

**JOINT COMMENTS OF THE AMERICAN BAR ASSOCIATION'S
SECTION OF ANTITRUST LAW AND SECTION OF INTERNATIONAL
LAW ON THE GERMAN FEDERAL CARTEL OFFICE'S PUBLIC
CONSULTATION ON DOMESTIC EFFECTS IN MERGER CONTROL**

February 4, 2014

The views stated in this submission are presented only on behalf of the Section of Antitrust Law and Section of International Law of the American Bar Association. These comments have not been approved by the ABA House of Delegates or the ABA Board of Governors, and therefore may not be construed as representing the policy of the American Bar Association.

The Sections of Antitrust Law and International Law (“Sections”) of the American Bar Association (“ABA”) are pleased to submit these comments on the German Federal Cartel Office’s (“FCO”) Draft Guidelines on Domestic Effects in Merger Control (the “Draft Guidelines”).¹ The Sections’ comments reflect the expertise and experience of their members with competition law in numerous jurisdictions worldwide, including the United States and the European Union and its Member States.

This consultation presents a welcome opportunity for the FCO to streamline its approach to the notification of foreign-to-foreign mergers and joint ventures. Doing so offers substantial potential benefits and savings to the FCO in reducing the volume of notifications it receives and the need to review transactions that have no appreciable competitive effects in Germany. This is particularly important given the German merger control system’s expansive scope and thresholds. The Sections also welcome the FCO’s efforts to provide additional guidance on the filing of a precautionary notification in cases that do not raise substantive competition issues.

As currently formulated, however, the Sections are concerned that the Draft Guidelines interpret the concept of domestic effects too broadly to provide sufficiently practical guidance in some cases. The Draft Guidelines may actually entail more substantive assessment at the jurisdictional stage and could result in an increased number of precautionary filings of transactions having little or no nexus to Germany. For example, sufficient domestic effects to require a filing could exist even if neither parent to a joint venture competed in either the joint venture market or an adjacent market if the joint venture had “economic significance” to or played a “strategic role” for the parents. In addition, even if the joint venture was forecasted to account for less than EUR 5 million over the succeeding three to five years, a filing could be necessary if the parents contributed intellectual property

¹ The announcement of the FCO’s public consultation is available at http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Merkblaetter/Leaflet%20-%20Guidance%20document%20domestic%20effects%20-%20consultation.pdf?__blob=publicationFile&v=2.

rights or know-how to the venture and the parents are actual or potential competitors in any market including Germany. The Draft Guidelines thus could have the unintended effect of diverting the BKA's resources to reviewing transactions that have no competitive impact in Germany.

The Sections' comments first address the Draft Guidelines' approach to transactions that clearly have a domestic effect (Part A) and those that clearly lack a domestic effect (Part B), followed by comments regarding scenarios that call for a case by case assessment (Part C). Part D discusses the relationship between the Draft Guidelines and other aspects of German merger control rules. As the Draft Guidelines implicitly recognize, the potential reach of German merger control to a wide range of transactions renders even more important the need to clarify the concept of domestic effects for filing requirements

A. TRANSACTIONS THAT CLEARLY HAVE DOMESTIC EFFECTS

The Draft Guidelines assume that certain transactions will always have domestic effects. Of particular note are: (i) transactions involving only two parties where the domestic turnover thresholds are met; and (ii) transactions involving a joint venture or a target company that generate a German turnover of over EUR 5 million (or that are expected to generate such turnover in Germany in the next three to five years).

This approach appears to reflect a potentially too narrow interpretation of Section 130 (2) of the Act against Restraints of Competition ("ARC") and does not leave room for consideration of whether a transaction gives rise to no domestic effects, even in the absence of any competitive overlap in the parties' activities in the same or an adjacent (i.e., upstream, downstream or neighboring) market covering parts of or the entire territory of Germany ("Relevant Market"). With regard to joint ventures, the test will also require the parties to project future turnover which is uncertain or even speculative.

The Sections recommend that the Draft Guidelines presume that there is no domestic effect where none of the joint venture's parents are active in a Relevant Market or where they are not active in Germany in the same market as the joint venture or in an adjacent market.

B. TRANSACTIONS THAT CLEARLY LACK DOMESTIC EFFECTS

The Draft Guidelines identify a narrow category of transactions that are presumed to lack domestic effects. These include, in particular, transactions where a joint venture will have no activities in Germany and where the parents neither actually nor potentially compete in a Relevant Market.

This category of transactions appears to be too limited. The Sections suggest that the fact that parents do not compete in the market(s) of the joint venture in Germany should be sufficient to exclude a sufficiently material risk of joint venture specific spill-over effects to require notification. In fact, if the parents of a joint venture were to coordinate in such relevant markets, whether due to the joint venture or otherwise, this would be subject to Article 101 of the Treaty of the Functioning of the European Union (“TFEU”)/Article 1 of the ARC. Therefore, the Sections suggest that either the mere potential for future competition should be dropped as criteria of the Draft Guidelines, or the Draft Guidelines should provide guidance as to the circumstances under which potential competition will be regarded as sufficient to require notification.

C. CASE BY CASE ASSESSMENT

The Draft Guidelines provide for a case by case assessment in transactions that do not fall within the above categories (i.e., where domestic effects are neither clearly established nor ruled out). According to the Draft Guidelines, this assessment is designed to identify transactions where a joint venture’s activities are of only “marginal” domestic effect.

