

15. The Bundeskartellamt cannot require the parties to propose the best remedy possible with regard to its effects on competition. Parties are only required to offer an effective remedy that is sufficient to resolve the competition problems created by the merger. If a market is characterized by effective competition absent the merger, the remedy has to ensure that the merger will not result in a situation in which competition is reduced. If the market is already highly concentrated and characterized by the market power of one or several companies, the remedy has to at least prevent the merger from (further) worsening the conditions of competition on the affected market.

16. The parties to the merger may also not be required to offer commitments that go beyond what is necessary to prevent or eliminate the competitive harm created by a merger. This does not exclude that it may be necessary in particular cases for a divestment remedy to extend beyond the areas that are strictly affected by the merger. In some situations, a divestment business is only viable if, for example, it includes other economic activities as well.

17. Remedies can also be geared towards improving conditions of competition on a different market than the market where the competition issues arise (so-called balancing clause).⁶ In order to be acceptable, however, remedies have to be intrinsically linked to the concentration, i.e. the pro-competitive effects have to be caused by the concentration. For such a connection it is not sufficient that the merging parties merely create a formal link by offering a remedy package that includes improvements that are otherwise unrelated to the merger. In addition, the pro-competitive effects of a merger must be of a structural nature to outweigh the anti-competitive effects. Therefore, for example, expected price cuts, intended conduct according to a business plan or the willingness to invest, are not sufficient.⁷

⁵ For a detailed overview of the Bundeskartellamt's practice with market tests see A. Bardong, "Market Tests and Merger Remedies in Germany", Concurrences N° 1-2013.

⁶ A merger which significantly impedes effective competition will not be prohibited if the conditions of the so-called balancing clause under Section 36 (1) GWB are fulfilled. Under this exemption, a merger is cleared if the companies prove that the concentration will also have pro-competitive effects on a different market, and that these will outweigh the negative effects on the first market. If the effects on competition concern the same market where the merger takes place, they are not taken into account in the context of the balancing clause, but in the assessment of impediment of effective competition.

⁷ See Bundeskartellamt, decision of 3.4.2008, B7- 200/07 – *KDG/Orion*, para. 245.

18. The pro-competitive effects have to outweigh the anti-competitive effects resulting from the concentration. Remedies that only reduce the competitive harm created by a merger and do not fully compensate for the impediment to effective competition are not sufficient to avoid a prohibition.⁸ The law imposes the burden of proof on the merging parties in respect of the expected pro-competitive effects: merging parties are required to provide substantial and consistent explanation.

19. The Bundeskartellamt has no discretion to decide whether or not to accept commitments: If the commitments are suitable, necessary and proportionate to fully and effectively remedy the competition problems in a timely manner, the Bundeskartellamt has to clear the merger subject to remedies under the principle of proportionality.⁹ In the opposite situation, the Bundeskartellamt does not have discretion either: If the proposed commitments are not sufficient to remedy the competition issues with the required degree of certainty, the Bundeskartellamt does not have the power to clear the merger subject to commitments, but must prohibit it.¹⁰

2.3 *International cooperation*

20. When mergers are subject to review in several jurisdictions, an effective and close co-operation between the authorities is key, in particular, if remedies for cross-border mergers are negotiated in several jurisdictions. Inconsistent remedies should be avoided whenever possible.¹¹

21. In some cases, cooperating agencies reach different remedial decisions because of the different effects of the merger or acquisition in their jurisdictions. Indeed, remedies may not be necessary in every jurisdiction. In some other cases, timing plays a role. Asynchronous filings and different deadlines for the assessment may also lead to different decisions by national authorities. 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. Likewise, effective cooperation can be facilitated if the parties provide each of the relevant competition authorities with so-called waivers of confidentiality in which they express their consent to an exchange of documents and confidential information provided by them between the competition authorities involved.¹²

⁸ See Bundeskartellamt, decision of 19.1.2006, B6-103/05 – *Springer/Pro7Sat1*, p. 73 et seq. (only reducing the degree to which a dominant position is strengthened).

