

German Merger Control Rules May Change: More Transactions Could Be Exempt from Filing

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Fewer transactions will require notification in Germany if a recent lower court decision holds up. The court that reviews Federal Cartel Office (FCO) decisions, the Düsseldorf Higher Regional Court, recently broadened the “*de minimis* exception” to the rule that the parties to any transaction that causes effects in Germany must seek FCO approval before closing. As a practical matter, almost any sizeable purchaser with €25 million in German sales must get FCO approval prior to closing, when a target has even trivial sales in Germany.

The *de minimis* exception exempts transactions from filing when total sales in the relevant market are less than €15 million. The FCO defines “total sales” as including all *European* (or *worldwide* depending on the relevant geographic market) sales, making it difficult for parties to take advantage of the exception. The Düsseldorf court disagreed, holding that the exception applies when *German* sales in the relevant market are less than €15 million. This would extend the benefit of the exception to far more transactions. The FCO has said that it will appeal the decision to the Federal Court of Justice, Germany’s highest court.

The Düsseldorf court overturned an FCO decision barring DuPont’s acquisition of Pedex, a manufacturer of toothbrush bristles, holding that the transaction was not subject German merger control law. The court quoted an article by Morgan Lewis partner Jürgen Beninca in which Dr. Beninca argued that the Bundestag intended that the *de minimis* exception applies to transactions where the German sales in the relevant product market are less than €15 million.

While the decision is on appeal, the FCO will continue to apply its narrow interpretation of the *de minimis* exception. Even if the FCO loses the appeal, numerous transactions will require German notification, especially if the FCO continues with (or even broadens) its belief that sales in “neighboring markets” (products that are closely related or sold through the same distribution channel) should be included when determining if a transaction requires notification.

For additional information please contact Dr. Jürgen Beninca, of our Frankfurt office. Dr. Beninca is part of Morgan Lewis’s growing European and Asian competition practice with offices in Brussels, Frankfurt, London, Paris, Tokyo and Beijing.

Dr. Jürgen Beninca, Morgan, Lewis & Bockius, Guiollettstrasse 54, D-60325 Frankfurt am Main, Germany, +49.69.714.007.19, jbeninca@morganlewis.com.

Izzet M. Sinan, Morgan, Lewis & Bockius, 7 Rue Guimard, B-1040 Brussels, Belgium, +32 (0)2 507 7522, isinan@morganlewis.com.

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