The Sections believe that the approach adopted in the Draft Guidelines, while intuitively appealing, gives rise to a number of difficulties of interpretation. Although the Draft Guidelines indicate that a domestic effect can *in principle* be excluded if (i) the joint venture is projected to have revenues over the succeeding three to five years of less than EUR 5 million in Germany and (ii) has a market share of less than five percent, this may not be sufficient to avoid a filing requirement. Sufficient domestic effects nevertheless may be found to exist where: (i) a parent has contributed assets “relevant to the company’s market position to the joint venture – for example IP rights or know-how; (ii) the parents have a combined market share of more than 10 percent in a Relevant Market; or (iii) the parents do not compete at all in a Relevant Market, but compete in some other domestic market that is neither the joint venture market nor an adjacent one. The Draft Guidelines provide as a rationale of these exceptions that, even where the joint venture’s activities in Germany are “marginal” —and, indeed, even where the joint venture is neither an actual nor potential competitor in a market that includes all or a part of Germany—, there can be “spill-over effects” among the parents potentially giving rise to domestic effects.

With regard to the first exception, however, the parents commonly contribute significant assets to the joint venture. As a result, it appears that joint ventures may only infrequently qualify as having a “marginal” domestic effect even where they will not operate in Germany and the parents do not compete or collectively account for a small share of a Relevant Market.

The second exception appears to be the easiest to apply, except for a general concern that would appear to counsel against the use of market share thresholds in jurisdictional analysis.

The third exception is potentially problematic. The Draft Guidelines recognize that significant spill-over effects are less likely to occur where the parents do not compete in a Relevant Market. The Draft Guidelines nevertheless suggest that such effects are “feasible” if the joint venture facilitates implicit coordination between the parents in unrelated markets including all or part of Germany. In fact, it appears that sufficient domestic effects would be assumed if the joint venture is of “economic significance” to the parents – for example, where the joint venture’s current or projected worldwide turnover is relatively large compared to the parents’ turnover, where the joint venture plays a “strategic role,” or where the joint venture controls technology or other resources determined to be of particular importance to the parents. This concept appears to be so expansive that it is possible that very few, if any, joint ventures can be considered lacking a domestic effect in Germany. Because a joint venture will often be a means for the parents to implement their commercial strategy through a structural operation rather than through a cooperation agreement, it is unlikely that a joint venture will not be of economic significance or strategic importance to the parents.

Given the complexities and vagueness of the spill-over test, the assessment of whether such effects arise may be more complex than a substantive antitrust assessment of the transaction itself. Under these circumstances, parties may well choose to make a precautionary notification rather than risk failing to notify a transaction that was later deemed to have had sufficient domestic effects.

As noted above in Section B, the Sections suggest that overlaps between the parents in Relevant Markets other than the market with the activities of the joint venture should not be taken into consideration in the analysis of the domestic effect. Any spill-over by way of coordination or otherwise is already subject to the sanctions of Article 101 TFEU/Article 1 of the ARC. But if the Draft Guidelines retain the spill-over effect test, the Sections suggest that it be less ambiguous and more clearly limited, e.g., by the parents’ combined market shares in Relevant Markets in which they compete.

D. RELATIONSHIP BETWEEN DOMESTIC EFFECTS AND OTHER ASPECTS OF GERMAN MERGER CONTROL

The expansive concept of domestic effects in the Draft Guidelines presents particular challenges for international entities that seek to complete a foreign-to-foreign transaction that does not raise substantive competition concerns in Germany. This situation arises not so much from the Draft Guidelines themselves as from their effect given the expansive reach of German merger control, which often requires notification of transactions

that parties need not notify in other jurisdictions. Germany has very low domestic turnover thresholds as compared to other European Union Member States and filing is mandatory and suspensory. Parties risk penalties if they do not file and observe the mandatory review periods for transactions that meet these thresholds.² In addition, German merger control applies to the acquisition of lesser forms of influence than outright legal control. For example, a foreign-to-foreign acquisition of a certain minority interests (e.g., those involving the acquisition of a decisive influence) may trigger a merger filing in Germany, but not under other merger control regimes.

In these circumstances, to the extent that there is any uncertainty as to whether a filing obligation is triggered, parties contemplating a transaction where the (low) filing thresholds are met often may decide to make a filing even where there are no apparent domestic effects.

Although the Draft Guidelines leave open the possibility of informal consultation with the FCO, merging parties may well decide to notify the transaction if they believe that the costs and delay involved in a pre-notification dialogue (which has no formal timetable) will outweigh the costs and time to make the filing and complete the merger review process. We welcome the FCO's invitation to pre-notification contacts. In cases that raise a genuine issue about domestic effects, parties will likely take the safe option of making a precautionary filing to avoid the additional costs and delay of pre-notification. Thus, in precisely those cases where pre-notification contact might be most useful (i.e., foreign-to-foreign mergers that raise genuine issues as to the absence of effects in Germany), pre-notification contacts may be too resource-intensive and without a definitive end point (absent formal deadlines) to be a practical option.

E. CONCLUSION

The Sections appreciate the opportunity to provide comments on the FCO's public consultation on the Draft Guidelines on Domestic Effects in Merger Control. The Sections would be pleased to respond to any questions the FCO may have regarding these comments, or to provide any additional information that may assist the FCO in finalizing these guidelines.

² See, e.g., FCO, message from 13.02.2009, available at http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2009/13_02_2009_DuV-Bu%C3%9Fgeld.html, and FCO, message from 10.05.2011, available at http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2011/10_05_2011_Intersehroh.html.