

German Federal Court of Justice Upheld Recent Change of German Merger Control Rules: More Transactions Will Be Exempt from Filing

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On December 5, the German Federal Court of Justice (BGH) published a recent decision confirming the Düsseldorf Higher Regional Court's *Sulzer/Kelmix* decision, pursuant to which fewer transactions will require notification in Germany. The Düsseldorf Higher Regional Court, the court that reviews Federal Cartel Office (FCO) decisions, had recently overturned the FCO's narrow application of the *de minimis* market exception in two high-profile cases. (For more details, see our LawFlash issued January 30, 2007: http://www.morganlewis.com/pubs/ATR_GermanMerger_LF_30jan07.pdf.)

Pursuant to the *de minimis* market exception, a transaction that otherwise would have to be reported to the FCO does not require a premerger filing if the total sales in the relevant market do not exceed €15 million. In the past, the FCO took into account only the total sales achieved in Germany when applying this exception, even if the relevant geographic market was larger than Germany. Recently, the FCO had narrowed this exception, taking into account the total sales in the entire relevant geographic market; in defending this narrowed view, the FCO argued that a recent change in the German Competition Act required it to do so. This change has made it difficult for parties to take advantage of the exception. The Düsseldorf Higher Regional Court has twice overturned the FCO in this matter, holding that the exception applies when the *German* sales in the relevant market are less than €15 million. Nonetheless, the FCO continued its restrictive application of the exemption.

In the *Sulzer/Kelmix* decision, the BGH upheld the Düsseldorf Higher Regional Court's decision overturning the FCO's prohibition of the acquisition of two non-German companies by Swiss company Sulzer AG because of competitive concerns. The FCO had ordered the dissolution of the merger—which Sulzer AG had consummated in 2006—by invoking the *de minimis* market exception.

The President of the FCO, Dr. Bernhard Heitzer, announced last week that the FCO will discontinue its narrow approach to the *de minimis* market exception effective immediately, stating that this should reduce the number of transactions requiring German approval. Notably, however, the BGH confirmed the FCO's practice of including sales in "neighboring markets" (products that are closely related or sold through the same distribution channel) when applying the *de minimis* market exception. As a result, while this BGH decision represents significant progress for any party to a merger that has only limited effects in Germany, the application of the *de minimis* market exception will continue to require a complex analysis.

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