

Unclassified

DAF/COMP/WP3/WD(2016)3

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

10-Jun-2016

English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Working Party No. 3 on Co-operation and Enforcement

PUBLIC INTEREST CONSIDERATIONS IN MERGER CONTROL

-- Note by Germany --

14-15 June 2016

This document reproduces a written contribution from Germany submitted for Item 3 of the 123rd meeting of the OECD Working Party No. 3 on Co-operation and Enforcement on 14-15 June 2016.

*More documents related to this discussion can be found at
www.oecd.org/daf/competition/public-interest-considerations-in-merger-control.htm*

JT03397846

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GERMANY

Public interest clauses in Germany's competition framework

1. This submission considers hereinafter the general framework for public interest considerations in merger control in Germany (1.). Specific public interests outweighing competition concerns (2.) and procedural aspects of such considerations in merger control (3.) are discussed. Finally, relevant public interest considerations unrelated to competition concerns (especially with regard to essential security interests and media plurality) are summarized (4.). The submission closes with conclusions (5.).

1. General framework for public interest considerations in merger control

2. Public interest deviations from the objective to protect effective competition which aim at allowing mergers that cause competitive harm are kept to very exceptional cases in Germany.¹ The German public interest regime is designed as being solely a safety valve in outstanding cases where public interests other than competition trump the competitive harm that a merger will cause.

1.1 *The Bundeskartellamt bases its decisions solely on competition aspects*

3. German competition law strictly separates competition and non-competition aspects. When reviewing a merger, the Federal Cartel Office ('Bundeskartellamt', '**BKartA**') applies solely the SIEC test: Pursuant to Sec. 36 § 1 of the German Competition Act ('Gesetz gegen Wettbewerbsbeschränkungen', '**GWB**') a concentration which would significantly impede effective competition, in particular a concentration which is expected to create or strengthen a dominant position, shall be prohibited by the BKartA. A decision based on these criteria closes the merger control proceedings before the BKartA. The undertakings concerned may subsequently appeal that decision to the Düsseldorf Higher Regional Court.

1.2 *Ministerial Authorization on non-competition grounds in exceptional cases*

4. If the BKartA has prohibited a concentration, the undertakings concerned are entitled to apply to the Federal Ministry for Economic Affairs and Energy ('Bundesministerium für Wirtschaft und Energie', '**Ministry**') for a ministerial authorization ('Ministererlaubnis'). Sec. 42 § 1 GWB enables the Minister for Economic Affairs and Energy ('**Minister**'), in exceptional cases, to permit a merger on strictly non-competition grounds.² An application by an undertaking affected by the decision of the BKartA starts a new administrative procedure, different from that before the BKartA.

5. It is of utmost importance to distinguish these two procedures (merger control in the narrow sense before the BKartA and a potential subsequent application to the Ministry), as very differing tests and standards are applied and to a limited extent, other procedural provisions apply (see below). This differentiation helps to ensure that the BKartA's merger control procedure can concentrate solely on competition aspects and is shielded from any other arguments.

6. The law explicitly states that the ministerial authorization should only be granted "in exceptional cases". This understanding which is shared by the government and the public including

¹ See also OECD Roundtable 2009 "Competition Policy, Industrial Policy and National Champions"

² Such public interest concerns often arise in cases that mainly affect one Member State of the European Union and that do not have a significant cross border aspect.

media can be considered a precondition for the two-staged system. It guarantees that the ministerial authorization does not undermine the protection of competition. Practice confirms that it is very difficult to obtain a ministerial authorization. The parties rarely apply for an authorization and in only very few cases have done so successfully. Since the ministerial authorization was introduced, 22 undertakings concerned have applied to the Minister for a ministerial authorization.³ This underlines the exceptional character of ministerial authorizations, in particular compared to the total number of mergers reviewed (some 45,000) and prohibition decisions (approximately 200). In six cases a ministerial authorization was denied. In another seven cases the undertakings concerned withdrew their applications after the Monopolies Commission ('Monopolkommission')⁴ decided against granting a ministerial authorization (see below). In the remaining nine cases the Minister granted a ministerial authorization. However, in one case the authorization granted was only partial and in another five cases granted under certain conditions and obligations. Only the remaining three ministerial authorizations constituted unconditional approvals.

7. The ministerial authorization was introduced in 1973 at the same time as the German merger control regime was added to the GWB. Besides creating the limited ability to take public considerations into account, one of the procedure's aims is to safeguard the BKartA's autonomy. By keeping politics away from decisions taken by the BKartA, political pressure exercised in controversial merger proceedings is directed only towards the Ministry.