⁹ See [BT-Drucksache 13/9720](#), Government Draft of the sixth amendment to the Act against Restraints of Competition, justification for the amendment of § 40 para. 3 GWB, p. 60.

¹⁰ The German Federal Court of Justice clarified that the Bundeskartellamt has no discretion when deciding whether to prohibit a merger or clear it with remedies. The Court established that "a merger clearance subject to conditions and obligations is only permissible, yet also required, if this can prevent an impairment of the market structure that Section 36 (1) GWB seeks to avoid." Cf. BGH (Federal Court of Justice), decision of 20.4.2010, KVR 1/09 – *Phonak/GN Store*, para. 90 (juris). For the different view of the lower court in first instance (Düsseldorf Higher Regional Court) see decision of 7.5.2008, VI-Kart 13/07 (V) – *Cargotec/CVS Ferrari* and decision of 26.11.2008, VI-Kart 8/07 (V) – *Phonak/GN Store*, para. 166 et seq. (juris).

¹¹ Cf. International Competition Network (ICN), Merger Working Group, Practical Guide to International Enforcement Cooperation in Mergers, 2015, para. 37 et seq., in particular para. 39.; ICN, Recommended Practices for Merger Notification and Review Procedures, 2002-2006, p. 31 (<http://www.internationalcompetitionnetwork.org/working-groups/current/merger.aspx>); as well as EU Merger Working Group, Best Practices on Cooperation between EU National Competition Authorities in Merger Review, 2011, para. 2.3 (http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Sonstiges/ECN%20Best%20Practices%20n%20cooperation.pdf?__blob=publicationFile&v=6). See also OECD Recommendation concerning International Co-operation on Competition Investigations and Proceedings V.1., VI 3.(i) and VI.4.(v) (<http://www.oecd.org/daf/competition/2014-rec-internat-coop-competition.pdf>).

¹² Cf. ICN, Waivers of Confidentiality in Merger Investigations, 2005 (the ICN model waiver is contained in annex A) (<http://www.internationalcompetitionnetwork.org/uploads/library/doc330.pdf>).

3. Statistics and recent cases

22. The Bundeskartellamt prohibited a limited number of cases after in-depth scrutiny (second phase proceedings) in the last five years. The number of commitment decisions was at a comparable level. In the last five years, nine mergers were prohibited (four only in 2012) and five mergers were cleared with remedies.

Table 1. Second Phase decisions in the last 10 years - Statistics

	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Prohibition	5	7	4	3	1	2	4	1	1	1
Clearance with commitments	6	8	4	5	3	1	1	2	1	1
Clearance without commitments	24	14	7	13	6	3	11	6	8	6

3.1 Conditional merger clearances in the last 5 years

23. In 2011 the Bundeskartellamt cleared the merger between the neighbouring cable network operators Kabel Baden-Württemberg (KabelBW) and Liberty Global (Unitymedia) with commitments.¹³ The merger raised concerns mainly with regard to competition between network operators for retail TV service contracts which are concluded with housing associations. According to the Bundeskartellamt's assessment, the merger would have resulted in the stabilisation of the tacit collusion between the regional cable network operators to limit their activities to their home network areas, inter alia because the non-competitive oligopoly of regional cable network operators would have been reduced from three to two suppliers. Liberty Global offered, amongst other things, the commitment to grant special termination rights to certain housing associations, which included a large number of housing units. The Bundeskartellamt considered this commitment (together with the other commitments offered) sufficient to compensate for the negative market effects because it lowered the market entry barriers for third suppliers. In contrast, the Düsseldorf Higher Regional Court (OLG Düsseldorf, first instance court in Germany) lifted the approval, arguing that the commitments were not sufficient to compensate for the elimination of the future potential competitor KabelBW in an adequately effective and sustainable way. The court defined the regional markets more narrowly, consisting of the respective network area of each of the two merging parties. On this basis, the court concluded that the merger would have eliminated the potential competitor KabelBW on the regional cable market in the network area of the purchaser Unitymedia.

24. In 2012 the Bundeskartellamt cleared the acquisition of the business segment "Returnable Transit Packaging" of the Linpac Group Limited by Private Equity Fonds one Equity Partners II L.P. (OEP) subject to conditions and obligations.¹⁴ OEP was already dominant on the German market for beverage crates prior to the merger and the proposed merger would have strengthened this dominant position. Clearance was granted subject to the condition that the business segment "Beverage Crates" was sold to an independent third party. This would have allowed a market participant to expand its market position and reduce the gap to the market leader.

¹³ Bundeskartellamt, decision B7-66-11, 15.12.2011, initially annulled by OLG Düsseldorf, decision of 14.8.2013, VI-Kart 1/12 (V) – *Signalmarkt*; later withdrawal of appeals while appeals against the refusal to grant leave were pending before the Federal Court of Justice (Bundesgerichtshof, BGH); thus, decision of Bundeskartellamt rendered final.

¹⁴ Bundeskartellamt, decision B3-120/11, 03.02.2012.

25. In 2013 two mergers were cleared with remedies. The acquisition by Asklepios Kliniken Verwaltungsgesellschaft (a group that operates 56 acute care hospitals, as well as other clinics and medical care centres) of a stake in Rhön-Klinikum AG would have strengthened Asklepios' dominant position in the region of Goslar (Lower Saxony).¹⁵ Asklepios obtained clearance by selling the hospital it operated in the area, and a medical care centre to an independent hospital operator. The merger between Brink's Deutschland GmbH and Brink's Transport und Service GmbH and the Madrid based company Prosegur Compania de Seguridad SA would have caused competition problems in the market for cash handling services in Greater Berlin. The companies undertook to sell a substantial share of their business in the Greater Berlin area to third companies prior to the acquisition.¹⁶

26. In 2014 the Bundeskartellamt cleared subject to conditions and obligations the acquisition by Funke Mediengruppe (FMG) of Axel Springer's TV programme magazines.¹⁷ According to the Bundeskartellamt, FMG's takeover of the print titles previously published by Springer would have reduced the number of suppliers on the reader and advertising market for TV programme magazines from four to three. To solve these competition problems the parties agreed to sell several programme magazine titles to an independent competitor.

27. In 2015 the acquisition of Trost Auto Service Technik SE (Trost) by Wessels & Müller SE (WM) was cleared subject to remedies.¹⁸ The merger would have led to a significant impediment to effective competition in six regional markets in Germany for the independent wholesale trade in automobile spare parts. WM and Trost offered to sell one or more branches in the regional markets concerned to a suitable third party not affiliated to them that would have been able to continue operations at these regional markets, also in competition with WM.

28. In other cases, the Bundeskartellamt did not consider the remedies offered by the parties sufficient to solve the competition concerns identified in the in-depth investigations and prohibited the merger. A selection of cases are described in section 4.

¹⁵ Bundeskartellamt, decision B3-132/12, 12.03.2013.

¹⁶ Bundeskartellamt, decision B4-18/13, 18.07.2013.

¹⁷ Bundeskartellamt, decision B6-98/13, 25.04.2014.

¹⁸ Bundeskartellamt, decision B9-48/15, 13.08.2015.

Table 2. Second phase decisions in the last five years - Prohibitions and clearance with remedies

Year	Prohibition	Clearance with remedies
2015	Edeka / Kaiser's Tengelmann (food retail)	Wessels & Müller SE / Trost Auto Service Technik SE (motor vehicle spare parts)
2014	Klinikum Esslingen / Kreiskliniken Esslingen (hospitals)	Axel Springer SE / Funke Mediengruppe (TV programme magazines)
2013	Tele Columbus / Kabel Deutschland (cable networks)	Brink's Deutschland GmbH and Brink's Transport & Service GmbH / Prosegur Compania de Seguridad SA (cash handling services)
2012	Lenzing AG / Kelheim Hygiene Fibres GmbH (cellulosic fibres) Klinikum Worms GmbH / HDV gemeinnützige GmbH (hospitals) GU Haspa Finanzholding / Kreissparkasse Herzogtum Lauenburg / Kreis Herzogtum Lauenburg (banking services) Xella / H+H (concrete)	Asklepios Kliniken / Rhön-Klinikum (hospitals) Returnable Transit Packaging of Linpac Group Limited / Private Equity Fonds one Equity Partners II L.P. (transport packaging)
2011	Tönnies Holding / Tummel (food industry) GU ProSieben Sat.1 Media AG / RTL interactive GmbH (video on demand via internet)	Liberty Global Europe Holding B.V. / Kabel Baden-Württemberg GmbH (cable networks)