8. If in the individual case the restraint of competition is outweighed by advantages to the economy as a whole resulting from the concentration, or if the concentration is justified by an overriding public interest, the Minister will authorize the concentration.⁵ Authorization may, however, only be granted if the scope of the restraint of competition does not jeopardize the market economy system.

9. As a different test is applied when reviewing a case within the ministerial authorization process, the Minister does not overrule the BKartA's competitive assessment. The BKartA's competitive assessment is generally binding. Exceptions apply only if new facts arise or if the BKartA's analysis would be implausible. The ministerial authorization therefore rather builds on the BKartA's decision and takes into account additional considerations that the BKartA is – by law – not allowed to incorporate into its assessment (see above).

10. Ministerial authorizations can be and have been challenged in court. The judicial review of the procedure which has to be followed by the Ministry has been intense (and in one case also led to the annulment of a ministerial authorization).⁶

2. Specific public interests outweighing competition concerns

2.1 *Decision-making practice*

11. The German system defines advantages to the economy as a whole that outweigh restraints of competition or an overriding public interest that justifies restraints of competition as the two guiding principles for public interest considerations (collectively referred to as 'common welfare considerations'). Past decisions provide some guidance on how to interpret these principles.

³ An overview on the cases can be found online: <https://www.bmwi.de/BMWi/Redaktion/PDF/Wettbewerbspolitik/antraege-auf-ministererlaubnis>.

⁴ The Monopolies Commission is an independent advisory commission to the Federal Government. It submits expert opinions on various subjects. During the process of a ministerial authorization, an opinion of the Monopolies Commission shall be obtained pursuant to Sec. 42 § 4 GWB (see below).

⁵ In this context, the competitiveness of the undertakings concerned in markets outside the scope of application of the GWB shall also be taken into account.

⁶ However, with regard to the interpretation of public interest grounds, German law is generally understood to grant the Minister a broad margin of appreciation.

2.2 *Common welfare considerations*

12. Among other reasons, past decisions were based on the following public interest grounds:
- securing technological progress⁷,
 - supporting international competitiveness⁸,
 - securing employment⁹ including safeguarding jobs and the protection of workers' rights¹⁰,
 - securing energy supply¹¹, and
 - maintaining a high level of health care and/or securing research and higher education at a university hospital¹².

13. The GWB does not define a catalogue of public interests that may be taken into account. The Minister is generally free to introduce new common welfare considerations. The concentration must nevertheless be causal for such social, economic or common welfare considerations which in addition must be of great significance in the individual case and demonstrated by concrete evidence. Other remedies which are in conformity with the rules of competition must not be available in the particular case. The ministerial authorization is therefore not an instrument of economic policy but rather complements the German market economy framework.

14. In a recent national merger case the Minister decided to grant a ministerial authorization with conditions for a merger in the German food retail sector which had been prohibited by the BKartA. The ministerial authorization involving the grocery chains EDEKA and Kaiser's Tengelmann was based on common welfare considerations, in this specific case safeguarding jobs and the protection of workers' rights (collective agreements and operational co-determination). The concentration was allowed, though only under severe conditions (*inter alia* precedent and subsequent).

3. **Procedural aspects of the ministerial authorization**

3.1 *Course of proceedings*

15. Before the procedure can be initiated, the case at hand undergoes the BKartA's merger control procedure. Only undertakings whose cases were prohibited are eligible for an application.

⁷ The preservation of valuable technical know-how can be regarded as a macroeconomic benefit ('Thyssen/Hüller').

⁸ Access to international markets ('BayWA/WLZ Raiffeisen', 'MAN/Sulzer', 'IBH/Wibau') or the necessity to merge in order to be permanently able to compete on international markets ('Kali + Salz/PCS') have been considered as public interests in past decisions as well as the improvement of international competitiveness in general ('Daimler/MBB' and 'E.ON/Ruhrgas').

⁹ Securing employment is also in line with the German Act to promote Stability and Economic Growth ('Gesetz zur Förderung der Stabilität und des Wachstums der Wirtschaft'). Pursuant to its Sec. 1, the Federal Government and the States have *inter alia* to promote a high level of employment within the framework of a free market economy.

¹⁰ EDEKA/ Kaiser's Tengelmann.

¹¹ Securing energy supply was used as a strategic public interest consideration in the first ministerial authorization procedure decided in 1974 ('VEBA/Gelsenberg'). This concentration was an essential contribution to securing Germany's supply with mineral oil and to decreasing dependency on imports of refined products.