4. The Bundeskartellamt's new Guidance on Remedies in Merger Control

29. The design of an effective remedy capable of adequately addressing the competitive concerns in a merger case is a complex matter that requires a high degree of knowledge of the industry concerned, as well as a great deal of foresight on the part of the case team and the merging parties.

30. The Bundeskartellamt has recently published a guidance document on remedies for public consultation (the Guidance).¹⁹ The Guidance explains the requirements that need to be met for the Bundeskartellamt to clear otherwise problematic concentrations subject to conditions and obligations (remedies). The Guidance describes the most important types of remedies and explains the individual requirements they have to fulfil respectively. Additionally, the document sets out the procedure in which remedies are accepted and implemented. Finally, the Guidance incorporates the Bundeskartellamt's case practice and experience as well as the case law of the Oberlandesgericht Düsseldorf (Düsseldorf Higher Regional Court, OLG) and the Bundesgerichtshof (German Federal Court of Justice, BGH).²⁰

4.1 Requirements placed on a remedy

31. The Guidance establishes that a remedy has to be suitable and necessary to completely remedy the competitive harm identified in the Bundeskartellamt's investigation in a timely manner. This is the case if the remedy completely prevents the expected negative impact on market conditions and market structures or at least reduces the anticompetitive effects of the merger to an acceptable degree that does not meet the requirements for a prohibition.²¹

¹⁹ The Guidance on Remedies in Merger Control, 07.10.2016.
<http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitlinien/Guidance%20on%20Remedies%20in%20Merger%20Control.html?nn=3591568>.

²⁰ The case practice and guidance documents of other competition authorities regarding the assessment of commitments are also taken into account. This is particularly true for the case law of the European courts and the decisions and guidelines of the European Commission. The work products of the international fora ICN and OECD were also taken into consideration when drafting the guidance document.

²¹ Guidance on Remedies in Merger Control, para. 14.

32. Also, remedies are only suitable if their implementation can be expected with sufficient certainty and in a timely manner. They must be practical, i.e. capable of being implemented, monitored and enforced. This requires that the text of the remedy clearly specifies which particular actions the parties to the merger have to undertake to fulfil the obligations laid down in the remedy. To verify the implementation of these actions, suitable control mechanisms need to be provided for in the clearance decision. Finally, it is necessary that all the parties to the transaction fully agree on the remedy proposal. Otherwise, it is normally not possible to confirm during the limited time available for a merger control procedure that the proposed remedies will be fully implemented.²²

33. Most importantly, commitments have to be submitted in time. The Bundeskartellamt needs to be able to evaluate the proposed remedies (and where necessary conduct a market test) before the review period for a phase-two decision expires. Merging parties have to take these requirements into account when they plan milestones for the transaction and negotiate the contractual rights and obligations of the parties.²³

4.2 *Guiding principles*

34. The Bundeskartellamt follows three guiding principles when drafting remedies to ensure their effectiveness: (i) Divestiture remedies are the most appropriate instrument in most cases. (ii) Insofar as behavioural commitments can be considered to provide an effective solution in the particular case, they must not subject the conduct of the companies involved to continued control.²⁴ (iii) As a rule, a divestiture remedy has to take the form of an up-front buyer divestiture.²⁵

4.2.1 *Preference for structural remedies*

35. Divestiture remedies are usually the most preferable remedy. Divestments lead to a structural change that directly addresses the external growth that causes a competition problem. In addition, a major advantage of this type of remedies is that, once implemented, divestments do not require any further monitoring or intervention by the competition authority. Divestments are usually self-policing and they often have a lasting competitive impact. For most divestments, implementation risks are less severe than the risks that are usually associated with non-structural remedies. For these reasons, the remedy practice of the Bundeskartellamt is characterized by divestments in the vast majority of cases. In some cases, behavioural remedies can be a possible solution, but they are usually considered not as effective as structural remedies. Behavioural remedies are often used as complementary obligations in addition to a divestment remedy to ensure the effective implementation of the divestment.

36. In some cases it may be necessary to include, apart from a divested company or business unit, specific assets or human resources in the divestiture package to ensure that the divestment business is readily marketable and competitive, for example:

- 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;

²² Guidance on Remedies in Merger Control, para. 18.

²³ Guidance on Remedies in Merger Control, para. 20.

²⁴ Section 40 (3) sentence 2 GWB.

²⁵ Guidance on Remedies in Merger Control, para. 21.

- specific functions, e.g. central functions which a purchaser may not substitute readily, 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 divestiture package is a better strategic fit for possible purchasers, for example profitable market entry may require a minimum scale of activities.²⁶

Box 1. Case Edeka/Tengelmann

The Bundeskartellamt cleared subject to divestments plans by Edeka (Germany's leading food retailer) and Tengelmann (at the time of the decision the fifth largest food retailer in Germany) to merge their two discount chains Netto and Plus in a jointly controlled joint venture.²⁷ Without the divestments the proposed merger would have raised serious competition concerns in around 70 regional markets. In the assessment of the competition situation on the regional markets affected by the merger, the Bundeskartellamt also took into consideration the competitive landscape of the neighbouring geographic markets. It turned out that the regional markets that raised concerns and the neighbouring markets formed clusters in which Edeka was the market leader. Therefore, the parties' strong market position could not be countered by strong competitors on neighbouring markets.

The parties offered to divest all Plus outlets in the markets which the Bundeskartellamt considered problematic to avoid a prohibition of the merger. All in all, this concerned approx. 400 outlets. As part of the remedies, additional outlets (outside the regional markets affected) had to be added where this was necessary to form a suitable package for the potential buyer. In order to be effective, the package(s) had to consist of one cohesive network of outlets within the respective clusters. Infrastructure facilities of the parties, in particular warehouses or logistical facilities, were to be included as well where this was required by the buyer for an efficient supply of the acquired outlets.

37. A divestiture package in which assets and personnel of the purchaser and the target company are combined (mix-and-match) often raises serious issues as to whether the divestment business will be viable and competitive. In most cases, it is not sufficiently certain that the formerly separate parts will be able to work together effectively, that they can be integrated quickly after the divestment remedy has been implemented, and that the new business unit will be able to operate reliably.²⁸

Box 2. Case Xella/H+H

The takeover of the Danish manufacturer of aerated concrete H+H by the market leader Xella would have resulted in a dominant position for Xella on the regional markets for aerated concrete and light-weight concrete blocks in northern and western Germany.²⁹ In Germany H+H manufactured exclusively aerated concrete and had one production site in each of the two regional markets affected by the merger. Xella was the leading manufacturer of aerated concrete and calcium silicate bricks in Germany with production sites across the entire country. The Bundeskartellamt prohibited the takeover. According to the authority, the commitments offered by Xella were not sufficient to eliminate the negative effects on competition. Xella had offered, among other commitments, to sell its own aerated concrete production site at Wedel in the northern regional market, which had so far been integrated into Xella's central distribution structure. Xella proposed to divest one of its own production facilities, the customer list of an H+H production site, the contractual relations between H+H and its customers, the sales staff employed by H+H for a specific geographic market and, if required, the H+H brand. Furthermore, Xella committed to undertake not to solicit these customers for a period of two years. In the Bundeskartellamt's view, this combination of divested assets and

²⁶ Guidance on Remedies in Merger Control, para. 52.

²⁷ Bundeskartellamt, decision B2-96/14, 31.03.2015.