¹² Securing local hospitalized high-level medical primary care has been regarded as a public interest ('Landkreis Rhön-Grabfeld/Rhön-Klinikum AG'), along with supporting specialized medical research ('Universitätsklinikum Greifswald/KKH Wolgast').

Hence, in all cases of a ministerial decision an at least four months long control procedure will have taken place with a published BKartA's prohibition decision that allows the general public to get a detailed understanding of the competition concerns from the start. All past cases therefore attracted intense media attention and the entire process of the ministerial authorization was closely scrutinized by the public.

16. The procedure itself is initiated by an application by one of the undertakings concerned only.

17. Such application shall generally be submitted in writing to the Ministry within a period of one month from service of the BKartA's prohibition decision. If the prohibition is appealed, the period shall run from the date when the prohibition becomes final and non-appealable (Sec. 42 § 2 GWB). An appeal against the BKartA's prohibition decision and an application for a ministerial authorization can be lodged in parallel.

18. The Minister shall decide on the application within four months. Exceeding this time-limit does not constitute a procedural irregularity. Prior to the decision, an opinion of the Monopolies Commission ('Monopolkommission') shall be obtained, and the supreme Laender authorities in whose territory the undertakings concerned have their registered seat shall be given the opportunity to submit comments (Sec. 42 § 4 GWB). Especially the Monopolies Commission's opinion is an important milestone during the process. The Monopolies Commission is an independent expert committee which advises the German government and legislature in the areas of competition policy-making, competition law, and regulation. Its task during the ministerial authorization procedure is to assess the public interest arguments put forward by the merging parties and to weigh the competition concerns against the public interest grounds. Its opinion is published and due to its reputation and general role the Commission's opinion attracts wide attention in the public.

19. The transparency of the procedure is ensured by a mandatory public hearing in which the undertakings concerned and other parties involved in the proceedings (see below) are heard by the Ministry in accordance with the law (Sec. 56 § 3 GWB). The right to be heard must be observed at all stages of the procedure. This adds to the published BKartA's decision and the published Monopolies Commission's opinion.

3.2 *Decision-making power*

20. The GWB allocates the decision-making power directly to the Minister in person. The Minister shall therefore not appear to be biased. There must be no doubts as to the Minister's impartiality and independence. In prior cases in 2002 and 2006,¹³ where the acting Ministers had been professionally active in the relevant economic sectors or had commented publicly on the case and had been personally involved with one of the undertakings concerned, the Permanent State Secretary at the Ministry acted in place of the Minister.

3.3 *Third parties*

21. Third parties can participate in the proceedings as an intervenor. In one previous case, more than 30 parties joined the proceedings.¹⁴ These may be competitors, but also suppliers, customers, or associations of labor representatives are suitable to join as a party to the ministerial authorization procedure.¹⁵ The joining parties are entitled to deliver opinions and to appeal procedural decisions as well as the ministerial authorization itself.

¹³ 'E.ON/Ruhrgas' and 'Landkreis Rhön-Grabfeld/ Rhön Klinikum AG'.

¹⁴ 'E.ON/Ruhrgas'.

¹⁵ Legal base is Sec. 54 § 2 No. 3 GWB: "... persons and associations of persons whose interests will be substantially affected by the decision and who, upon their application, have been admitted by the competition authority to the proceedings; the interests of consumer advice centres and other consumer associations supported by public funds are substantially affected also in cases in which the decision

4. Public interest considerations unrelated to competition concerns

4.1 Introduction

22. Within the process of a ministerial authorization, public interest considerations may allow a concentration that has been prohibited by the BKartA. In contrast, there are also limited occasions where public interest considerations may trigger additional approval requirements under German law.

23. In principle, the EU Commission has sole jurisdiction to take decisions with regard to concentrations having an EU dimension and that therefore fall under the EU Merger Regulation ('EUMR').¹⁶ Art. 21 (4) EUMR nevertheless allows Member States to take appropriate measures to protect legitimate interests other than those taken into consideration by the EUMR. Public security, plurality of the media and prudential rules are regarded as legitimate interests within the meaning of this exception.

4.2 Public order and security

24. Concentrations falling under the jurisdiction of the EU Commission as well as concentrations falling under the jurisdiction of the BKartA may in specific cases trigger additional review by the Ministry to guarantee the public order or security of Germany.