²⁸ Guidance on Remedies in Merger Control, para. 49.

²⁹ Bundeskartellamt, decision B1-30/11, 08.03.2011.

resources from different businesses was not suitable to transfer (a sufficiently large portion of) H+H's previous market position. In the affected industry the divestiture of customer relationships together with production capacities was not sufficient to guarantee the actual transfer of customer relationships to the buyer of the divestment business. The envisaged customer allocation measures would have only resulted in a restriction of competition between Xella and the purchaser of the divestment business to the detriment of the customers. The Düsseldorf Higher Regional Court confirmed the Bundeskartellamt's assessment of the proposed "mix and match" solution and its weak competitive effect.³⁰

4.2.2 *No continued control*

38. According to German law, remedies must not aim at subjecting the parties' market conduct to continued control.³¹ Enforcing behavioural remedies can therefore be problematic: The need to constantly monitor compliance with particular behavioural remedies would not only create a significant administrative burden for the competition authority, but also call into question the remedy's effectiveness. If conduct remedies necessitate a continued control, they are also not in line with the objectives of a preventive merger control system: Non-compliance could only be identified and addressed ex-post.

39. Imposing obligations on the parties to the merger with regard to their conduct, i.e. to apply or abstain from a particular conduct, is allowed by the Bundeskartellamt if: 1) the parties must not be obliged to act constantly in a specific way; 2) the relevant conduct must have a lasting effect on market conditions that is sufficient to remedy the competitive harm; 3) the effect on market conditions has to be the result of one or only a few subsequent but connected implementing measures. These requirements are usually met if the permanent effect of the remedy does not require any further monitoring activities by the competition authority after it has verified that all the necessary implementing measures have been undertaken.³²

Box 3. Case Tönnies/Tummel

Tönnies, the leading operator of sow slaughterhouses in Germany, intended to buy a competitor, the slaughterhouse Tummel.³³ To compensate for the expected lessening of competition in the market for the purchase of cull sows and the distribution of sow meat, Tönnies offered to suspend its sow slaughtering activities at Tummel's plant for about two years. In an additional proposal Tönnies suggested to offer slaughtering capacities to third parties, i.e. providing them with slaughtering services on the basis of three to five year contracts. The Bundeskartellamt rejected these proposals and prohibited the merger. The proposed remedies would have required a permanent monitoring of the market conduct of Tönnies and would not have solved the competition problems raised by the merger. The disuse of capacities at the acquired plant would not have been sufficient to effectively compensate for the loss of competitive pressure that Tummel exercised on Tönnies.

40. Examples of remedies that the Bundeskartellamt would not accept are market access remedies and sales restrictions, provided they require constant monitoring. "Chinese-Wall" commitments are also not suitable because their implementation within a group of companies cannot be effectively monitored by a competition authority. Equally problematic are organisational obligations (e.g. legal unbundling within a corporate group), obligations to make or to refrain from particular investments, and obligations not to exercise certain shareholder rights. Neither would price caps be considered an acceptable remedy because in practice they are not an effective measure to address the negative impact of a merger on market conditions.

³⁰ The Court based its assessment on a broader product market definition, on which the BKartA had only relied as a fall-back option. OLG Düsseldorf, judgement of 25.9.2013, VI Kart 4/12 (V).

³¹ Section 40 (3) sentence 2 GWB.

³² Guidance on Remedies in Merger Control, para. 25.

³³ Bundeskartellamt, decision B2-36/11, 16.11.2011.

Nor would long-term supply obligations meet the requirements for effective remedies.³⁴ The following behavioural remedies have been accepted so far: divestment of take-off and landing slots at airports, termination of exclusive distribution agreements, granting customers the right to terminate long-term supply contracts, granting access to infrastructure, granting IP licences, obligation to apply public procurement procedures in the local public transport sector after contracts have expired and admission of a competitor as a supplier of publicly funded healthcare services. The appropriateness of these remedies was analysed case by case.

Box 4. Case Brauer/Axel Springer

The two press wholesalers active in Hamburg, Presse Vertrieb Nord (Bauer) and Buch und Presse-Großvertrieb Hamburg (Axel Springer) intended to transfer the physical logistics function of their activities in the press wholesale sector to an existing joint venture, with both partners holding equal shares in the company.³⁵ In particular, it was planned that the joint venture would receive the copies of newspapers and magazines delivered by the publishers and intended for retail sale. The joint venture would sort the products according to the orders of each retailer, package and deliver them. The joint venture would also collect the copies of newspapers and magazines that were not sold and take care of the recycling. The commercial and administrative functions were to remain with the parent companies.

As a result of the merger, the provision of logistics services would no longer be subject to competition between the two suppliers on the press wholesale market in the Hamburg area. These horizontal aspects of the case were not the only reason why the Bundeskartellamt prohibited the merger project. The merger also raised vertical issues. The joint venture would have enabled Axel Springer to gain access to comprehensive data relating to the deliveries made to each supplied retailer in the Hamburg area, as well as the respective figures on returned unsold products. This information could have been used to identify detailed sales figures for titles published by Axel Springer's competitors. The commitments offered by the parties included, inter alia, a non-disclosure obligation with regard to the sales data of the two wholesalers that are the joint venture's parent companies. The joint venture would have been barred from transmitting the data of one wholesaler to the other. The commitment also stipulated that the parent companies should not have access to the joint venture's information technology and communication systems. In addition, the merging parties undertook to make their management and personnel aware of how important it is to maintain the confidentiality of the sales data and that penalties would have been imposed in the case of non-compliance. The Bundeskartellamt rejected the commitment because the proposed measures would not have a permanent effect on market conditions and would require the authority to continuously monitor the merging parties' compliance with the non-disclosure obligations.

5.2.3 Preference for up-front buyer solutions for divestiture remedies

41. If clearance with commitments is subject to a condition, the clearance of the concentration is linked to the fulfilment of the condition. There are two possible alternatives: up-front buyer solutions (conditions precedent) and conditions subsequent. In the case of up-front buyer remedies, the remedy must be implemented before the clearance decision becomes effective and the concentration can be completed. In the case of conditions subsequent, the merger can be completed directly after the clearance decision has been served on the merging parties. If, afterwards, the commitment is not implemented within the stipulated timeframe, the condition shall be fulfilled and clearance shall lapse.³⁶

42. The Bundeskartellamt has a strong preference for divestment remedies in the form of up-front buyer solutions. This type of remedy is mostly in line with the general objective of merger control to prevent undesired anticompetitive effects from occurring in the first place. The merger can only be implemented once the up-front buyer condition is fulfilled, which usually occurs when the divestment business is sold and transferred to a suitable buyer. In contrast, if the clearance decision only contains an

³⁴ Guidance on Remedies in Merger Control, para. 26.

³⁵ Bundeskartellamt, decision B6-86/05, 27.10.2005.

³⁶ Cf. OLG Düsseldorf, judgment of 30.9.2009, VI-Kart 1/08 (V) – Globus/Distributa, para. 102 (juris).

obligation to divest, competitive harm may occur during the period between completion of the merger and implementation of the divestment remedy. Furthermore, an up-front buyer solution creates a strong incentive for the parties to the merger to implement the divestment as soon as possible in order to consume the transaction with the least possible delay. This effect lowers the risks and uncertainties involved in whether an effective divestment will occur in time. If a remedy that foresees an up-front buyer divestment is not implemented within the specified timeframe, the condition can no longer be met and the conditional clearance decision has the effect of a prohibition. In practice, merging parties have been able to meet the requirements of up-front buyer solutions within the required time limits. With regard to other divestment remedies, the experience has often been different.³⁷

43. Obligations and conditions subsequent are remedies that are less burdensome from the point of view of the parties to the concentration, and may therefore appear to be preferable from the perspective of proportionality. However, in most cases, these types of remedies are not sufficiently effective in removing the competitive harm created by the proposed merger with the required degree of certainty.