25. Pursuant to Sec. 5 § 2 and 3 of the Foreign Trade and Payments Act ('Außenwirtschaftsgesetz', 'FTPA')¹⁷, restrictions can particularly be imposed with reference to the acquisition of domestic companies or shares in such companies by non-EU residents if the acquisition endangers¹⁸ the public order or security of Germany ('cross-sectoral examination of corporate acquisitions').¹⁹

26. More severe restrictions can be imposed if the domestic companies manufacture or develop war weapons or other military equipment or manufacture products with IT security functions ('sector-specific examination of corporate acquisitions').²⁰

27. The Ministry may – at its own discretion – open the examination procedure only within three months of the conclusion of the contract and after informing the direct acquirer about the proceeding initiated (Sec. 55 § 3 of the Foreign Trade and Payments Ordinance ('Außenwirtschaftsverordnung', 'FTPO')²¹. For the review to be triggered, it is necessary that the corporate acquisition exceeds certain thresholds: After the acquisition, the direct or indirect share of voting rights of the acquirer in the domestic company must reach or exceed 25 percent of the voting

affects a wide range of consumers and in which therefore the interests of consumers in general are substantially affected.”

¹⁶ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EU Merger Regulation), Official Journal L 24, 29.01.2004, p. 1-22.

¹⁷ The English version of this Act is available online: http://www.gesetze-im-internet.de/englisch_awg/englisch_awg.html.

¹⁸ For this to be the case, there must be an actual and sufficiently serious danger affecting a fundamental interest of society.

¹⁹ The cross-sectoral examination of corporate acquisitions follows the procedure laid down in Chap. 6., Div. 2, Subdiv. 1 of the Foreign Trade and Payments Ordinance.

²⁰ The sector-specific examination of corporate acquisitions follows the procedure laid down in Chap. 6., Div. 2, Subdiv. 2 of the Foreign Trade and Payments Ordinance.

²¹ The English version of this Ordinance is available online: http://www.gesetze-im-internet.de/englisch_awv/englisch_awv.html.

rights (Sec. 56 § 1 FTPO).²² The Ministry can also – in response to a request in writing – issue a certificate of non-objection if there is no objection to the acquisition in terms of public order or security (Sec. 58 § 1 FTPO).

4.3 *Plurality of the media*

28. Concentrations falling under the jurisdiction of the EU Commission as well as concentrations falling under the jurisdiction of the BKartA may in specific cases trigger additional review with regard to the plurality of the media. The German Interstate Treaty on Broadcasting and Telemedia ('Rundfunkstaatsvertrag', 'IBT')²³ foresees a specific regulatory regime which aims at preventing certain forms of media concentration. The acquisition of ownership interests in private broadcasters of television services in Germany is reviewed by the Commission for the appraisal of a concentration in the media ('Kommission zur Ermittlung der Konzentration im Medienbereich') on media plurality grounds. Art. 26 *et seq.* IBT provide that an undertaking itself or through undertakings attributable to it may not acquire a dominant power of opinion with regard to television services transmitted nationally in Germany.²⁴

5. Conclusions

29. German competition law strictly separates competition and non-competition aspects in a two-staged merger review process. Merger review by the Bundeskartellamt is solely based on competition aspects. Only after a merger has been prohibited can non-competition aspects be taken into account by the Minister for Economic Affairs and Energy who can grant the ministerial authorisation of a merger based on public interest grounds. The procedure of the ministerial authorisation ensures a high level of transparency and sets high standards for the Minister to grant an authorisation. In the light of these requirements applications for an authorisation were rare and only few ministerial authorisations were finally granted.

²² The calculation of the voting rights (Sec. 56 § 2 and 3 FTPO) must include the voting rights of third parties in the domestic company (i) in which the acquirer holds at least 25 percent of the voting rights, or (ii) with which the acquirer has concluded an agreement on the joint exercise of voting rights. In the case of an indirect acquisition, the proportion of voting rights of the acquirer in the domestic company shall amount to at least 25 percent if the acquirer and the respective intermediate shareholder, the attribution principles applied *mutatis mutandis*, possess at least 25 percent of the voting rights in the respective subsidiary.

²³ The English version of this Act is available online: http://www.kjm-online.de/fileadmin/Download_KJM/Recht/18_RAendStV-eng_01-01-2016.pdf.

²⁴ If the services attributable to an undertaking reach an annual average audience share of 30 per cent of all viewers, a dominant power of opinion shall be assumed to be given. The same applies to an audience share of 25 per cent if the undertaking holds a dominant position in a media-relevant related market or an overall assessment of its activities in television and in media-relevant related markets shows that the influence on the formation of opinion obtained as a result of these activities corresponds to that of an undertaking with a 30 per cent audience share.