Box 5. Case Globus/Distributa

In 2007 the Bundeskartellamt cleared the acquisition of the Distributa group by its competitor Globus subject to the condition to divest four out of a total of 31 stores to an independent acquirer.³⁸ The divestment was not designed as an upfront buyer solution but as a dissolving condition, i.e. the clearance would have lapsed if the stores had not been sold before the end of the divestiture period. The companies consumed the merger and challenged the condition in court. They claimed the Bundeskartellamt should have restricted the remedy to a mere obligation and should have prolonged the divestment period. In addition they claimed difficulties in selling the stores. The Düsseldorf Higher Regional Court upheld the BKartA's decision.³⁹ The Court explained in its judgement that the use of conditions subsequent or obligations is lawful only in exceptional cases. The Court made it clear that the parties had consumed the merger at their own risk and that remedies without upfront buyer solutions have the effect of tolerating the creation or strengthening of a dominant position⁴⁰ until the divestment is implemented. Therefore, the duration of the divestment period has to be kept to a minimum.⁴¹ On this basis, Globus faced the obligation, in principle, to undo the entire transaction. In the light of these consequences, Globus was successful in selling the stores to a suitable buyer.

5. Conclusions

44. Commitments have proved to be a major instrument for the effective implementation and enforcement of merger control rules in Germany.

³⁷ Guidance on Remedies in Merger Control, para.28.

³⁸ Bundeskartellamt, decision B9-125-07, 05.12.2007.

³⁹ OLG Düsseldorf, judgment of 22.12.2008, VI-Kart 12/08 (V).

⁴⁰ In 2007 the *test* for the prohibition of *mergers in Germany* was the dominance test.

⁴¹ “In cases as the one decided, in which the Bundeskartellamt cleared the concentration subject to a condition subsequent (or an obligation) and the parties to the merger are therefore allowed to implement the transaction immediately (in contrast to the situation of a suspensive condition [i.e. an upfront buyer solution]), strict requirements with regard to the design of the remedies have to be established. This is because the use of a condition subsequent (or obligation) is tantamount to temporarily tolerating a merger with anti-competitive effects. Insofar as weighing the merging parties’ interest to implement the transaction prior to divestment against the objective to protect competition in the particular case, the outcome is that the negative effect on competition can be tolerated in this exceptional case for a transitional period; this phase – for the implementation of the remedy - has to be as absolutely short as possible.“ OLG Düsseldorf, judgment of 22.12.2008, VI-Kart 12/08 (V) Globus/Hela; upheld by Federal Court of Justice, judgment of 21.07.2009, KVZ 8/09 – Globus/Hela.

45. The Bundeskartellamt has no discretion when deciding whether or not to accept commitments. If the commitments fully and effectively remedy the competition problems in a timely manner, clearance subject to remedies has to be granted under the principle of proportionality. If the proposed commitments are not sufficient to remedy the competition issues with the required degree of certainty, the Bundeskartellamt must prohibit the merger.

46. The Bundeskartellamt's new Guidance on Remedies in Merger Control will explain the requirements that need to be met for the authority to clear an otherwise problematic concentration subject to remedies.

47. Remedies have to be suitable and necessary to completely remedy the competitive harm identified in the Bundeskartellamt's investigation. This is the case if the remedies completely prevent the expected negative impact on market conditions and market structures or at least reduce the anticompetitive effects of the merger to an acceptable degree that does not meet the requirements for a prohibition.

48. Divestiture remedies have proved their effectiveness in many cases, which is why they are usually considered by the Bundeskartellamt as the most preferable remedy. Divestment solutions are in line with the aim and purpose of merger control to prevent ex-ante the competitive harm that would be caused by changes to the market structure due to the merger.

49. In fast moving markets like digital markets, structural remedies could become ineffective over the long term. In such markets, remedies must be sufficiently well-defined, but at the same time they must be flexible. This applies especially in abuse cases, but also in merger cases. The Bundeskartellamt takes into account this need for flexibility when entering into discussions with parties about the design of appropriate and proportionate remedies.